

Secretariat of the Commission for Environmental Cooperation

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

Submitter: Memphremagog Conservation Inc.
Represented by: Ariane Orjikh
Party: Canada and United States
Original Submission: 5 July 2019
Date of the determination: 15 August 2019
Submission No.: SEM-19-003 (*Lake Memphremagog*)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the NAAEC or the “Agreement”) provide for a process allowing any person residing in or nongovernmental organization established in North America 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” or the CEC)¹ initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). If the Secretariat determines that a submission does not meet all of the Article 14(1) criteria, it requests that the Submitters file a revised submission within 30 days. When the Secretariat finds that a submission does meet these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party.
2. On July 5, 2019, Memphremagog Conservation Inc. (MCI or the “Submitter”) filed a NAAEC Article 14(1) submission with the Secretariat asserting that both Canada and the United States are failing to effectively enforce their treaty obligations under certain articles of the Boundary Waters Treaty of 1909 (“Boundary Waters Treaty” or the “Treaty”) with respect to water pollution in Lake Memphremagog, a cross-border lake in both Quebec, Canada and Vermont, US. The Submitter contends that a proposed landfill expansion in Coventry County, Vermont will cause water pollution to cross the US/Canadian border via the lake, which is used for drinking water by Quebec residents in the province’s Eastern Townships. The Submitter also asserts that under applicable Vermont law, the state must ensure that a landfill expansion project will not unduly increase water pollution or the discharge of toxic waste into groundwater. The Submitter is specifically concerned with landfill leachate which often

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC or Agreement) signed by Canada, Mexico, and the United States (the “Parties”). The bodies which comprise the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The NAAEC remains in effective despite the Parties recent renegotiations concerning NAFTA resulting in a revised trade agreement and a new Environmental Cooperation Agreement, neither of which has yet to be implemented.

includes per- and polyfluoroalkyl substances (PFAS)² and requests that meaningful studies be carried out before the landfill expansion is approved.

3. The Secretariat notes that at the time the submission was received, on July 5, 2019, no permit had been issued by the State of Vermont Environmental Commission to New England Waste Service of Vermont Inc. (NEWSVT) for the Coventry landfill expansion pursuant to Vermont's Act 250. The Vermont Environmental Commission, however, issued the permit to expand the landfill on July 23, 2019, during the processing of the submission (see further discussion, para. 25).
4. The Secretariat has determined that the submission does not satisfy all of the requirements of NAAEC Article 14(1). Therefore the submitter has 60 working days from the receipt of this determination to submit a revised submission that conforms to the admissibility criteria of Article 14(1).³ The Secretariat's reasons for this determination are set forth below.

II. SUMMARY OF THE SUBMISSION

5. As noted above, MCI asserts that Canada and the United States are failing to effectively enforce their treaty obligations under Articles IV, VIII, and IX in connection with a landfill expansion in Coventry County, Vermont that the Submitter asserts would cause water pollution to cross the US/Canadian border via Lake Memphremagog, a source of drinking water for over 175,000 Quebec residents in the Province's Eastern Townships.
6. According to the Submitter, "the landfill produces significant amounts of leachate, commonly called 'garbage juice', which is processed at the Newport Wastewater Treatment Plant and then discharged into the lake."⁴ The landfill is located near Lake Memphremagog. MCI contends that Lake Memphremagog and other surrounding water sources are "threatened by the many chemicals that occur in leachate, including PFAS, which are neither analyzed by nor processed in the wastewater treatment plant."⁵ The Submitter maintains that PFAS are dangerous chemicals found in leachate water that jeopardize the quality of the drinking water and can cause serious health problems.
7. In the submission, the Submitter denounces the proposed Solid Waste Management Facility Certification OL510 SJ91-0001 that was pending when the submission was filed. The Submitter further asserts that it is the responsibility of Vermont's "District #7 Environmental

² PFAS substances are synthetic chemical substances, used in both consumer products and industrial applications, that have persisted (e.g., not degraded) in the environment since the 1940s and have been linked to numerous human health issues. The substances are known to be present in drinking water supplies in both the United States and Canada. The Secretariat notes that the two countries have entered into a Great Lakes Water Quality Agreement, under which they agreed to develop a list of "Chemicals of Mutual Concern." Certain PFAS substances were added to the list by both countries in 2016. See article on [IJC website, available at: https://ijc.org/en/epa-announcement-canada-and-us-governments-move-address-pfas-pollution-under-glwqa](https://ijc.org/en/epa-announcement-canada-and-us-governments-move-address-pfas-pollution-under-glwqa) (viewed on 6 August 2019).

