
Secretariat of the Commission for Environmental Cooperation

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

Submitters: The Quebec Environmental Law Centre (*Centre québécois du droit de l'environnement*—CQDE)
Nature Québec

Party: Canada

Date received: 3 September 2009

Date of this determination: 20 October 2009

Submission I.D.: SEM-09-004 (*Quebec Mining*)

I. INTRODUCTION

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “Guidelines”). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission. Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC’s website.¹

This Determination contains a summary of the Secretariat’s analysis in accordance with NAAEC Article 14(1) and the Guidelines, and a summary of submission SEM-09-004 (*Quebec Mining*) (hereinafter the “Submission”), filed with the Secretariat on 3 September 2009 by ‘*Nature Québec*’ and the ‘*Centre Québécois du droit de l’environnement*’ (hereinafter, the “Submitters”). The Submitters assert that Canada, through the Province of

¹ CEC Online at: <http://www.cec.org/citizen/index.cfm?varlan=english>.

Quebec, has failed to effectively enforce the *Quebec Mining Act* (the “Act”) and *Regulation respecting mineral substances other than petroleum, natural gas and brine* (the “Regulation”), as well as the *Sustainable Development Act*.

The Submitters assert, inter alia, that the government’s failure to enforce provisions relating to the rehabilitation and restoration of land affected by mining operations is creating a heavy financial burden on the people of Quebec while causing unwarranted environmental damage.

Pursuant to Guideline 3.10, the Secretariat notified the Submitter by letter of minor errors of form on 4 September 2009, noting that the submission failed to indicate whether the matter had been communicated in writing to the relevant authorities of the Party. On 21 September 2009, the Submitters filed supplemental information in response to the Secretariat’s letter of 4 September 2009. Specifically, the Submitters asserted that their claims had been made known to the relevant authorities through a press release by a coalition (of which they are part), *Pour que le Québec ait meilleure mine!* The Submitters provided several media reports meant to support their statements.

Taking into account the submission and the Submitter’s letter of 21 September 2009, for the reasons set out below, the Submitters are being notified in this Determination that submission SEM-09-004 (*Quebec Mining*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular Article 14(1)(c) and (e), and that, in accordance with Guideline 6.2, they have thirty days from the date of this Determination to provide a submission which conforms to all of the requirements of Article 14(1), failing which the Secretariat will terminate the process with respect to this submission.

II. SUMMARY OF THE SUBMISSION AND SUPPLEMENTAL INFORMATION

On 3 September 2009, the Submitters filed a submission with the Secretariat of the CEC asserting that Quebec is failing to effectively enforce sections 221, 222, 232.1 to 232.5 and 251 of the *Quebec Mining Act*, sections 108 to 115 of the *Regulation respecting mineral substances other than petroleum, natural gas and brine*, and section 6 of the *Sustainable Development Act*. In support of their assertions, the Submitters rely solely on the *Report of the Auditor General of Quebec to the National Assembly for 2008–2009, Volume II, Chapter 2: Government interventions in the mining sector* (the “AG Report”), the *Governmental Strategy for Sustainable Development 2008–2013 (Stratégie gouvernementale de développement durable 2008–2013)*, and several media clippings.

The Submitters state that, under Annex 41 of the NAAEC,² the Government of Canada is bound in respect of any acts and omissions of the Province of Quebec as these relate to the application of the NAAEC. They further note that the Quebec National Assembly ratified the NAAEC in Article 2 of the *Act respecting the implementation of international trade agreements*, Article 8 of which specifies that NAAEC clauses concerning application of the

² Submission, para. 13.

