

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 97-006 (Oldman River II) January 2002

I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (the NAAEC) by Canada, Mexico and the United States (together, the Parties). The CEC operates through three organs: a Council, made up of a top-level environmental official from each of the Parties; a Joint Public Advisory Committee (JPAC), comprised of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows any non-governmental organization or person in North America to file a submission with the Secretariat asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. This initiates a process of review of the submission that can result in the Council instructing the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by the JPAC or by interested non-governmental organizations or persons; or developed by the Secretariat or independent experts.

On 16 November 2001, the Council issued Council Resolution 01-08, unanimously instructing the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, "on whether Canada, in the Sunpine Forest Products Access Road case, is failing to effectively 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 Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the Oldman River II submission, SEM-97-006. The following sections provide background on the submission and describe the kind of information requested.

II. The Oldman River II submission

On 4 October 1997, The Friends of the Oldman River (Submitters) filed a submission with the CEC asserting that 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 CEEA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEEA.”¹ They assert that in practice, almost no section 37(2) orders are issued and the number of section 35(2) authorizations varies widely from province to province and has decreased significantly in recent years. They assert that the *Directive on the Issuance of Subsection 35(2) Authorizations (Directive)*, which provides for the issuance of letters of advice in certain cases, invents a decision-making process which frustrates the intention of Parliament and usurps the role of CEEA as a planning and decision-making tool and as a mechanism for public participation. The Submitters also assert that there are very few prosecutions for violations of the habitat protection provisions of the *Fisheries Act* and they claim that Canada has abdicated its legal responsibilities to the provinces, which, they claim, have not done a good job of securing compliance with or enforcing the *Fisheries Act*.

The Submitters refer to the Sunpine Forest Products Access Road case (Sunpine Project) as an example of Canada’s alleged failure to enforce the *Fisheries Act* and CEEA. The Sunpine Project involved the construction, by Sunpine Forest Products Ltd. (Sunpine), of a 40 kilometer road to access forest areas on the eastern slope of the Rocky Mountains, west of the town of Rocky Mountain House in Alberta.

The Submitters assert that they repeatedly urged Canada to initiate an environmental assessment of the Sunpine Project under CEEA on the basis that the Project triggered CEEA twice: first, it would result in the harmful alteration, disruption or destruction of fish habitat, thus requiring an authorization pursuant to section 35(2) of the *Fisheries Act*; and second, Canada had requested information from Sunpine and was evaluating it as provided by section 37(2) of the *Fisheries Act*. The Submitters assert that at the time of filing the submission, they had not received a response from Canada regarding whether an environmental assessment would be triggered by the Sunpine Project.

In its response dated 13 July 1998, Canada contends that sections 35(2) and 37 of the *Fisheries Act* are not invoked if there is no harmful alteration, disruption or destruction of fish habitat. With regard to the Sunpine Project, Canada asserts that the Department of Fisheries and Oceans (DFO) became aware of the Project and that it included 21 river crossings. DFO concluded that 8 such crossings had potential implications for fish habitat and subsequently concluded that 6 of these had no potential to damage fish habitat

¹ Submission at 1.

if constructed as proposed by Sunpine. For the remaining 2 crossings, DFO wrote letters of advice.

III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of 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 in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively 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 in the context of the Sunpine Project.

IV. Examples of relevant information

Examples of relevant information include the following:

1. Technical information regarding the Sunpine Project, such as maps, technical drawings, and engineering studies, including any information regarding:
 - design options;
 - siting options; or
 - alternatives to the Project.
2. Information regarding the potential of the Sunpine Project to result in the harmful alteration, disruption or destruction of fish habitat, including:
 - environmental impact studies;
 - evaluations by government professionals;
 - concerns of the public.
3. Information about measures proposed, considered or adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project, including information about any public consultations.
4. Information about the effectiveness of measures adopted to prevent harmful alteration, disruption or destruction of fish habitat in connection with the Sunpine Project.

5. Information on local, provincial or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, 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 in connection with the Sunpine Project.
6. Information on federal, provincial or local enforcement- or compliance-related staff or resources available for enforcing or ensuring compliance with, 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 in connection with the Sunpine Project.
7. Information on Canada's or Alberta's efforts to enforce or ensure compliance with 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 in connection with the Sunpine Project, including for example:
 - efforts to prevent violations, such as by placing conditions on or requiring modification of the Sunpine Project or providing technical assistance;
 - monitoring or inspection activity;
 - warnings, orders, charges or other enforcement action issued to Sunpine;
 - actions to remedy any impacts to fish habitat caused by the Sunpine Project; or
 - coordination between different levels of government on enforcement and compliance assurance.
8. Information on the effectiveness of Canada's or Alberta's efforts to enforce or ensure compliance with 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 in connection with the Sunpine Project, for example their effectiveness in:
 - preventing violations of those provisions;or
 - remedying any violations that occurred.
9. Information on barriers or obstacles to enforcing or ensuring compliance with 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 in connection with the Sunpine Project.
10. Any other technical, scientific or other information that could be relevant.

V. Additional background information

The submission, Canada's response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

VI. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2002, to the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393 St-Jacques St. West
Suite 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

* Please reference the submission number (SEM-97-006 / Oldman River II) in all correspondence.

For any questions, please send an e-mail to the attention of Katia Opalka, at info@ccentl.org.