³ Guideline, para 6.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [the "Guidelines"].

⁴ Submission at p. 2

⁵ *Id.*

Commission to ensure that that the landfill expansion project will not lead to undue pollution of neighboring waters”⁶ and that very few data are available on the impact of contaminants from the landfill site on the water quality of Lake Memphremagog.

8. Therefore, MCI is demanding that the landfill expansion be halted until meaningful studies of the contemporary impact of the landfill and of leachate processing on the water quality of Memphremagog Lake are carried out.⁷
9. Based on these assertions, the Submitter contends that both Canada and the United States are failing to effectively enforce Article IV of the Boundary Waters Treaty. With respect to Article IV, MCI maintains that the governments are failing to enforce the agreement reflected in the Treaty that “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.”⁸ Further, the submission references Article IX of the Treaty, which the Submitter characterizes as requiring the International Joint Commission (IJC), created by the Treaty, to advise the governments “on the application of the obligation in Article IV.”⁹ The Submitter also references Article VIII, which it characterizes as a requirement that the ICJ, when issuing orders of approval, must consider interests that may be injured, including environmental interests.¹⁰
10. In its submission, MCI also refers to two pieces of legislation in the state of Vermont that detail the restrictions and conditions under which permits and certifications are issued for land use and development and waste management. The Submitter states that the Vermont Department of Environmental Conservation is responsible for issuing the certification related to the treatment of solid waste that is regulated by the Waste Management Act,¹¹ and that the State of Vermont Environmental Commission is responsible for granting permits pursuant to Vermont’s Land Use and Development Law (Act 250).¹² Apart from referring to these laws generally, the Submitter does not specifically explain how and why the relevant Vermont authorities have failed to comply with these laws.

III. ANALYSIS

A. Opening paragraph of Article 14(1)

11. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission” meets the admissibility criteria in Article 14(1) (a) to (f).

⁶ Submission at p.1

⁷ Submitters also refer to potential water quality impacts to Lake Magog and the Magog River. Submission at 2.

⁸ Boundary Waters Treaty 1909, art IV(2)

⁹ Submission at 3. The Submitter actually references a 2002 CEC publication for this assertion, which summarizes the treaty. The Secretariat notes that this publication does not necessarily provide a definitive rendering of the Treaty.

¹⁰ Id.

¹¹ 10 V.S.A. § 6605

¹² 10 V.S.A. § 6086

12. In determining whether a submission meets the requirements of Article 14(1) of the NAAEC, the Secretariat does not view the admissibility criteria to be an insurmountable procedural screening device.¹³ The Secretariat reviewed the submission with that perspective in mind.
13. The Secretariat finds that the Submitter is a nongovernmental organization working to raise awareness and ensure the environmental health of Lake Memphremagog and its watershed. There is no information in the submission to suggest that the Submitter belongs to the government or is under its direction.
14. The next criteria to determine are whether the Submitter has identified an “environmental law” as defined in the NAAEC and whether the Submitter has alleged that a Party is “effectively failing to enforce” that law.
15. NAAEC Article 45(2) defines “environmental law” as follows:

2. For purposes of Article 14(1) and Part Five:

- (a) "environmental law" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

B. Environmental law in question

16. An initial question arises whether Articles IV, VIII, and IX of the Boundary Waters Treaty constitute “environmental law” within the meaning of NAAEC Article 45(2)(a). The root of the submission is the assertion that the landfill expansion in Coventry County, Vermont, will cause water pollution to cross the US/Canadian border via the Lake Memphremagog in

¹³ See SEM-97-005 (*Biodiversity*), Determination under Article 14(1) (26 May 1998); SEM-98-003 (*Great Lakes*), Determination under Article 14(1)(2) (8 September 1999).

violation of Article IV of the Boundary Waters Treaty and for which an Article IX referral should ensue.