Agreement apply to the Government of Quebec.³ They also note that the Government of Quebec signed the *Canadian Intergovernmental Agreement Regarding the NAAEC*, which specifies at Article 2 that signatories are bound by NAAEC Article 14 as it pertains to enforcement matters.⁴

The Submitters assert that “poor State management of the province’s mining resources has had disastrous [environmental, economic, and social] consequences”⁵ and that the Quebec government’s information management system for the mining sector is deficient.⁶ The Submitters note that pursuant to sections 221 and 222 of the Act, those engaged in mining operations are bound to submit annual reports to the Minister of Natural Resources and Wildlife (*Ministère des Ressources naturelles et de la Faune*, or “MRNF”) regarding their activities during the preceding year as well as preliminary reports and forecasts for the upcoming year.⁷ The Submitters allege that these reports contain information that is “crucial for monitoring rehabilitation and restoration plans and the state of financial guarantees.”⁸

The Submitters then recall section 251 of the Act, whereby inspectors may examine reports and plans for mining operations and request additional information respecting those operations.⁹ The Submitters cite the AG Report which notes that of 25 files analyzed, 56% did not include an inspection report, and which states that

the documentation of mining site files made by the MRNF had serious flaws such as a lack of justification and supporting documents for certain decisions, key pieces of evidence that were missing, or departmental actions not recorded in the documents.¹⁰

The Submitters further recall that the AG Report pointed out that “documentation of mining site files made by the MRNF had serious flaws,”¹¹ and that it stresses the importance of keeping mining files up to date in light of the “significant economic, social and environmental impact they have in certain regions.”¹²

The Submitters maintain that section 232.1 of the Act requires a company operating a mining site to restore it based on an MRNF-approved plan, which must in turn be based on consultations with the Ministry of Sustainable Development, Environment and Parks (*Ministère du Développement durable, de l’Environnement et des Parcs* (hereafter the “MDDEP”) pursuant to section 232.5 of the Act.¹³ They note that section 232.2 of the Act

³ *Ibid.*, para. 13 (a).

⁴ *Ibid.*, para. 13 (b).

⁵ *Ibid.*, para. 16.

⁶ *Ibid.*, paras. 19 – 24.

⁷ *Ibid.*, para. 20.

⁸ *Id.*

⁹ *Ibid.*, para. 21.

¹⁰ *Ibid.*, para. 23.

¹¹ *Id.*

¹² *Ibid.*, Appendix 4 at para. 2.99.

¹³ *Ibid.*, para. 25.

indicates that the plan must be submitted to the MDDEP¹⁴ (sic) for approval before operations commence.¹⁵ Relying on the statement in para. 2.66 of the AG Report that the MRNF does not have an internal process permitting it to monitor the commencement of mining operations, the Submitters maintain that “the MRNF is not in a position to coordinate the reception of plans within the time limits set out in the Act.”¹⁶

The Submitters continue to summarize the AG Report, noting that out of 25 files analyzed by the AG, there were 2 cases where companies commenced operations prior to having submitted plans, 9 cases where companies failed to take into account the time required to review their plan, 11 cases where companies failed to meet stipulated deadlines for tabling or reviewing their plans without being fined, and 10 cases where plans were approved despite MDDEP notices that were inconclusive, unfavourable, stipulated conditions or were altogether absent.¹⁷ The Submitters also express dissatisfaction with “unacceptably long” lengths of time taken to approve plans.¹⁸ The Submitters go on to describe the regime for operator-paid financial guarantees to restore mining sites (citing sections 232.1 and 232.4 of the Act), as well as the amounts of those guarantees (section 111 of the Regulation), and the payment schedules (sections 112 and 113 of the Regulation).¹⁹ The Submitters note that under Regulation section 112, “payments are to start *only after* approval.”²⁰ The Submitters maintain that “unreasonable delays in approval, as well as failures to even table a plan [...] can lead to disastrous consequences in the financial management of these files.”²¹ The Submitters proceed to assert that the MRNF is not complying with sections 112 and 113 of the Regulation, and, relying again on the AG Report, note that “poor enforcement of the Regulation resulted in the postponement of \$16 million in payments by the companies examined” (by the Auditor General).²²

The Submitters recall the AG Report’s finding that the MRNF has stopped making information about the mining industry public, and they contend that this information is necessary for the people of Quebec to “understand the benefits and impacts of the sector,” and that it is vital for regions economically dependent on the mining sector.²³ The Submitters draw attention to the AG Report’s recommendations, and to section 6 of the *Sustainable Development Act*, regarding citizen participation and access to knowledge. They also note that section 3 of the *Sustainable Development Act* stipulates that it applies to the MRNF.²⁴

The Submitters conclude that Canada has failed to enforce its legislation concerning the effective management of mines operating in the Province of Quebec, and note that a factual

¹⁴ It appears that there may be a typo in the Submission and that the reference is meant to be the “MRNF.”

