
Secretariat of the Commission for Environmental Cooperation

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

Submitters:

Adirondack Communities and Conservation Program
Adirondack Mountain Club, Inc.
American Lung Association of the City of New York
American Lung Association of Connecticut
American Lung Association of Maine
American Lung Association of Massachusetts
American Lung Association of New Hampshire
American Lung Association of New Jersey
American Lung Association of New York
American Lung Association of Rhode Island
Appalachian Mountain Club
Audubon New York
Breast Cancer Coalition of Rochester
Citizen's Environmental Coalition
Connecticut Public Interest Research Group
Conservation Law Foundation
Delaware-Otsego Audubon Society, Inc.
Environmental Advocates
Environmental and Society Institute
Finger Lakes Trail Conference
Fishkill Ridge Caretakes, Inc.
Global Warming Action Network
Great Lakes United
Green Education and Legal Fund, Inc.
Greenpeace Canada
Greenpeace USA
Hudson River Sloop Clearwater, Inc.
Lake Clear Association
Massachusetts Public Interest Research Group
Natural Resources Defense Council
New Hampshire Public Interest Research Group
New Jersey Public Interest Research Group
New York Public Interest Research Group
New York State Community of Churches
Northeast Organic Farming Association of New York, Inc.
Ohio Public Interest Research Group
Ontario Clean Air Alliance
PennEnvironment
Rainbow Lake Association, Inc.
Resident's Committee to Protect the Adirondacks
Rhode Island Public Interest Research Group

Scenic Hudson, Inc.
Sierra Club, including Sierra Club of Canada
Sierra Club of Canada, Eastern Canada Chapter
Toronto Environmental Alliance
U.S. Public Interest Research Group
Vermont Public Interest Research Group
Waterkeeper Alliance
WNY Sustainable Energy Association
Party: Canada
Date received: 14 August 2003
Date of receipt of the original submission: 1 May 2003
Date of this determination: 19 September 2003
Submission I.D.: SEM-03-001 / Ontario Power Generation

I. INTRODUCTION

On 14 August 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a revised submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). The revised submission contains new information following the Secretariat's determination of 15 July 2003 that the original submission, filed on 1 May 2003, failed to meet fully the requirement in Article 14(1)(c) because the Submitters provided insufficient information regarding whether private remedies available under Canada's law have been pursued.

The Secretariat has determined that the revised submission meets all of the requirements in Article 14(1) for further consideration and, upon consideration of the factors in Article 14(2), that it merits requesting a response from Canada. The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE REVISED SUBMISSION

Like the original submission, the revised submission, filed by 49 Canadian and United States non-governmental organizations,¹ asserts that Canada is failing to effectively enforce the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants. The revised submission focuses primarily on

¹ Five of the original Submitters are listed as Interested Parties in the submission: the attorneys general of New York, Connecticut and Rhode Island and the Towns of Chesterfield and Wilmington, both in New York State. The submission makes clear that these "Interested Parties" are not submitters. Submission at ii. In its 15 July 2003 determination, the Secretariat concluded that, in view of the Article 45(1) definition of "non-governmental organization," "the two towns and the three attorneys general, who joined the submission in their capacities as attorneys general, are not non-governmental organizations or persons within the meaning of Article 14." SEM-03-001, Determination under Article 14(1) (15 July 2003).

OPG's Nanticoke, Lambton and Lakeview generating stations, but the submission encompasses all six of OPG's fossil fuel powered facilities.

The Submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from OPG's coal-powered facilities pollute the air and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the Canadian Environmental Protection Act, 1999 (CEPA), which, they claim, obligate the Minister of the Environment to take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance or another deleterious substance may enter water frequented by fish.

The Submitters attach portions of a 2001 report indicating that OPG's six fossil fuel fired facilities generate 14.7% of the nitrogen oxides, 23.7% of the sulfur dioxide and 22.6% of the mercury emitted in Ontario.² The revised submission describes the transport of emissions of sulfur dioxide and nitrogen oxides and their deposition as acidic precipitation and asserts that the prevailing westerly winds in North America transport OPG's emissions of these substances to Quebec, the Maritime Provinces, New York, Connecticut, Rhode Island and other New England states. The revised submission cites (and attaches portions of) studies indicating that Ontario is the source of 23% of the sulfur deposition on Whiteface Mountain in New York State's Adirondack Mountains and 22% of the sulfur deposition in the western Adirondacks.³ The revised submission also provides information regarding the adverse environmental and human health impacts that they claim result from the downwind deposition of OPG's mercury, sulfur dioxide and nitrogen oxides emissions in eastern Canada and northeastern United States. The Submitters claim that they or their members are directly and personally affected by the harm described in the revised submission and that natural resources that they use have been degraded in recreational and other value.⁴

