

Secretariat of the Commission for Environmental Cooperation

Request for Information for Preparation of a Factual Record Submission SEM-02-003 (Pulp and Paper) February 2004

Contents

- 1. The factual record process**
- 2. The Pulp and Paper submission and Council's instructions**
- 3. Request for information**
- 4. Examples of relevant information**
- 5. Additional background information**
- 6. Where to send information**

1. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of NAAEC allows persons or nongovernmental organizations in North America to inform the Secretariat, in a submission, that any member country (hereinafter, a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, after which the Council may instruct the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Article 15(4) and 21(1)(a) of NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by JPAC or by interested nongovernmental organizations or persons; or developed by the Secretariat or independent experts.

On 11 December 2003, in its Resolution 03-16, the Council decided unanimously to instruct the Secretariat to develop a factual record in connection with submission SEM-

02-003 (Pulp and Paper), in accordance with Article 15 of NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Guidelines). The Secretariat is now requesting information relevant to matters to be addressed in the factual record. The following sections provide background on the submission and describe the kind of information requested.

2. The Pulp and Paper submission and Council's instructions

On 8 May 2002, several Canadian nongovernmental organizations presented to the Secretariat of the CEC a submission—in accordance with Article 14 of NAAEC—asserting 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) promulgated in 1992, against pulp and paper mills in Ontario, Quebec and the Atlantic provinces (i.e., New Brunswick, Nova Scotia and Newfoundland). Section 36(3) of the *Fisheries Act* prohibits the deposit of a deleterious substance in water frequented by fish unless the deposit is authorized by regulation, such as the PPER.

The PPER define acutely lethal effluent, biochemical oxygen demand (or BOD) matter and total suspended solids (or TSS) as deleterious under the *Fisheries Act*. The PPER authorize levels of BOD and TSS that do exceed specified maximum quantities as long as certain conditions are met, but they strictly prohibit acutely lethal effluent.

The PPER establish a self-reporting system by which mills are required to do certain effluent tests and report the results to environmental authorities. Failure of a test for acute lethality to trout is an automatic non-compliance with the PPER (and hence *Fisheries Act*) and requires accelerated follow-up testing. Failure of an acute-lethality test for *Daphnia magna*, while not an automatic non-compliance, also requires follow-up test procedures. For both kinds of acute-lethality test, failure to conduct follow-up test procedures as required is non-compliance with the PPER and the *Fisheries Act*. Effluent that contains unauthorized levels of BOD or TSS does not comply with the PPER or the *Fisheries Act*.

Violations of s. 36(3) and the PPER are punishable on summary conviction by a fine not exceeding C\$300,000 for a first offense and C\$300,000 plus imprisonment not exceeding six months for subsequent offenses, and for an indictable offense, a fine not exceeding \$1 million for a first offense and a fine not exceeding \$1 million and imprisonment not exceeding three years for subsequent offenses.

The Submitters allege that in the period from 1995 to 2000 there were more than 2,400 documented violations of the PPER at mills in central and eastern Canada, and very few prosecutions. The submission and its appendices provide information on alleged violations at approximately 70 of the 116 mills that the Submitters identify, with twelve

mills highlighted as mills of particular concern to the Submitters. In its response, Canada provided information with respect to federal enforcement responses from 1995–2000 in regard to the twelve mills for which the Submitters raised particular concerns.