¹⁵ Submission, para. 26.

¹⁶ *Ibid.*, para. 27.

¹⁷ *Ibid.*, para. 28.

¹⁸ *Ibid.*, para. 30.

¹⁹ *Ibid.*, paras. 31–33.

²⁰ *Ibid.*, para. 33. Emphasis in original.

²¹ *Id.*

²² *Ibid.*, para. 36.

²³ *Ibid.*, para. 38.

²⁴ *Ibid.*, para. 40.

record would “shed light on the government’s practices and numerous failures in the mining sector,” and would be in line with the objectives stated in NAAEC Articles 1(a), (b), (g), (h), and (i).²⁵ Last, the Submitters note that the laws cited “do not stipulate any private remedy that would ensure their effective enforcement,” and that “no other remedies are currently being sought.”²⁶

III. ANALYSIS

The Secretariat will now treat each requirement of NAAEC Article 14(1) in turn.

Article 14(1)

The chapeau of NAAEC Article 14(1) provides: “[t]he Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law” if the submission meets with the criteria in Article 14(1)(a-f).

Although the submission purports to assert in its paragraph 14 that the Government of Quebec has failed to effectively enforce the laws there cited, the submission almost exclusively relies on recitation of the AG Report, often without formulating direct assertions.

The Submitters assert “poor State management of the province’s mining resources”²⁷ and note a deficient information management system for the mining sector by the Government of Quebec.²⁸ However, the Submitters do not directly make an assertion on how the Party is allegedly failing to effectively enforce the Act, and in particular sections 221, 222, and 251 of the Act, nor do they “focus on any acts or omissions of the Party asserted to demonstrate such failure” in accordance with Guideline 5.1. As noted in the previous paragraph, the Secretariat considers that recalling sections of the AG Report is not equal to positively asserting a failure to effectively enforce an environmental law in accordance with the chapeau of Article 14(1) and Guideline 5.1.

With respect to the consideration of whether the laws cited in a submission qualify as “environmental law,” the Secretariat notes that the primary purpose (in the sense of NAAEC Article 45(2)(a and c)) of sections 221 (except arguably 221.3) and 222, appears to concern reporting requirements for issues other than environmental protection, and that section 251 on its own merely establishes the powers of inspectors.²⁹ These provisions do not appear to be “environmental law” as defined by NAAEC Article 45(2)(a), although they may function within an overall regime which could broadly be described as focusing on environmental protection. NAAEC Article 45(2)(c) provides that “the primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be

²⁵ *Ibid.*, paras 41–42.

²⁶ *Ibid.*, para. 44.

²⁷ *Ibid.*, para. 16.

²⁸ *Ibid.*, paras. 19–24.

²⁹ Section 222 of the Mining Act may be considered, however, to guide the Secretariat’s analysis in the event the Submission merits further consideration regarding the effective enforcement of the environmental law in question.

determined by reference to *its* primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.” Applying this important clarification in NAAEC Article 45(2)(c) to the meaning of NAAEC Article 45(2)(a) and the submission, the Secretariat concludes it cannot proceed further with respect to assertions on the foregoing sections of the Act.³⁰

Regarding the submission’s contentions as to sections 232.1, 232.2, and 232.5 of the Act, although the cited provisions can be considered environmental law within the meaning of Article 45(2) of NAAEC, the Submitters do not indicate clearly which time limits referred to in submission paragraph 27 are meant, and more importantly, the Submitters’ assertion regarding the MRNF not being in a position to coordinate the reception of plans within time limits appears to be speculative about possible future events, but the Submitters do not in this connection, pursuant to NAAEC Article 14(1) and Guideline 5.1, assert a specific act or omission of the Party which would amount to an alleged failure to effectively enforce its environmental law. Furthermore, the Secretariat has repeatedly interpreted the words in the chapeau of Article 14(1) “is failing to effectively enforce its environmental law,” to mean that an assertion of a failure to effectively enforce should concern an ongoing situation.³¹ A revised submission may clarify whether the submission regarding the MRNF not being in a position to coordinate the reception of plans within time limits concerns an ongoing circumstance related to specific alleged failures to effectively enforce environmental law.