17. The Boundary Waters Treaty was signed by Canada and the United States in 1909 and provides general principles for preventing and resolving disputes over waters shared between the two countries and for settling other transboundary issues, including those related to pollution. The Treaty created the IJC to implement its provisions and provides certain mechanisms for seeking resolution of disputes relating to the two governments.
18. Article IV of the Treaty provides:

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

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. [emphasis added]

19. The Treaty further provides at Article IX:

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

20. Thus, if either country, or both, finds that an Article IV situation is occurring, a referral under Article IX can be made to the IJC.
21. With respect to whether a Treaty article can be considered an environmental law under the NAAEC, the Secretariat distinguishes between domestic and international legal obligations and has previously determined that only international obligations that are considered part of a country's domestic law can be included within the definition of "environmental law" in Article 45(2)(a).¹⁴ In fact, in a previous determination involving this very article and a submission involving both Canada and the United States,¹⁵ the Secretariat determined that it could not conclude that this anti-pollution provision is a provision of a "statute or regulation" of either country within the meaning of NAAEC Article 45(2)(a).¹⁶
22. The Secretariat finds, consistent with its prior determination,¹⁷ that the United States has not adopted legislation that implements any provisions of the Boundary Water Treaty. US federal courts have concluded that the Boundary Waters Treaty "creates no enforcement mechanism for Articles III and IV which could conceivably create a private cause of action."¹⁸ Moreover, the Treaty provides its own enforcement mechanism, by allowing the government parties to refer questions unilaterally or jointly to the IJC under Article IX.¹⁹ Therefore, the Secretariat determines that the Boundary Waters Treaty provisions cited by the Submitter do not meet the definition of "environmental law" in NAAEC Article 45(2)(a) with respect to a submission against the United States.
23. In contrast, Canada has enacted the International Waters Treaty Act, 1910, (IBWTA) which provides legislative confirmation and sanction of the Treaty.²⁰ While the IBWTA clearly brings certain provisions of the Boundary Waters Treaty within Canadian domestic law, it

¹⁴ SEM-97-005 (*Biodiversity*), Determination under Article 14(1) (26 May 1998).

¹⁵ SEM-06-002 (*Devils Lake*).

¹⁶ SEM-06-002 (*Devils Lake*), Determination under Article 14(1) (21 August 2006), p. 5, available at <http://b.link/pdf67> <viewed on 6 August 2019>.

¹⁷ *Id.*

¹⁸ *Miller v. United States* (583 F.2d 857) 1978 U.S. App, footnote 6 at p.859-860

¹⁹ The Secretariat notes that with respect to Lake Memphremagog, both Canada and the United States have made a joint referral to the IJC in October 2017 in which they asked the IJC to "[i]n collaboration with relevant government agencies, academic institutions and other entities in the region, identify the range of nutrient loading issues that are of concern in the Lake Memphremagog basin and make recommendations on how current efforts can be strengthened, including consideration of management approaches being taken for Lake Champlain and Missisquoi Bay that may be applicable." The referral letter from Canada is available at [the IJC website at: <http://b.link/agog77>](http://b.link/agog77) (viewed on 6 August 2019). The referral letter from the United States is available at [IJC website at: <http://b.link/pfas15>](http://b.link/pfas15) (viewed on 6 August 2019). The Secretariat also notes that this study, about nutrient pollution, appears to be different in scope than the issue that concerns the Submitter, PFAS pollution. Finally, the Secretariat understands that this current study, to be prepared by the Memphremagog Study Advisory Group, is ongoing and is scheduled to be submitted to the IJC in January 2020. See, <http://b.link/study72> <viewed on 6 August 2019>.

²⁰ International Waters Boundary Treaty Act, 1985 R.S.C., 1985, c. I-17 at Article 3, which states that "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 so as to sanction, confer and impose the various rights, duties and disabilities intended by the Treaty to be conferred or imposed or to exist within Canada."

does not do so with respect to the anti-pollution provision of Article IV or the related referral authority of Article IX. Indeed, the Act concerns itself only with licenses, regulations or other matters related to obstructions or diversions that may affect the natural level or flow of boundary waters or the prohibition of environmental harm from the bulk removal of boundary waters. Further, with respect to Article VIII, the Secretariat finds that it relates only to “cases involving the use or obstruction or diversion of the waters” under Article IV and, therefore, it is not further considered by the Secretariat.

