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**Secretariat of the Commission for Environmental Cooperation**

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

**Submitters:** St. Clair Channelkeeper  
Environmental Law Society of Wayne State University Law School  
Brendan Frey  
Noah Hall  
Doug Martz  
Andrea Montbriand  
Oday Salim

**Parties:** Canada

**Date received:** 25 July 2007

**Date of this  
determination:** 1 August 2007

**Submission I.D.:** SEM-07-004 (St. Clair River)

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**I. INTRODUCTION**

On 25 July 2007, the Submitters 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). If the Secretariat determines that a submission meets those requirements, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that Canada is failing to effectively enforce Section 3 of the federal International Boundary Waters Treaty Act<sup>1</sup> (“IBWTA”) and not meeting its obligations under Article IV of the 1909 Treaty Relating to Boundary Waters between Canada and the United States (the “Treaty” or “BWT”) by allowing polluted water to flow across the border, to the injury of health and property in the United States. According to the Submitters, Canada is failing to prevent spills of sewage and chemicals to the St. Clair River in Sarnia, Ontario, notify downstream areas when spills occur, and match US efforts to contain damage from spills through early-warning technology.

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<sup>1</sup> R.S.C. 1985, c. I-17.

The Secretariat has determined that the submission does not satisfy Article 14(1) of the NAAEC and provides the reasons for this determination below.

## II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce Section 3 of the IBWTA and Article IV of the BWT by allowing frequent and substantial quantities of pollutants to flow from petrochemical facilities in Sarnia, Ontario into the St. Clair River and Lake St. Clair, causing injury to health and property of the United States and its citizens.<sup>2</sup>

The submission contains information regarding chemical and sewage spills to the St. Clair River that occurred in Canada and which the Submitters claim polluted US waters.<sup>3</sup> According to the Submitters, spills originating in Canada harm water quality and the surrounding environment, and spilled materials such as hydrocarbons, cement and lime solution are known to have various negative health effects such as eye and skin irritations, respiratory problems, central nervous system depression, and anemia, among others.<sup>4</sup> According to the Submitters, spills in Canada have placed an economic burden on Southeastern Michigan generally, and especially on Macomb County and its residents.<sup>5</sup> The Submitters claim that when spills are the result of inadequate rainwater management or other sewage-related problems, Michigan residents suffer harm in the form of beach closings and general public anxiety about being in or around the water.<sup>6</sup> The Submitters allege that despite a 2006 report of the International Joint Commission which found inadequate data, communication and enforcement for cross-border spill management in the St. Clair-Detroit River corridor, Canada has offered little response to invitations from local authorities in the United States to match US efforts to improve spill prevention and notification through the purchase and installation of state-of-the-art, real-time water quality monitoring technology, ideally as part of a linked Canada-US system.<sup>7</sup> According to the Submitters, the issue is an international one, and for over a decade, citizen groups and political subdivisions in the United States have mounted public campaigns about spills urging Canadian and US officials to address the lack of enforcement and notification.<sup>8</sup>

## 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 a consideration of the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1)

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<sup>2</sup> Submission at 4.

<sup>3</sup> Submission at 5-6 and Appendices 4-9, 13.

<sup>4</sup> Submission at 6-7.

<sup>5</sup> Submission at 7.

<sup>6</sup> *Ibid.*

<sup>7</sup> Submission at 6.

<sup>8</sup> Submission at 7-8.

determinations,<sup>9</sup> Article 14(1) is not intended to be an insurmountable procedural screening device.

The opening phrase 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 does not meet this requirement. In an earlier determination, the Secretariat concluded:

In sum, it is not clear whether the anti-pollution provision in Article IV of the Boundary Waters Treaty is part of the domestic law of Canada. The question remains unresolved. Considering that the law is unclear and unsettled on whether Article IV is considered part of the domestic law in Canada or the United States so as to be considered equivalent to a statutory provision, the Secretariat is unable to conclude that the anti-pollution provision in Article IV meets the definition of “environmental law” in NAAEC Article 45(2)(a). Additional clarity would be required on these questions for the Secretariat to proceed with a submission asserting a failure to effectively enforce the anti-pollution provision in Article IV.<sup>10</sup>

The Submitters assert that “[t]he Devils Lake determination was made in response to a submission that only alleged violations of the Treaty, not the Act. In contrast, we submit that Canada is failing to enforce Section 3 of the [IBWTA].”<sup>11</sup> Section 3 of the IBWTA provides:

The laws of Canada and of the provinces are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty, and so as to sanction, confer and impose the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.

