

Secretariat of the Commission for Environmental Cooperation

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

Submitter: Bennett Environmental Inc.
Concerned Party: Canada
Date of submission: 11 January 2011
Date of this determination: 12 April 2012
Submission I.D.: SEM-11-001 (*PCB Treatment in Grandes-Piles, Quebec*)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC,” or the “Agreement”)¹ provide for a process allowing any person or non-governmental organization to file a submission asserting that a Party to the Agreement 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 NAAEC (the “Guidelines”). When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. 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 where certain circumstances prevail, it proceeds no further with its consideration of the submission.²

2. On 11 January 2011, Bennett Environmental Inc. (the “Submitter”) filed Submission SEM-11-001 (*PCB Treatment in Grandes-Piles Quebec*)³ (the “Submission”) with the Secretariat of the CEC, asserting that Canada, through its Province of Quebec, is

¹ *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994) [NAAEC], arts 14–15, online: CEC <[goo.gl/8h4s2](http://www.cec.org/citizen)>.

² 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 at: <<http://www.cec.org/citizen>>. References to the word “Article” throughout this Determination, unless otherwise stated, refer to an article of the NAAEC. Use of the masculine implies the feminine, and vice-versa.

³ Submission by Bennett Environmental Inc. pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (11 January 2011) [“Submission”], available online at: <http://www.cec.org/Storage/81/9470_11-1-SUB_en.pdf>.

failing to effectively enforce section 24 of the Quebec *Environmental Quality Act* (EQA)⁴ by having issued an authorization for a soil treatment process that the Submitter alleges “does not work to treat [polychlorinated biphenyls (‘PCBs’)].”⁵

3. On 11 February 2011, the Secretariat issued its Determination (the “Determination”) that the Submission did not meet all the requirements of Article 14(1), and requested further information from the Submitter.⁶

4. On 7 March 2011, the Secretariat received supplemental information (the “Supplemental Information”) from the Submitter within the time period specified by Guideline 6.2.⁷

5. On analysis of the Submission and the Supplemental Information, for the reasons set out below, the Submitter is being notified in this Determination that its Submission and Supplemental Information do not meet all the criteria of Article 14(1) and that, in accordance with Guideline 6.3, the process with respect to the Submission is terminated.

II. SUMMARY OF THE SUBMISSION

6. The original Submission dated 11 January 2011 was summarized at pages 2-5 of the Secretariat’s Determination dated 11 February 2011.⁸ The following paragraphs contain a summary of the Submitter’s supplemental information.

7. The Submitter in its “response” (the “Supplemental Information”) to the Secretariat’s above-mentioned Determination, states that the Secretariat has “misinterpreted the NAAEC and, by necessary implication, the North American Free Trade Agreement (‘NAFTA’).”⁹ Moreover, the Submitter states that the Secretariat “has wrongly equated enforcing the law to ensure fair competition, with harassing a competitor,” by “wrongly focusing on the identity of the Submitter” and its motives, rather than “on the evidence of failure by the Quebec government to enforce the law [...]”.¹⁰

⁴ RSQ, c Q-2.

⁵ Submission, *supra* note 3 at 1.

⁶ CEC Secretariat, “Determination in Accordance with Article 14(1) of the [NAAEC]” (11 February 2011) [“Determination”], online: Commission for Environmental Cooperation <http://www.cec.org/Storage/97/9644_11-1-DETN_14_1_en.pdf>.

⁷ Response of Bennett Environmental Inc. to the Determination by the Secretariat of the Commission for Environmental Cooperation in Accordance with Article 14(1) of the North American Agreement on Environmental Cooperation (7 March 2011) [“Supplemental Information”], available online at: <http://www.cec.org/Storage/35/9683_11-1-NOT_en.pdf>.

⁸ Determination, *supra* note 6.

⁹ Supplemental Information, *supra* note 7 at 1.

¹⁰ *Ibid.*

8. The Submitter alleges that the NAAEC requires more focus on the Submitter's assertion that Quebec has not enforced the EQA with "the resulting harm to fair competition and risk to human health and the environment."¹¹ The Submitter further alleges that the Secretariat's interpretation "would defeat the purpose of NAAEC and one of the principal objectives of NAFTA."¹²

9. The Submitter proceeds to reiterate the assertions made in the original Submission, and relies again on the Conestoga-Rovers & Associates ("CRA") report, stating that:

[i]f the CRA report is correct, the certificate of authorization was wrongly issued, because it allows the emission, deposit, issuance, or discharge of contaminants into the environment in a manner that is contrary to the regulations respecting the burial of contaminated soil [... and] it necessarily follows that the holder of the certificate of authorization is not operating in compliance with [section 24 of the EQA].¹³

