

Secretariat of the Commission for Environmental Cooperation

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

Submitter: Bennett Environmental Inc.
Concerned Party: Canada
Date of submission: 11 January 2011
Date of this determination: 11 February 2011
Submission I.D.: SEM-11-001 (*PCB Treatment in Grandes-Piles, Quebec*)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC,” or the “Agreement”) provide for a process allowing any person or non-governmental organization, to file a submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (the “Guidelines”). When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it proceeds no further with the submission.¹

2. On 11 January 2011, Bennett Environmental Inc. (the “Submitter”) filed Submission SEM-11-001 (*PCB Treatment in Grandes-Piles Quebec*) with the Secretariat of the CEC asserting that Canada, through the Province of Quebec, is failing to effectively enforce Section 24 of the Quebec *Environmental Quality Act* (EQA)² by having issued an authorization for a soil treatment process that the Submitter alleges “does not work to treat [polychlorinated biphenyls (‘PCBs’).]”³

¹ Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC’s website at:

<http://www.cec.org/citizen/index.cfm?varlan=english>. References to the word “Article” throughout this determination, unless otherwise stated, refer to an article of the NAAEC. Use of the masculine implies the feminine, and vice-versa.

² R.S.Q., c. Q-2.

³ Submission, p.1.

3. On analysis of Submission SEM-11-001 for the reasons set out below, the Submitter is being notified in this Determination that their Submission does not meet all the criteria for admissibility contained in Article 14(1), and in particular Article 14(1)(c) and (d), and that, in accordance with Guideline 6.2, the Submitter has thirty days from the date of this Determination to provide a submission conforming to all of the requirements of Article 14(1), failing which the Secretariat will terminate the process with respect to this submission.

II. SUMMARY OF THE SUBMISSION

4. The Submitter states that it is an environmental services company specializing in the destruction of polychlorinated biphenyls (PCBs).⁴ The Submitter asserts that Canada, and in particular the Quebec government, is failing to effectively enforce section 24 of the Quebec *Environmental Quality Act*⁵ (EQA) in connection with the Quebec government's authorization of a soil treatment process used by another environmental services company, Horizon Environment, Inc. (Horizon). The Submitter operates a plant for soil decontamination using incineration in St. Ambroise, QC.⁶ The Submitter maintains that Horizon "purports to use" chemical oxidation for PCB treatment and/or removal at Horizon's facility in [Grandes-Piles] Quebec.⁷ The Submitter maintains that chemical oxidation is unproven to reduce concentration of PCBs below the legal limit at the commercial scale in question, and that the Quebec Minister of Sustainable Development, Environment and Parks (MSDEP) has refused to provide documents showing that authorization was given in accordance with s. 24 EQA; in other words, allegedly the government "refuses to respond to evidence that the law is being broken."⁸

5. The Submitter notes that under section 24 EQA, the Minister of the MSDEP shall, before giving his approval to an application for a certificate of authorization, ascertain that the emission, deposit, issuance or discharge of contaminants will be in accordance with the EQA and associated regulations.⁹ The Submitter further states that the *Regulation respecting the burial of contaminated soils*,¹⁰ (the "Regulation") adopted under the EQA, sets maximum permitted levels of PCB concentrations in contaminated soils.¹¹ The Submitter refers to section 4(2) of the Regulation, which provides that soils having more than 50mg of PCB per kilogram (50 parts per million ("ppm")) of soil may not be disposed of in contaminated soil burial sites.¹² The Submitter observes that the term 'treatment' in connection with PCBs refers to partial removal to reduce PCB

⁴ *Ibid.*

⁵ R.S.Q., c. Q-2.

⁶ Submission, p. 1 & 9. See also Appendix G, at 13, Letter from Jack Shaw, CEO of Bennett Environmental Inc., to the MSDEP dated 23 September 2010. <http://www.bennettenv.com/php2/>.

⁷ Submission, p.8.

⁸ Submission, p.1.

⁹ *Ibid.*

¹⁰ 2001 G.O.Q. 2, 4574, c. Q-2, r 6.01.

¹¹ Submission, p.5.