24. As such, the above referenced Treaty articles cannot be considered part of Canadian domestic law. Therefore, the Secretariat is unable to conclude that the anti-pollution provision in Article IV or the referral authority of Article IX meets the definition of “environmental law” in NAAEC Article 45(2)(a) with respect to a submission against Canada.
25. The Secretariat notes that although the submission’s assertions regarding the failure to effectively enforce are mainly based on the Boundary Waters Treaty, the submission does appear to assert that certain laws relating to the Vermont Land Use and Development Plan Law and the Waste Management Law have not been complied with. As noted above, however, at the time that the submission was filed with the Secretariat, the State of Vermont Environmental Commission had not yet rendered its decision regarding the granting of the permit for the landfill expansion, which it did on July 23, 2019. The Submitter sent to the Secretariat its press release noting this action. The press release maintains that although the expansion of the landfill has been granted, the Commission decided not to allow the treatment of leachate at the Newport waste treatment plant.²¹ Because this information affects a central aspect of the submission, the Secretariat considers it in this determination.²²
26. In light of the fact that Vermont’s final action on the permit did not occur until after the submission was filed, the Secretariat cannot make a proper 14(1) determination because the matter was ongoing at the time the submission was filed. The Submitter could therefore not properly assert which environmental laws were not being effectively enforced since Vermont had yet to complete its review of the project. Thus, the Secretariat determines that this aspect of the submission does not meet the opening paragraph of Article 14(1) with respect to asserting that a Party is failing to effectively enforce its environmental law.

²¹ Memphrémagog Conservation Inc., *Conventry landfill expansion green-lighted, but a victory for the lake with the interdiction on treating ‘garbage juice’ at the Newport waste treatment plant*, Press Release, July 23 2019. Available at: <http://www.memphremagog.org/FCKeditor/ckfinder/userfiles/files/Centre_de_documents/EN/2019-07-23-Act-250-Coventry-en.pdf> (viewed on 6 August 2019).

²² See, SEM-03-003 (*Lake Chapala II*) Factual Record (22 January 2013) §42, where the Secretariat notes that a proceeding is no longer pending, although the Secretariat did not receive formal notification from Mexico during the preparation of the Factual Record); SEM-05-002 (*Coronado Islands*) Secretariat Withdrawal of its 15(1) Notification (26 March 2007) where “[b]ecause authorization for the LNG terminal project has been rescinded in its entirety, and Semarnat has definitively closed the administrative file for the project, Mexico’s decision to approve the environmental impact statement for the project no longer has any legal effect.”); SEM-13-001 (*Tourism Development in the Gulf of California*) Notification pursuant to Article 15(1) (§10a (5 September 2014) where “Mexico notified the Secretariat that the project in question ‘does not exist either materially or legally’ due to the annulment of its environmental impact authorization. The Secretariat considers that since the environmental impact authorization has been annulled, the preparation of a factual record is not warranted, and the assertions with regard to this project are moot.”

27. In light of this determination, the Submitter is able to submit a revised submission under Guideline 6.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*²³ (see, paragraph 30). A revised submission should address the specific legal provisions related to the approval process of the final permit and how Vermont regulatory agencies may not have effectively enforced such provisions.²⁴
28. Finally, since the submission does not yet meet the opening paragraph of Article 14(1), the Secretariat will not determine if it meets the remaining admissibility criteria of Article 14(1)(a)-(f).

IV. DETERMINATION

29. Having conducted its NAAC Article 14(1) review of the submission SEM 19-003 (*Lake Memphremagog*), the Secretariat finds that it does not meet the requirements of that article for the reasons set out herein.
30. Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, will terminate the Article 14 process with respect to this submission, unless the Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) within 60 working days after receipt of this Determination, or by 12 November 2019.

Respectfully submitted,



Robert Moyer
Director, Submissions on Enforcement Matters and Legal Unit

cc: Isabelle Bérard, Alternate Representative, Canada
Chad McIntosh, Alternate Representative, United States
Rodolfo Godínez Rosales, Alternate Representative, Mexico
Richard A. Morgan, CEC Executive Director
Submitter

²³ Guidelines 6.2 “After receipt of such notification from the Secretariat, the Submitter will have 60 working days to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement and to the requirements set out in these guidelines”

²⁴ If the Submitter submits a revised submission, it may add any other assertions relating to a failure to effectively enforce an environmental law by either Party, which it thinks may be applicable.