

**SUBMISSION
TO THE COMMISSION FOR
ENVIRONMENTAL COOPERATION**

Pursuant to:

**Article 14 of the *NORTH AMERICAN AGREEMENT ON
ENVIRONMENTAL COOPERATION***

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and July 7, 2006

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INDEX

	Page
I. SUMMARY	1
II. DEVILS LAKE DIVERSION AND POLLUTION	2
III. INTERNATIONAL AND DOMESTIC ENVIRONMENTAL LAW – <i>INTERNATIONAL BOUNDARY WATERS TREATY</i>	7
IV. FAILURE OF THE UNITED STATES AND CANADA TO EFFECTIVELY ENFORCE THEIR ENVIRONMENTAL LAWS	8
V. ARTICLE 14 NAAEC REQUIREMENTS	11
VI. RELIEF REQUESTED	14

APPENDICES

Tab

1. Treaty Relating to Boundary Waters between the United States and Canada, Jan.11, 1909, U.S.-Gr. Brit., 36 Stat.2448, T.I.A.S. No. 548
2. “Protecting Our Water”, Manitoba Government, Devils Lake Facts, and Manitoba Presentation to the U.S Bureau of Reclamation re Red River Valley Water Project, Feb. 7, 2006
3. “Limited Survey of Biota in Devils and Stump Lakes, North Dakota”, Manitoba’s Contribution Assessment Coordinated by the U.S. Council on Environmental Quality, November 2005 and Excerpts from *People to Save the Sheyenne River v. North Dakota Department of Health*, Appellant’s Brief
4. Affidavit of Hedwig (Hedy) Joanna Kling, July 2005
5. “Scum of the Earth”, by Helen Fallding, Winnipeg Free Press, October 9, 2005
6. “MPS Form Common Front on Devils Lake Committee Unanimously Backs Resolution Calling For Urgent Action”, News Release of Standing Committee on Environment and Sustainable Development, June 14, 2005
7. Various correspondence supporting IJC reference
8. Open Letter to U.S. President George W. Bush from FOE U.S. and Canada, and Petition to government of Canada
9. Canadian Ambassador McKenna correspondence dated April 14, 2005 to North Dakota’s Senator Conrad, Secretary of State Rice and Manitoba Premier Doer
10. U.S. *Treaties in Force* (2005)
11. August 5, 2005 Joint Press Statement on Devils Lake Flooding and Ecological Protection by the United States, Canada, North Dakota, Minnesota and Manitoba” and “Little-known White House office negotiates Devils Lake dispute”, Duluth News, Sept. 5, 2005
12. “Devils Lake begins draining into Red River, Canadian Press, August 16, 2005 Gravel filter partially destroyed by water”, Winnipeg Free Press, August 10, 2005, A5, and FOE letter dated August 8, 2005
13. Manitoba Government News Release, April 6, 2005, “Canada-US Coalition Urges IJC Review of Devils Lake Project”

14. People to Save the Sheyenne River et al v. North Dakota Department of Health et al, 2005 N.D. 104 (2 June 2005)
15. News Release, May 25, 2006, from North Dakota Department of Health re. sulphate loading exceedences
16. Great Lakes Water Quality Agreement, preamble, Articles VII and XII
17. CBC News, July 4, 2006, "U.S. court ruling will have ripple effecting Can., U.S."
18. Letter dated July 7, 2006 from Sierra Legal to CEC Secretariat with submissions

I. SUMMARY

This Submission is made pursuant to Article 14 of the North American Agreement on Environmental Cooperation (the “NAAEC”).

Article 5 of the NAAEC requires that each State Party shall “effectively enforce its environmental laws”. The Submitters assert that the governments of the United States and Canada are “failing to effectively enforce” the anti-pollution provision of the 1909 *International Boundary Waters Treaty* (the “Treaty”)¹. Article IV of the Treaty creates the mandatory obligation not to pollute shared waters. It provides (emphasis added):

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

This is a cross-border issue that arises out of the construction and operation by the state of North Dakota of an outlet to drain water from Devils Lake into the Sheyenne River, the Red River Basin, Lake Winnipeg, and ultimately the broader Hudson Bay drainage system. The project threatens direct and negative environmental impacts on Canadian waters, including the introduction of biological pollutants such as invasive species. Moreover, this project is part of a larger scheme to divert and transfer water into the Red River Valley.

The construction of the artificial outlet from Devils Lake is an unlawful cause, or threatened cause, of transboundary pollution, contrary to the Treaty obligation. There are unresolved issues as to the design, engineering and construction of the physical structure of the outlet (the “filter” failed in its very first use); the constituents of the polluting waters; the terms, rights and obligations of the purported arrangement between the United States Commission for Environmental Quality and the federal, provincial and state governments.