¹² *Ibid.*

concentration to less than 50 ppm, whereas PCB “destruction” normally refers to the elimination of PCBs to a degree greater than 99.9%.¹³

6. The Submitter states it has not been able to obtain “evidence that the process authorized under [Horizon’s] certificate of authorization was made subject to a detailed evaluation by the MSDEP to confirm that the process can in fact reduce concentrations of PCBs in contaminated soils to the legal level before burying them.”¹⁴ The Submitter, through its legal counsel, requested documents regarding the approval process for Horizon’s certificate of authorization from the MSDEP under s. 171 (1) of Quebec’s *An Act respecting access to documents held by public bodies and the protection of personal information*¹⁵ (“*Act respecting access*”) and ss. 118.4 and 118.5 of the EQA. Section 118.4 EQA provides that “every person has the right to obtain from the [MSDEP] copy of any available information concerning the quantity, quality or concentration of contaminants emitted, issued, discharged or deposited by a source of contamination.”¹⁶

7. Section 118.5 EQA lists the items which the Minister shall keep in his register, all of which is considered to be public information, such as authorizations, permits, notices, environmental impact assessments, etc...¹⁷ The government responded providing the Submitter with documents, yet noted that certain information requested was being redacted pursuant to s. 9 of the *Quebec Charter of Human Rights and Freedoms*¹⁸ regarding professional secrecy and articles 14, 23, 24, 31, and 37 of the *Act respecting access*¹⁹ regarding rights and restrictions of access to information. The Submitter maintains that the documents received pursuant to its access to information request contained “no information indicating compliance with s. 24 of the EQA.”²⁰

8. The Submitter hired the firm Conestoga-Rovers & Associates (CRA) to provide an expert opinion concerning the effectiveness of chemical oxidation for treating and/or destroying PCBs in contaminated soil containing greater than 50 ppm of PCBs. CRA’s literature search of 244 documents found no studies of chemical oxidation for PCB contaminated soils treatment outside of a laboratory context and at a commercial scale.²¹ Moreover, CRA’s permit and licensing review found that there was no evidence of any approvals for chemical oxidation treatment having been issued in Canada, the U.S. or the U.K.²² Further, the CRA’s facility review found that Horizon is the only facility in

¹³ Submission, p.7.

¹⁴ Submission, pp.1, 6, 8.

¹⁵ R.S.Q. c. A-2.1.

¹⁶ *Supra* note 5.

¹⁷ *Ibid.*

¹⁸ *Supra* note 14.

¹⁹ *Ibid.* 12 documents from between 28 June 2002 and 19 July 2009 being sought in the Submitter’s access to information request were redacted. See Submission, Appendix E, Letter dated 19 July 2010 from Ms. Caroline Drouin, MSDEP, to Ms. Anne-Marie Sheahan, Counsel to Récupère Sol.

²⁰ Submission, p.6.

²¹ Submission, p.7.

²² *Ibid.* See also, Submission, Appendix F.

Canada, the United States and Europe that purports to treat PCB-contaminated soil at concentrations greater than 50 ppm using ex-situ, non-thermal, chemical oxidation.²³ The Submitter notes that the CRA report concluded chemical oxidation is neither recognized nor accepted internationally and scientifically for destruction or treatment of PCBs on a commercial or industrial scale.²⁴ The Submitter also asserts that “the government has flouted the law by refusing to respond to the CRA report.”²⁵

9. The Submitter provides background information on the laws at issue and case law allegedly relevant to its assertions.²⁶ The *Regulation respecting the application of the Environmental Quality Act*²⁷ sets out information that must be included in an application to the MSDEP. Also, pursuant to section 22 of the EQA, the application form for a certificate of authorization must include a *detailed evaluation* “of the quantity or concentration of contaminants expected to be emitted, deposited, issued or discharged into the environment through the proposed activity.”²⁸ The Submitter asserts there is no evidence that MSDEP’s certificate of authorization to Horizon is based on such a *detailed evaluation* and there is thus no proof that Horizon’s treatment process is effective. It is therefore not clear, in the Submitter’s view, that the soil treated at Horizon’s facilities can legally be disposed of in the ground.²⁹ The Submitter seeks information regarding the basis of the MSDEP’s decision to authorize the use of chemical oxidation to treat and/or destroy PCBs, as well as MSDEP’s determinations as to whether such process is indeed effective.³⁰

10. According to the Submitter, the MSDEP is failing to follow laws to protect public health, and is subverting the rule of law by refusing to fully respond to information requests and to the CRA report.³¹ The Submitter notes that section 24 of the *Environmental Quality Act* obliges the MSDEP to ascertain the legality of the plan or project, in conformity with the *Regulation respecting the burial of contaminated soil* and *Regulation respecting the application of the Environmental Quality Act*, prior to issuing a certificate of authorization.³²

11. The Submitter states its view that the submission satisfies the requirements of Article 14(1) of the NAAEC, and also addresses the factors for consideration identified in Article 14(2) of the NAAEC.³³

²³ Submission, p.8.