While the Devils Lake submission did not invoke Section 3 of the IBWTA, the Secretariat, in its Article 14(1) determination, examined whether Section 3 incorporated Article IV of the BWT into the domestic law of Canada.<sup>12</sup> It found that although the IBWTA clearly brings certain provisions of the Boundary Waters Treaty within Canadian domestic law, it does not clearly do so with respect to the anti-pollution provision of Article IV.<sup>13</sup> The Secretariat has reviewed the caselaw filed by the Submitters in support of the submission and finds that it does not shed light on whether the IBWTA makes the anti-pollution provision of Article IV of the BWT part of the domestic law of Canada.<sup>14</sup>

According to the Submitters, Section 3 of the IBWTA “[...] should be read in light of subsequent Canadian statutes that echo Article IV’s mandate not to pollute transboundary waters,”<sup>15</sup> and they cite as examples s. 36(3) of the federal *Fisheries Act*<sup>16</sup> and s. 30(1) of the *Ontario Water Resources Act*.<sup>17</sup> The Secretariat is aware that in Canada, governments have adopted laws

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<sup>9</sup> 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).

<sup>10</sup> SEM-06-002 (Devils Lake), Determination pursuant to Article 14(1) (21 August 2006).

<sup>11</sup> Submission at 9.

<sup>12</sup> SEM-06-002 (Devils Lake), Determination pursuant to Article 14(1) (21 August 2006).

<sup>13</sup> *Ibid.* See also P. Muldoon, D. Scriven and J. Olson, *Cross-Border Litigation* (Toronto: Carswell, 1986) at 121-22.

<sup>14</sup> Submission, Appendix 3 and Appendix 22.

<sup>15</sup> Submission at 9.

<sup>16</sup> R.S.C. 1985, c. F-14.

<sup>17</sup> R.S.O. 1990, c. O.40.

prohibiting domestic and international water pollution.<sup>18</sup> However, the submission does not focus on the enforcement of provisions contained in those laws. Rather, the submission focuses on Section 3 of the IBWTA and Article IV of the Treaty. As explained above, because it is not sufficiently clear that the IBWTA incorporates Article IV of the BWT into the domestic law of Canada, the Secretariat concludes that the submission does not meet the requirements contained in the opening phrase of Article 14(1) of the NAAEC.

Because the Secretariat has determined that the submission does not meet the requirements contained in the opening phrase of Article 14(1), there is no need for a detailed analysis of whether the submission satisfies the admissibility criteria under Article 14(1). However, the Secretariat notes that the submission lacks information in a number of areas. For example, addresses are missing for all Submitters but one (Art. 14(1)(b) and (f)),<sup>19</sup> and it is not clear whether Andrea Montbriand is one of the Submitters. Furthermore, as regards the requirement, in Article 14(1)(c), that the submission contain sufficient information to allow the Secretariat to review it, the Secretariat notes the lack of information regarding whether relevant Canadian authorities have responded to communications regarding matters raised in the submission and regarding criteria in Article 14(2)(c), for example, as regards any remedy available under Section 5 of the IBWTA.<sup>20</sup>

#### IV. DETERMINATION

For the foregoing reasons, the Secretariat has determined that submission SEM-07-004 (St. Clair River) does not meet all the criteria for admissibility contained in NAAEC Article 14. 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 Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) and the Guidelines within 30 days after receipt of this determination.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

Katia Opalka

Legal Officer

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<sup>18</sup> See e.g. *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, ss. 175 *et seq.*

<sup>19</sup> See Guideline 3.4 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [hereinafter “Guidelines”].

<sup>20</sup> See Guidelines 5.5 and 5.6.

c.c.: Jerry Clifford, US-EPA  
David McGovern, Environment Canada  
Enrique Lendo, Semarnat  
Felipe Adrián Vázquez-Gálvez, CEC  
Oday Salim