Both governments have failed to meet the transboundary pollution Treaty obligation, constituting a failure to effectively enforce their environmental laws. The Submitters therefore respectfully request that the Commission for Environmental Cooperation (the “CEC”) direct its Secretariat to prepare and publish a Factual Record pursuant to Article 15 of the NAAEC, investigating and documenting the allegations contained in this Submission.

¹ Treaty Relating to Boundary Waters between the United States and Canada, Jan.11, 1909, U.S.-Gr. Brit., 36 Stat.2448, T.I.A.S. No. 548, see Appendix 1.

II. DEVILS LAKE DIVERSION AND POLLUTION

A. The Diversion

In September 2005 the state of North Dakota began diverting water out of Devils Lake into the Sheyenne River, from which it flows to the Red River, across the border into Lake Winnipeg in Canada, and ultimately into the broader Hudson Bay drainage system. The perceived need to lower the level of Devils Lake has been created in part by the mostly unauthorized drainage of nearby wetlands and poor land use planning.

Map of the Basin



B. Negative Environmental Impact

Devils Lake is salty and polluted. According to the U.S. Environmental Protection Agency, the lake contains biota of concern, and high levels of pollutants such as sulphate,

mercury, phosphorus and arsenic. The lake water has been described as being too polluted to irrigate surrounding farmland.²

On the other hand, Lake Winnipeg on the receiving end, is the world's tenth largest fresh water lake, and has a vibrant community of commercial, consumer and recreational users.³

The environmental impacts of the Devils Lake diversion have not been adequately assessed. According to "A Limited Survey of Biota in Devils and Stump Lakes, North Dakota" it is widely acknowledged that insufficient information exists about the biota of Devils Lake. A survey conducted in late July 2005, identifies four types of blue-green algae not found in Lake Winnipeg and three fish parasites that are potential species of concern to Manitoba.⁴ This biota of potential concern could significantly jeopardize Manitoba's natural assets and riparian habitat, as well as potable water, commercial and recreational freshwater fishing, and tourism.⁵

In addition to the threat of introducing harmful algae and invasive species into Canadian waters, the high level of phosphorus loading from Devils Lake into Lake Winnipeg is likely to cause and exacerbate toxic algae blooms.⁶ According to the Manitoba government, the artificial Devils Lake outlet will load approximately 40,000 pounds per year of additional phosphorus into Lake Winnipeg. This could create a layer of algae about five inches thick on nearly 10 miles of Lake Winnipeg beaches. Hedy Kling, a well recognized algal taxonomist who reviewed the Devils Lake Outlet project concluded: "It will essentially create a pathway for toxic algae to travel to and multiply in Lake Winnipeg. The Devils Lake Diversion will most probably alter the chemistry of Lake Winnipeg's water and contaminate it with foreign organisms and toxins, causing irreparable harm to the ecosystem of Lake Winnipeg; seriously disrupting its entire food chain; significantly damaging the fisheries; and, causing further serious health problems for animals and other users of the lake".⁷ Recent media reports indicate Lake Winnipeg is already "near the top of the list" for the worst large-scale blooms in North America.⁸

² Cited in "Synopsis of Devils Lake Crisis", Friends of the Earth Canada, see http://www.foecanada.org/images/stories/devils_lake/devil%20brochure%203.pdf

³ "Protecting Our Water", Manitoba Government, Devils Lake Facts, see www.manitoba.ca, Appendix 2.

⁴ "Limited Survey of Biota in Devils Lake and Stump Lakes, North Dakota", Manitoba's Contribution to a Multi-Jurisdictional Collaborative Assessment Coordinated by the U.S. Council on Environmental Quality, Nov. 2005, and see as U.S. Army Corps of Engineers explained to the North Dakota Department of Health, that issued the National Pollutant Discharge Elimination System water permit for the Devils Lake outlet, there is "an extremely high risk that biota of concern could already be present in Devils Lake" and that if they are, "the risk is also extremely high that these biota would be transferred via a pumping operation from Devils Lake into the Sheyenne River if a preventative filter system were not in place", see People to Save the Sheyenne River v. North Dakota Department of Health, Appellant's Brief, p. 3 and 13 of 19, (emphasis added) and see Corp's Biota Transfer Study, 2002, pgs. 68, 98 and 99, Appendix 3.

⁵ Canadian Department of Foreign Affairs, "Downstream Effects of the Devils Lake Outlet: Alien Biota a concern to Canada": "...The precautionary principle must be used in a case such as this...", <http://www.dfaid-maeci.gc.ca/can-am/washington/pdf/fact-biota.pdf>

⁶ Ibid.