10. The Submitter further asserts that "a violation of the EQA, in this case, amounts to a violation of Articles 3 and 5 of the NAAEC by Canada."¹⁴

11. The Submitter notes that it has not received a substantive response from the Quebec government to the CRA report, and its ostensibly "legitimate questions about what is being done to ensure compliance with the law."¹⁵

12. The Submitter also maintains that "[n]othing in the Determination calls into question the correctness of BEI's submissions" regarding the Quebec government's alleged failure to apply section 24 of the EQA.¹⁶

13. The Submitter proceeds to note that it has responded to the Secretariat's information request made in the Determination, within the constraints of "solicitor-client privilege."¹⁷

14. Responding to the Secretariat's request for "further information as to whether the submitter has appealed to the Quebec Commission on Access to Information ['CAI'] regarding the items marked as confidential in the government's response to the submitter's access to information request dated 14 June 2010,"¹⁸ the Submitter states that

¹¹ *Ibid* at 2.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid* at 3.

¹⁷ *Ibid.*

¹⁸ Determination, *supra* note 6 at 7.

it did not appeal the decision, and gives its reasons for not doing so, alleging that “an appeal of the CAI’s decision would have achieved no purpose.”¹⁹

15. The Submitter states that:

the focus of the Submission is the claim that the MSDEP has failed to apply the EQA, and not Horizon’s conduct. The Submission deals with Horizon because the issuance of the certificate of authorization to Horizon, and Horizon’s operations pursuant to it, are the facts underlying BEI’s claim that the MSDEP has failed to enforce the EQA.²⁰

16. The Submitter further notes that “it is reasonable to presume that any submission made by BEI would be in response to the activities of individuals or companies in the business sector in which BEI operates.”²¹

17. The Submitter sets out its concerns with the Secretariat’s Determination, in particular with the Secretariat’s alleged “treatment of competition,” whereby the Submitter recalls objectives of NAFTA in promoting fair competition, and alleges that NAAEC Article 1(e) is analogous.²²

18. The Submitter includes further arguments on the law and unfair competition, and alleges the existence of a right “to insist on the enforcement of law to ensure that the objectives of NAFTA and the NAAEC, including fair competition, are achieved.”²³

19. The Submitter continues by explaining its views on the alleged enforcement objective of NAFTA, which it claims “by necessary implication” is an objective of NAAEC.²⁴

20. Offering its views on the interpretation of “harassment,” the Submitter states that the Submission is not intended to harm a competitor, does not harass, and that the Submission is based on a third party “independent study” that supports its assertions that the MSDEP is failing to effectively enforce section 24 of the EQA.²⁵

21. Regarding the harm that the Submitter allegedly continues to suffer from the Party’s asserted failure to enforce section 24 of the EQA, the Submitter states that “[t]he harm to BEI [the Submitter] is the harm that would befall any company, in Canada, the

¹⁹ Supplemental Information, *supra* note 7 at 3.

²⁰ *Ibid* at 4.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid* at 5.

²⁵ *Ibid.*

United States, or Mexico, from the failure by a government to ensure that laws are enforced and that there is fair competition.”²⁶

22. Concerning the information the Secretariat sought in paragraph 28 of the Determination about competition and other economic factors, and regarding how the Submission is allegedly solely aimed at promoting enforcement rather than at harassing industry,²⁷ the Submitter states that the Secretariat’s request is “premised on an incorrect interpretation of Article 14.” The Submitter does not however provide the information sought by the Secretariat on these matters.²⁸

23. The Submitter continues by stating “BEI does not need to know what information, received from Horizon, the Quebec government used to issue the certificate of authorization.”²⁹ The Submitter then suggests that an “independent examination of the Quebec government’s enforcement of s. 24 of the EQA in light of the questions raised by the CRA study” be conducted, and that the Submitter itself and the Submitter’s expert be involved in this procedure, in order “to ensure that there is a searching examination of the relevant information.”³⁰

24. The Submitter concludes by offering its interpretation of Guideline 17.4 and Article 11(8)(b) of NAAEC, and by reiterating that it “has suffered, and continues to suffer, harm as a result of the failure by the Quebec government to enforce the EQA.”³¹

III. ANALYSIS

25. As noted in the Secretariat’s first Determination, NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or non-governmental organization asserting that a NAAEC Party is failing to effectively enforce its environmental laws. As the Secretariat has found in previous NAAEC Article 14(1) determinations,³² Article 14(1) is not intended to be an “insurmountable screening device,” which means that the Secretariat will interpret every submission in accordance with the Agreement and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat will now address each requirement of NAAEC Article 14(1) with regard to the Submission and Supplemental Information with this perspective in mind.

