

RULING RE: CLARIFICATION OF DECEMBER 8, 2010 FINAL RULING
PRODUCTION OF FISH HEALTH RECORDS

1. On December 8, 2010, I issued a ruling pursuant to Rule 19 of the commission's rules of practice and procedure (the "final ruling"). In the final ruling, I ordered the Province of British Columbia (the "Province"), the Government of Canada ("Canada"), and the British Columbia Salmon Farmers' Association ("BCSFA") (together, the "respondents") to produce those fish health documents in their possession and control for the period of January 1, 2000 to September 1, 2010, for 120 fish farms (identified in paragraph 54 of the final ruling) by January 21, 2011.

Background to the request for clarification:

2. On January 20, 2011, the Province wrote to commission counsel requesting clarification of the final ruling. Attached to the Province's letter was an affidavit of Dr. Gary Marty, a fish pathologist with the Animal Health Centre in the Province's Ministry of Agriculture.

3. In its letter, the Province advised commission counsel that during the course of collecting its fish health documents in compliance with the final ruling, the Province became aware that "a paper copy of the electronic necropsy file was also created and saved" (the "paper records"). According to the Province, "while large portions of the documents [the paper and electronic fish necropsy reports] contain identical information, there is some additional diagnostic information on some of these [paper] records that is not contained in the electronic record."

4. In his affidavit at paragraph 4, Dr. Marty stated that the Province has approximately 817 paper records from the years 2000, 2001 and 2002 and that there are approximately 1,116 paper records for the years after 2003. Dr. Marty

stated that there are no farm names for the 817 paper records and that “farms are identified in only a fraction” of the 1,116 paper records post-2003.

5. Dr. Marty stated at paragraph 6 of his affidavit that he had examined 31 paper records from one box of case reports from early 2000 and that “the 31 reports do contain more details about clinical history and diagnostic results, but none of the hard copies contain any information about farm of origin.” In paragraph 7, Dr. Marty asserted, “without knowledge of the farm of origin, it is impossible to determine if the given farm is near or far from the sockeye salmon migration routes, or even if the samples came from freshwater.”

6. Dr. Marty also stated that it “will likely take 6 weeks to recover and copy the stored files” but that the time could be longer if any of the storage boxes had been moved. As well, at paragraph 9 of his affidavit, Dr. Marty acknowledged that after the paper records are produced to counsel, they are reviewed for privilege and converted to electronic form before being disclosed to the commission and that this would take more time.

7. In its letter, the Province took the position that “the additional information that could be gleaned from these [paper] documents will not assist the commission, as in most instances these records fail to identify the farm of origin.” The Province also asserted that it would take approximately 10 weeks to produce the paper records.

8. The Province concluded its letter by stating that it was seeking a formal clarification “that the intention of the December 8, 2010 order was to only produce the electronic form of the necropsy reports and to not produce the underlying paper records.”

9. Commission counsel contacted the applicants to the final ruling, the Aquaculture Coalition and the Conservation Coalition (together, the “coalitions”), advising them of the Province’s January 20, 2011 letter and Dr. Marty’s affidavit.

As a result, on February 4, 2011, the coalitions and commission counsel and science staff attended at the Province's offices to review some sample paper records. It was hoped that these parties might reach consensus regarding the need to produce the paper records; however, no consensus was reached.

10. By letter dated February 7, 2011, the coalitions advised the Province that, based on the paper records viewed on February 4, "as well as the description of the documents included in Dr. Marty's affidavit and the sample reports attached thereto, it is our position that the documents are relevant, necessary and potentially valuable and should be produced."

11. Subsequent to the February 7, 2011 letter from the coalitions, commission counsel wrote to all participants advising of the Province's application for formal clarification of the final ruling and requesting submissions. On February 14, 2011, Canada, the BCSFA and the coalitions filed submissions; commission counsel filed a submission on February 16, 2011; and the Province filed a reply submission on February 18, 2011.