⁷ Affidavit of Hedwig (Hedy) Joanna Kling, July 2005, pars. 6. and 7: "...Two facts about the water from Devils Lake are cause for concern: 1) the water has a higher concentration of phosphorous to nitrogen,

Furthermore, the environmental impacts may be exacerbated as North Dakota State Water Commission filed in May 2006 a request for modification of the permit to discharge Devils Lake surface water into the Sheyenne River. The changes requested include making reference to specific months in which a discharge can occur, removal of the total suspended solids limit and adjustment of the in stream sulphate limit. (See Appendix 15 - News Release, May 25, 2006, from North Dakota Department of Health.) Under the terms of the permit, issued by North Dakota Department of Health, the operation of the Devils Lake Outlet was limited in 2005 to ten days due to elevated levels of sulphate in the Sheyenne River. As of the filing of this submission in 2006, the Outlet had again been prohibited from operation due to sulphate loadings in excess of permit specifications.

C. Negative Economic Impact

Freshwater fisheries play an important role in Manitoba's economy. According to Tourism Manitoba, approximately 160,000 licensed anglers contribute to spending over \$75 million annually on recreational fishing in pursuit of walleye, pike, perch, catfish, trout, bass and a number of other species. In 1996, commercial fishers harvested 12.5 million kgs. of walleye, sauger, whitefish and other species, generating \$32 million for the provincial economy. Almost \$21 million of that amount was derived from the Lake Winnipeg fishery through sales to international markets by the Freshwater Fish Marketing Corporation.⁹

D. Part of a Larger Scheme

This dispute relates to a larger, long term North Dakota initiative to install an outlet from the Missouri River through Devils Lake to the Sheyenne River and then into the transboundary Red River system. This initiative was first rejected in 1977 as part of the original Garrison Diversion Project that the IJC held ought not to proceed, even with modifications, because the introduction of unwanted foreign biota posed an unacceptable risk to the detriment of the people of Canada and to the general ecology of the region, and beyond.¹⁰

which promotes the growth of nitrogen fixing toxic blue-green algae; and 2) the water contains species of toxic algae that are not found in Lake Winnipeg”, see Appendix 4.

⁸ “Scum of the Earth, by Helen Fallding”, Winnipeg Free Press, October 9, 2005, see Appendix 5.

⁹ Frequently Asked Questions on Devils Lake Crisis, Friends of the Earth Canada, see http://www.foecanada.org/images/stories/devils_lake/devil%20brochure%202.pdf and see Manitoba's Initial Comments on the Draft EIA RE The Red River Valley Water Supply Project, February 7, 2006, http://www.gov.mb.ca/waterstewardship/water_info/transboundary/pdf/2006-02-07.presentation_to_us_bureau_of_reclamation.pdf, for more current information on economic impacts, e.g. total annual tourism expenditures in the region are approximately \$110 million, p. 3. Appendix 2.

¹⁰ International Joint Commission, “Transboundary Implications of the Garrison Diversion Project”, 1977, <http://www.ijc.org/php/publications/pdf/ID582.pdf>, at pg. 114 and see Charles Carvell, “The North Dakota Garrison Diversion Project and International Environmental law”, 60 N.D.L.Rev 603 (1984)

Despite this result, the *Dakota Water Resources Act* of 2000 authorized a U.S. Bureau of Reclamation study of water supply needs in the North Dakota portion of the Red River Valley. The 2005 draft study included a Lake of the Woods diversion option and three Missouri diversion options, all of which call for the final destination to be the Red River, which drains into Lake Winnipeg, and ultimately the Hudson Bay basin.¹¹

The government of Canada voiced significant concern with these options and concluded that it: "...in no way accepts that the approach set out in the Red River Valley Water Needs and Options report meets the standard established by the IJC to eliminate the risk of biota transfer." The government also observed that the Lake of the Woods option makes use of boundary waters as defined in the Treaty and would therefore require an Order of Approval from the IJC. The Manitoba government voiced similar concerns and referred to "well established" evidence that there are numerous organisms of concern found in the Missouri River basin that are not present in the Hudson Bay basin.¹² Both the federal and provincial governments spoke of the likely need to refer this matter to the IJC.

E. Public Campaigns to Refer to the IJC

Despite massive campaigns by citizens and politicians from both sides of the border to stop the diversion and to request a joint IJC reference, both the U.S. and Canadian governments failed to prevent the diversion and unlawful pollution of waters flowing across the boundary, contrary to the Treaty. These campaigns included statements from: an all-party resolution in the Canadian House of Commons' Standing Committee on Environment and Sustainable Development¹³; eight Great Lakes states; the state of Missouri; the Great Lakes Commission; three Canadian provinces and the Prime Minister; Tribes¹⁴; First Nations¹⁵ and international environmental groups¹⁶. Nevertheless, both governments failed to refer the dispute either jointly or unilaterally to the IJC for a proper assessment and resolution of the issues.

