



---

## **Commission for Environmental Cooperation - Secretariat**

### **Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation**

**Submission ID:** SEM-97-004

**Submitter(s) :** Canadian Environmental Defence Fund

**Concerned Party:** Canada

---

## **I- PROCEDURAL HISTORY**

On 26 May 1997, the Submitter filed with the Secretariat a submission on enforcement matters<sup>1</sup> ("Submission") under Article 14 of the North American Agreement on Environmental Cooperation ("Agreement").

The Secretariat reviews below the Submission in accordance with Article 14(1) of the Agreement.

## **II- NAAEC ARTICLES 14 AND 15**

Article 14 of the Agreement allows the Secretariat to 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. The Secretariat may consider any submission that meets the criteria set out in Article 14(1). Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission (Article 14(2)). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared in accordance with Article 15(1). The Council, comprised of the Ministers of the Environment (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission (Article 15(2)). Final factual records are made publicly available upon a 2/3 vote of the Council (Article 15(7)).

## **III- SUMMARY OF THE SUBMISSION**

The Submitter alleges:

that the Canadian government has failed to enforce its law requiring environmental assessment of federal initiatives, policies and programs. In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy (TAGS), as required under Canadian law. By its failure to do so, it is alleged the Canadian government has jeopardized the future of Canada's east coast fisheries (Submission at p. 1).

According to the Submitter, the Canadian government introduced TAGS in May 1994 (Submission at p. 8).

The Submitter further alleges that:

At the time of TAGS, federal law for environment assessment was set out in EARPGO [*Environmental Assessment and Review Process Guidelines Order*]. Therefore, TAGS

---

<sup>1</sup> Submission No. SEM-97-004.

was subject to EARPGO's requirements. There was no discretion to legally avoid an environmental assessment (Submission at p. 3).

The Submitter continues:

Instead of following binding law, the federal government claims it assessed TAGS according to a vague, non-binding cabinet policy [*Federal Environmental Assessment Process for Proposals (EAPP)* (...)]. This policy sets out a different environmental assessment process than the EARPGO, making no provision, for example, for independent public review of policies or programs. The government purports to have complied with this policy through carrying out a cursory evaluation of TAGS and its potential environmental effects. However, at the time of this assessment and the introduction of TAGS, EARPGO was in force. Therefore, its mandatory provisions override the discretionary provisions of the cabinet policy (Submission at p. 4).

The Submitter is therefore "seeking a declaration by the Commission [for] Environmental Cooperation (CEC) that Canada did not apply EARPGO to the TAGS cabinet decision" (Submission at p. 3).

The Submitter concludes:

For the effective, environmentally and socially sound management of Canada's fisheries, and to guarantee that the fishery will become a sustainable long-term resource, the Canadian government must conduct a comprehensive environmental assessment of fisheries policies (Submission at p. 10).

## IV- ANALYSIS

### A. INTERPRETATION

Article 14(1) of the NAAEC establishes the initial criteria for processing a submission. The introduction of Article 14(1) reads: "the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law".

Article 14(1) requires that a submission (i) be filed by a non-governmental organization or person asserting that (ii) a Party to the Agreement (iii) *is failing* to effectively enforce (iv) its environmental law. The italicized language imposes a temporal constraint on the filing of a submission.

In assessing whether or not a submission relates to a failure to effectively enforce environmental law, the Secretariat must evaluate the nature of the alleged failure in its temporal context.

## B. APPLICATION

In this instance, the Submitter alleges that the Government of Canada failed to effectively enforce its environmental law when TAGS was introduced without an environmental assessment under the EARPGO.

The environmental assessment process is a tool to ensure that timely and accurate information on potential environmental impacts of proposed projects is available prior to any irrevocable decision being taken<sup>2</sup>. The scope of EARPGO, as defined in section 3, is clearly to that effect:

The Process shall be a self assessment process under which the initiating department shall, *as early in the planning process as possible and before irrevocable decisions are taken*, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

Likewise, the Submitter envisages the purpose of environmental assessment (EA) as:

... essentially a tool of precaution. EA attempts to predict effects so as to prevent significant or unacceptable events from occurring.” (Submission at. p. 9)

Under the circumstances, the submission does not appear to have raised the issue of non-enforcement in a timely manner in light of the temporal requirement of Article 14(1) established by the use of the words “is failing”. The significant delay between the time of the alleged failure to enforce and the filing of the submission contravenes the purpose and intent of Article 14(1) in light of the circumstances described below.

The submission, filed three years after the decision on, and the entry into force of, the government’s strategy, provides no indication that the Party’s failure is continuing or recent. The Secretariat is not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the government’s alleged failure to enforce. In addition, this passage of time makes it difficult or impossible to assess the effectiveness of enforcement in the earlier temporal context.

Moreover, the law has been superseded and is no longer in force. The Submitter has not demonstrated that the transitional provisions of the new legislation expressly preserved the enforcement of the former law for specific proposed projects nor that TAGS belongs in such a category.

Finally, nothing in the submission indicates that the submitters have been diligently pursuing

---

<sup>2</sup> “The purpose of environmental impact assessments is to ensure that environmental considerations are built in the decision-making process at an early stage. (...) environmental assessment legislation exists to ensure that major undertakings are planned for and carried out in an environmentally responsible manner” (in *Miller Thompson’s Environmental Law Dictionary*, Carswell, Toronto, 1995, at pp. E-51–E-52).

local remedies between the time of the government's adoption and implementation of TAGS and the date the submission was filed.

For these reasons, the Secretariat determines that the submission does not meet the temporal requirement contained in the introductory paragraph of Article 14(1), i.e. - that the Party *is failing* to effectively enforce its environmental law. Accordingly, the Secretariat will not further consider the submission.

In accordance with Section 6.2 of the *Guidelines on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* ("Guidelines"), the Submitter has 30 days from the receipt of this determination 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 the Guidelines.

Montreal, this 25th day of August 1997.

**Commission for Environmental Cooperation - Secretariat**

(original signed)  
per: Victor Lichtinger  
Executive Director