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October 4, 1997
By Registered Mail

Victor Lichtinger, Executive Director
Commission for Environmental Cooperation
393, rue St. Jaques Oest, Bureau 200
Montreal, Quebec H2Y 1N9
CANADA

Dear Victor Lichtinger:

Enclosed is a copy of our submission on enforcement matters under Article 14 of the North American Agreement on Environmental Cooperation.

History of this submission:

On September 9, 1996, the Friends of the Oldman River (FOR) filed a submission (SEM-96-003) with the Secretariat. On October 1, 1996, the Secretariat determined that the submission did not meet the criteria of Article 14(1). On October 8, 1996, FOR filed an amended submission which satisfied the criteria of Article 14(1). The Secretariat then reviewed the submission under Article 14(2) and requested a response from the Government of Canada on November 8, 1996. On December 13, 1996, the Government of Canada advised the Secretariat that it would respond to the submission within 60 days of the receipt of the submission. On January 13, 1997, the Government of Canada filed its response with the Secretariat.

The Secretariat determined that the submission made in October 1996 did not warrant developing a factual record because similar legal issues were before both the Federal Court and the Secretariat. However, the Secretariat indicated in their 15(1) determination dated April 2, 1996 that the Submitter could file a new submission following resolution of the Originating Notice of Motion before the Federal Court of Canada.

The Friends of the West Country Association are abandoning their application against the Minister of Fisheries and Oceans and the Attorney General of Canada, application number T-2457-96. The reason that application is being abandoned is because the records finally obtained (in September, 1997) indicated that neither authorizations nor letters of advice had been issued for nineteen of the stream crossings. An environmental assessment was triggered under the Navigable Waters Protection Act for the two stream crossings (Prairie Creek and Ram River) for which letters of advise were issued.

Therefore, the matter that is the subject of this submission is no longer before the courts and we are asking you to proceed with your review of this submission and, hopefully, preparation of a factual record.

I have not included another copy of the supplemental information which was sent to you with our September and October 1996 submissions.

Please contact me if you require any additional information.

very sincerely,

The Friends of the Oldman River
North American Agreement on Environmental Cooperation
Article 14 Submission

Submission

The Friends of the Oldman River (FOR) is a non-profit society incorporated under the Societies Act of Alberta in September 1987. I, Martha Kostuch, am the Vice-President of FOR.

One of the objectives of FOR is to recognize the importance of the environment and to engage in activities related to the protection of the environment. We have focused on protection of rivers including fish habitat. FOR was actively involved in the development of the Canadian Environmental Assessment Act (CEAA) and we have utilized the Canadian Courts in an attempt to enforce compliance with the Fisheries Act (FA).

One of the objectives of the North American Agreement on Environmental Cooperation (NAAEC) (Article 1(g)) is to enhance compliance with, and enforcement of, environmental laws and regulations. Enforcement should be interpreted to include application of and compliance with procedural laws and regulations.

The Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and with CEAA. In particular the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the Fisheries Act, Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA. The primary purpose of the Sections of the Fisheries Act referred to is environmental protection, not resource management.

FOR's interests, protection of the environment and particularly protection of rivers and riparian ecosystems, are very much affected by how the Fisheries Act and CEAA are applied. These two Acts together are the most important legislation for the protection of fish habitat in Canada.

FOR's interests and the public's interests are being harmed by the Government of Canada's failure to apply, comply with and enforce the Fisheries Act and CEAA.

While there may be private remedies available in specific cases where fisheries habitat is damaged, letters of advise issued by the Department of Fisheries and Oceans frustrate prosecutions by individuals and interventions and stays by Attorney Generals make prosecutions by individuals difficult if not impossible.

Private remedies may also be available in specific cases to force the Federal Government to comply with CEAA but having to do so largely defeats the intent and purpose of the Act. Nor is it in the public interest to have to go to court to force the Government to do its job.

We are not aware of any private remedies to force the Government of Canada to comply with and enforce the Fisheries Act and CEAA in general.