¹¹ See <http://www.usbr.gov/gp/dkao/redriver/rrvwsp/StartCD.pdf>

¹² Environment Canada, "Government of Canada Comments on the Draft Report on Red River Valley Water Supply Needs and Options", by David McGovern, International Relations Directorate, 2005, see <http://www.usbr.gov/gp/dkao/redriver/rrvwsp/Appendices/letters/Environment%20Canada.PDF> and Manitoba Water Stewardship, "Draft Report on Red River Valley Water Needs and Options", by Dwight Williamson, Director, 2005, p.2, see

<http://www.usbr.gov/gp/dkao/redriver/rrvwsp/Appendices/letters/Manitoba%20Water%20Stew.PDF>

¹³ "MPS Form Common Front on Devils Lake Committee Unanimously Backs Resolution Calling For Urgent Action", News Release of Standing Committee on Environment and Sustainable Development, June 14, 2005, Ottawa, and see "Grits soft on Devils Lake: Harper", by Helen Fallding, Winnipeg Free Press, July 26, 2005, A3, see Appendix 6.

¹⁴ Please note that the Red Lake Tribal Council in correspondence to the U.S. EPA dated November 21, 2003 maintained that the Devils Lake diversion would, *inter alia*, "put sovereign tribal trust resources at risk –which constitutes a violation of the federal Indian trust responsibility", see Appendix 7.

¹⁵ Assembly of First Nations correspondence dated May, 2005 to the U.S. State Department, see <http://www.dfaid-maeci.gc.ca/can-am/washington/pdf/letter-firstnations.pdf>

¹⁶ FOE Canada recorded over 3,000 signatures to a petition seeking a joint reference to the IJC, see Appendix 8.

It is submitted that the independent, bi-national and consensus-based IJC is in the best position to conduct the necessary fact-finding through scientific studies and public hearings to assess the potential impacts of the diversion, the available alternatives, such as wetland restoration, and effective mitigation techniques to manage the flood control problems at Devils Lake. This could avoid irreversible damage to Manitoba. Neither government has been responsive to the request of the Submitter Friends of the Earth that they enforce the Treaty and refer the matter to the IJC.¹⁷

The U.S. government failed to accept the formal invitations of the government of Canada made in April 2004¹⁸ and again in 2005 to jointly refer the Devils Lake outlet to the IJC¹⁹. This was contrary to assurances given by the U.S. government to Canada that any Devils Lake outlet would conform to U.S. obligations under the Treaty.²⁰

F. Bad Precedent for Failure to Prevent Transboundary Water Pollution

In addition to the ecological and economic damage caused by the unilateral transboundary actions of a U.S. state, the failure of the federal governments of the U.S. and Canada to enforce the Treaty and prevent transboundary water pollution sets an unacceptable precedent in bi-national affairs.²¹

Given that the Treaty and the jurisdiction of the IJC include the wise management of the Great Lakes, it is startling and worrisome that unilateral transboundary action by a state has gone unchecked, especially when contrasted with the joint negotiation of the proposed new Annex Agreement to the *Great Lakes Charter* between eight Great Lakes

¹⁷ See “Open Letter to U.S. President George W. Bush” from FOE U.S. and Canada requesting an IJC referral, see Appendix 8.

¹⁸ In 2002 Canada had declined as “premature” a joint referral to the IJC about a much different U.S. federal proposal concerning an alternative outlet. To date no U.S. federal environmental assessment has been completed under the *National Environmental Protection Act*, see Anita Neville, June 2005, Hansard.2005-06-21 http://www.parl.gc.ca/38/1/parlbus/chambus/house/debates/120_2005-06-21/han120_2215-E.htm

¹⁹ Canadian Ambassador Frank McKenna in correspondence dated April 14, 2005 to North Dakota’s Senator Conrad, copied to Secretary of State Rice and Manitoba Premier Doer urged the U.S. government to join Canada in a reference to the IJC, recalling that the government of Canada had made a prior request in June, 2004, and noting that: “What leverage will either government have in the future if a state or a province wants to proceed with a transboundary water project, citing Devils Lake as an excuse to avoid the inconvenience of proper environmental assessment”, see http://www.dfaid-maeci.gc.ca/can-am/washington/shared_env/statementtoIJC-en.asp, see Appendix 9.

²⁰ Ibid, see Appendix 9.