²⁴ Submission, p.8.

²⁵ *Ibid.*, p.10.

²⁶ Submission, pp.1-6.

²⁷ C. Q-2, r. 1.001.

²⁸ Submission, p.6.

²⁹ *Ibid.*

³⁰ Submission, pp.1,9.

³¹ Submission, p.1.

³² Submission, p.9.

³³ Submission, pp.9-11.

12. The Submitter requests further inquiry into what the MSDEP did to meet its obligations under s. 24 EQA before issuing Horizon's authorization, and states that the CEC Secretariat "must intervene and ask Canada for a response to this submission[.]"³⁴ The Submitter further sets out that "Canada must respond to the expert report stating that chemical oxidation does not work to treat PCBs."³⁵ The Submitter requests the CEC Secretariat to recommend preparation of a factual record should Canada fail to respond to the question that the Submitter wants the Secretariat to ask, namely, "[h]ow was s. 24 of the EQA complied with before the certificate of authorization [for Horizon] was issued?"³⁶

III. ANALYSIS

13. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or non-governmental organization asserting that a NAAEC Party is failing to effectively enforce its environmental laws. As the Secretariat has found in previous NAAEC Article 14(1) determinations,³⁷ Article 14(1) is not intended to be an "insurmountable screening device", which means that the Secretariat will interpret every submission in accordance with the Agreement and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat will now address each requirement of NAAEC Article 14(1) with regard to Submission SEM-11-001 with this perspective in mind.

14. The opening paragraph of NAAEC Article 14(1) provides: "[t]he Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law" if the Secretariat finds that the submission meets the criteria in Article 14(1)(a-f).

15. The Secretariat notes that the Submitter, Bennett Environment International, is a company with its head offices in Oakville, Ontario, Canada. The Secretariat finds that the Submitter meets the establishment criterion contained in the opening paragraph of Article 14(1), and the Submitter may be considered a "person" for the purposes of Article 14(1) opening paragraph.

16. The Secretariat finds that the Submission contains an assertion that a Party, in this case Canada through its Province of Quebec, is failing to effectively enforce its environmental law, namely s. 24 EQA. Section 24 EQA is concerned with the Minister's obligation to "ascertain that the emission, deposit, issuance or discharge of contaminants into the environment will be in accordance with the Act and regulations."³⁸ The

³⁴ Submission, p.1.

³⁵ *Ibid.*

³⁶ Submission, p.12.

³⁷ See, e.g., SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); and SEM-98-003 (*Great Lakes*), Article 14(1) and(2) Determination (8 September 1999).

³⁸ R.S.Q., c. Q-2.

Secretariat finds that s. 24 EQA is environmental law in accordance with Article 45(2)(a) of NAAEC, in that its primary purpose is “protection of the environment and/or prevention of a danger to human life or health” and that the Minister’s obligation relates to “prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants” set out in Article 45(2)(a)(i) of the NAAEC. The Secretariat may consider s. 24 EQA as environmental law for further review of the assertions in the Submission.

17. The Secretariat next analyzes whether the Submission asserts alleged ongoing failures to effectively enforce the environmental law at issue.³⁹ The Submitter includes documents and correspondence in Appendices D, E, and G, covering a time-period from 1995 to 2010. The most recent correspondence is a letter from the Submitter’s legal counsel to the MSDEP dated 17 November 2010 concerning an ongoing alleged failure of the Party to effectively enforce the law at issue.⁴⁰ The Secretariat considers that the Submission meets the temporal requirement in the opening paragraph of Article 14(1).

18. The Secretariat next turns to consider whether the Submission meets Article 14(1)(a-f) in accordance with the Guidelines.

19. Article 14(1)(a) requires that a submission be: “in writing in a language designated by that Party in a notification to the Secretariat [...]” The Secretariat notes that the Submission meets the criteria of Article 14(1)(a) as it is in French and English, both being official languages designated by the Parties for filing a submission.⁴¹

20. Article 14(1)(b) requires that a submission: “clearly identifies the person or organization making the submission [...]” The Secretariat considers that the Submitter is clearly identified and the Submission meets the criteria of Article 14(1)(b).