Supporting Information

ENGO CONCERNS AND POLICY OPTIONS REGARDING THE ADMINISTRATION AND DELEGATION OF SUBSECTION 35(2) OF THE FISHERIES ACT, PROPOSED SUBSECTION 35(3) AND CONSEQUENCES FOR FEDERAL ENVIRONMENTAL ASSESSMENT, A Discussion Paper for the Department of Fisheries and Oceans prepared for the Fisheries Act Working Group of the Canadian Environmental Network by the Quebec Environmental Law Centre, January 1996

A succinct account of the facts taken from the above paper follows:

It is important to recognize that Sections 35 and 37 taken together and supported by appropriate regulations were to create a preventative and planning regime for works and undertakings with the potential to harm fish habitat. (p. ii)

Almost no Section 37(2) orders are issued and the number of Section 35(2) authorizations varies widely from province to province. Application of Section 35(2) is far from consistent. (p. iii)

In 1995, without any apparent legal foundation, the Department of Fisheries and Oceans (DFO) released their Directive on the Issuance of Subsection 35(2) Authorizations. This Directive is a clear attempt to avoid issuing 35(2) authorizations and to circumvent CEAA. (p. iv)

Letters of Advise are of questionable legality and invite the non-application of Sections 35 and 37. (p. vi)

The Directive invents a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool. The questions of significant environmental effects other than effects on fisheries and fish habitat and cumulative effects of projects are not considered. The question of whether effects on fisheries and fish habitat is acceptable and can be properly mitigated is prejudged without any public input. (p. vi)

There are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country. In fact, there has been a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces. And the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act.

Reviews by the Department of Fisheries and Oceans

228 projects were reviewed by the Department of Fisheries and Oceans in the Central and Arctic Region (the Prairie Provinces, Ontario and the Northwest Territories), as of June 21, 1996. For these projects, 78 Letters of Advise were issued. The other 150 projects listed were handled by providing advise to provincial or territorial agencies or to the permitting agency.

In 1995-96, DFO initiated 337 screenings and 2 comprehensive studies according to information provided by the Canadian Environmental Assessment Agency. Even if all of these assessments related to authorizations under section 35(2) of the Fisheries Act (which is very unlikely), it means that no more than 339 authorizations were issued in 1995-96 fiscal year compared to over 12,000 issued in 1990-91.

An Example

Following is a specific example of the failure to apply and comply with the Fisheries Act and to circumvent or avoid triggering CEAA. This Submission is related to the general failure of the Government of Canada to apply, comply with and enforce the Fisheries Act and the Canadian Environmental Assessment Act and not this particular case which is provided only as an example.

The following is a summary of the facts.

1. On June 7, 1995, I wrote the Minister of Fisheries and Oceans (hereafter referred to as the Minister) and notified him that Sunpine Forest Products was planning to build a road which would cross 21 streams. Information about the fish in some of the streams and the effects of the road on the streams was included in the letter. I asked the Minister to request information under Section 37 of the Fisheries Act and to determine whether the proposed project was likely to result in any alteration, disruption or destruction of fish habitat.
2. On July 26, 1995, the Minister wrote to me and indicated that he was preparing a request for relevant information regarding the proposal and that his staff would review the information to determine the potential impacts of the proposal on fisheries.

3. On July 31, 1995, I wrote the Minister asking him to inform Sunpine Forest Products of the requirement to apply for an authorization for works or undertakings affecting fish habitat and that to alter, disrupt or destroy fish habitat without an authorization contravenes Section 35 of the Fisheries Act . I also requested that he initiate an environmental assessment of the proposal since under Section 37 of the Fisheries Act he had requested information which would enable him to determine if an offense is likely to be committed.
4. On August 3, 1995, Garry Lindsey, Habitat Management Division of Fisheries and Oceans, wrote Dave Christiansen, Fisheries Management Division, Alberta Environmental Protection, and asked for information regarding the proposal.
5. On August 15, 1995, the Minister wrote a letter to me in which he indicated that they had requested information from both the proponent and Alberta Environmental Protection. He also indicated that they would be in a position to decide on the need for a Fisheries Act authorization and environmental assessment of the project under CEAA once they had reviewed the information.
6. On August 21, 1995, Dave Christiansen wrote a letter to Garry Lindsey advising him that due to the absence of an agreement between their two agencies on the administration of the Fisheries Act , the provincial Fisheries staff would not be providing the requested input and comments.
7. On September 10, 1995, I wrote the Minister stating that we believe that he has no choice but to trigger an environmental assessment of the proposed new road because both Sections 37(2) and 35(2) of the Fisheries Act are included in the CEAA Law List Regulations. I asked what information he had received regarding the proposal. And I asked him to refer the project to an environmental assessment review panel because of the significant environmental impacts and the high level of public concern.
8. On October 18, 1995, I had a phone conversation with Glen Hopky, Habitat Coordinator, DFO. During the conversation, Glen Hopky indicated that they are doing an internal review of the information and that they will only require a 35(2) authorization if they believe the impacts of the proposal on fisheries can not be fully mitigated. He also indicated that they would only trigger CEAA if his department determined that a 35(2) authorization was necessary even if a proponent makes an application for a 35(2) authorization. Furthermore, he claimed that they did not request the information under Section 37(1) nor were they doing their review or evaluation under Section 37(2).

