

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) and (2) of the North American Agreement for Environmental Cooperation

Submitters: Friends of the Earth
Union Saint-Laurent
Grands Lacs
Conservation Council of New Brunswick
Ecology Action Centre
Environment North

Represented by: Sierra Legal Defence Fund (SLDF)

Concerned Party: Canada

Date received: 8 May 2002

Date of this determination: 7 June 2002

Submission I.D.: SEM-02-003 / Pulp and Paper

I - INTRODUCTION

On 8 May 2002, the Submitters listed above 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 nongovernmental 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 Submitters assert that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations (PPER)* against pulp and paper mills in Ontario, Quebec and the Atlantic Provinces (i.e. New Brunswick, Nova Scotia and Newfoundland). The Secretariat has determined that the submission meets all of the requirements in Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations (PPER)* against pulp and paper mills in Ontario, Quebec and the Atlantic Provinces.

The Submitters first provide general assertions regarding the amount and pollutant content of effluent from Canada's 157 pulp and paper mills, contending the mills have "added tonnes of harmful substances to our waterways and caused extensive harm to aquatic ecosystems."¹ They claim that the pulp and paper industry made progress in investing in environmental upgrades in the early 1990's but that those investments have dropped sharply since 1995.²

Next, the Submitters describe the pollution prevention provisions of the *Fisheries Act* and the *PPER* that they contend Canada is failing to effectively enforce in Ontario, Quebec and the Atlantic Provinces. They note that under the *Fisheries Act*, "it is an offence to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation."³ They identify as relevant to their submission two provisions of the federal government's Compliance and Enforcement Policy for the pollution prevention and habitat protection provisions of the *Fisheries Act*. First is the policy that "fair, predictable, and consistent enforcement govern the application of the law, and responses by enforcement personnel to alleged violations."⁴ Second is the intent stated in the Policy "to ensure that violators will comply with the *Fisheries Act* within the

¹ Submission at 3.

² Submission at 3.

³ Submission at 3. See *Fisheries Act* s. 36(3).

⁴ Submission at 4 (quoting *Fisheries Act* Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy, Introduction).

shortest possible time, that violations are not repeated and that all available enforcement tools are used.’⁵

The Submitters note that the 1991 *PPER* regulations, which took effect in July 1992, define acutely lethal effluent, biological oxygen demand (or BOD) and total suspended solids (or TSS) as deleterious substances under the *Fisheries Act*. According to the Submitters, the *PPER* authorize deposits of BOD and TSS as long as certain conditions are met, but (at least since 1995) they strictly prohibit acutely lethal effluent.⁶ The Submitters describe the conditions on discharges of BOD and TSS as “relating to monitoring equipment, monitoring reports, preparing a remedial plan in case the effluent fails certain acute lethality tests, preparing and implementing an emergency response plan, and preparing environmental effects monitoring studies.”⁷

They also describe the test methods and effluent monitoring requirements for BOD, TSS and acute lethality and note that each day on which the *PPER* are violated constitutes a separate offence. They note that trout acute lethality test failure is an automatic *PPER* (and hence *Fisheries Act*) violation that requires accelerated follow-up testing, and that failure of an acute lethality test for *Daphnia magna*, while not an automatic violation, also requires follow-up test procedures. For both kinds of acute lethality test, failure to conduct required follow-up test procedures violates the *PPER* and the *Fisheries Act*.

The Submitters next present in detail their assertion that Canada is failing to effectively enforce the *Fisheries Act* and the *PPER* in regard to pulp and paper mills in Ontario, Quebec and the Atlantic Provinces. The two categories of violations for which they contend enforcement is deficient are (1) failure to meet a “deleterious substances” test and (2) failure to conduct follow-up testing when there is an effluent test failure.

In regard to Quebec, the Submitters obtained data that they claim show 960 acute lethality, BOD and TSS violations from 1995 to 2000 at nine mills. They claim that in 2000, 26 Quebec mills had 171 violations (presumably acute lethality, BOD and TSS violations); 24 mills failed the trout acute lethality test, 33.3% of which also violated follow-up test procedures; and 28 mills, after failing the *Daphnia magna* acute lethality test, violated the acute lethality follow-up procedures.⁸ In all, the Submitters claim that there were at least 250 reported potential offences of the *PPER* follow-up test procedures throughout Quebec in

⁵ Submission at 4.

⁶ Submission at 5.

⁷ Submission at 5.

⁸ Appendix 6 to the submission provides a flowchart showing the acute lethality testing procedures and the points at which violations occur.

2000. The Submitters claim that, despite these violations, they could find no *Fisheries Act* prosecutions or convictions of any Quebec mills, and they state that they are particularly concerned about apparent lack of effective enforcement at six mills, based on data from 2000. Of these, they highlight especially the Tembec Inc. mill in Temiscaming, for which they claim no prosecution was brought under either federal or provincial effluent regulations despite an alleged 275 reported violations from 1995 through 2000.

