

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission I.D.: SEM-97-003

Submitter(s):

Centre québécois du droit de l'environnement
Centre de recherche et d'intervention environnementale du
Grand-Portage
Comité de citoyens « À bon port » (Assomption)
Comité de citoyens de Grande-Piles (Mauricie)
Comité de citoyens de Saint-André de Kamouraska (bas-
Saint-Laurent)
Comité de citoyens de Sainte-Luce (bas-Saint-Laurent)
Comité de citoyens de St-Roch-de-Mékinac (Mauricie)
Comité de citoyens pour un Shipton propre (Estrie)
Comité de protection de la santé et de l'environnement de
Gaspé)
Comité de protection Panmassawipi (Estrie)
Comité de la santé publique et de l'environnement
Comité de qualité de vie de Saint-Jean-de-Dieu (bas-
Saint-Laurent)
Les Ami-e-s de la Terre de Québec
Mouvement Vert Mauricie
Regroupement écologique de Val-d'Or et de ses environs
Réseau québécois des groupes écologistes
Union québécoise pour la conservation de la nature
Union Saint-Laurent Grands Lacs (Canada-États-Unis)

Concerned Party: Canada

Date Received: 9 April 1997

Date of this Determination: 29 October 1999

I. Executive Summary

The Submitters, a number of nongovernmental organizations,¹ assert that many livestock operations in the Province of Quebec are operating in violation of various environmental laws. The Submitters further claim that the pollution discharged from these operations in violation of the law is causing significant harm to the environment and human health. The Submitters identify the Chaudière, Yamaska and l'Assomption river basins as having suffered especially adverse impacts. The Submitters, finally, claim that Canada has failed to effectively enforce the environmental laws with respect to these violations. The Submitters rely on a variety of government reports, among other sources of information, in making these claims.

Canada asserts that it is effectively enforcing the environmental laws concerning agricultural operations in Quebec. Canada points to a wide variety of strategies it has developed and is implementing in order to promote compliance with these laws. One of these strategies involves prosecutions, but Canada has pursued a number of other approaches as well. Canada claims that its efforts have contributed to an improving environment in Quebec and lessened the impacts of agricultural operations on this environment.

Having considered the submission in light of the response, the Secretariat believes that developing a factual record is warranted. The submission and response leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue. We identify two of the main assertions here in order to provide an introduction to the issues discussed below:

- The Submitters assert that the Party is failing to enforce effectively limits on the number of authorized livestock. The Submitters assert that the Party establishes legally binding, enforceable limits on the number of animal units an operation may produce, that there are widespread violations of these limits, and that the Party is failing to effectively enforce with respect to these limits. Further, a government study cited by the Submitters found that the Party subsidizes continuation of such illegal practices through various financial assistance mechanisms it administers.² The Party offers some information concerning the asserted illegal over-production and the Party's efforts to promote compliance, but more information is needed concerning the nature of these efforts and their effectiveness.

¹ A complete list of the parties filing the Submission is provided above.

² See Annex 16 of the submission: *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995–1996*, vol. I, chapter 2: “Aide financière offerte aux producteurs agricoles.”

- The Submitters assert that the Party is failing to effectively enforce standards for manure storage and spreading. The Submitters assert that there are legally enforceable requirements governing these practices, that there are widespread violations of these requirements, and that the Party is failing to effectively enforce with respect to them. Again, the Party offers some information concerning the alleged illegal manure-spreading and storage practices and the Party's efforts to promote compliance, but more information is needed concerning the nature of these efforts and their effectiveness.

Outstanding questions of fact concerning these assertions, and a number of other assertions of ineffective enforcement that the Submitters have made, are discussed in more detail below.

In sum, the Secretariat believes that it is appropriate to develop a factual record concerning the use and effectiveness of the different enforcement tools the Party employs to promote compliance with various environmental laws governing livestock operations in the Province of Quebec. Conducting such a review would be consistent with a broad interpretation of enforcement, an interpretation contemplated by Article 5 of the North American Agreement on Environmental Cooperation (NAAEC).

II. Background

On 9 April 1997, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of NAAEC. The submission alleges that the Quebec government is failing to enforce environmental laws concerning pollution originating from livestock operations, primarily from hog farms.

Under Article 14 of NAAEC, the Secretariat may consider a submission from any non-governmental 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). On 8 May 1997 the Secretariat determined that the submission met these criteria.

Article 14(2) provides that the Secretariat is to determine whether a submission that meets the criteria in Article 14(1) merits a response from a Party. In a determination dated 9 July 1997, the Secretariat found that the submission merited a response from Canada. Canada submitted its response on 9 September 1997. In its response, Canada asserts that Quebec effectively enforces its environmental laws with respect to agricultural pollution and that development of a factual record is inappropriate given, among other things, new provisions respecting agricultural pollution enacted by the Province of Quebec.

On 16 February 1998 the Secretariat requested further information from Canada, pursuant to Article 21(1)(b). In May 1998, the Secretariat received Canada's response to the Secretariat's Article 21 request for information. This determination represents the Secretariat's Notification to Council that the submission warrants developing a factual record pursuant to Article 15(1) of NAEEC.