9. On October 30, 1995, as a follow-up to our October 18, 1995 phone conversation, I wrote Glen Hopky and stated that it is my position that the request for information was made under Section 37(1) and that the evaluation is being conducted under Section 37(2). I also indicated that it is my position that the purpose of CEAA is to determine whether the impacts of a proposal are acceptable and whether they can be mitigated.

10. On November 23, 1995, the Minister wrote me and indicated that his department was reviewing the potential effects of the proposal on fish and fish habitat in accordance with the requirements of the Fisheries Act and on navigation under the Navigable Waters Protection Act (NWPA). He indicated that the review being done under the Fisheries Act would determine whether potential impacts can be mitigated, whether compensation is required and whether an environmental assessment under CEAA is required.

11. On December 15, 1995, Glen Hopky wrote me and indicated that DFO does not require authorizations. He indicated that before issuance of a Section 35(2) authorization, an assessment under CEAA would be required but they have yet to determine whether that applies to Sunpine's proposal. He also indicated that they did not refer to Section 37(1) in their letter requesting information from Sunpine and that he does not believe that their review is being done under Section 37(2).

12. On February 5, 1996, I wrote the new Minister and provided him with copies of the letters I had sent to the previous Minister and with information from provincial wildlife and fisheries biologists and foresters which indicated that the proposal will have significant impacts on the environment which can not be fully mitigated. In the letter, I again asked him to refer the proposal to an environmental assessment review panel.

13. On February 15, 1996, Glen Hopky wrote H. Ross, Canadian Coast Guard, in response to their referral and advised that DFO's Habitat Management Division (DFO-HMD) has determined that the proposed crossings over the Ram River and Prairie Creek have the potential to affect fish and fish habitat. He also stated that, at this time, DFO-HMD does not have a CEAA trigger as a responsible authority but that could change pending the provision of additional information they had requested from Sunpine. Coast Guard provided me with a copy of this letter in July, 1995.

14. On March 14, 1996, the Minister wrote to me indicating that under NWPA certain works [the two bridges over the Ram River and Prairie Creek] related to Sunpine's proposed road would trigger an environmental assessment pursuant to CEAA.

15. On May 20, 1996, I wrote Glen Hopky and asked him the status and results of their review under the Fisheries Act . I asked if they had determined whether an environmental assessment pursuant to CEAA is required for the proposed road including the 21 stream crossings.

16. On June 21, 1996, Glen Hopky wrote me and indicated that they would be providing their comments to the Canadian Coast Guard. He did not indicate the status of their review under the Fisheries Act nor did he indicate whether they had determined whether an environmental assessment would be triggered by the Fisheries Act.

17. On July 13, 1996, I wrote the Minister asking him the status of the review under the Fisheries Act and whether they had determined whether an environmental assessment would be triggered by the Fisheries Act.

18. On August 9, 1996, I wrote the Minister and asked him to refer the proposal to Minister Marchi for an environmental assessment panel review.

19. On August 19, 1996, I again wrote the Minister asking him the status of the review under the Fisheries Act and whether they had determined whether an environmental assessment would be triggered by the Fisheries Act. I indicated that if I did not hear from him by August 26, 1996, we would take appropriate action.

20. As of the date of this submission, I have not received a response to my July 13, August 9 or August 19, 1996 letters to the Minister.

21. On August 22, 1996, I met with RCMP Sargent D.G. Lyons. I asked Sargent Lyons on behalf of the RCMP to take the necessary actions to prevent Sunpine from committing an offense under the Fisheries Act.

22. On August 28, 1996, RCMP Sargent Lyons called me. Sargent Lyons said that there may be a problem with how the Department of Fisheries and Oceans has interpreted the Fisheries Act. He indicated that the RCMP does not plan to prosecute Sunpine because a successful prosecution is highly unlikely because Sunpine has attempted to obey the law.

23. On November 7, 1996, the Friends of the West Country Association filed an Originating Notice of Motion against the Minister of Fisheries and Oceans and the Attorney General of Canada.