In Ontario, the Submitters contend that 13 mills had over 225 acute lethality, BOD and TSS test failures between 1996 and 2000. In 2000 alone, they claim that 7 mills were responsible for 18 such test failures, six of which mills failed the trout acute lethality test and two of which also failed the trout lethality test follow-up procedures. They also claim that 9 mills violated the *Daphnia magna* follow-up procedures. In all, the Submitters claim there were at least 94 follow-up test procedure violations at Ontario mills in 2000. The Submitters assert that from 1995 to 2000, six Ontario mills were prosecuted under the *PPER*, which they believe explains the lower number of violations in Ontario as compared to Quebec and the Atlantic Provinces, where the Submitters claim there have been fewer prosecutions. Nonetheless, on the basis of 2000 data, the Submitters identify two Ontario mills for which they “have concerns about the apparent lack of effective enforcement of the federal laws.”⁹

The Submitters obtained only partial data for mills in the Atlantic Provinces for the years 1995 to 2000 and claim therefore that they understate the number of violations in those provinces. According to the Submitters, the data they obtained show that 19 mills reported 1,081 acute lethality, BOD and TSS violations from 1995 to 2000. The Submitters did not calculate follow-up test procedure violations for the Atlantic Provinces. They claim that despite the number of test failure violations, they found only “two prosecutions of mills in the Atlantic Region under the federal laws since the *PPER* came into force.”¹⁰ Based on 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding four Atlantic Provinces mills. According to the Submitters, the Atlantic Provinces mill allegedly with the most violations from 1995 to 2000, the Irving Saint John mill, was prosecuted under the federal laws in 1998 but still had 22 test failure violations and an unknown number of follow-up test violations in 2000.

The Submitters contend that the exclusions in NAAEC Article 45(1) from the definition of “failure to effectively enforce environmental law” do not apply. They claim that Canada’s alleged failure to effectively enforce the *Fisheries Act* and the *PPER* do not reflect a reasonable exercise of discretion or result from *bona fide* decisions to allocate resources to

⁹ Submission at 9.

¹⁰ Submission at 10.

other enforcement matters within the meaning of Article 45(1). Among other things, they assert that “[i]t is not a reasonable exercise of discretion where an available enforcement tool, such as prosecutions, is used so infrequently in the face of widespread and numerous violations.”¹¹

Finally, as discussed further below, the Submitters present information in support of their contention that the submission meets the requirements of Article 14(1)(a)-(f) and that the submission merits requesting a response from Canada based on the criteria in Article 14(2).

III - ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental 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,¹² 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.

A. Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]” The Submission meets these requirements.

First, the Submitters are nongovernmental organizations as defined in Article 45(1) of the NAAEC. Second, the submission asserts that a Party, Canada, is failing to effectively enforce section 36 and other sections of the *Fisheries Act* related to pollution prevention, as well as provisions of the *PPER*. As the Secretariat has found in other submissions, the pollution prevention provisions of the *Fisheries Act* are environmental law within the meaning of NAAEC Article 45(2).¹³ Third, as the Submitters “assert that the Government of Canada is

¹¹ Submission at 11.

¹² See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

¹³ See SEM-98-004 (BC Mining), Article 15(1) Notification at 11 (11 May 2001).

in breach of its commitment under the NAAEC by failing to effectively enforce its *Fisheries Act* and [*PPER*],”¹⁴ the submission alleges an ongoing failure to effectively enforce the *Fisheries Act* and the *PPER*. Notably, it appears Canada could still take enforcement action with respect to at least some of the alleged violations that the Submitters specifically identify.¹⁵ Finally, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.

Article 14(1) then 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.¹⁶

The submission meets these criteria. The submission is in English, a language designated by the Parties.¹⁷ It clearly identifies the organizations making the submission.¹⁸

The submission provides sufficient information to allow the Secretariat to review the submission.¹⁹ The Submitters provide extensive data regarding numerous specific violations of the *PPER* and the *Fisheries Act*, as well as data regarding the extent to which Canada has taken enforcement action in response to those violations.²⁰

¹⁴ Submission at 2 (emphasis added).

¹⁵ See, e.g., *Fisheries Act* s. 82(1).

¹⁶ Article 14(1)(a)-(f).

¹⁷ Article 14(1)(a), Guideline 3.2; submission at 12.

¹⁸ Article 14(1)(b); submission at 12.

¹⁹ Article 14(1)(c), Guideline 5.2, 5.3.

²⁰ See, e.g., Submission, Appendix 5.

