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

Submitter(s): Names withheld pursuant to Article 11(8)(a)
Concerned Party: Canada
Date received: 12 April 2001
Date of this determination: 24 April 2001
Submission I.D.: SEM-01-002

I - INTRODUCTION

On April 12, 2001, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“*NAAEC*” or “*Agreement*”). Under Article 14 of the *NAAEC*, the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party to the *Agreement* is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to meet its obligations under Article 2(3) of the *NAAEC*, which provides:

Each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a Pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.

Specifically, the Submitters allege that Canada "has failed to issue a prohibitory and/or injunctive order halting the export to the United States, by AAA Packaging, of products containing the banned hazardous substance [isobutyl nitrite]"¹ The Submitters claim that under United States law, isobutyl nitrite is a regulated hazardous substance and its importation is banned. The only information provided in support of the submission is a series of undated Vancouver Sun articles, which the Submitters claim were published on or about January 2001.

III - ANALYSIS

Article 14 of the *NAAEC* directs the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the *NAAEC* is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,² Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the *NAAEC*.³

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." Following this first sentence, Article 14(1) lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁴

¹ Submission, at 1.

² See e.g., SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (May 26, 1998).

³ See SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (May 26, 1998).

⁴ Article 14(1)(a)-(f).

This submission contains two plain defects, either one of which is alone sufficient to warrant dismissal at this stage. First, the submission does not meet all of the criteria inherent in the first sentence of Article 14(1). Although the submission appears to meet the requirement that it be filed by a "non-governmental organization or person"⁵ and the temporal requirement inherent in the phrase "is failing," it does not meet the requirement that it focus on an asserted failure to enforce a Party's environmental laws.⁶

Article 45(2) of the *NAAEC* prescribes, among other criteria, that for purposes of Article 14 an "environmental law" is "any statute or regulation of a Party, or provision thereof." The sole provision that the Submitters claim Canada is not enforcing is *NAAEC* Article 2(3).⁷ The Secretariat has dismissed previous allegations of ineffective enforcement of a Party's international obligations on the ground that the international obligations at issue, including in one case obligations set forth in the *NAAEC*, had not been imported into a Party's domestic law and therefore did not meet the Article 45(2) definition of "environmental law."⁸ As the Secretariat noted in regard to the B.C. Logging submission, SEM-00-004, Canada does not appear to have taken action to incorporate the *NAAEC* into its domestic law, as distinguished from its purely international obligations.⁹ Further, the Secretariat concluded with regard to the B.C. Logging submission that, in general, the remedy for a *NAAEC* Party's alleged failure to fulfill any of its obligations under *NAAEC* Articles 6 and 7 lies with the other *NAAEC* Parties.¹⁰ The same holds true for any obligations contained in *NAAEC* Article 2(3). Accordingly, although the Secretariat is not excluding the possibility that future submissions might raise questions concerning a Party's international obligations that would meet the criteria of Article 14(1), the Submitters here have not alleged that Canada is failing to enforce its environmental law within the meaning of Article 14.

⁵ Article 45(1) defines a "non-governmental organization" to include any non-profit or public interest organization or association which is neither affiliated with, nor under the direction of, a government. There is no indication from the submission that either Submitter is affiliated with, or under the direction of, a government.

⁶ Cf. SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) (14 December 1998).

⁷ The Submitters assert that in the United States, isobutyl nitrite is regulated and its importation banned under provisions of the Consumer Product Safety Act, citing 15 U.S.C. §§ 2051-2084. However, these provisions of United States law clearly are not environmental laws of Canada.

⁸ SEM-00-04 (B.C. Logging), Determination pursuant to Articles 14(1) and 14(2) (8 May 2000); SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (4 January 1999); SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (26 May 1998). While the Secretariat is not bound by principles of *stare decisis* to follow these determinations, relying on them helps to ensure consistency in the Secretariat's determinations under Articles 14 and 15.

⁹ SEM-00-04 (B.C. Logging), Determination under Articles 14(1) and 14(2) (8 May 2000).

¹⁰ SEM-00-04 (B.C. Logging), Determination under Articles 14(1) and 14(2) (8 May 2000).

The second fatal defect in the submission is that, while it appears to meet some of the criteria contained in Article 14(1)(a)-(f), it plainly does not meet the requirements of Article 14(1)(e).¹¹ 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 attached to the submission reporting that Health Canada is investigating the Canadian company that allegedly produces and markets isobutyl nitrite to customers in the United States and elsewhere. However, nothing in the submission indicates that the specific matter addressed in the submission -- Canada's enforcement of *NAAEC* Article 2(3) -- has been communicated in writing by the Submitters or others to the relevant Canadian authorities, and no copies of relevant correspondence is attached to the submission.¹² Nor does the submission indicate or attach copies of the response, if any, of the relevant Canadian authorities.

IV - CONCLUSION

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 30 days after receipt of this Notification.¹³

Yours truly,

(original signed)

per: Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

c.c: Dr. Alan Hecht, US-EPA
Ms. Norine Smith, Environment Canada
Dra. Isabel Studer, SEMARNAT
Ms. Janine Ferretti, Executive Director

¹¹ Because either deficiency discussed in this determination clearly warrants dismissal, there is no need to address all of the criteria in Article 14(1)(a)-(f).

¹² See Guideline 5.5.

¹³ See Guideline 6.2.