

Secretariat of the Commission for Environmental Cooperation

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

Submitters: Eliot Spitzer, Attorney General of the State of New York
Richard Blumenthal, Attorney General of the State of Connecticut
Patrick C. Lynch, Attorney General of the State of Rhode Island
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, Inc.
American Lung Association of New Hampshire
American Lung Association of New Jersey
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 & 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
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
Town of Chesterfield
Town of Wilmington
U.S. Public Interest Research Group
Vermont Public Interest Research Group
Waterkeeper Alliance
WNY Sustainable Energy Association

Party: Canada
Date received: 1 May 2003
Date of this determination: 15 July 2003
Submission I.D.: SEM-03-001 / Ontario Power Generation

I. INTRODUCTION

On 1 May 2003, 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 under Article 14(2) whether the submission merits requesting a response from the Party named in the submission, in this case Canada.

The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. Specifically, the submission does not satisfy Article 14(1)(c) because the Submitters have not submitted sufficient information to allow the Secretariat to consider all of the factors in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE SUBMISSION

The submission, filed on 1 May 2003 by the attorneys general of the states of New York, Connecticut and Rhode Island, along with 48 Canadian and United States non-governmental organizations and two towns in New York State, 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 submission focuses

primarily on 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 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.¹ The 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 submission cites (and attaches portions of) studies indicating that Ontario is the source of 23% of the sulfur deposition on Whiteface Mountain in the Adirondacks and 22% of the sulfur deposition in the western Adirondacks.² The 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 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."³ 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."⁴

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

¹ Submission at 5, Appendix C.

² Submission at 7, Appendix C.

³ Submission at 13.

⁴ *Id.*

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,⁵ 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 include 48 non-governmental organizations within the meaning of this definition. Five of the Submitters – the three state attorneys general and the towns of Chesterfield and Wilmington – are governmental entities. In view of the Article 45(1) definition of “non-governmental organization,” the Secretariat concludes that 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. Any further proceedings in connection with this submission will reference the 48 non-governmental organizations as the Submitters.

The 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 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.⁶ 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 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

⁵ 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).

⁶ See CEPA ss. 166 and 176.

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 14.⁷ 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.⁸

The submission meets all of these criteria except Article 14(1)(c). Consistent with Article 14(1)(a), the submission is in English, a language designated by the Parties. As Article 14(1)(b) requires, it clearly identifies the organizations making the submission. The 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.⁹ The Secretariat does not find the submission to be frivolous.¹⁰ The 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.¹¹ The submission provides 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 submission satisfies Article 14(1)(f).

⁷ See SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (8 September 1999).

⁸ Article 14(1)(a)-(f).

⁹ See Guideline 5.4(a).

¹⁰ See Guideline 5.4(b).

¹¹ Submission at 12-15.

Overall, the submission does not meet the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission.¹² Regarding the Submitters' substantive assertions, the submission and the documentary evidence attached to it do 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;¹³ 2) the downwind movement of these pollutants to northeastern United States and eastern Canada, including some information regarding the percentage contribution of Ontario emissions;¹⁴ 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.¹⁵ The 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." The submission also contains information on at least some of Canada's efforts to address power plant emissions.¹⁶

Taken together, this information provides some support for 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 176.¹⁷ 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.¹⁸ 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.¹⁹ Further, the "deposit" need not be directly into the water, as s. 36(3) also encompasses the deposit "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 information in the submission

¹² Article 14(1)(c); Guideline 5.3

¹³ Submission at 5-6 and documents cited (Appendix C).

¹⁴ Submission at 6-7 and documents cited (Appendix C).

¹⁵ Submission at 8-9 and documents cited (Appendix C).

¹⁶ Submission at 13.

¹⁷ See Submission at 2-3 (citing provisions of the U.S. Clean Air Act and Clean Water Act).

¹⁸ Submission at 13.

¹⁹ Section 34(1) defines a deposit as "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing."

regarding the OPG emissions, their downwind 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 section 36(3).

The submission fails to meet fully the requirement in Article 14(1)(c) because the Submitters have provided insufficient information regarding whether private remedies available under Canada's law have been pursued, a factor the Secretariat must consider under Article 14(2) in determining whether to request a response to the submission. The letters attached to the submission referencing concerns regarding enforcement of CEPA ss. 166 and 176 and *Fisheries Act* s. 36(3) in connection with OPG's emissions do not provide the information needed for the Secretariat's consideration of Article 14(2)(c).

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that although submission SEM-03-001 (Ontario Power Generation) meets some of the requirements of Article 14(1), it does not meet all of them, in particular Article 14(1)(c). Pursuant to Guideline 6.2 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat will terminate the Article 14 process with respect to this submission, unless remaining Submitters (that is, those who are nongovernmental organizations or persons within the meaning of Article 14(1)) provide the Secretariat with a submission that conforms to the criteria of Article 14(1) and the guidelines within 30 days after receipt of this Notification.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

per: Victor Shantora
Acting Executive Director

cc: Norine Smith, Environment Canada
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Judith E. Ayres, US-EPA
Submitters