On 11 December 2003, in its Resolution 03-16, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of NAAEC and the Guidelines, for the assertions in Submission SEM-02-003 with regard to alleged failures to effectively enforce s. 36(3) of the *Fisheries Act* and alleged effluent test failures as well as failures to conduct follow-up tests as required under the PPER, with respect to the following mills and time periods identified in the submission:

- Irving Pulp and Paper Ltd. at St. John, New Brunswick from 1996 to 2000
- AV Cell Inc. at Atholville, New Brunswick for 2000
- Abitibi-Consolidated at Grand Falls, Newfoundland for 2000
- Bowater Mersey Paper Company Ltd. at Brooklyn, Nova Scotia for 2000
- Fjordcell Inc. at Jonquière, Québec for 2000
- Interlake Papers at St. Catharines, Ontario for 2000
- Tembec Inc. at St. Raymond, Québec for 2000
- Uniforêt-Pâte Port Cartier Inc. at Port-Cartier, Québec for 2000
- F.F. Soucy Inc. at Rivière-du-Loup, Québec for 2000
- La Compagnie J. Ford Ltd. at Portneuf, Québec for 2000

In light of ongoing investigations, the Council excluded from the factual record two of the twelve mills that the Submitters identified as mills of particular concern: the Abitibi-Consolidated Inc. mill at Iroquois Falls, Ontario, and the Tembec Inc. mill at Temiscaming, Quebec.

The Council also instructed the Secretariat that the factual record shall describe Canada's consideration of actions taken by the provinces to enforce their legislation, regulations and permit conditions related to pulp and paper mills, specifically the information submitted by the provinces to federal officials where such provincial enforcement actions were relied upon by those federal officials, with respect to the mills listed in Council Resolution 03-16; bearing in mind that the submitters do not assert that any of the provinces are failing to effectively enforce provincial environmental law and there is not to be an examination of provincial enforcement of provincial law.

The Council also instructed the Secretariat that the factual record shall describe the other facts directly related to Canada's enforcement of s. 36(3) of the *Fisheries Act* and of ss. 5 and 6 and Schedules I and II of the PPER, with respect to the mills listed in Council Resolution 03-16.

The Council directed the Secretariat to consider, in developing the factual record, whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of NAAEC on 1 January 1994. In considering such an alleged

failure to effectively enforce, the factual record may include relevant facts that existed prior to 1 January 1994.

3. Request for information

The Secretariat seeks information relevant to:

- (i) the facts concerning Canada's actions regarding alleged failures to effectively enforce s. 36(3) of the *Fisheries Act* with respect to the mills and time periods identified in Council Resolution 03-16;
- (ii) the facts concerning Canada's action regarding alleged effluent test failures and failures to conduct follow-up tests as required under the PPER with respect to mills and time periods identified in Council Resolution 03-16;
- (iii) the facts concerning Canada's consideration of actions taken by the provinces to enforce their legislation, regulations and permit conditions related to pulp and paper mills, as specified in Council Resolution 03-16, with respect to the mills identified in Council Resolution 03-16;
- (iv) other facts directly related to Canada's enforcement of s. 36(3) of the *Fisheries Act* and of ss. 5 and 6 and Schedules I and II of the PPER, with respect to the aforementioned mills; and
- (v) whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* and ss. 5 and 6 and Schedules I and II of the PPER in the context of the mills and time periods listed in Council Resolution 03-16.

4. Examples of relevant information

This section provides examples of the kind of information that the Secretariat is seeking in connection with the factual record. Information that the Secretariat receives will be considered for inclusion in the factual record. Examples of potentially relevant information include the following:

- (i) Information on effluent tests (TSS, BOD, trout lethality, Daphnia lethality, follow-up tests) for any of the ten mills listed above, from the time period listed for each mill up to the present time, for example information on:
 - Whether such tests were performed as required under the PPER;
 - The results of such tests;
 - The methodologies and procedures used in performing such tests.