Regarding sections 108 to 115 of the Regulation, the Secretariat considers these provisions could broadly fall within the definition of environmental law in accordance with Article 45(2) as they operate in conjunction with Section 232.1 of the Act. However, the information provided by the Submitters describes punctuated instances of past conduct which do not appear to indicate an ongoing circumstance of an alleged failure to effectively enforce environmental law in accordance with the temporal requirement of the Article 14(1) chapeau.

The Submitters, in referring to the AG Report’s findings, do not directly assert a failure to effectively enforce the *Sustainable Development Act* pursuant to NAAEC Article 14(1) and Guideline 5.1. However, the Secretariat may consider the *Sustainable Development Act* section 6 as environmental law in accordance with NAAEC Article 45(2).

³⁰ In previous determinations, submissions asserting the lack of use of inspection requirements as a failure to effectively enforce environmental law were rejected. The Submitters in the instant submission pointed out that in some cases, inspections did not take place, and that the AG Report said they should in order to ensure “effective management.” Effective management and effective enforcement of an environmental law are different matters. This is clear in SEM-00-004 *BC Logging*, “inspections...might, but do not necessarily, lead to further enforcement action within a specified timeframe.” See NAAEC Article 45(1) on the use of regulatory discretion.

³¹ Submissions where the Secretariat has on numerous occasions discussed the need for assertions regarding failures to effectively enforce to meet a temporal requirement of being an “ongoing” situation at the time of submission include: SEM-97-03 *Quebec Hog Farms*, “the submission meets the temporal requirement in Article 14(1) because [...] the submission asserts that many of the alleged violations are ongoing” [page 8]; SEM-99-02 *Migratory Birds*, [page 4] “the submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1)”; SEM-00-003 *Jamaica Bay* [page 3] “it appears that the submission focuses on a prospective rather than on an ongoing asserted failure to effectively enforce. It therefore fails to comply with Article 14(1).”

As noted above, the submission states that the AG Report pointed out that “documentation of mining site files made by the MRNF had serious flaws,”³² and that the AG Report stresses the importance of keeping mining files up to date in light of the “significant economic, social and environmental impact they have in certain regions.”³³ Here as well, mere recollection or citation of a report is not a positive assertion of a failure to effectively enforce environmental law in accordance with Article 14(1) and Guideline 5.1.

Bearing the foregoing in mind, any revised submission should conform to the requirements of Article 14(1) chapeau, and Guideline 5.1.

Article 14(1)(a)

Article 14(1)(a) requires that a submission be: “in writing in a language designated by that Party in a notification to the Secretariat [...].”

The Secretariat notes that the submission meets the criteria of Article 14(1)(a) as it is in French, an official language designated by the Parties for filing a submission.³⁴

Article 14(1)(b)

Article 14(1)(b) requires that a submission: “clearly identifies the person or organization making the submission [...].”

The Secretariat considers that the Submitters and their organizations are clearly identified and the submission meets the criteria of Article 14(1)(b).

Article 14(1)(c)

Article 14(1)(c) requires that a submission provide: “sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based [...].”

As to assertions on sections 232.1 and 232.4 of the Act, and sections 111, 112, and 113 of the Regulation, and in particular that the MRNF is not complying with said sections 112 and 113, because allegedly “poor enforcement of the Regulation resulted in the postponement of \$16 million in payments by the companies examined” by the AG,³⁵ the requirements of Article 14(1)(c) are not met, and the submission does not include in accordance with Guideline 5.3 “sufficient documentary evidence” to allow the Secretariat to review the submission with regard to this particular assertion.³⁶ For example, the AG Report mentions

³² Submission, para. 23.