The submission appears to be aimed at promoting enforcement rather than at harassing industry. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, the Submitters are not competitors of any of the mills alleged to have violated the *PPER*, and the submission does not appear frivolous.²¹

The Submitters indicate that the matter “has been communicated in writing to the Government of Canada in a report released in 2001 entitled *Pulping the Law*.”²² As the Submitters noted, the report indicated that the Submitters were planning to file a submission with the CEC on matters addressed in the report.²³ The Submitters also note that newspaper articles that they attach as an appendix to the submission demonstrate that the relevant authorities of Canada were aware of and responded to the report. In addition, the Submitters show that Sierra Legal Defence Fund raised the enforcement matters at issue in the submission in a written summary presented to the House of Commons Standing Committee on Environment and Sustainable Development in 1998, in connection with proceedings that Environment Canada and Fisheries and Oceans Canada attended. Accordingly, the submission meets the requirements of Article 14(1)(e).²⁴

Finally, because the Submitters are established in the United States or Canada, the submission meets the requirement in Article 14(1)(f) that it be filed by a “person or organization residing or established in the territory of a Party.”²⁵

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the Party concerned prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

²¹ See Guideline 5.4.

²² Submission at 13.

²³ Submission, Appendix 3, at 4.

²⁴ As the communications mentioned here, taken together, are sufficient for purposes of Article 14(1)(e), the Secretariat takes no position as to whether, as the Submitters claim, the mills’ self-reporting of *PPER* violations to Environment Canada would be sufficient to meet Article 14(1)(e). Notably, while this self-reporting brings violations to the attention of the government, it differs from the other communications on which the Submitters rely in that it does not clearly communicate a concern regarding a possible failure to effectively enforce environmental law.

²⁵ Submission at ii.

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.²⁶

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits requesting a response from the Party.

Citing in particular to the *Pulping the Law* report in Appendix 3 to the submission, the Submitters explicitly allege harm to the persons they represent:

The Submitters are non-governmental environmental organizations whose members include thousands of individuals who have a shared interest in protecting the waters of Canada, including the reduction and elimination of pollution from pulp and paper mills in central and eastern Canada. The members make use of these waters and water pollution harms the entire ecosystem, including people, fish and their habitat.²⁷

Similar assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.²⁸

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.²⁹ The Submitters note, *inter alia*, that further study in

²⁶ Article 14(2) of the NAAEC.

²⁷ Submission at 14.

²⁸ In SEM-96-001 (Cozumel), Recommendation to the Council for the Development of a Factual Record (7 June 1996), for example, the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC."

the citizen submission process would foster the protection and improvement of the environment as contemplated in NAAEC Article 1(a); promote sustainable development based on cooperation and mutually supportive environmental and economic policies, as contemplated in NAAEC Article 1(b); increase cooperation between governments to better conserve, protect and enhance the environment, as contemplated in NAAEC Article 1(c); avoid creating trade distortions or new trade barriers, as contemplated in NAAEC Article 1(e); strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices, as contemplated in NAAEC Article 1(f); enhance compliance with, and enforcement of, environmental law and regulations, as contemplated in NAAEC Article 1(g); and promote pollution prevention policies and practices, as contemplated in NAAEC Article 1(j). The Secretariat agrees that further study of the matters raised in the submission would advance these goals, particularly those set out in NAAEC Articles 1(a), 1(e), 1(g) and 1(j).

The submission is particularly likely to advance the goals of the NAAEC in that the Submitters allege a failure to effectively enforce environmental law in numerous specific cases over a wide geographic area and time period, so as to illustrate a “systemic problem of persistent non-enforcement by the Canadian government.”³⁰ The Secretariat has previously noted that assertions of a widespread failure to effectively enforce an environmental law “are particularly strong candidates for Article 14 consideration.”³¹

The Submitters assert that “[t]here are no realistic alternative private remedies available.”³² They claim that they either do not have status for civil remedies or such remedies would be impractical to pursue. They also claim that bringing private prosecutions, which the government can stay, is a financial burden and not a viable option in light of the number of alleged violations and alleged failures to take enforcement action included in the submission. Taking note of these burdens, and noting also that the Submitters or others have made Canadian authorities aware of their enforcement concerns as long ago as 1998, the Secretariat gives considerable weight to the assertion that further pursuit of private remedies was not a practicable option for the Submitters in regard to the matters raised in the submission.

Finally, the submission is not based exclusively on mass media reports. As the Submitters note, the submission is based primarily on information obtained from the federal government, industry and SLDF research, and not simply mass media reports.

²⁹ Article 14(2)(b) of the NAAEC.

³⁰ Submission at 15.

³¹ SEM-99-002 (Migratory Birds), Determination pursuant to Article 14(1) and (2) of the NAAEC (23 December 1999).

³² Submission at 15.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that Canada is failing to effectively enforce provisions of the *PPER* and the *Fisheries Act* in regard to pulp and paper mills in Ontario, Quebec and the Atlantic Provinces merits a response from Canada.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-02-003 (Pulp and Paper) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

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