The revised submission describes the efforts of some of the Submitters to communicate to the Canadian Minister of the Environment and others their concerns regarding the alleged downwind impacts of OPG's air emissions. The Submitters claim that "Canada has responded to these communications by promising attention to the matter but by doing little about it."⁵ They contend that "[t]he only concrete changes at the OPG plants discussed by Canada have been the installation of pollution control equipment on certain units to reduce NO_x emissions in an effort to meet obligations under the 2000 Ozone Annex to the Canada-United States Air Quality Agreement."⁶

The only new information in the revised submission concerns the pursuit of private remedies available under Canadian law in regard to the matters addressed in the submission. The

² Revised submission at 5, Appendix C.

³ Revised submission at 7, Appendix C.

⁴ Revised submission at 14-15.

⁵ Revised submission at 13.

⁶ *Id.*

Submitters claim that “[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success.”⁷

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,⁸ 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. Opening sentence of 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 [...]”

Article 45(1) of the NAAEC defines a “non-governmental organization” as “any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government.” The Submitters are 49 non-governmental organizations within the meaning of this definition.

The revised submission alleges that a Party, Canada, is failing to effectively enforce ss. 166 and 176 of CEPA and s. 36(3) of the *Fisheries Act*. All of these provisions come clearly within the definition of “environmental law” found in Article 45(2)(a).

The revised submission alleges “failure to effectively enforce” these sections against OPG, not a deficiency in the provisions themselves or in standard-setting under the provisions. CEPA ss. 166 and 176 both provide that the Environment Minister shall take certain prescribed action if the Environment Minister and the Health Minister have reason to believe that a substance released from a Canadian source into the air or water creates, or may reasonably be anticipated to create, air or water pollution either (1) in a foreign country that provides substantially the same rights to Canada as Canada provides in ss. 166 and 176 or (2) that violates or is likely to violate an international agreement on prevention, control or correction of pollution.⁹ In regard to alleged non-federal sources of pollution such as OPG, the ministerial action that ss. 166 and 176 contemplate is, first, consultation with the relevant non-federal government to determine whether that government can address the transboundary pollution and, second, if the non-federal government cannot or does not take action, either the

⁷ Revised submission at 12.

⁸ 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).

⁹ See CEPA ss. 166 and 176.

publication of a notice requiring preparation and implementation of a pollution prevention plan under CEPA s. 56(1) or recommendation of regulations to the Governor in Council regarding the pollution. In a previous submission, the Secretariat determined that assertions similar to those regarding ss. 166 and 176 were assertions of a failure to effectively enforce or fulfill a specific legal obligation that the Secretariat could consider under Article 14.¹⁰ The assertion regarding enforcement of *Fisheries Act* s. 36(3) likewise satisfies the requirement that it refer to an alleged failure to effectively enforce.

B. Six specific criteria under Article 14(1)

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.¹¹

The revised submission meets all of these criteria. Consistent with Article 14(1)(a), the submission is in English, a language designated by the Party. As Article 14(1)(b) requires, it clearly identifies the organizations making the submission. The revised submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d) of the NAAEC. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, and the Submitters are not competitors of OPG.¹² The Secretariat does not find the revised submission to be frivolous.¹³ The revised submission meets the criterion contained in Article 14(1)(e) of the NAAEC, in that it indicates that the matter has been communicated in writing to the relevant Canadian authorities and their response.¹⁴ The revised submission includes copies of correspondence sent to the Canadian Minister of the Environment, and copies of the replies received. Finally, because the Submitters are established in the United States or Canada, the revised submission satisfies Article 14(1)(f).

10 See SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (8 September 1999).

11 Article 14(1)(a)-(f).

12 See Guideline 5.4(a).

13 See Guideline 5.4(b).

14 Revised submission at 11-13.

Unlike the original submission, the revised submission also meets the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission.¹⁵ Regarding the Submitters' substantive assertions, the revised submission and the documentary evidence attached to it provide information regarding 1) the amount of nitrogen oxides, sulfur dioxide and mercury that OPG's facilities emit, and their percentage contribution to overall emissions in Ontario;¹⁶ 2) the downwind movement of these pollutants to northeastern United States and eastern Canada, including some information regarding the percentage contribution of Ontario emissions;¹⁷ and 3) the harm to human health and the environment that deposition of mercury and acid precipitation resulting from emissions of sulfur dioxide and nitrogen oxides cause in eastern Canada and northeastern United States.¹⁸ The revised submission, with supporting documentation, asserts that acid rain has resulted in "large losses of fish and aquatic communities in over 30,000 sensitive lakes in southern Ontario and Quebec."¹⁹ The submission also contains information on at least some of Canada's efforts to address power plant emissions.²⁰

