

**SUBMISSION
TO THE COMMISSION FOR
ENVIRONMENTAL COOPERATION**

Pursuant to:

**Article 14 of the *NORTH AMERICAN AGREEMENT ON
ENVIRONMENTAL COOPERATION***

July 15, 2007

Submitted by:

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I. SUMMARY

This Submission is made pursuant to Article 14 of the North American Agreement on Environmental Cooperation (the “NAAEC”).

Article 5 of the NAAEC requires that each State Party shall “effectively enforce its environmental laws.” The Submitters assert that the government of Canada is “failing to enforce” the *International Boundary Waters Treaty Act* (the “Act”)¹, which fully implements the obligations contained in the *International Boundary Waters Treaty* (the “Treaty”)² into domestic Canadian law.

Article IV of the Treaty creates the mandatory obligation not to pollute shared waters. It provides: “It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”

Section 3 of the Act incorporates the Treaty’s obligation into domestic Canadian law. Section 3 of the Act states:

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.

The schedule of the Act includes the full text of the Treaty as it existed before the 1950 amendments, including Article IV’s mandatory obligation not to pollute shared waters.

Furthermore, the Supreme Court of Canada, in *Arrow River & Tributaries Slide & Boom Co v Pigeon Timber Co*,³ held that the Treaty applied to a dispute involving the Pigeon River, which forms part of the boundary between Canada and the United States. The Government of Canada is obligated to comply with the treaty.

The Government of Canada has failed to effectively enforce the Act and the Treaty when it has allowed frequent and substantial quantities of pollutants to flow from petrochemical companies in Sarnia, Ontario, into the St. Clair River and Lake St. Clair. These chemical spills have flowed into the United States side of the St. Clair River and Lake St. Clair, causing injury to the health and property of the United States and its citizens.

The Submitters respectfully request that the Commission for Environmental Cooperation (the “CEC”) direct its Secretariat to prepare and publish a Factual Record pursuant to

¹ R.S.C. 1985, c. I-17, as am. See Appendix 1 [in digital form].

² Treaty Relating to Boundary Waters between the United States and Canada, Jan. 11, 1909, U.S. – Gr. Brit., 36 Stat. 2448, T.I.A. No. 548. See Appendix 2 [in digital form].

³ 1932 CarswellOnt 63. See Appendix 3 [in digital form].

Article 15 of the NAAEC, investigating and documenting the allegations contained in this Submission.

II. CANADIAN POLLUTION OF THE ST. CLAIR RIVER AND LAKE ST. CLAIR

A. The Spills

1. Geography

Lake Huron water passes through the St. Clair River, which flows into Lake St. Clair. The water that makes this journey is the source of drinking water for approximately five million citizens of the United States and Canada. Both the United States and Canada share the larger Lake Huron watershed, as well as the St. Clair River basin specifically at issue here. Spills that originate upstream from the St. Clair River and Lake St. Clair in Canada migrate to the boundary waters of the United States.

2. Spills from 1986 to 2006

In August of 2003, northeastern North America suffered a damaging power outage. During that period, a chemical manufacturer in Sarnia, Ontario, called Royal Polymer had two consecutive spills to the St. Clair River.⁴ The spills consisted mainly of vinyl chloride monomer totaling 132 kg (290 lbs). Royal Polymer failed to report these spills for several days due to the power outage and the subsequent failure of its monitoring system to detect the spills. Royal Polymer also failed to notify anyone in the St. Clair—Detroit River corridor that its monitoring system was temporarily inoperative.

Shortly after the Royal Polymer spills in February of 2004, another Sarnia, Ontario, company, Imperial Oil, suffered a leak in a heat exchanger that contaminated cooling water discharged to the St. Clair River with two chemicals: methyl ethyl ketone and methyl isobutyl ketone.⁵

3. Spills from 2006 to the present

Despite a 2006 IJC report that laid out findings and recommendations for improving spill prevention in the St. Clair—Detroit River Corridor, problems persist. The following are examples of spills that occurred after the release of the July 2006 IJC Report.⁶ The list is by no means conclusive.

⁴ See *Report on Spills in the Great Lakes Basin with a Special Focus on the St. Clair—Detroit River Corridor*, International Joint Commission, 1 (July 2006), available at <http://www.ijc.org/php/publications/pdf/ID1594.pdf>. See Appendix 4 [in digital form].

⁵ *Ibid.*

⁶ See the *Pollution Emergency Alert System* for information on spills in general, available at <http://www.deq.state.mi.us/peas/>.