Submissions of the parties and commission counsel:

Canada:

12. Canada supported the Province's position that it should not be required to produce the underlying paper records.

13. In its submission, Canada acknowledged that it also has "paper records that have not been produced pursuant to the [final ruling]." Canada identified these documents as "field sheets used by Dr. [Brent] Hargreaves' research team to record information as sampling nets are pulled from the water" and indicated that there are approximately 9600 of these field sheets. Canada also noted that it may have field sheets from Dr. Richard Beamish, a DFO scientist, but it had yet to confirm if these exist or the number. In support of its submission, Canada filed an affidavit of Dr. Hargreaves (a DFO scientist, currently the acting Lead, Salmon

Team), together with an affidavit from Michelle Duffy, a project manager with the document management company assisting with processing documents for production to the commission.

14. In paragraph 3 of his affidavit, Dr. Hargreaves indicated that he is in possession of “approximately 9,600 hardcopies of field sheets dating back to 2003.” Dr. Hargreaves continued at paragraph 6 that “all but three categories of information from the field sheets” can be found on the electronic records disclosed to the commission on January 21, 2011. Dr. Hargreaves also stated at paragraph 9 that he estimates it would take him 3 weeks to disclose, organize and scan the field sheets. In her affidavit at paragraph 8, Ms Duffy indicated that it would take 11 days to process and transmit the field sheets of Dr. Hargreaves to the Department of Justice.

15. Canada asserted that “if all of the field sheets were added to the document production queue, and prioritized over documents currently being processed or waiting for processing, all lower priority documents would be delayed by approximately 11 days” and referenced paragraph 8 of Ms Duffy’s affidavit.

16. Canada further submitted that:

14. ... there would be minimal benefit from reviewing the field sheets to produce a few of them and, most certainly, to produce all 9600. Even if the field sheets can be said to be associated with the fish health issue, they would at most marginally assist the Commissioner in his work.

15. Applying the proportionality principle, Canada should not be required to devote resources and funds to doing this work, at considerable cost and expenditure of staff time that can be better used on substantive work, for minimal return.

BCSFA:

17. The BCSFA supported the position of the Province and argued that “there must be reasonable limits placed on the production of documents in this process.” The BCSFA also asserted that, although it has not reviewed the sample paper records, it believes that the additional diagnostic information contained on them “is of little use to the Commission and need not be produced.”

18. The BCSFA argued that the final ruling did not order production of fish health documents which are not associated with the 120 fish farms and submitted that “documents that cannot be identified as being from those farms should not be produced, as looking at data without context would likely confuse the Commissioner and participants as to the potential effects of salmon farming on Fraser River sockeye salmon.”

19. Further, the BCSFA submitted that I should take a balanced approach to this issue and noted that the respondents have “already produced a substantial amount of documents” pursuant to the final ruling. The BCSFA also raised the “significant risk that production of this data will be misused by the participants opposed to the salmon farming industry, as the farms of origin may not be identifiable and may not even be in the marine environment.”

The coalitions:

20. The coalitions submitted that the final ruling is not restricted to electronic documents and applies to both paper and electronic reports and noted that “at no point in time did any of [the coalitions], Commission Counsel or the Commissioner distinguish in any way the treatment that should be afforded to electronic versus paper records.”

21. In support of their submission, the coalitions filed the affidavit of Stan Proboszcz, a fisheries biologist with Watershed Watch Salmon Society, dated February 14, 2011. At paragraph 6 of this affidavit, Mr. Proboszcz stated that in

his review of the paper fish necropsy reports in the Province's possession, "the paper records contained significantly more information related to fish health than their electronic counterparts." Accordingly, the coalitions reiterated their position that,

... the additional fish health information contained in the paper records is, on its face, useful for determining the role of disease in declining Fraser sockeye stocks. As well, given that the paper versions of the necropsy reports contain significantly more fish health information they are, *prima facie*, necessary and relevant to this inquiry.

Commission counsel:

22. Commission counsel summarized the submissions and made several observations, including the following:

6. The Ruling does not delineate between electronic databases and paper or other documents. It approaches the matter topically, by asking for documents (a term defined broadly in the commission's Rules) relevant to certain topics. The [coalitions] are correct that the Ruling applies equally to paper and electronic documents.

7. On the other hand, the BCSFA is correct in saying that the Ruling specifies 120 particular aquaculture facilities. A document that cannot be associated to any of the 120 facilities listed in the Ruling may not fall within the scope of the Ruling.

8. From the materials on this application, it is not clear how many of the paper necropsy reports (the documents at issue) can be associated to the 120 listed facilities. ...