³³ *Ibid.*, Appendix 4 at para. 2.99.

³⁴ *Cfr.* Guideline 3.2.

³⁵ Submission, para. 36.

³⁶ The Secretariat, in previous determinations noted that, “Many submitters are nongovernmental environmental organizations with limited financial and human resources for monitoring compliance with environmental laws and gathering evidence of specific breaches. These constraints provide additional support for concluding that the

numerous dossiers, but these are not included either in the AG Report or supplied to the Secretariat by the Submitters. Moreover, there is a lack of information as to whether the assertions regarding all of the laws cited regard ongoing failures to effectively enforce or not. Regarding the assertion that “the MRNF is not in a position to coordinate the reception of plans within the time limits set out in the Act,”³⁷ the submission does not clarify which are those time limits set out in the Act and the AG Report alone does not support the Submitters’ contention. Any revised submission should address this lack of sufficient information to document the Submitter’s assertions.³⁸

Article 14(1)(d)

Article 14(1)(d) requires that a submission: “appears to be aimed at promoting enforcement rather than at harassing industry [...]”

The submission is in accordance with Article 14(1)(d) and Guideline 5.4 and appears to be aimed at promoting enforcement and not at harassing industry.

Article 14(1)(e)

Article 14(1)(e) requires that a submission: “indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any [...]”

The submission fails to meet the requirements of Article 14(1)(e) and is not in accordance with Guideline 5.5. The supplementary information provided to the Secretariat in the Submitter’s letter of 21 September 2009 solely consists of press releases and clippings, which are not communications in writing to the relevant authorities for the purposes of Article 14(1)(e) and Guideline 5.5. A letter, e-mail, fax, or similar form of communication from the Submitters or others directly to the relevant authorities is meant here, and such must regard the matters which are the subject of the submission, and be dated prior to the submission’s filing. Moreover, copies of any response of the Party must be included.³⁹

Submitters have submitted sufficient information regarding the alleged widespread failure to enforce section 36(3) effectively to meet the threshold requirements of Article 14.” SEM-98-004 *BC Mining*, Art 15(1) Determination, at 13. In this case, however, the submission does not include documentary evidence sufficient to prove a causal link between the alleged “poor enforcement of the Regulation” and the “postponement of \$16 million in payments.” Such an assertion must necessarily be accompanied by sufficient information to allow the Secretariat to closely examine it in any further steps of the process, and this information appears to be available despite possible resource constraints the Submitters may face.

³⁷ Submission, para. 27.

³⁸ *Cfr.* Guideline 1.1.

³⁹ Submissions wherein the Secretariat has previously discussed the requirement that the matter be communicated in writing to the relevant authorities of the Party concerned include: SEM-01-002 *AAA Packaging*, which states, “the only indication that the government of Canada is aware generally of issues related to matters raised in the submission is in a newspaper article [...] However, nothing in the submission indicates that the specific matter addressed in the submission [...] has been communicated in writing by the Submitters or others to the relevant Canadian authorities...”. See also, A14/SEM/00-004/04/COM *BC Logging* [page 2] wherein potentially relevant

Article 14(1)(f)

Article 14(1)(f) requires that a submission: “is filed by a person or organization residing or established in the territory of a Party.”

The submission indicates that it is filed by organizations and persons residing in and established in Montreal, Quebec, Canada, and thus meets the requirements of Article 14(1)(f).

IV. DETERMINATION

Submission SEM-09-004 (*Quebec Mining*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular its chapeau, as well as Article 14(1)(c) and (e). In accordance with Guideline 6.2, the Submitters have thirty calendar days from the date of this Determination to provide a submission which conforms to the requirements of Article 14(1)(a-f), failing which the Secretariat will terminate the process with respect to this submission.

Secretariat of the Commission for Environmental Cooperation

(original signed)

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correspondence with the relevant authorities was not included with the Submission and was subsequently requested by the Secretariat.