21. Article 14(1)(c) requires that a submission provide: “sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based [...]” The Secretariat finds that the Submission does not satisfy the requirements of Article 14(1)(c) because it does not provide sufficient information in accordance with Guideline 5.3 which states in relevant part that a submission “must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.” The Submission refers to correspondence and documents that appear to be relevant for reviewing the Submission, but which could not be found by the Secretariat in the appendices to the Submission. Specifically, any revised submission should therefore include:

³⁹ See SEM-09-005 (*Skeena River Fishery*); SEM-00-003 (*Jamaica Bay*); SEM-99-02 (*Migratory Birds*); SEM-97-03 (*Quebec Hog Farms*) (all discussing the need for assertions regarding failures to effectively enforce to meet a temporal requirement of being an “ongoing” situation at the time of submission).

⁴⁰ Submission, Appendix G, at p.29.

⁴¹ Cfr. Guideline 3.2.

- the letter from Me. Michel Y Michel Yergeau of Lavery, De Billy, S.E.N.C.R.L. to Me. Catherine Powell of Blake, Cassels & Graydon LLP, dated 30 September 2010;⁴²
- the letter from Me. Ariane Gagnon of Gauthier Bédard to Ms. Murielle Coutu of the MSDEP access to information department dated 24 November 2009;⁴³
- the full chain of e-mail correspondence between Me. Ariane Gagnon of Gauthier Bédard to Mr. Jean-Francois Landry of Récupère Sol dated 22 December 2009;⁴⁴
- any information received from the government of Quebec related to follow-up on treated soil quality mentioned in the letter from Mr. Luc St-Martin to Me. Katia Opalka dated 16 November 2010;⁴⁵
- further information as to whether the submitter has appealed to the Quebec Commission on Access to Information regarding the items marked as confidential in the government's response to the submitter's access to information request dated 14 June 2010.⁴⁶

22. The Submission addresses the factors provided for in Article 14(2), but does not provide sufficient information regarding *in what manner* the Submitter alleges harm in accordance with Article 14(2)(a) of NAAEC, as informed by Guideline 7.4. Any revised submission may include such information.

23. Article 14(1)(d) requires that a submission “appears to be aimed at promoting enforcement rather than at harassing industry,” and Guideline 5.4(a) clarifies that in making that determination, the Secretariat will consider such factors as whether “the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the submitter is a competitor that may stand to benefit economically from the submission.”

24. An e-mail dated 5 October 2010 from Me. Katia Opalka to Mr. Michel Rousseau⁴⁷ states “[m]y client is a competitor of the company named Horizon Environment which is operating in Mauricie [...]”⁴⁸ Moreover, a letter dated 6 October 2010 between the Submitter's legal counsel, Ms. Catherine Powell, to Horizon's legal

⁴² Submission, Appendix G, at 15.

⁴³ Submission, Appendix G, at 3.

⁴⁴ Submission, Appendix G, at 5.

⁴⁵ Submission, Appendix G, at 27.

⁴⁶ Submission, Appendix G, at 5,6.

⁴⁷ Submission, Appendix G, at 16 (and labelled as a circled number “14” next to the “From” [“De” in French] field in the e-mail).

⁴⁸ Translation from the original French into English by the CEC Secretariat.

counsel, Mr. Michel Yergeau⁴⁹ discusses the alleged “unfair competition” with Horizon that Bennett may be subject to.

25. Although the Submission appears to be focused in part on promoting enforcement of the environmental law at issue, it also appears to be focused on the acts or omissions of a particular company, Horizon. Horizon, according to the submitter, is the “only facility in the U.S., Canada and Europe that purports to treat PCB-contaminated soil at concentrations greater than 50 ppm using ex-situ, non-thermal, chemical oxidation.”⁵⁰ Thus, it appears that the Submission is concerned with a particular company that is a competitor of the submitter, as per Guideline 5.4(a).