23. Commission counsel also referred to the work of Dr. Josh Korman, a researcher retained by the commission to conduct a quantitative analysis of fish farm and environmental data related to salmon farm disease frequency. Dr. Korman is relying on the documents produced by the respondents for the preparation of his report, which he expects to produce to the commission in final form by March 31, 2011 (as stated in paragraph 13 of his affidavit filed November 1, 2010). As noted by commission counsel,

That final report date is crucial, because the two other aquaculture scientific contractors hired by the commission will receive and use Dr. Korman's work in their own analyses, which must be produced well before hearings on this topic commence in the late summer.

24. Commission counsel also submitted that, "put in context, the outstanding materials, while potentially relevant, may add little if any additional value to any analysis undertaken by commission researchers."

Reply of the Province:

25. In its reply submission, the Province noted that "no party has identified a particular reason why access to paper necropsy records (as opposed to electronic version) is required, other than additional information is contained in the older paper records."

26. The Province asserted that "only a small fraction of the necropsy reports indicate which farm the salmon came from" and that "these non-random submissions are unlikely to assist the Commission because they are incidental and targeted lesions specific to an individual fish and would not be considered representative of the farm, region or general population dynamics. As a result these reports are of limited utility for statistical or epidemiological analysis."

27. The Province also took the position that the final ruling "only relates to 120 specified farms, accordingly, it is impossible to know if the unidentified records fall within the scope of the order as the farm of origin is not identified."

28. Finally, the Province reiterated its request, stating that "disclosure of the paper records will be voluminous and will take substantial resources to retrieve copy and convert the data. The Province would like clarification, specifically whether the commission seeks only the electronic copy of the materials or requires both the paper and electronic copy of the materials. If it does require the paper copy, the Province seeks additional time to disclose these materials.

Specifically, it will need 9-10 weeks to retrieve the documents from storage, copy, scan and code them.”

Analysis

29. In the final ruling at paragraph 38, I ordered production of fish health documents for a temporal period (January 1, 2000 – September 1, 2010) and for a specified number of identified fish farms to assist me (and the researchers contracted by the commission) to assess such issues as the impact of fish farms on Fraser River sockeye salmon (if any) and in determining the degree of proximity required for a risk of infection to exist.

30. In the final ruling, I did not make, nor did I intend to make a distinction between paper and electronic records. Thus, although the Province now applies for a “clarification” on this point, its application can, in my view, be more appropriately characterized as an application for a variation of the final ruling in the context of new information regarding the existence of the paper records and their content.

31. I acknowledge the concerns of Canada and the Province regarding the additional time which would be required to produce the paper records if I ordered their production, and the negative effect this would have on the ongoing production of documents at this point in time when the commission’s hearings are underway. This obviously must be balanced with evidence regarding the utility of the paper records under consideration.

32. With respect to the balance that must be struck in this application, I note that the coalitions have not proffered evidence on why the additional information contained in the paper records is necessary, or how the information would enhance the anticipated scientific evidence, other than to assert that the information on the paper records is “on its face, useful for determining the role of disease in declining Fraser sockeye stocks.”

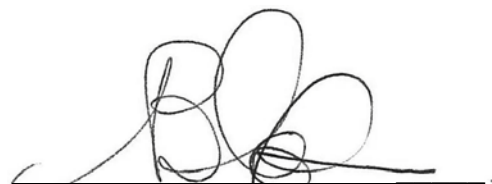
33. On the other hand, the final ruling specified particular aquaculture facilities and in this regard, I note the significant evidence of Dr. Marty that very few of the paper records in issue which he reviewed actually identify the fish farm of origin.

34. In light of the above, I am not persuaded that the production of the Province's paper records would materially advance my consideration of the issues related to fish farms and their impact, if any, on Fraser River sockeye. Moreover, I am mindful of the fact that requiring the production of the paper records would delay the work of the researchers contracted by the commission to prepare their reports on the topic of aquaculture.

35. In the result, I find that the final ruling should exempt the Province from its obligation to produce the paper records.

36. Finally, Canada has not applied for a variation of the final ruling with respect to the field sheet records of Dr. Hargreaves and Dr. Beamish which were also discovered subsequent to the final ruling. Thus, no ruling is made with respect to these records, although the parties may find the comments in this ruling instructive when considering their positions with respect to these records.

Dated : March 17, 2011



The Honourable Bruce I. Cohen
Commissioner