
Secretariat of the Commission for Environmental Cooperation**Determination in accordance with Article 14(1) of the North
American Agreement for Environmental Cooperation**

Submitters: NESTE Canada Inc.
Concerned Party: United States
Date Received: 4 January 2000
Date of this determination: 17 April 2000
Submission I.D.: SEM-00-002

I - INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law, if the Secretariat finds that the submission meets the requirements of Article 14(1). On 4 January 2000 the Submitter filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The Secretariat hereby consolidates the submission with SEM-99-001 (the “Methanex Submission”), filed on 18 October 1999. The Secretariat provides its reasons in Section III below.

II - SUMMARY OF THE SUBMISSION

The submission largely tracks Submission 99-001, recently filed by the Methanex Corporation (SEM-99-001). Neste's main assertion, like Methanex's, is that the government is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs).¹ Neste explicitly refers in its submission to the close link with

¹ See e.g., Submission at 1, 2.

Submission 99-001, stating that, *inter alia*, "[w]e believe that the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs."²

Additional information on the Methanex submission, including the Secretariat's 30 March 2000 Determination that one of the assertions in Methanex's submission merits a response from the United States, is available from the CEC's home page, www.cec.org.

III - ANALYSIS

The threshold question the Neste submission raises concerns the appropriate treatment of a submission when it relates to the same facts and same asserted failure to effectively enforce as an already pending submission. Guideline 10.3, quoted in full below, provides guidance concerning the appropriate treatment of related submissions. It indicates that the Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce. It also provides that the Secretariat may propose such consolidation to the Council when there is substantial overlap between submissions and the Secretariat believes it would be more efficient or cost-effective to consolidate them.

- 10.3 The Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law. In other situations where two or more submissions relate essentially to the same facts and enforcement matter and the Secretariat considers that it would be more efficient or cost-effective to consolidate them, it may so propose to the Council.

The Secretariat's reading of the Neste submission is that it relates to the same facts and the same asserted failure to effectively enforce an environmental law as the Methanex submission. As noted above, the operative text in Guideline 10.3 provides that the Secretariat "may" consolidate two submissions if they meet the elements for consolidation. This is the first submission that has raised the "consolidation" issue. A review of the submissions filed to date reveals that the common approach of like-minded prospective submitters has been to file jointly, rather than file independently and then await possible consolidation. Thirteen of the 26 submissions filed to date have involved multiple submitters. For the reasons stated below, the Secretariat has determined that consolidation is appropriate in this instance.

The Secretariat has reviewed whether the Neste submission meets the criteria in Article 14(1). As is the case for the Methanex submission, the Neste submission meets the requirements contained in the opening sentence of Article 14(1). This sentence authorizes the Secretariat to consider a

² Submission at 2.

submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” Article 45(1) of the NAAEC defines "non-governmental organization" to include, *inter alia*, "any . . . business . . . which is neither affiliated with, nor under the direction of, a government. . . ." Based on the information provided in the submission, the submitter qualifies as a "non-governmental organization."³ It is a business and there is no indication that it is affiliated with, or under the direction of, a government. Further, the assertion in the submission that the Party has failed to effectively enforce UST-related requirements⁴ focuses, as required, on a Party's asserted failure to effectively enforce the law, not on the effectiveness of the law itself.⁵ Third, the submission's focus is on the asserted failure to effectively enforce "environmental laws." The submission challenges the enforcement of numerous laws, including the United States Clean Water Act, the United States Safe Drinking Water Act, the California Water Code, and the California Code of Regulations.⁶ These laws qualify as "environmental law" for purposes of the NAAEC in that their primary purpose is "protection of the environment, or the prevention of a danger to human life or health. . . ."⁷ Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party "is failing" to effectively enforce its environmental law.

Article 14(1) lists six specific criteria relevant to the Secretariat's consideration of submissions.

The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁸

³ See NAAEC Article 45(1), Guideline 2.1, Submission at 1.

⁴ See e.g., Submission at 1.

⁵ See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

⁶ Submission at 2.

⁷ Article 45(2)(a). The relevant provisions of the California Code have this purpose.

⁸ Article 14(1)(a)-(f).

The Submission meets the criteria contained in Article 14(1)(a) and (b). It is in English, a language designated by the Party.⁹ The submission identifies the organization making the submission.¹⁰ Article 14(1)(d) requires that the submission appear to be aimed at promoting enforcement rather than at harassing industry.¹¹ There is no indication that Neste is attempting to harass industry. Similarly, the final criterion, in Article 14(1)(f), is satisfied.¹² The Secretariat notes that dismissal of the submission would be required if it did not satisfy the requirements in Article 14(1)(a), (b), (d), and (f), even if it met the elements in Guideline 10.3 necessary for consolidation with an already pending submission.

