

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: Waterkeeper Alliance
Lake Ontario Waterkeeper
Société pour Vaincre la Pollution
Environmental Bureau of Investigation
Upper St. Lawrence Riverkeeper/Save the River!
Party: Canada
Date received: 14 August 2003
**Date of this
determination:** 15 September 2003
Submission I.D.: SEM-03-005 / Montreal Technoparc

I. INTRODUCTION

On 14 August 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 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 section 36(3) of the federal *Fisheries Act* in connection with various toxic pollutants that the Submitters allege are being discharged into the St. Lawrence River from the Technoparc site in Montreal, Quebec. 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 are three Canadian and two United States non-governmental organizations. They assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the alleged discharge of polychlorinated biphenyls (PCBs), polycyclic hydrocarbons (PAHs) and other pollutants into the St. Lawrence

River from the Montreal Technoparc, the site of an historic municipal and industrial waste landfill now owned by the city of Montreal. Under s. 36(3), it is an offense to deposit or permit the deposit of a deleterious substance in water frequented by fish or in any place under conditions where a deleterious substance may enter any such water.

The Submitters assert that the Montreal Technoparc site functioned as a landfill for municipal and industrial wastes until it was redeveloped as parking lots for Expo '67 and then, in 1988, as an industrial park.¹ They assert that the city of Montreal has been aware of PCB contamination of the site since at least 1995 and is responsible for discharges of deleterious substances from the site.² According to the Submitters, the city's efforts to use booms to contain the contamination are not effective. They cite sampling results from October 2000 to January 2002 showing levels of PCBs up to 941,000 times the Canadian Water Quality Guideline for the Protection of Freshwater Aquatic Life for Total PCBs inside the boom, 820 times the PCB Guideline outside the boom and 8.5M times the PCB Guideline at the discharge point.³ The Submitters attach an April 2002 biologist's report concluding that PCBs, PAHs and other pollutants are being discharged to the St. Lawrence River from the Montreal Technoparc in concentrations well in excess of provincial, federal and international guidelines.⁴ The submission includes a detailed description of the alleged threats to human health and aquatic life of PCBs.⁵ The Submitters assert that PCBs are "highly toxic, persistent and bioaccumulative" and that Environment Canada identifies PCBs as persistent toxic substances that are "too dangerous to the ecosystem and to humans to permit their release in any quantity."⁶

The submission states that, following its receipt of a brief describing the alleged discharges, Environment Canada initiated a *Fisheries Act* investigation of the Montreal Technoparc in April 2002. According to the Submitters, Environment Canada explained in an April 2003 letter that "the investigation was stopped because the source of the contamination could not be determined."⁷ The Submitters assert that their ability to bring a private prosecution in connection with the Montreal Technoparc is in question.⁸ They contend that the booms and absorbent pads that have been used to try to contain the alleged discharges are still ineffective and that the discharges are ongoing.⁹

The Submitters assert that the alleged failure to effectively enforce the *Fisheries Act* has resulted in harm to the Submitters and that further study of the matters raised in the submission would advance the goals of the NAAEC.¹⁰ They request the CEC to prepare a factual record.

¹ Submission at 3.

² *Id.*

³ Submission at 4-5.

⁴ Submission at 5-6.

⁵ Submission at 6-10.

⁶ Submission at 6.

⁷ Submission at 11.

⁸ *Id.*

⁹ Submission at 12, 13.

¹⁰ Submission at 13-14

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,¹¹ 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(3) of the *Fisheries Act*. Third, the pollution prevention provisions of the *Fisheries Act* are environmental law within the meaning of NAAEC Article 45(2)¹² and the submission alleges an ongoing failure to effectively enforce s. 36(3). Last, 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.¹³

¹¹ 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).

¹² See SEM-98-004 (BC Mining), Article 15(1) Notification at 11 (11 May 2001).

¹³ Article 14(1)(a)-(f).

The submission meets these criteria. First, the submission is in English, a language designated by Canada.¹⁴ Second, it clearly identifies the organizations making the submission.¹⁵ Third, the submission provides sufficient information to allow the Secretariat to review the submission.¹⁶ The Submitters provide extensive data regarding the alleged discharges and the manner in which they allegedly create an offense under the *Fisheries Act*, as well as information regarding the extent to which Canada has taken enforcement action in response to those alleged violations. Fourth, 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 standing to benefit economically from the submission, and the submission does not appear frivolous.¹⁷ Fifth, the Submitters indicate that the matter has been communicated in writing to the relevant Canadian authorities and the Canadian government's response, the letter of 24 April 2003, is attached to the submission.¹⁸ Finally, the Submitters are established in the United States or Canada.¹⁹

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 in the context of the particular assertions in the 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.²⁰

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

¹⁵ Article 14(1)(b); submission at i-ii.

¹⁶ Article 14(1)(c), Guideline 5.2, 5.3.

¹⁷ See Guideline 5.4.

¹⁸ Article 14(1)(e); Guideline 5.5; Submission at 10-11, Attachments.

¹⁹ Submission at i-ii; Article 14(1)(f).

²⁰ NAAEC Article 14(2).

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

First, in addition to describing adverse effects of PCBs on human health and aquatic ecosystems, the submission explicitly alleges harm to the Submitters.²¹

Second, the submission raises matters whose further study in the Article 14 process would advance the goals of the Agreement. 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); ensure that activities in Canada do not cause damage to the environment shared with the United States, consistent with responsibilities reaffirmed in the NAAEC preamble; 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 some or all of these goals.

Third, the Submitters describe their successful efforts to request that Environment Canada investigate the alleged discharges from the Montreal Technoparc site and assert that “[n]ow that the Ministry has ended their investigation without denying or confirming that an offense is indeed being committed the Submitters’ ability to bring forward a private prosecution is in question.”²² It appears that in April 2002, rather than initiate a private prosecution on their own, the Environmental Bureau of Investigation and the Société pour Vaincre la Pollution (two of the Submitters) opted to provide Environment Canada “with a full brief, which includes samples, results, notes, pictures, and a biologist’s report,”²³ such that the federal government could follow through with its own investigation and address the matters they raised. The Submitters now express concern about the potential impact on a private prosecution of Environment Canada’s decision to terminate its recent investigation without taking enforcement action.²⁴ The Secretariat concludes that the approach taken toward pursuing a remedy to the alleged discharges was reasonable in light of the circumstances.²⁵

Finally, the submission is not based exclusively on mass media reports. Water quality data that some of the Submitters obtained at their own initiative are a key element of the information supporting the submission.

²¹ Submission at 13-14.

²² Submission at 11.

²³ Letter from M. Mattson and D. Green to M. Berard (11 April 2002), attached to the Submission.

²⁴ See Submission at 11.

²⁵ See Guideline 7.5.

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 s. 36(3) of the *Fisheries Act* in regard to the Montreal Technoparc merits a response from Canada.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-03-005 (Montreal Technoparc) 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

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