

**Martha Kostuch, Vice-President  
The Friends of the Oldman River  
Box 1288  
Rocky Mountain House  
Alberta TOM ITO  
CANADA  
Phone: 403-845-4667  
Fax: 403-845-5377**

**September 9, 1996**

**Commission for Environmental Cooperation  
393, rue St. Jaques Oest, Bureau 200  
Montreal, Quebec H2Y IN9  
CANADA**

**Dear Secretariat:**

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

**Please contact me if you require any additional information.**

**very sincerely,  
(signature)**

**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(l)(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**

More information about the failure to apply, comply with and enforce these Acts are included in the supporting information which is enclosed with this submission including:

**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. A list of the projects they were issued for is included in the supplemental information. The other 150 projects listed were handled by providing advise to provincial or territorial agencies or to the permitting agency.

### **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. The letters referred to are included in the supplemental information.

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 Linsey, 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.

**Written Submission**  
**by**  
**Martha Kostuch, Vice-President**  
**The Friends of the Oldman River**  
**to the**  
**Commission for Environmental Cooperation**  
**August 1, 1996**

### **Deregulation**

The international competitive pressures unleashed by NAFTA have added pressure to weaken environmental laws.

The Government of Canada and some of the provincial governments are in the process of deregulating and delegating responsibilities for administering and enforcing laws to other levels of government or to the private sector.

The Alberta *Environmental Protection and Enhancement Act (EPEA)* prevents the public from being involved in decision making related to projects. Only people who are directly affected have the right to participate in decision making. Earlier this year, *EPEA* was amended to prevent any judicial reviews of decisions of the Environmental Appeal Board or the Minister of the Environment.

The Ontario Government is also pursuing a deregulation agenda. It currently is considering reducing building standards so they are less energy efficient and Bill 20, the Land Use Planning and Protection Act, reduced protection for naturally significant features and prime agricultural land.

The damage to the environment caused by Sunpine Forest Products provides a good example of the problems with deregulation. Ground rules developed jointly by the Government of Alberta and Sunpine are not being followed and the Government is not enforcing them. The environment including fish, wildlife and the watershed are all suffering as a result.

### **The Federal Fisheries Act and Environmental Assessment**

The Government of Canada is proposing to delegate responsibility for freshwater fisheries to the provinces. That would be a big mistake. The federal government has constitutional responsibility for fisheries and fish habitat and they should take that responsibility seriously, not try to down load it to the provinces.

The Federal Government is not doing a good job of protecting fish habitat because they are not applying the *Fisheries Act* as it was intended. Instead, the federal government is doing everything possible to avoid the use of the Act including giving "Letters of Advise" to proponents telling them what they should do so they supposedly do not have to get an authorization.



Industries and some government departments freely admit to doing everything possible to avoid triggering the *Canadian Environmental Assessment Act* (CEAA).

The purpose of CEAA is to ensure that environmental effects of projects receive careful consideration; to promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy; to ensure that projects do not cause significant adverse environmental effects; and to ensure that there is an opportunity for public participation. The Government of Canada should be doing everything possible to ensure the application of CEAA, not to circumvent it.

For more information on this topic, see: ***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 prepared for the Canadian Environmental Network Fisheries Act Working Group by the Quebec Environmental Law Centre.

### **Pollution Prevention**

Steps must be taken to address the causes of pollution at its source. The complex nature of pollution and the interconnections between the sources, effects, and issues can only be dealt with effectively by applying cross-cutting solutions which seek to address the causes and not just the effects.

For air pollution, one of the main underlying sources of the problem is the burning of fossil fuels.

Efforts to prevent pollution are far more effective than using technology to remove it at the end of the pipe. New fuels, energy efficiency, renewable energy sources, new, less energy intensive processes and reduced consumption will all help in the efforts to prevent air pollution. For more information on this topic, see: ***A Clean Air Agenda for Canada***", prepared for the Canadian Environmental Network Atmospheric Caucus by Dan Smith. This agenda could easily be expanded to include all of North America.