
Secretariat of the Commission for Environmental Cooperation

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

Submitter(s): Hudson River Audubon Society of Westchester, Inc.
Save our Sanctuary Committee

Concerned Party: United States

Date received: 2 March 2000

Date of this determination: 12 April 2000

Submission I.D.: SEM-00-003

I - INTRODUCTION

On March 2, 2000, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("*NAAEC*" or "*Agreement*"). Under Article 14 of the *NAAEC*, 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). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The submission concerns a proposal to construct a paved, multi-purpose bicycle path through the Jamaica Bay Wildlife Refuge. The Refuge, located in Queens, New York, is part of the Gateway National Recreation Area. The Submitters assert that through its proposed construction of the above-referenced bicycle path the United States Department of Interior - National Park Service (NPS) is "failing to enforce and proposing to violate Sections 4-10 of the Endangered Species Act [ESA]. . . ."¹ The Submitters also assert that construction of the pathway will violate the Migratory Bird Treaty Act (MBTA). The Submitters claim that construction of the pathway will constitute a failure to effectively enforce these laws because it "will destroy critical habitat for endangered and threatened species and it will result in the taking of migratory birds (including nests). . . ."²

III - ANALYSIS

¹ Submission at 1, 2.

² Submission at 2.

A. Overview

Article 14 of the *NAAEC* directs the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the *NAAEC* is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2).

As the Secretariat has noted in previous Article 14(1) determinations,³ Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the *NAAEC*.⁴

The Secretariat nevertheless has determined that the submission does not presently meet the criteria in Article 14 for further consideration.

B. The Governing Legal Framework

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” Following this first sentence, 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.⁵

C. Application of the Governing Legal Framework

As noted above, the opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” The submission, filed by the Hudson River Audubon Society of Westchester, Inc. (Hudson River) and Save Our Sanctuary Committee, meets the requirement in the opening sentence of Article 14(1) that it be filed by a “non-governmental

³ See e.g., Submission No. SEM-97-005 (May 26, 1998).

⁴ See e.g., Submission No. SEM-97-005 (May 26, 1998).

⁵ Article 14(1)(a)-(f).

organization.⁶ It also meets the requirement that it focus on an asserted failure to enforce a Party's environmental laws, rather than on a deficiency in the law itself.⁷ Further, both the Endangered Species Act and the Migratory Bird Treaty Act qualify as environmental laws. The submission, however, does not meet the requirement in the first sentence that the assertion focus on an alleged ongoing failure to enforce.

Article 14(1) requires that a submission allege that a Party “is failing” to effectively enforce its environmental law. The process presupposes in a case such as this one, where the submission identifies a particular government action as the source of the alleged enforcement failure, that the Party involved actually have taken the action at issue or made some final decision. Absent such a final action or decision, any allegation of a failure to effectively enforce is based on speculation.⁸

Although the submission alleges that the National Park Service “is failing to enforce” the MBTA and the ESA, it also alleges that the NPS is “proposing to violate” these statutes.⁹ Based on the Secretariat's understanding of the status of the potential bicycle path project that is the focus of the submission, it appears that the submission focuses on a prospective rather than on an ongoing asserted failure to effectively enforce. It therefore fails to comply with Article 14(1)'s requirement that the submission assert that a Party “is failing” to effectively enforce its environmental laws.

The failure of the submission to identify an ongoing enforcement failure is reflected in the assertions contained on page two of the submission. The submission asserts that the NPS “is violating” the ESA and the MBTA “by proposing to construct a paved, multi-purpose bicycle path” through the Refuge. According to the submission, construction of the pathway “will destroy critical habitat” for endangered and threatened species and “will result in the taking of migratory birds (including nests),” “and will therefore be in violation” of the ESA and the MBTA.¹⁰

The information supplied in the submission and the attachments to it do not reflect that the NPS has made a final decision to construct a bicycle path through the Refuge in any particular form or location. Indeed, the information provided with the submission suggests that the government is currently engaged in evaluating the appropriate location and other details of such a bicycle path. For example, a December 3, 1999 letter attached to the submission from Mr. Billy Garrett, Superintendent of the Jamaica Bay Unit of the NPS Gateway National Recreation Area, to participants in an August 1999 workshop (or “facilitated discussion”) on the “multi-use pathway (RGG-IIA) that has been proposed” for the Gateway National Recreation Area, contains Mr. Garrett's statement that “I am going to suggest

⁶ Article 45(1) defines a “non-governmental organization” to include any non-profit or public interest organization or association which is neither affiliated with, nor under the direction of, a government. There is no indication from the submission that either Submitter is affiliated with, or under the direction of, a government.

⁷ Cf. SEM-98-003 (14 December 1998).