²⁶ *Ibid.*

²⁷ Determination, *supra* note 6.

²⁸ Supplemental Information, *supra* note 7 at 5.

²⁹ *Ibid.*

³⁰ *Ibid* at 5-6.

³¹ *Ibid* at 6.

³² See, for example, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998) and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

26. In its Determination, the Secretariat considered that the Submission met the criteria of Article 14(1)(a), (b), (e), and (f), but also found that the Submitter should provide further information pursuant to Article 14(1)(c). The Secretariat moreover requested that the Submitter clarify certain matters relating to Article 14(1)(d), the matter of harm in Article 14(2)(a), and the pursuit of local remedies in accordance with Article 14(2)(c), as informed by the relevant Guidelines.³³ The Secretariat accordingly does not deal further in this section with analysis of the Submission's concordance with the requirements of Article 14(1)(a), (b), (e), and (f).

27. Regarding the Secretariat's request for further documentation in the Determination, the Submitter provided some, but not all of the requested information by excluding documents requested that were possibly subject to solicitor-client privilege.³⁴

28. Article 11(8)(b) and Guideline 17.1 allow the Secretariat to safeguard any confidential information supplied by a Submitter pursuant to a Secretariat information request, but the Submitter chose not to provide certain information sought by the Secretariat. It should be noted that the Submitter decided to withhold documents the Secretariat could have protected from disclosure, yet by the same token, the Submitter asked the Secretariat to request a response from Canada, knowing that such response could likewise contain information designated by the Party as confidential.³⁵ Having considered all the Supplemental Information, the Secretariat maintains the view it took in the Determination that the Submission does not fully satisfy the requirements of Article 14(1)(c), as informed by Guidelines 5.1 and 5.3.

29. In its Determination, the Secretariat also determined that on the basis of the information before it at the time, it could not be concluded that the Submission met the criteria of Article 14(1)(d) in light of Guideline 5.4(a).³⁶ The Secretariat in its Determination also requested that the Submitter provide information concerning the

[...] apparent economic competition that exists between BEI and Horizon Environment, and moreover include information regarding whether BEI may stand to benefit economically from the Submission. The Submitter may also address how the Secretariat's pursuit of a response from the Party that may contain information on industrial secrets and/or confidential third party information would not stand to benefit the Submitter economically, especially if such information brought to light were to also confirm the Submitter's assertions that Horizon's PCB chemical oxidation treatment methods are ineffective. Finally, the Submitter may include information on how the Submission is aimed at promoting enforcement *rather* than harassing industry. Based on information

³³ Determination, *supra* note 6 at 6-9.

³⁴ Supplemental Information, *supra* note 7 at 3.

³⁵ *Ibid* at 5-6.

³⁶ Determination, *supra* note 6 at para 28.

currently before it, the Secretariat finds that the Submission does not fully meet the criteria of Article 14(1)(d) as informed by Guideline 5.4(a).³⁷

30. In response to the Secretariat's request for such information, the Submitter states that

[t]he request for information on competitive impact, contained in paragraph 22 [of the Secretariat's Determination] is in evident contradiction with the Secretariat's position, set out in paragraphs 25 to 27, that competitive impact does not constitute the type of harm it considers relevant in assessing a submission. Effectively, the Secretariat is asking BEI to supply information which will form the basis for its dismissal of the Submission.³⁸

31. Moreover, the Submitter states in regard to the Secretariat's request for information

that the arguments advanced by the Secretariat, in paragraphs 22 and 25-27, inclusive, of the Determination, are based on a fundamental misinterpretation of Article 14 of the NAAEC. It follows that requests for information premised on an incorrect interpretation of Article 14 are themselves incorrect.³⁹

32. Taking each of the above-cited points of the Submitter's allegations regarding the Secretariat's Determination in turn, the first assumes that the Secretariat's request for further information on whether the Submitter may stand to benefit economically from the Submission, is predicated on a link between the "type of harm [the Secretariat] considers relevant in assessing a submission," and Article 14(1)(d). Article 14(1)(d) directs the Secretariat to determine whether a Submission "appears to be aimed at promoting enforcement rather than at harassing industry." Article 14(2)(a) regarding harm provides guidance to the Secretariat as to whether to request a response from the concerned Party. The Submitter conflates a requirement in Article 14(1) with the guidance set out in Article 14(2). The Secretariat proceeds to analyze the Submission in light of the guidance in Article 14(2) once it has determined that all the requirements of Article 14(1) have been met.⁴⁰

33. The Secretariat has neither in its application and interpretation of Article 14(1)(d), "radically [...] narrowed"⁴¹ the rights granted a submitter pursuant to Article 14(1), nor

³⁷ *Ibid.*

³⁸ Supplemental Information, *supra* note 7 at 4.