- May 1, 2007: Thirty cubic meters of raw sewage with UV disinfectant is spilled by Sarnia Waste Water Treatment due to inadequate rainwater holding capacity.⁷
- April 4, 2007: Release into St. Clair River from the Shell Refinery, Corunna, Ontario. Spill materials included slightly elevated hydrocarbons like benzene, toluene, and xylene in cooling water discharge.⁸
- April 3, 2007: Unknown amount of chlorinated sewerage spilled from the Cortwright Sewer Treatment Plant in St. Clair Township of Ontario, Canada.⁹
- March 3, 2007: Transporter chemical spill at Ford Power Plant in Windsor, Ontario, comprising nearly 1000 liters (264 gallons) of oily waste, which sheen was noticeable as far downstream as the Detroit River.¹⁰
- January 2, 2007: Release into St. Clair River from the Sarnia Suncorp Refinery in Sarnia, Ontario. Spill materials included benzene and metaxylene.¹¹

In an effort to implement recommendations laid out in the July 2006 IJC report, a number of political subdivisions in the United States have installed a state-of-the-art, real-time water quality monitoring system at thirteen locations along the international border that can accurately identify water quality problems as they occur and automatically notify appropriate officials when water quality constituents are outside predetermined ranges. The Macomb County (Michigan) Water Quality Board has urged their Canadian counterparts to install similar systems, with the ultimate goal of linking the systems to provide optimal communication.¹² Canada has yet to offer a comprehensive response.

In addition to spill prevention, there is also a duty to provide spill notification. There have been problems with notifying downstream areas in the St. Clair—Detroit River corridor about spill incidents.¹³

B. Negative Environmental Impact

The spills originating in Canada harm the water quality and the surrounding environment. The spill materials found to date include hydrocarbons (mostly fuels and lubricants), benzene, phenol, cement, methanol, ammonia, ethylhexyl nitrate, transport water, sodium metabisulfite, sodium hydroxide, toluene, xylene, and lime solution.¹⁴ These materials

⁷ See Appendix 5 [in digital form].

⁸ See Appendix 6.

⁹ See Appendix 7.

¹⁰ See Appendix 8 [in digital form].

¹¹ See Appendix 9.

¹² See Douglas Martz, *Letter to Canadian Federal and Provincial Officials* (March 1, 2007), see Appendix 10. See also Nicole Gerring, *Group Urging Canada to Monitor River*, Port Huron Times Herald (August 21, 2006), see Appendix 11 [in digital form].

¹³ See Jim Lynch, *Oil Spill Data for Waterway Imprecise*, The Detroit News, 3A (July 6, 2006). See Appendix 12 [in digital form].

¹⁴ Spills to the St. Clair River 1986-2000. See Appendix 13.

are known to have various negative health effects such as eye and skin irritations, respiratory problems, central nervous system depression, anemia, sensitization dermatitis, corrosive esophagitis and gastritis, anaphylaxis, liver and kidney damage, and death.¹⁵

C. Negative Social-Economic Impact

The spills have placed an economic burden on Southeastern Michigan generally, and especially on Macomb County and its residents. Where spills result in Ontario in connection with inadequate rainwater management or other sewage-related problems, Michigan residents suffer in the form of beach closings and general public anxiety about being in or around the water.¹⁶

Because of the numerous, constant spill incidents, various Michigan counties have decided to install costly, sophisticated water monitoring systems. These systems have so far cost \$3 million, and while their efficiency would increase if entities on the Canadian side contribute to the system, there has been little response from the Canadians about matching efforts.¹⁷

D. Public Campaigns

Citizens groups and American political subdivisions have sought enforcement of their respective environmental laws for over a decade. They have contacted Canadian officials in numerous ways about the spills and their concomitant lack of enforcement and notification.

For example, the Macomb County (Michigan) Water Quality Board has contacted Canadian officials repeatedly.¹⁸ Most recently, while meeting with elected officials in Washington D.C., the chairman of the Water Quality Board sent a letter addressed to Canadian federal and provincial officials. The letter urges Canadian officials to participate in the monitoring system aimed at improving the quality of drinking water that comes from the St. Clair River Basin.

Further, both the Water Quality Board and an American non-governmental organization, the St. Clair Channelkeeper (Channelkeeper), have worked with the American government to inform Canada of its obligations, and to seek enforcement of domestic and international Canadian laws that target the St. Clair River Basin. The Water Quality Board has sent a number of letters to Michigan's federal Senators and Representatives. In particular, these letters rightly frame the issue as an international one, and ask the Secretary of State and the Environmental Protection Agency Administrator to work with political and advocacy groups on both sides of the border to resolve the spill prevention

¹⁵ Ibid.

¹⁶ See Deb Price, *Sewage Spills Make Millions Sick*, Detroit News, 11Z (Aug. 14, 2005). See Appendix 14 [in digital form].

¹⁷ See above, note 12.