⁸ Under Article 14(2), the Secretariat is guided in determining whether to request a response by a series of factors including, among others, whether the submission alleges harm to the person or organization making the submission. This Determination does not suggest that, for example, any harm that a submitter alleges in connection with a Party's asserted enforcement failure must have already occurred before a submission may be filed.

⁹ Submission at 1, 2.

¹⁰ Submission at 1, 2.

that the preferred alternative identified in the 1997 Environmental Assessment (EA) be modified and updated and [the] expanded EA be finalized for public review and comment. Potential changes to the preferred alternative are described on the attached page.” Mr. Garrett’s letter then solicits comments on these potential changes.¹¹ The submission refers to this letter (along with an earlier August 27, 1999 letter from Mr. Garrett to Mr. Joseph O’Connell, the President of the Hudson River Audubon Society of Westchester) as “the most recent correspondence” from the NPS.¹² Accordingly, the documentation provided by the Submitters, along with the submission itself, suggests that there has not yet been a final decision to proceed with the bicycle path project. Similarly, the submission does not identify a final decision about the location and other details of the project. Because the submission does not identify a final government decision on the bicycle path, the assertion that the content of that decision constitutes a failure to effectively enforce is premature.

Further, while the submission meets several of the criteria contained in Article 14(1), it does not meet others. In particular, the submission satisfies Article 14(1)(a), (b), (d), and (f) -- the submission is in English, a language designated by the Party, the submission clearly identifies the submitters, the submission appears to be aimed at promoting enforcement rather than at harassing industry,¹³ and the Submitters appear to reside in and be established in the territory of a Party.

The submission, however, does not meet the requirement in Article 14(1)(c) of the NAAEC that a submission provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based. The activity that allegedly constitutes a failure to enforce both the MBTA and the ESA involves construction of a bicycle path that, according to attachments to the submission, is tentatively planned to be 10 feet wide with one-foot shoulders. The submission does little to support its assertion that construction of the path “will destroy critical habitat” for endangered and threatened species and thereby violate the ESA. The submission, for example, does not indicate what endangered or threatened species are found within the Refuge. It similarly does not indicate where “critical habitat” exists within the Refuge or the portion of such habitat (if any) which purportedly will be destroyed by the proposed bicycle path.

Concerning the Migratory Bird Treaty Act, the submission alleges that construction of the path will result in the taking of migratory birds (including nests). It adds that the construction and resulting recreational use of the path will disrupt nesting and feeding of migratory birds and destroy nests and feeding areas in violation of the MBTA.¹⁴ The Submitters cite to recent CEC publications that identify the Refuge as a key conservation site and an important bird area. The submission, however, does not provide support for its assertion that the path, in light of its location and other details, will cause disruption or destruction that violates the MBTA.

¹¹ An attachment to the December 3, 1999 letter, entitled “Cross Bay Boulevard Segment,” also indicates that the NPS “proposes to modify the preferred alternative and reissue the environmental assessment.” According to that attachment, the next step in the process would be to present the NPS’s modified alternative to the RGG Advisory Board.

¹² Submission at 2.

¹³ See also Guideline 5.4.

¹⁴ Submission at 2.

Absent further information to support the existence of a connection between construction of the bicycle path and the types of impacts that would violate the ESA and/or the MBTA, the submission fails to satisfy Article 14(1)(c).

A final issue involves Article 14(1)(e), which requires that submitters indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The Submitters assert that "[w]e have recommended to the United States Department of Interior-National Park Service an alternative site for the bicycle path outside the boundary of the refuge." The submission does not indicate, however, whether, in making these recommendations, the Submitters alerted the NPS to the specific concerns that form the basis for their submission. Neither of the letters from Mr. Garrett appended to the submission (including the attachment to the December 3, 1999 letter) raises a concern on the part of the Submitters or any other participant in the facilitated workshop process that construction of the bicycle path would violate an environmental law. Indeed, other than a general statement in an August 27, 1999 letter from the NPS to one of the Submitters that "impacts to wildlife habitat and existing visitor uses" will be considered, none of the documents provided refers to any concern that construction of the path would adversely affect endangered or threatened species or migratory birds. Additional information is needed to indicate that the "matter" that is the focus of the submission has been communicated in writing to the NPS. If such concerns have been brought to the attention of the Party, any correspondence that does so has not been provided. (See Guideline 5.5).

IV - CONCLUSION

Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, will terminate the Article 14 process with respect to this submission, unless the Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) within 30 days after receipt of this Notification.

Yours truly,

(original signed)

per: David L. Markell
Director, Submissions on Enforcement Matters Unit

c.c: Mr. William Nitze, US-EPA
Mr. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Ms. Janine Ferretti, Executive Director