³⁹ *Ibid* at 5.

⁴⁰ See for example, SEM-07-003 (*Seal Hunting*), Secretariat Determination in Accordance with Article 14(1) (6 September 2007), where the Secretariat in finding the Submission did not meet the criteria of Article 14(1), did not proceed to further analyze the Submission in light of the factors contained in Article 14(2).

⁴¹ Supplemental Information, *supra* note 7 at 4. The Secretariat cannot curtail the rights granted submitters by provisions of the NAAEC, contrary to what the Submitter has stated in the above quotation. The rights granted by NAAEC are immutable, and not modified or altered by a particular Secretariat

has it used Article 14(1) as an “insurmountable screening device.” Nor did the Secretariat ask for information on “competitive impact,” as the Submitter states above. The Secretariat has, however, already produced a reasoned Determination finding that, based on the information provided by the Submitter, it could not conclude that the Submission met the requirement of Article 14(1)(d) as informed by Guideline 5.4(a). In its Determination, the Secretariat provided the Submitter with an opportunity to provide further information on how the submission was aimed at promoting enforcement *rather* than harassing industry, and on the issue of the Submitter’s status as a competitor of Horizon, and whether the Submitter stood to benefit economically from the submission.⁴²

34. The Secretariat’s analysis of the Submission, in paragraphs 22 and 25-27 of the Determination, follows from the ordinary meaning of the language in Article 14(1)(d) and Guideline 5.4(a). Although the Submitter provides its own interpretation of what the word “harassment” means in Article 14(1)(d), the Secretariat must follow the meaning of that word as informed by Guideline 5.4(a), and not the Submitter’s interpretation, for which it provided no sources.⁴³

35. The Submitter suggests that the Secretariat has wrongly equated enforcing the law to ensure fair competition, with harassing a competitor. This is not true. Rather, the Secretariat has evaluated the nature of the asserted failure to effectively enforce the law in this instance and the purported evidence of such failure, and following Guideline 5.4(a), balanced it against the fact that the Submitter is a direct competitor of Horizon – the sole particular company involved in the alleged non-compliance with the law at the heart of the assertions. The provision in Guideline 5.4(a) “... especially if the Submitter is a competitor that may stand to benefit economically ...” suggests that the Secretariat ought to give closer scrutiny to submissions where such conditions obtain, compared to situations where they do not.⁴⁴ Having given the Submission and Supplemental Information such closer scrutiny, there is no information before the Secretariat that compels it to alter its originally held view at paragraph 28 of the Determination.

determination. The Secretariat also considers each submission separately according to its merits and demerits. In its 15 July 2009 Determination in SEM-07-001 (*Minera San Xavier*), the Secretariat noted in that connection “[...] there is no binding precedent that the Secretariat *must* follow arising from its previous determinations. Each Submission presents the Secretariat with a new set of considerations, which must be analyzed in accordance with NAAEC and the Guidelines. [...] The above notwithstanding, the Secretariat must attempt to ensure a modicum of predictability and thus fairness in its practice with regard to Articles 14 and 15, for example, by taking into account lessons learned from previous Determinations and Factual Records” (emphasis added), online: <http://www.cec.org/Storage/77/7102_07-1-DETN%2015-1_en.pdf>, at 9.

⁴² Determination, *supra* note 6 at para 28.

⁴³ Supplemental Information, *supra* note 7 at 5.

⁴⁴ In SEM-04-001 (*Hazardous Waste in Arteaga*), the Secretariat determined that a Submitter *may* have been a competitor and *may* have stood to benefit economically. In those circumstances, the criterion in Article 14(1)(d) was not met, and the process was terminated: CEC Secretariat, “Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte” (27 January 2005), online: Commission for Environmental Cooperation <http://www.cec.org/Storage/74/6817_04-1-DET15_1_es.pdf>, at 4.