²¹ In prior disputes, the U.S. government did comply with Treaty commitments, see for example Charles Carvell, “The North Dakota Garrison Diversion Project and International Environmental Law”, (1984) 60 N.D. L. Rev. 603 at 647: “International legal duties were surely adhered to by the United States when it agreed to refer the matter to the IJC, thereby allowing Canada full access to all facts about the project. Resort to the IJC was in the finest spirit of international cooperation” (emphasis added) and see recent successful joint references e.g. Request from the Canadian Columbia River Inter-Tribal River Fisheries Commission concerning Grand Coulee Dam, IJC, Media Release, http://www.ijc.org/rel/news051118_E.htm, November 18, 2005.

states, Quebec and Ontario, seeking to establish a common standard for regional review of water withdrawals and to virtually prohibit diversions in the Great Lakes basin.²²

Also of note is the contrast in the approach to the Devils Lake issue with the cooperative approach to pollution of the Great Lakes utilising Part IV of the Treaty and the Great Lakes Water Quality Agreement, referred to below.

III. INTERNATIONAL AND DOMESTIC ENVIRONMENTAL LAW – INTERNATIONAL BOUNDARY WATERS TREATY

The Treaty was signed in 1909 and provides the principles and mechanisms to help resolve disputes and to prevent future ones, primarily those concerning water quantity and water quality along the boundary between Canada and the United States.²³ The Treaty makes specific reference to water uses, as well as, pollution.

The IJC was created because Canada and the U.S. “recognized that each country is affected by the other's actions in lake and river systems along the border. The two countries cooperate to manage these waters wisely and to protect them for the benefit of today's citizens and future generations”.²⁴

The Submitters maintain that the Canadian and U.S. governments have failed and continue to fail to effectively enforce their environmental laws. Article 45(2) of the NAAEC defines “environmental law” to mean, among other things, any statute or regulation “the primary purpose of which is the protection of the environment”.

It is submitted that a primary purpose of the Treaty is to protect the environment. It deals with both the quantity and quality of transboundary waters.

The importance of Article IV of the Treaty in regards to water quality is underscored by the Great Lakes Water Quality Agreement, which provides (emphasis added):

REAFFIRMING in a spirit of friendship and cooperation the rights and obligations of both countries under the Boundary Waters Treaty, signed on January 11, 1909, and in particular their obligation not to pollute boundary waters; ... [see Appendix 16 – Great Lakes Water Quality Agreement, preamble, Articles VII and XII]

This is a clear acknowledgment by both Canada and the U.S. of the mandatory duty not to pollute boundary waters, which the Submitters assert is not being enforced and requires a factual record of the circumstances of the failure to enforce.

²² See Background to Annex Agreement,

<http://www.cglg.org/projects/water/annex2001Implementing.asp#Background%20Documents>

²³ See IJC Backgrounder to Treaty and Agreements <http://www.ijc.org/rel/agree/water.html>

²⁴ See IJC Backgrounder to the IJC http://www.ijc.org/en/background/ijc_cmi_nature.htm#What

The Treaty is an "environmental law" within the meaning of the NAAEC as it has been incorporated as a statute into the laws of both the U.S. and Canada. In the U.S., the Treaty may be self-executing. (See Muldoon, Scriven and Olson, *Cross-Border Litigation*, Carswell, Toronto, 1986 at p. 121.) It is also listed as a "Treaty In Force" by the State Department²⁵ and is included in the bound series entitled "U.S. Statutes at Large" as the *Treaty on Boundary Waters*, dated January 11, 1909, United States-United Kingdom, at 36 Stat page 2448.²⁶ Because the Treaty is listed as a Treaty In Force and is contained in the U.S. Statutes at Large series, it is a "statute" for the purposes of Article 14 of the NAAEC.²⁷ The Treaty's inclusion in the U.S. Statutes at Large likely reflects the long-standing nature of the Treaty. In Canada, the Treaty is "confirmed and sanctioned" in implementing legislation entitled the *International Boundary Waters Treaty Act*.²⁸

IV. FAILURE OF THE UNITED STATES AND CANADA TO EFFECTIVELY ENFORCE THEIR ENVIRONMENTAL LAWS

A. Failure to Enforce the *International Boundary Waters Treaty*

The governments of the United States and Canada have failed, and continue to fail, to effectively enforce the Treaty to prevent transboundary water pollution. The Treaty provides as follows (emphasis added):

"...it is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." (Article IV).

It is submitted that the outflow from Devils Lake is an unlawful cause of pollution contrary to Treaty obligations in Article IV. It is up to the parties to the Treaty to enforce this mandatory provision. While the mechanisms under the Treaty may be discretionary, the anti-pollution provision in Article IV is very clear. Article IV creates an absolute prohibition of transboundary pollution.²⁹ Pollution cannot be validated by IJC approval, unlike certain uses, obstructions and diversions of waters referred to in Article VIII.³⁰

²⁵ See U.S. Treaties in Force (2005), under Boundary Waters, p. 43, <http://www.state.gov/documents/organization/53724.pdf>, see Appendix 10.