26. It cannot be concluded on the basis of information currently before the Secretariat that the submitter would not stand to benefit economically from the aspersions cast in the Submission on the efficacy of the method used by Horizon Environment, and authorized by the MSDEP under the law in question,⁵¹ for treating PCB contaminated soil.⁵² The Submitter moreover states “[i]t is the government’s job to maintain a level playing field for industry by consistently and effectively enforcing the laws that serve to protect the health and wellbeing of the population and quality of the environment.”⁵³ The latter statement shifts the focus in the Submission from promoting enforcement of environmental law, to an assertion concerning economic competition between companies in the same field; that being soil decontamination. Furthermore, it is clear from the aforementioned statement, that promoting enforcement of environmental law in the context of this Submission is closely linked with ensuring that potential “unfair competition” does not result from alleged non-enforcement of said law. Finally, certain information sought by the Submitter has been labelled confidential by the Quebec government as it pertains to “industrial secrets or confidential information of a third party without consent from that party.”⁵⁴

27. It thus appears at least feasible that the submitter “*may* stand to benefit economically” from the Submission (emphasis added).⁵⁵ As BEI and Horizon are competitors, it stands to reason that BEI may benefit economically and Horizon’s business may suffer economically if the assertions made in the Submission concerning the efficacy of Horizon’s operations are confirmed by information unearthed as a result of the Submission. Article 14(1)(d) and Guideline 5.4(a) place the burden on the submitter to demonstrate that the submission is “aimed at promoting enforcement *rather* than harassing industry” (emphasis added).⁵⁶ Horizon’s ability to conduct business in the

⁴⁹ Submission, Appendix G, at 15.

⁵⁰ Submission, p.8.

⁵¹ The Secretariat notes that it does not make any determination regarding the alleged effectiveness of enforcement or non-enforcement of the law at issue.

⁵² Submission, pp.8,10,11.

⁵³ Submission, p.10.

⁵⁴ Supra, paragraphs 6 and 7.

⁵⁵ Guideline 5.4(a).

⁵⁶ *Ibid.*

PCB soil decontamination field (the “playing field” the Submitter states that the Quebec government must ensure is level) shared by BEI and Horizon might be inadvertently impacted were the Party response or Secretariat’s preparation of a factual record to unearth trade secrets that could benefit BEI. As it stands, the Submission portrays the process employed by Horizon in a negative light. Should Horizon lose clients and the Submitter gain clients as a result, the Submitter may indeed “stand to benefit economically from the Submission.”⁵⁷

28. In any revised submission, the Submitter may provide the Secretariat with further information regarding the apparent economic competition that exists between BEI and Horizon Environment, and moreover include information regarding whether BEI may stand to benefit economically from the Submission. The Submitter may also address how the Secretariat’s pursuit of a response from the Party that may contain information on industrial secrets and/or confidential third party information would not stand to benefit the Submitter economically, especially if such information brought to light were to also confirm the Submitter’s assertions that Horizon’s PCB chemical oxidation treatment methods are ineffective. Finally, the Submitter may include information on how the Submission is aimed at promoting enforcement *rather* than harassing industry. Based on information currently before it, the Secretariat finds that the Submission does not fully meet the criteria of Article 14(1)(d) as informed by Guideline 5.4(a).

29. Article 14(1)(e) provides that a submission “indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any.” The Submission includes numerous references and appendices indicating that the matter has been communicated in writing to the relevant authorities of the Party, and indicates the Party’s response(s), save for the few mentioned above in the Secretariat’s analysis of Article 14(1)(c). The Secretariat therefore finds that the Submission meets the requirements of Article 14(1)(e).

30. Article 14(1)(f) provides that a submission must be “filed by a person or organization residing or established in the territory of a Party.” The Secretariat finds that the Submitter is a legal person established in the territory of a Party, in this case Canada.

IV. DETERMINATION

31. Submission SEM-11-001 (*PCB Treatment in Grandes-Piles, Quebec*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular Article 14(1)(c) and Article 14(1)(d). In accordance with Guideline 6.2, the Submitters have thirty calendar days from the date of this Determination to provide a submission which conforms to the requirements of Article 14(1)(a-f), failing which the Secretariat will terminate the process with respect to this Submission.

⁵⁷ *Ibid.*

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Marcelle Marion
Legal Officer, Submissions on Enforcement Matters Unit

cc: Mr. David McGovern, Canada Alternate Representative
Ms. Michelle DePass, US Alternate Representative
Mr. Enrique Lendo, Mexico Alternate Representative
Mr. Evan Lloyd, Executive Director, CEC
Submitter