Taken together, this information is relevant to the assertion that, in respect to CEPA ss. 166 and 176, there is reason to believe that OPG air emissions create, or may reasonably be anticipated to create, air or water pollution in the United States, which appears to provide substantially the same rights to Canada as Canada provides to other countries in sections 166 and 176.²¹ The information is therefore sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(a) and 176(1)(a). The information also relates to the assertion that Canada has not taken sufficient action to meet nitrogen oxides requirements under the Ozone Annex to the Canada-United States Air Quality Agreement, such that those emissions violate or are likely to violate an international agreement on prevention, control or correction of pollution.²² The information in the submission is therefore also sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(b) and 176(1)(b).

The Submitters' assertions regarding s. 36(3) appear to suggest a largely untested application of the provision to air emissions that eventually fall into water frequented by fish. Although it is possibly unprecedented, the Secretariat finds no basis for rejecting outright the application of s. 36(3) that the Submitters propose. The definition of "deposit" in s. 34(1) includes any "emitting" or "spraying" of a substance.²³ Further, the "deposit" need not be directly into the water, as s. 36(3) also encompasses the deposit of a deleterious substance "in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter" water frequented by fish. The revised submission clearly identifies OPG as the source of the emissions of concern. The information in the revised submission regarding the OPG emissions, their downwind

15 Article 14(1)(c); Guideline 5.3

16 Revised submission at 5-6 and documents cited (Appendix C).

17 Revised submission at 6 and documents cited (Appendix C).

18 Revised submission at 7-11 and documents cited (Appendix C).

19 Revised submission at 8.

20 Revised submission at 12.

21 See Revised submission at 2-3 (citing provisions of the U.S. Clean Air Act and Clean Water Act).

22 Revised submission at 12.

23 Section 34(1) defines a deposit as "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing."

movement and their potential impacts on numerous water bodies in Ontario, Quebec and the Atlantic Provinces, as well as on Canada's alleged lack of an adequate enforcement response, is sufficient to allow the Secretariat to review the Submitters' assertions regarding s. 36(3).

Finally, unlike the original submission, the revised submission provides sufficient information to allow the Secretariat to conduct its review of all of the factors in Article 14(2). In particular, it provides the information needed for the Secretariat's consideration pursuant to Article 14(2)(c) of whether private remedies available under the Party's law have been pursued.

C. 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:

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.²⁴

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

The Submitters provide information regarding the adverse impacts of OPG emissions on human health and the environment and assert that they and their members are "directly and personally affected" by those impacts.²⁵ Similar assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.²⁶

²⁴ Article 14(2) of the NAAEC.

²⁵ Revised submission at 7-11, 14-15.

²⁶ 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

The revised submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.²⁷ The Submitters note, *inter alia*, that further study in 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).²⁸ 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 Submitters assert that “[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success.”²⁹ They claim that it is “impractical and unrealistic for individuals and non-governmental entities with limited resources and expertise to seek redress through private remedies for a transnational problem of such scope and complexity.”³⁰ 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 by OPG and their alleged widespread effects on the environment.³¹ The Submitters assert that “the better approach is for the government regulator to address the source of the emissions.”³² The Submitters also describe the legal and other obstacles they would face in bringing private tort actions or common law actions.³³ Nonetheless, the Submitters describe efforts to urge the federal government of Canada and the government of Ontario to address the air and water pollution issues presented in the submission.³⁴ Taking note of the burdens that the Submitters describe, and noting also that the Submitters or others have made federal or provincial authorities in Canada aware of their concerns regarding OPG’s emissions on numerous occasions beginning in May 1999,³⁵ the Secretariat concludes that the approach in regard to pursuit of private remedies was reasonable in light of the circumstances.

America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.”

27 Article 14(2)(b) of the NAAEC.

28 Revised submission at 15.

29 Revised submission at 12.

30 Revised submission at 13.

31 Revised submission at 13.

32 Revised submission at 13-14.

33 Revised submission at 14.

34 Revised submission at 13-14.

35 Revised submission at 11-12.

Finally, the submission is not based exclusively on mass media reports. As the Submitters note, the submission is based primarily on “government reports and studies and on peer reviewed scientific studies.”³⁶

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 *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants merits a response from Canada.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that the revised submission SEM-03-001 (Ontario Power Generation) 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 revised submission and the supporting information provided with the original submission were previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

cc: Norine Smith, Environment Canada
Olga Ojeda, SEMARNAT
Judith E. Ayres, US-EPA
William V. Kennedy, CEC Executive Director
Submitters

³⁶ Revised submission at 14.