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

Submitters: The Friends of the Oldman River
Party: Canada
Date received: 10 September 2004
**Date of this
determination:** 14 October 2004
Submission I.D.: SEM-04-004 / Oldman River III

I. INTRODUCTION

On 10 September 2004, the Submitter listed above 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 nongovernmental 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 Submitter asserts that Canada is failing to effectively enforce sections 35, 37 and 40 of the federal *Fisheries Act* and section 5(1)(d) of the *Canadian Environmental Protection Act* (CEAA), by “avoiding triggering CEAA by providing advice outside of the *Fisheries Act*.” The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1). The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE SUBMISSION

The submission is a follow-up to the Submitter’s 1997 submission, Oldman River II (SEM-97-006), for which the CEC published a factual record in August 2003. The Submitter states that “the purpose of the submission is to address the general failure of the Government of Canada to comply with and enforce their environmental laws.”¹ The Submitter asserts that between 1 April 2001 and 31 March 2002, the Department of Fisheries and Oceans (DFO) provided to project proponents 6,922 letters of advice that

¹ Submission at 1.

the Submitter contends were unlawful because they were not authorized under section 35 of the Fisheries Act and because no environmental assessment was conducted under section 5 of CEAA before the letters were issued. The Submitter contends:

Where a project is brought to the attention of the Minister of Fisheries and Oceans Canada (DFO) such that the project as proposed would likely result in the harmful alteration, disruption or destruction of fish habitat (HADD), the legislation requires that the project be assessed under CEAA. This is the case even if imposition of mitigation and follow-up conditions results in no HADD.²

The Submitter asserts that the goals and purposes of the CEAA are not achieved when DFO issues advice without conducting an environmental assessment. According to the Submitter, these goals and purposes include promoting economic development that conserves and enhances environmental quality; integrating environmental factors into planning and decision making processes in a manner that promotes sustainable development; facilitating public participation in the environmental assessment of projects and providing access to information on which those environmental assessments are based; and ensuring that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them.³

The Submitter also asserts that the 1998 “Decision Framework for the Determination and Authorization of Harmful Alteration, Disruption or Destruction of Fish Habitat” is not authorized by or compatible with the *Fisheries Act* or CEAA.

The Submitter states its belief “that preparing a Factual Record in response to this submission will ‘enhance compliance with, and enforcement of, environmental laws and regulations’” consistent with NAAEC Article 1(g).⁴

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental 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,⁵ Article 14(1) is not intended to be an insurmountable procedural screening device.

² Submission at 2.

³ Submission at 2.

⁴ Submission at 1.

⁵ See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

A. Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]” The submission meets these requirements. First, the Submitter is a nongovernmental organization as defined in Article 45(1) of the NAAEC. Second, the submission asserts that a Party, Canada, is failing to effectively enforce provisions of the *Fisheries Act* and CEAA. Third, sections 35, 37 and 40 of the *Fisheries Act*⁶ and section 5(1)(d) of CEAA are clearly environmental law within the meaning of NAAEC Article 45(2) and the submission alleges an ongoing failure to effectively enforce these provisions of environmental law. Last, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.

Article 14(1) then 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

⁶ Section 35 of the *Fisheries Act* states:

“(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat;

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister [of Fisheries and Oceans] or under regulations made by the Governor in Council under this Act.”

Section 37 of the *Fisheries Act* establishes the authority of the Minister of Fisheries and Oceans to gather information from project proponents regarding actual or proposed works or undertakings that results or are likely to result in the alteration, disruption or destruction of fish habitat; to issue orders requiring modifications or additions to the project or restricting projects that do or are likely to result in an offense under s. 40(1) or (2) of the *Fisheries Act*.

Section 40 of the *Fisheries Act* establishes offenses for violating the habitat and pollution prevention provisions of the *Fisheries Act*.

Section 5(1)(d) of CEAA provides that “[a]n environmental assessment of a project is required before a federal authority ... [.] under a provision prescribed pursuant to [CEAAA] paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.”

- (f) is filed by a person or organization residing or established in the territory of a Party.⁷

The submission meets the criteria in Article 14(1)(a), (b), (d) and (f). First, the submission is in English, a language designated by Canada.⁸ Second, it clearly identifies the organizations making the submission.⁹ Third, the submission appears to be aimed at promoting enforcement rather than at harassing industry.¹⁰ It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, the Submitters are not competitors standing to benefit economically from the submission, and the submission does not appear frivolous.¹¹ Finally, the Submitter is established in Canada.¹²

The submission does not provide sufficient information to allow the Secretariat to review it, and therefore fails to satisfy Article 14(1)(c).¹³ In essence, the submission puts forward a legal argument: that, as a general matter, all of the letters of advice amount to action that enabled projects to be carried out and are not authorized under s. 35 of the *Fisheries Act*, and therefore issuing them without conducting an environmental assessment violates ss. 35, 37 and 40 of the *Fisheries Act* and s. 5(d)(1) of CEAA.¹⁴ However, the submission is less than three pages in length and includes no appendices. It refers to 12,427 referrals in which DFO was allegedly involved, and to 6,922 letters of advice that DFO allegedly provided to project proponents between 1 April 2001 and 31 March 2002. None of these letters of advice or the projects with which they are associated are described in any manner, and none of the letters are attached.

Without additional information that would allow the Secretariat to discern more clearly the context in which the Submitter seeks to have factual information presented in a factual record, the Secretariat is not able to review the submission. In addition, the submission lacks information that would allow a consideration, under Article 14(2)(c), of whether private remedies available under the Party's law have been pursued in connection with the letters of advice referenced in the submission..

The submission also fails to meet the requirement that it indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicate the Party's response.¹⁵ In the Oldman River II (SEM-97-006), the Submitter made essentially the same assertions as are presented here, and Canada responded to those assertions in its

⁷Article 14(1)(a)-(f).

⁸Article 14(1)(a), Guideline 3.2; submission at 12.

⁹Article 14(1)(b); submission at i-ii.

¹⁰Article 14(1)(d).

¹¹See Guideline 5.4.

¹²Submission at i-ii; Article 14(1)(f).

¹³Article 14(1)(c), Guideline 5.2, 5.3.

¹⁴Information gathered for the Oldman River II factual record indicated that DFO interprets the Fisheries Act and CEAA as requiring an environmental assessment of a project only if DFO determines that a project *will* harmfully alter, disrupt or destroy fish habitat. If DFO determines that proposed mitigation measures will avoid harm to fish habitat, the project is not assessed under CEAA, notwithstanding the fact that CEAA provides for an evaluation of proposed mitigation measures as part of the environmental assessment process. See SEM-97-006 (Oldman River II), Factual Record at 35-52.

¹⁵Article 14(1)(e); Guideline 5.5.

response to the submission. However, the submission does not indicate that the matter of the 6,922 letters of advice referenced in the submission, all of which were provided long after the Oldman River II submission was filed in 1997, has been communicated to the relevant Canadian authorities or indicate those authorities' response, if any.

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that although submission SEM-04-004 (Oldman River III) meets some of the requirements of Article 14(1), it does not meet all of them, in particular Articles 14(1)(c) and (e). Pursuant to Guideline 6.2 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat will terminate the Article 14 process with respect to this submission, unless the Submitter provides the Secretariat with a submission that conforms to the criteria of Article 14(1) and the guidelines within 30 days after receipt of this Notification.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

Geoffrey Garver

Director

Submissions on Enforcement Matters Unit

c.c.: Norine Smith, Environment Canada
Judith E. Ayres, US-EPA
Jose Manuel Bulas, SEMARNAT
William V. Kennedy, CEC Executive Director
Submitter