- (ii) Information on any action that federal or provincial government authorities took in response to any non-compliance with either (1) the s. 36(3) of the *Fisheries Act* or the PPER, or (2) provincial legislation, regulations or permit conditions, in regard to effluent tests for any of the ten mills and the time periods listed above, for example information on:
- Inspections or investigations;
 - Environmental monitoring;
 - Notices of violation;
 - Compliance orders or agreements;
 - Warnings;
 - Laying of charges;
 - Fines, sentences or remediation orders.
- (iii) Information on the history of compliance with *Fisheries Act* s. 36(3) or the PPER of any of the ten mills listed above prior to the time periods listed in connection with each mill.
- (iv) Information on the degree of harm (or absence of harm) to fish, fish habitat or human use of fish, or the risk of such harm, caused by any instances of non-compliance with *Fisheries Act* s. 36(3) or the PPER by any of the ten mills listed above during the time periods indicated for each mill.
- (v) Information on provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, either (1) s. 36(3) of the *Fisheries Act* or the PPER, or (2) provincial legislation, regulations or permit requirements applicable to pulp and paper mill effluent discharges in Ontario, Quebec, New Brunswick, Nova Scotia or Newfoundland.
- (vi) Information on application of any of the policies identified under item (v) above to any of the ten mills listed above, in connection with the mills' effluent discharges during the relevant time periods.
- (vii) Information on any public complaints regarding non-compliance of any of the mills listed above, during the time periods listed for each mill, with *Fisheries Act* s. 36(3) or the PPER, and on any response by federal or provincial authorities to any such complaints.
- (viii) Information on federal or provincial enforcement or compliance-related staff or resources available (in connection with the mills and times periods listed above) for enforcing or ensuring compliance with either (1) s. 36(3) of the *Fisheries Act* or the PPER, or (2) provincial legislation, regulations or permit requirements applicable to pulp and paper mill effluent discharges.

- (ix) Information on federal-provincial coordination in Ontario, Quebec, New Brunswick, Nova Scotia or Newfoundland regarding ensuring compliance with or enforcing *Fisheries Act* s. 36(3), the PPER or related provincial laws or regulations.
- (x) Information on the Canadian federal government's efforts to promote compliance with *Fisheries Act* s. 36(3) or the PPER at pulp and paper mills in Ontario, Quebec, New Brunswick, Nova Scotia or Newfoundland, including for example information on:
- Communication and publication of information on the requirements of *Fisheries Act* s. 36(3) or the PPER;
 - Public education;
 - Consultation with mills;
 - Technical assistance.
- (xi) Information regarding the challenges that the pulp and paper sector in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland has faced in seeking to achieve compliance with *Fisheries Act* s. 36(3) and the PPER, including for example information on;
- The nature, environmental limitations, availability and compliance potential of various pulp and paper production technologies and effluent treatment technologies;
 - The kinds of process, facility and equipment changes required to achieve compliance;
 - The economic costs of compliance;
 - The variability in these factors across mills in Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland.
- (xii) Information on the effectiveness of Canada's efforts to enforce or ensure compliance with *Fisheries Act* s. 36(3) or the PPER in connection with the mills listed above, for example its effectiveness in:
- Remedying or mitigating the negative effects of any non-compliance with *Fisheries Act* s. 36(3) or the PPER;
 - Achieving compliance in the shortest possible time;
 - Preventing or deterring future violations of those provisions;
- (xiii) Information on barriers or obstacles to enforcing or ensuring compliance with *Fisheries Act* s. 36(3) or the PPER in connection with paper mills in Ontario, Quebec, New Brunswick, Nova Scotia or Newfoundland.

- (xiv) Information on the consistency of Canada's actions in regard to the mills listed above with the manner in which similar situations are being or have been handled.
- (xv) Any other technical, scientific or other information that could be relevant.

5. Additional background information

The submission, Canada's response, the Secretariat determinations, the Council Resolution, the overall plan to develop the factual record and other information are available in the Citizen Submissions on Enforcement Matters section of the CEC web site: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

6. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2004, by e-mail to info@ccemtl.org or by regular mail to the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393, rue St-Jacques ouest,
bureau 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

Please reference SEM-02-003 (Pulp and Paper) in all correspondence.

For any questions, please call (514) 350-4300 or send an e-mail to the attention of Geoffrey Garver, at <info@ccemtl.org>.