²⁶ See Treaties in Force, U.S. State Department, 2005, see Appendix 10.

²⁷ This submission does not rely on theories about whether or not the Treaty is self-executing, or the supreme law of the land pursuant to the Constitution's supremacy clause. Article VI, Section 2, U.S. Constitution provides: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." and see discussion in Biodiversity Determination SEM 97 005 (25 June 1998) 5, <http://www.cec.org/files/pdf/sem/97-5-DET-E.pdf>

²⁸ *International Boundary Waters Treaty Act*, R.S., c. 1-17, s. 2 and see s. 3: "The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the Treaty...", and see Schedule (S.2), <http://laws.justice.gc.ca/en/i-17/77063.html>

²⁹ While Article IV about unlawful pollution has never, as yet, been invoked by the Parties, the IJC's reference function as outlined in Article X (joint referrals) and arbitration function as outlined in Article IX (unilateral/arbitration referrals) were reaffirmed recently in the 1991 *Agreement on Air Quality* as options

Both governments have a lawful duty to prevent transboundary water pollution under Article IV. The *Vienna Convention on the Law of Treaties* quite specifically underscores the duty *pacta sunt servanda* : “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” (emphasis added)³¹.

Under Article IV of the Treaty, the U.S. and Canadian governments are obliged to ensure that “waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other”, which they have failed to do.

While the mechanism that the Canadian and U.S. governments may wish to utilize could be a joint reference under Article X, or a unilateral reference to the IJC under Article IX of the Treaty, the focus of this complaint is the failure to enforce Article IV.

Both governments have failed to meet this anti-pollution Treaty obligation, thereby failing to effectively enforce their environmental laws.

B. Article 45 (1) of NAAEC is Not Applicable

The phrase “effectively enforce its environmental law(s)” used in Articles 5 and 14 (1) of the NAAEC is qualified in Article 45 (1):

A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5 (1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;

It is submitted that the failure to enforce the anti-pollution provision in Article IV of the Treaty by both the U.S. and Canadian governments is not a reasonable exercise of discretion. Rather, the two governments have abdicated their enforcement obligations under the Treaty and neglected to make use of the IJC mechanism for precisely the kind

for the settlement of disputes under this Air Agreement. This development indicates the on-going intent of the Parties that the IJC dispute settlement role continues, see *Agreement on Air Quality*, Mar. 13, 1991, U.S. – Can, 1991 Can T.S., No. 3. , see Article XIII Settlement of Disputes, <http://www.ijc.org/rel/agree/air.html>.

³⁰ See Article VIII of the Treaty where the IJC “shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this Treaty the approval of this Commission is required...”.

³¹ Article 26, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). While the U.S. has signed but not ratified the Vienna Convention, it is generally regarded as an authoritative statement of the principles of treaty obligations.

of issue that it was designed to deal with. Reference is again made to the mandatory language of the applicable Article IV of the Treaty.

Further, the application of the internationally recognized precautionary principle would ensure that environmental measures are taken to anticipate, prevent and attack the causes of environmental degradation, especially where there are threats of serious or irreversible damage.³² Lack of full scientific certainty should not be used as a reason for postponing effective measures to prevent environmental degradation.

While the U.S. and Canada are sovereign nations with much discretion, where nations have agreed not to pollute their shared waters and have at hand cooperative institutional mechanisms to resolve disputes, such as the IJC, “the principle of cooperation denies to some extent the exclusiveness of states’ rights”.³³ The submitters would underscore this proposition in a situation such as this where the obligations of the parties to the Treaty are mandatory.

Instead of fulfilling its duty not to send polluted water to its neighbour under the Treaty, the U.S. government deferred to the politically appointed U.S. Council on Environmental Quality (the "CEQ")³⁴ to attempt to broker an agreement, and thereby side-step enforcement of the Treaty. This does not address the mandatory anti-pollution provision in the Treaty and additionally usurps the jurisdiction of the Treaty and the IJC. The non-binding CEQ “arrangement” (apparently nothing more than a press release) is not a reasonable exercise of discretion. The public on both sides of the border are entitled to require that their governments fulfil their obligations and not simply create an *ad hoc* mechanism with no accountability, when it suits them. The CEQ is not independent, its membership is not bi-national and its work is nowhere near as rigorous and comprehensive as the IJC process under the Treaty or a federal environmental impact assessment.

A Factual Record could examine not only the pollution and the physical outlet and its effectiveness, but also the factual trail of the avoidance of the Treaty dispute resolution mechanisms.