¹⁸ See above, note 7.

issue.¹⁹ Senators Debbie Stabenow and Carl Levin, and Representative Sander Levin have sent a letter directly to the then United States Secretary of State Colin Powell and United States Environmental Protection Agency Administrator Steven Leavitt about the issue.²⁰ The letter cites a report by the Government Accounting Office, which found that too many spills, including those originating in Canada, remained unreported.

After all these attempts, it is submitted that the CEC is the most appropriate body to resolve this issue of spill prevention and notification.

III. OBLIGATIONS OF CANADIAN ENVIRONMENTAL LAW—THE INTERNATIONAL BOUNDARY WATERS TREATY ACT

When The United States and Canada signed the Boundary Waters Treaty of 1909, they created obligations between the two countries and established rules governing the use and management of boundary and transboundary waters.²¹ The Treaty primarily created international legal obligations, and the Secretariat has “suggested that only international obligations that are considered part of a country’s domestic law can be included within the definition of ‘environmental law’ in Article 45(2)(a).”²² However, passage of the Act of 1910 implemented the Treaty’s legal obligations into Canadian domestic law. Domestic legal obligations contained in the Act must be included within Article 45(2)(a)’s definition of “environmental law.”

There is a long standing legal principle that “[u]ntil international obligations are implemented by way of statute or regulation pursuant to a statute, those obligations do not constitute the domestic law of Canada.”²³ The Act clearly satisfies the standard, implementing the treaty as Canadian domestic law.

In the Devils Lake submission, the Secretariat noted that the Act “serves to ratify the international obligations in the Treaty.”²⁴ However, the Act is more than a ratification instrument. The Act is legislative in nature, and has been subjected to the formal process of approval mandated by the *Statutory Instruments Act*.²⁵ The Act affects Canada’s domestic law, and therefore must be considered an “environmental law” of Canada for the purposes of Article 14(1).²⁶

¹⁹ See Douglas Martz, *Letter to The Honorable Colin Powell* (May 17, 2004). See Appendix 15.

²⁰ See Carl Levin et al., *Letter to The Honorable Colin Powell* (September 1, 2004). See Appendix 16.

²¹ P. Muldoon, D. Scriven and J. Olson, *Cross-Border Litigation* (Carswell: Toronto 1986), at 118.

²² SEM-06-002 (Devils Lake), Determination in accordance with Article 14(1) (21 August 2006) at 4 (citing, SEM-97-005 (Biodiversity), Determination under Article 14(1) (26 May 1998). Cf. *Mexico-Tax Measurers on Soft Drinks and Other Beverages*, AB-2005-10, Report of the Appellate Body at ¶ 70 (WTO 2006) (“finding that the term ‘laws and regulations’ in Article XX(d) of the GATT 1994 refers ‘to rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.’”)) See Appendix 17 [in digital form].

²³ SEM-97-005 (Biodiversity), Determination under Article 14(1) (26 May 1998) at 4. See Appendix 18 [in digital form].

²⁴ Devils Lake, at 6.

²⁵ R.S.C. 1985, c. S-22. See Appendix 19 [in digital form].

²⁶ See Biodiversity, at 5 (distinguishing between a “regulation” the ratification of the *Biodiversity Convention*).

In Devils Lake, the Secretariat determined that the Act “clearly brings certain provisions of the Boundary Waters Treaty within Canadian domestic law,” but the Secretariat also held that it was unclear whether the Act incorporated Article IV of the Treaty into domestic Canadian law.²⁷ The 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 Act.

Section 3 of the Act amends the laws of Canada and of the provinces “so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the treaty...”²⁸ The language of the Act in no way limits the obligations of the Treaty, they are all contained in the plain language of this clause. The adoption of these obligations sanctions, confers, and imposes “the various rights, duties and disabilities intended by the treaty to be conferred or imposed or to exist within Canada.”²⁹ One of the duties the Treaty and the Act intended to impose upon Canada was the duty not to pollute boundary waters to the injury of health or property in the United States. Nothing in the Act indicates the intention to eliminate the obligation contained in Article IV of the Treaty from the obligations adopted by the Act. Therefore, Canada’s failure to contain pollution from Sarnia, Ontario, causing injury to the health and property of the United States and its citizens is a failure to enforce section 3 of the Act, an “environmental law” for the purposes of Article 14(1).

The Act should be read in light of subsequent Canadian statutes that echo Article IV’s mandate not to pollute transboundary waters. The Canadian *Fisheries Act* provides:

...no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.³⁰

Similarly, the *Ontario Water Resources Act* (“OWRA”) states that:

Every person that discharges or causes or permits the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence.³¹

The mandates of the *Fisheries Act* and the *OWRA* support a reading of the *International Boundary Waters Treaty Act* that includes the obligations contained in Article IV of the Treaty. Section 3 of the Act implemented Article IV’s obligations into domestic

²⁷ Devils Lake, at 6.