24. On May 7, 1997, the Honourable Mr. Justice Muldoon stated in an interim order on this motion:

"Apparently, it is the respondent's submission that a policy which the DFO has developed internally without any explicit statutory foundation to do so will in some way relieve the Minister of statutory obligations or limit the obligations of the Minister vis a vis subsections 35(2) and 37(2) of the Fisheries Act and, in turn, paragraph 5(1)(d) of the CEEA. It also appears that a further "benefit" which derives from this informal approach to the statutory mandate and obligations placed upon the DFO by the Fisheries Act and the CEEA is that the DFO does not need to disclose materials in relation to a judicial review application related to the letters of advice since, in accordance with the policy, the letters of advice (although they do inform a party that subsection 35(1) of the Fisheries Act will apply to them or not) do not constitute a decision within the meaning of rule 1612. This is a transparent bureaucratic attempt at sheer evasion of binding statutory imperatives. It is neither cute nor smart, and this Court is not duped by it. By making "policy" not contemplated by the statutes, the DFO types simply cannot immunize the Minister and DFO from judicial review, nor circumvent the environmental laws which they decline to obey."(Underlining added.)

A copy of Justice Muldoon's Order is enclosed with this submission.

25. On or about October 2, 1997, the Friends of the West Country Association abandoned their application against the Minister of Fisheries and Oceans and the Attorney General of Canada, application number T-2457-96.

Summary of the Facts regarding communication of the general matter to the relevant authorities

26. On October 3, 1994, Steve Burgess, Chief, Policy and Programs, sent me a letter responding to the responses to our questionnaire. In it he indicated that the Interim Directive was on hold until there had been further discussions with stakeholders.

27. On December 4, 1994, I wrote the Minister of Fisheries and Oceans and asked him to initiate an environmental assessment of his department's Strategic Action Plan.

28. On January 3, 1995, the Minister wrote to me indicating that his responsibility is to manage the fisheries and to conserve and protect its habitat. He did not address my request for an environmental assessment of his department's Strategic Action Plan.

29. On May 26, 1995, members of the CEN Fisheries Working Group, met with the Assistant Deputy Minister of Science, Dr. L.S. Parsons, at which time we put forward our concerns with the Department's plan to transfer freshwater habitat management authority to inland provinces. We also raised concerns about the Interim Directive, the failure to require 35(2) authorizations and the circumvention of the CEAA.

30. On June 3, 1995, I wrote to the Minister and indicated that we are opposed to the delegation of responsibility for fisheries and fish habitat to the provinces and that the federal government has a constitutional responsibility for fisheries and fish habitat that must not be passed off to the provinces.

31. On June 23, 1995, the Minister wrote to me and indicated that it is not the government's intention to undermine the effectiveness of the Fisheries Act and the Canadian Environmental Assessment Act.

32. In January 1996, we submitted our discussion paper, ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the Fisheries Act, Proposed Subsection 35(3) and Consequences for Federal Environmental Assessment, to the Department of Fisheries and Oceans.

33. On April 11, 1996, I wrote a letter to the Minister requesting a meeting.

34. On April 11, 1996, the Minister wrote to me and indicated that he would be unable to meet with us but that he wished to have us meet with his Deputy Minister, William Rowat.

35. On April 12, 1996, the Deputy Minister wrote to me regarding meeting dates and times.

36. On April 22, 1996, representatives of the Canadian Environmental Network Fisheries Working Group met with the Deputy Minister, William Rowat at which time we put forward our concerns with the Department's plan to transfer freshwater habitat management authority to inland provinces. We also raised concerns about the Interim Directive, the failure to require 35(2) authorizations and the circumvention of the CEAA.

37. On April 29, 1996, I wrote to the Deputy Minister and indicated that we are opposed to delegation of 35(2), creation of a new Section 35(3) and removal of 35(2) from the CEAA Law List.

38. On May 22, 1996, the Deputy Minister sent me their response to our Discussion Paper.

39. On June 11, 1996, I wrote to the Deputy Minister and indicated that we were not satisfied with their response and urged him to reconsider our recommendations.

40. On June 27, 1996, the Deputy Minister wrote to me elaborating on their response to our recommendations.

41. On July 2, 1996, I wrote the Deputy Minister requesting a more detailed response to our recommendations.

42. On July 11, 1996, the Minister wrote to me and indicated that his Deputy was in the process of providing us a response to our concerns regarding DFO's proposal to delegate freshwater fish habitat management responsibilities to the provinces.

43. On September 9, 1996, I faxed a copy of our original submission to the Commission on Environmental Cooperation to the Hon. Sergio Marchi, the Minister of the Environment and the Minister responsible for the Canadian Environmental Assessment Act.

44. On October 4, 1996, I sent copies of our original submission to the Hon. Sergio Marchi, Minister of the Environment, and to the Hon. Fred Mifflin, the Minister of Fisheries and Oceans.