The criteria contained in Article 14(1)(c) and (e) warrant more detailed discussion because of the questions they raise concerning the extent to which it is appropriate to consider SEM-99-001 in addressing this submission. With respect to Article 14(1)(c), the Submitter has endorsed and incorporated by reference the materials submitted in connection with Submission SEM-99-001:

Neste is aware of the particulars of the submission (the "Methanex Submission") made to the Secretariat by Methanex Corporation on October 18, 1999. We believe that the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs. Neste has done its own extensive research and investigations and, based on our knowledge of the facts, we submit that the documentary evidence that Methanex has provided to you accurately reflects the current situation.¹³

The Secretariat finds that the submission meets the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based, through its incorporation of the information provided by Methanex.¹⁴ The Secretariat previously determined that Submission 99-001 met the requirement in Article 14(1)(c). Little value would be served by requiring this submitter to submit another copy of these materials.¹⁵

The Secretariat similarly finds that this submission meets the requirements contained in Article 14(1)(e), in part because of the content of Submission 99-001 on this issue. Article 14(1)(e) requires that a submitter "indicate[] that the matter has been communicated in writing to the relevant authorities of the Party and indicate[] the Party's response, if any. . . ." Guideline 5.5 provides

⁹ Article 14(1)(a), Guideline 3.2.

¹⁰ Article 14(1)(b), Submission at 1.

¹¹ Article 14(1)(d).

¹² Article 14(1)(f), Submission at 1.

¹³ Submission at 2.

¹⁴ Article 14(1)(c), Guideline 5.2, 5.3.

¹⁵ Neste provides limited additional information concerning the asserted failure to effectively enforce as well. Submission at 2.

that a submission must include copies of any relevant correspondence with the relevant authorities.

The Secretariat has previously determined (in the Methanex Determination) that the matter at issue in this submission has been communicated to the Party, as required by Article 14(1)(e). The Agreement does not require that, in a multiple submitter submission, each submitter independently communicate with the Party. Given the complete identity of the matter involved in this submission and in SEM-99-001, and the practical consequence of consolidating this submission with SEM-99-001, it would promote efficiency to recognize that this submission does not arise in a vacuum by considering the Methanex submission, including the Secretariat's Determination that the Methanex submission satisfies Article 14(1)(e), in reviewing this issue here.

In sum, if two submissions relate to precisely the same facts and the same asserted failure to effectively enforce an environmental law, and the Secretariat has determined that the already pending submission merits a response from the Party, consolidation of the two submissions may be appropriate if the "follow up" submitter could have signed on to the original submission. If the "follow up" submitter would not qualify as a submitter under Article 14(1)(a), (b), (d), or (f), the follow up submission would warrant dismissal. If, however, the "follow up" submitter meets these criteria, and it has specifically referred to the earlier submission as is the case here, it seems contrary to a common sense application of the Agreement to require such a submitter to duplicate the showings made concerning Article 14(1)(c) and (e). Thus, as noted above, little value would be gained by having Neste submit another copy of the information already supplied by Methanex. This analysis assumes, of course, that consolidation would not prejudice the Party, or the original Submitter (here Methanex). No such prejudice would appear to be present here. As noted above, the Party has been asked to provide a response to SEM-99-001, and this submission raises no new issues or matters. It follows that even though this submission alleges a failure to effectively enforce a variety of state and federal laws, the submission will proceed, as consolidated, only with respect to the assertions for which a response has been requested in SEM-99-001.

Having determined that the submission meets the criteria in Article 14(1), the Secretariat determines that the submission warrants consolidation with SEM-99-001 and, in that respect, warrants a response from the Party in light of the factors in Article 14(2). The Secretariat's review of the Article 14(2) factors in connection with SEM-99-001 applies with equal force here, particularly given the determination that Neste could have been a co-submitter for Methanex's submission.

IV - CONCLUSION

For the foregoing reasons and to the extent outlined above, the Secretariat has determined that this submission warrants consolidation with Submission SEM-99-001 under Guideline 10.3. A

response from the United States to SEM-99-001 has previously been requested. A copy of Submission SEM-00-002 and of the supporting information is annexed to this letter.

Yours truly,

(original signed)

David L. Markell

Director, Submissions on Enforcement Matters Unit

c.o. Mr. William Nitze, US-EPA (with annexes)

c.c. Ms. Norine Smith, Environment Canada

Mr. José Luis Samaniego, SEMARNAP

Kimmo Rahkamo, General Manager, Neste MTBE Canada

Ms. Janine Ferretti, Executive Director

Mr. Michael McDonald, Methanex Corporation