²⁸ R.S.C. 1985, c. I-17 s. 3.

²⁹ Ibid.

³⁰ R.S.C. 1985, c. F-14 s. 36(3). See Appendix 20 [in digital form].

³¹ R.S.O. 1990, c. O.40 s. 30(1). See Appendix 21 [in digital form].

Canadian law, and the cited provisions in the *Fisheries Act* and *OWRA* are intended to further the obligations created by the Boundary Waters Treaty and Act. Unfortunately, Canada has failed to enforce the Act and live up to its obligations when it has allowed frequent and large quantities of pollutants to enter the St. Clair River, to the injury of health and property in the United States.

The rules of statutory construction in Canada support the conclusion that section 3 of the Act implemented the obligations of Article IV into domestic Canadian law. There is a “general principle of statutory construction applicable under Canadian domestic law, that legislation should be interpreted and applied, unless by its clear terms this is impossible, in a manner consistent with international obligations.”³² It is far from impossible to read the clear terms of section 3 of the Act to be consistent with the international obligations created by Article IV of the Treaty. Section 3 of the Act should be read according to its clear terms, which state that the Act implements all obligations contained in the Treaty into domestic Canadian law, including the obligation not to pollute transboundary waters. Canada is failing to enforce section 3 of the Act.

IV. ARTICLE 14 NAAEC REQUIREMENTS

A. This is a Submission the Secretariat “May Consider”—NAAEC Article 14

The Submitters respectfully submit that this Submission meets the criteria set out in Article 14(1).

Article 14(1)(a) – The submission is presented in English.

Article 14(1)(b) – The submitters are: St. Clair Channelkeeper, a non-profit organization dedicated to conserving, restoring and protecting waters of the Lake Huron-Lake Erie connecting channel, including the St. Clair River, Lake St. Clair and the Detroit River; The Environmental Law Society of Wayne State University Law School, a student organization whose mission is to promote awareness of environmental issues, to increase involvement in such issues, foster the study of environmental laws and encourage responsibility and stewardship by practitioners in the public interest; Doug Martz, a concerned resident of Michigan; Noah Hall, a concerned resident of Michigan and Assistant Professor of Law at Wayne State University Law School; Oday Salim, a concerned resident of Michigan, and; Brendan Frey, a concerned resident of Michigan.

Article 14(1)(c) – The submission provides sufficient information from a variety of sources to allow the Secretariat to review the submission, including an extensive report by the International Joint Commission and other documents contained in the appendices, upon which this submission is based.

Article 14(1)(d) – The submission is not intended to harass industry, its intent is to encourage proper enforcement of Canada’s environmental laws.

³² *Celltech Ltd. v. Canada*, 1993 CarswellNat 317. See Appendix 22 [in digital form].

Article 14(1)(e) – This matter has been communicated in writing to the highest levels of government in both the United States and Canada. The government of Canada has failed to provide a comprehensive response.³³

Article 14(1)(f) – The submitters are organizations and individuals residing or established in the State of Michigan, United States of America.

B. The Issues Raised in this Submission Merit a Response from Canada pursuant to NAAEC Articles 14(2) and (3).

The submitters respectfully ask the Secretariat to request a response from the Government of Canada.

Article 14(2)(a) – The submitters are individuals residing, and organizations located, in southeast Michigan who are harmed when they cannot make use of the waters in the St. Clair River and Lake St. Clair because of the large quantities of toxic and non-toxic pollutants coming from Ontario, Canada.

Article 14(2)(b) – The submission raises matters whose further study would advance the goals of the NAAEC. Preparation of a factual record would help shed light on the extent to which Canada has failed to enforce the *International Boundary Waters Treaty Act*, and would encourage Canadian cooperation with the United States on the implementation of an improved pollution prevention and reporting system for the Lake Huron-Lake Erie connecting channel.

Article 14(2)(c) – There are no other realistic or effective domestic or private remedies available. The submitters have communicated on this issue with the highest levels of Canadian Government. The Canadian Government has failed to respond to or act on the submitters' concerns.

Article 14(2)(d) – This submission is based on data from several sources, including a study completed by the IJC.

Article 14(3)(a) – The submitters are not aware of any pending judicial or administrative proceedings.

V RELIEF REQUESTED

The submitters respectfully request that the CEC prepare a factual record on the subject of Canada's failure to enforce section 3 of *The International Boundary Waters Treaty Act*, in breach of its obligations under the NAAEC.

³³ See section II(D), *supra* at 7-8.