An important question for the CEC in determining whether a Factual Record is warranted is whether or not “non-enforcement” initiatives, taken as a whole, are effective in achieving the underlying goal or purposes of the governing statute.³⁵ In this case, the temporary measure the CEQ arranged for the Devils Lake outlet could not have prevented

³² See Bergen Ministerial Declaration on Sustainable Development, accepted by the Supreme Court of Canada in 114957 Canada Ltee (Spraytech) v. Hudson (Town), [2001] 2 S.C.R. 241 at 266-267.

³³ Sarah Richardson, “Sovereignty, Trade and the Environment”, 24 CAN-US L.J., 183: 184 (1998): “Indeed, if the interdependent nature of the issue is acknowledged by a state and a regime for the management of that issue becomes a joint one, this, by definition, denies exclusivity”.

³⁴ Press Statement, Office of the Spokesman, Washington, DC, August 5, 2005 “Joint Press Statement on Devils Lake Flooding and Ecological Protection by the United States and Canada, North Dakota, Minnesota and Manitoba” and see Little-known White House office negotiates Devils Lake dispute, By Mary Clare Jalonick, Duluth News, Sep. 05, 2005, see Appendix 11.

³⁵ Migratory Birds- Determination SEM/99-002/11/ADV (15 December 2000) at 12.

the pollution of Canadian waters. Media and other reports indicate that the gravel filter placed at the outlet washed away during the very first test operation.³⁶

Further, North Dakota operated the outlet for 10 days before it was shut down because of high concentrations of sulphate in the diverted waters, contrary to North Dakota's own discharge permit requirements.³⁷ Operating the outlet before the biota testing was analyzed and reported contradicts the spirit as well as the intention of even the CEQ temporary arrangement.

As noted above, North Dakota has now requested that the permitted concentration of sulphate pollution in the diverted Devils Lake waters be increased.

C. Conclusion

In short, Article IV of the Treaty is not being enforced and Article 45 (1) of the NAAEC does not operate as a saving mechanism in this case. The U.S. and Canadian governments have failed, and continue to fail, to enforce their environmental laws.

The failure of the U.S. and Canadian governments to enforce the Treaty has significant ecological and economic consequences and will compromise almost one hundred years of cooperative efforts by the U.S. and Canada to protect and enhance their boundary waters and waters flowing across the boundary.

The goal of environmental cooperation is explicitly recognized as a goal of the CEC.³⁸ The three national leaders of the NAFTA Parties met in Texas as recently as March 2005 and committed to enhance water quality in North America by working together and through existing boundary treaties and the IJC.³⁹

V. ARTICLE 14 NAAEC REQUIREMENTS

A. This is a Submission the Secretariat “May Consider”- Article 14

The Submitters respectfully submit that this Submission meets the criteria set out in Article 14 (1).

³⁶ Devils Lake begins draining into Red River, By Steve Lambert, Canadian Press, Tuesday, August 16, 2005, Page A6, Gravel filter partially destroyed by water, By Mia Rabson, Winnipeg Free Press, August 10, 2005, A5. and see FOE letter dated August 8/05, see Appendix 12.

³⁷ “Devils Lake outlet shut until spring?” By Mia Rabson, Winnipeg Free Press, Sept. 15, 2005. “Canada tried everything to get North Dakota to wait”, Manitoba Premier Doer said, “It is absolutely illogical and potentially irresponsible not to wait the two weeks until the tests are done.” August 16, 2005 Winnipeg Free Press. Appendix 12.

³⁸ NAAEC Article 1: Objectives(c) increase cooperation between the Parties to better conserve, protect and enhance the environment...”

³⁹ Manitoba Government News Release, April 6, 2005, “Canada-US Coalition Urges IJC Review of Devils Lake Project”, see Appendix 13.

Article 14 (1) (a) - The Submission is presented in English.

Article 14 (1) (b) - The Submitters are: Friends of the Earth Canada and Friends of the Earth U.S.), registered not-for-profit organisations that engage in policy research and public education with a long history of environmental public interest advocacy; the People to Save-the-Sheyenne, Inc., a non-profit, grassroots organization of people from North Dakota who are concerned about preserving the Sheyenne River and protecting resources of people living along its banks; Thelma Paulson, a concerned citizen from North Dakota; Gary Pearson D.V.M., a concerned citizen from North Dakota; Claire Sevenhuysen and Lawrence Price, concerned citizens of Manitoba.

The Submitters are represented by Sierra Legal Defence Fund, a non-governmental, non-profit organisation that acts as an environmental watchdog by representing other environmental groups on a "no fee" basis.

Article 14 (1) (c) - The Submission provides sufficient information from a variety of government and non-government sources to allow the Secretariat to review the submission, including all of the documentary evidence contained in the Appendices, upon which the Submission is based.