36. The Submission rests almost entirely on the report prepared by the Submitter's commissioned expert, CRA.⁴⁵ The CRA report concludes that the chemical oxidation process purportedly used by Horizon is "unreasonable, impractical, and not economically feasible" for destroying PCBs at the scale authorized by the MSDEP.⁴⁶ The Secretariat notes that the CRA report does not, however, conclude that the process approved by the MSDEP for Bennett's competitor, Horizon, is impossible. Rather, the CRA report's conclusion, based on a review of certain publicly available evidence (including literature, permits, licenses and information relating to other facilities) is that what Horizon seems to have received an authorization for, is unprecedented elsewhere.⁴⁷ While the CRA report raises questions about Horizon's operations in Grandes-Piles, Quebec, the Submission does not specify how this report alone evidences the Quebec Government's alleged failure to effectively enforce section 24 of the EQA.

37. Quebec has no obligation, flowing from section 24 of the EQA, to respond to a document such as the CRA report. The Submitter notes however that "Despite repeated attempts, BEI has been unsuccessful in getting the Quebec government to respond to the substance of the CRA report."⁴⁸ The Submitter does not elaborate on why the Quebec Government has purportedly failed to effectively enforce the law at issue by not responding to the CRA report, or why section 24 EQA would legally entitle the Submitter to expect a response to it from the Government of Quebec. The Secretariat in reviewing the Submission and Supplemental Information does not consider that the Submitter has provided sufficient information regarding its assertion that "[i]f the CRA report is correct, the certificate of authorization was wrongly issued."⁴⁹ Assertions of a failure to effectively enforce environmental law should, following Guideline 5.1, "focus on any acts or omissions of the Party asserted to demonstrate such failure." Quebec's not responding to the CRA report is not documentary evidence of an "act or omission of a Party" in the sense of Guideline 5.1.

38. Given the nature of the asserted failure to effectively enforce the law at issue, and the purported evidence of such failure, it is then highly relevant, under Guideline 5.4(a), that the Submission is focused exclusively on compliance by a particular company – Horizon – with section 24 of the EQA, and that the Submitter is Horizon's direct competitor that, in certain circumstances,⁵⁰ may stand to benefit economically from the Submission.

⁴⁵ Supplemental Information, *supra* note 7 at 2.

⁴⁶ Submission, Appendix F: Conestoga-Rovers and Associates, "Chemical Oxidation Treatment and/or Destruction of Polychlorinated Biphenyl-Contaminated Soil" (prepared for WeirFoulds LLP, September 2010) at 23.

⁴⁷ *Ibid* at 25.

⁴⁸ Supplemental Information, *supra* note 7 at 2.

⁴⁹ *Ibid*.

⁵⁰ Such possible circumstances are set out in para 27 of the Secretariat's Determination.

39. The Submitter's arguments and assertions regarding unfair competition and NAFTA in the Supplemental Information, do not regard a particularized assertion of a failure to effectively enforce environmental law in the sense of NAAEC Article 45(2) (as informed by Guideline 5.1), and the Submitter does not explain how a purported requirement for the Government to provide a "level playing field"⁵¹ is legally part of the operation of section 24 of the EQA. The Secretariat therefore does not consider further the Submitter's assertions regarding unfair competition, except to the extent these arguments shed light on the "appearance" of the Submission for the purpose of analyzing whether the Submission meets the requirements of Article 14(1)(d).

40. The Secretariat could consider the Submitter's discussion of the objectives of NAAEC for the purposes of analysis pursuant to NAAEC Article 14(2)(b), but as the Secretariat has determined the Submission does not meet the requirements of Article 14(1), the Secretariat also does not proceed further with such analysis.

41. The Submitter has refused to provide information requested by the Secretariat on whether the Submission would "stand to benefit the Submitter economically."⁵² The Submitter stated that to provide such information would essentially be "asking BEI to supply information which will form the basis for its dismissal of the Submission."⁵³ The latter statement by the Submitter is not true. The only purpose of the Secretariat's requests for such information was to have before it all necessary and relevant information for assessing the Submission in light of Article 14(1) and the Guidelines.

42. After having considered both the Submission and Supplemental Information, the Secretariat maintains its original Determination that the Submission does not satisfy the requirements of Article 14(1)(d).

43. As the Secretariat does not determine that the Submission merits further consideration, it does not provide analysis regarding Article 14(2) factors or other arguments raised by the Submitter.

IV. DETERMINATION

44. Submission SEM-11-001 (*PCB Treatment in Grandes-Piles, Quebec*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular Article 14(1)(c) and 14(1)(d). In accordance with Guideline 6.3, the process with respect to this Submission is terminated.

⁵¹ Submission, *supra* note 3 at 10.

⁵² Determination, *supra* note 6 at para 28.

⁵³ Supplemental Information, *supra* note 7 at 4.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)
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CEC Executive Director

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