Article 14 (1) (d) - The Submitters have a long-standing interest and involvement in the protection of the environment, including transboundary water use and pollution issues.⁴⁰

The Submission is aimed at promoting environmental cooperation and the enforcement of environmental law.

Article 14 (1) (e) - This matter of the Devils Lake diversion into, and unlawful pollution of, Canadian waters has been widely communicated to the governments of the U.S. and Canada.⁴¹

Article 14 (1) (f) - The Submitters are non-profit organizations and person(s) residing or established in the territory of the U.S. and Canada.

B. The Issues Raised in this Submission Merit A Response from the United States and from Canada pursuant to Articles 14 (2) and 14 (3) of the NAAEC

The Submitters respectfully submit that they have met the criteria set out in Article 14 (1), and ask that the Secretariat request a response from the Governments of the United States and Canada.

Article 14 (2) (a) - The Submitters are persons and non-governmental environmental organizations whose memberships include thousands of individuals who have a shared interest in protecting the waters of Canada, including ensuring that the duties and

⁴⁰ In addition to the materials in Appendices 8,12, 13, please see details of Friends of the Earth on-going "Stop Devils Lake" campaign at www.foecanada.org.

⁴¹ See Section II, A.1.c) Public Campaign to Refer to the IJC, p. 4 above.

obligations of both governments under the *International Boundary Waters Treaty* are fulfilled. The Submitters and their membership make use of these waters and the unlawful pollution has or will harm the entire ecosystem, including people, fish and their habitat.

Article 14 (2) (b) - This Submission raises matters whose study would advance the goals of the NAAEC. In particular, the preparation of a factual record would:

- foster the protection and improvement of the environment for present and future generations (Preamble par. 1, and Article 1 (a));
- ensure that activities in the U.S. do not cause damage to the environment shared with Canada (Preamble par. 2);
- promote sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1 (b));
- increase cooperation between governments to better conserve, protect, and enhance the environment, particularly the joint management of boundary waters (Articles 1 (c), and 10 (2) (i));
- avoid trade distortions arising out of the failure of the U.S. and Canada to enforce the Treaty, thereby giving the State of North Dakota and entities within that state a competitive advantage over a province and entities within a province of Canada. This Devils Lake diversion and the resulting pollution effectively uses Canadian water as a free resource with the government of the U.S. and North Dakota shifting their economic and environmental burden onto their neighbour, rather than preventing pollution and resolving the dispute at the IJC; and
- promote pollution prevention policies and practices (Article 1 (j)).

Article 14 (2) (c) - There are no other realistic or effective domestic or private remedies available. There are a number of barriers to non-governmental organizations and other persons to obtain such remedies, including: no public access to the dispute resolution mechanisms of the IJC; sovereign immunity issues; prosecution difficulties due to standing and jurisdictional issues; domestic permitting of water schemes is not equipped to deal with transboundary issues; appeals of water-related decisions by those outside the jurisdiction of the state of North Dakota are very limited i.e. Manitoba's unsuccessful appeal⁴²; the risk and expense of legal proceedings to non-governmental organizations; the evidentiary burden, problems of proof and the expense of obtaining expert scientific evidence; the unenforceability of private agreements between governments; and other matters of a similar nature. The recent decision of a U.S. court upholding the right of U.S. citizens to commence a lawsuit in the U.S. against the Canadian company Teck Cominco Ltd. for transboundary water pollution gives a sense of the difficulty in bringing such a claim and illustrates the disparity of the potential remedies under the domestic laws of the two countries. (See Appendix 17 – CBC News, July 4, 2006, "U.S. court ruling will have ripple effecting Can., U.S.".)

⁴² The Province of Manitoba, et al, lost on appeal at the Supreme Court of North Dakota challenging the discharge permit, see People to Save the Sheyenne River et al v. North Dakota Department of Health et al, 2005 N.D. 104 (2 June 2005), see Appendix 14.

Article 14 (2) (d) - This Submission is based primarily upon information obtained from government and non-government research resources in addition to numerous mass media reports, all of which have highlighted the public importance of the issue in its own right and as an injurious precedent for the resolution of future transboundary water issues.

Article 14 (3) (a) - The Submitters are not aware of any pending judicial or administrative proceedings.

VI. RELIEF REQUESTED

The Submitters repeat and rely upon the submissions contained in the letter dated July 7, 2006 attached as Appendix 18 (letter from Sierral Legal to the CEC Secretariat).

The Submitters therefore respectfully ask that the CEC prepare a Factual Record of the assertion that the governments of the United States and Canada are in breach of their duties and obligations under the NAAEC to effectively enforce the anti-pollution provisions of Article IV of the Treaty.

All of which is respectfully resubmitted this 7th day of July 2006, by:



Robert V. Wright

Sierra Legal Defence Fund
Counsel for the Submitters