A. The Submission

The Submitters assert that the Party is failing to enforce its environmental laws that regulate the management of manure produced in livestock operations in the Province of Quebec.³ The Submitters further assert that this failure has caused significant harm both to the environment and to human populations, especially those living near places where livestock operations are concentrated.⁴ The submission, for example, provides that:

Pollution of watercourses from agricultural sources is one of the most important environmental problems in Quebec. . . . Legal tools have been set up in order to prevent the negative environmental impacts of these agricultural activities, but failure to enforce these laws and regulations makes it impossible to respond effectively to these problems.⁵

The submission relies in part on government reports, including a report to the National Assembly of Quebec by the Quebec Auditor General for the year 1995–96,⁶ to support its assertions.

In particular, the submission and its annexes (including the Auditor General's Report) assert that there is evidence of widespread violations of the Environment Quality Act (EQA) and the Regulation respecting the prevention of water pollution in livestock operations (the Regulation).⁷ Such alleged violations include production of unauthorized animal units, illegal manure-spreading, operation of noncompliant storage facilities, and

³ See, e.g., Submission at 3, 4, 9, 11.

⁴ Submission at 3, 9, 13.

⁵ Submission at 9.

⁶ *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995–1996*, vol. I, chapter 2: "Aide financière offerte aux producteurs agricoles" (Annex 16). The submission also cites other government reports, such as: *Vision stratégique 1. Les grands enjeux 1996–2001* and *État de l'environnement au Québec 1992*, chap. 7: "L'activité agricole." The former, provided as Annex 1 to the submission, found that the volume of manure "stored in facilities that do not comply with regulations exceeds 9 million cubic meters per year and the spreading surface available near the production sites is only sufficient for 3.6 million cubic meters per year," cited in the submission, page 3. The latter government report, attached as Annex 2 to the submission, states that there were approximately 10,000 livestock operations that had not complied with the regulations in 1991. Cited in Submission, page 3.

⁷ R.R.Q., 1981, c. Q-2, reg. 18 in force from 1981 to 1997. This regulation has been replaced by the Regulation respecting the Reduction of Pollution from Agricultural Sources (1997), which came into force 3 July 1997. Response at 9. We discuss below the impact of the adoption of new regulations on this submission.

noncompliance with record-keeping requirements.⁸ In addition, the submission and its annexes (including, again, the Auditor General's Report) claim that there are a number of weaknesses in government efforts to enforce the law. They assert, for example, that monitoring is ineffective, and that government is hampered by a lack of basic information about the regulated sector.⁹ Further, the Auditor General's Report found that government programs provide financial aid to producers who do not comply with the Regulation and thereby subsidize illegal practices.¹⁰

B. The Response

In its response, Canada submits that it has acted consistently with its obligations under NAAEC in enforcing environmental legislation in the agricultural sector.¹¹ First, Canada claims that Quebec effectively enforces the Environment Quality Act and the Regulation, utilizing a wide array of "innovative regulatory enforcement methods" that "for the most part use incentive measures to ensure enforcement and to reach environmental goals" as well as prosecutions and related tools.¹² The Party asserts that Quebec's strategies and enforcement methods fully satisfy Article 5 of NAAEC, which presents a "non-comprehensive list of governmental measures aimed at ensuring the enforcement of laws and regulations."¹³

Second, Canada points out that Quebec adopted new laws with respect to agricultural pollution in 1997, "taking on new measures that improve enforcement of the Environment Quality Act. . . ."¹⁴ Canada asserts that this effort to improve the state of regulation of this industry renders preparation of a Factual Record inappropriate, in accordance with Article 3 of NAAEC concerning improvement of environmental laws and regulations.¹⁵

Third, Canada argues that the preparation of a Factual Record would not produce any new information or "present the matter in a new light," in view of the level of detail provided in the response.¹⁶

The Party appears to claim that the Submitters would have enjoyed legal standing under the Environment Quality Act to pursue this issue and that they have not pursued all of the remedies available to them under domestic law.¹⁷

⁸ See, e.g., Submission at 3, 7, 9, 12–13.

⁹ Submission; Auditor General's Report at 2.110, 2.162–2.166.

¹⁰ Auditor General's Report at 2.111–2.113, 2.141.

¹¹ Response at 1.

¹² Response at 2. Section III contains a more detailed presentation of the enforcement measures identified by the Party in its response.

¹³ Response at 2.

¹⁴ Response at 5.

¹⁵ Response at 5.

¹⁶ Response at 5.

Finally, Canada submits that NAAEC should not be interpreted as having retroactive effect.

III. Analysis

A. Introduction

We are now at the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it is appropriate to request a response from a Party based upon a review of the factors contained in NAAEC Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations, the requirements contained in Article 14 are not intended to place an undue burden on submitters. In the determination concerning the Animal Alliance submission (SEM-97-005), for example, the Secretariat states as follows:

The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC. . . ¹⁸

In its discussion in the Animal Alliance determination of the burden under Article 14, the Secretariat noted that use of the word “assertion” in the opening sentence of Article 14(1) “supports a relatively low threshold under Article 14(1),”¹⁹ while also indicating that “a certain amount of substantive analysis is nonetheless required at this initial stage” because “[o]therwise, the Secretariat would be forced to consider all submissions that merely ‘assert’ a failure to effectively enforce environmental law.”

The recent revisions to the Guidelines provide further support for the proposition that the Article 14(1) and (2) stages of the citizen submission process are not intended to serve as an “insurmountable” screening mechanism. The Guidelines limit submissions to 15 pages in length.²⁰ The revised Guidelines require a submitter to address a minimum of 13 criteria or factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) and (2) for more in-depth consideration.

¹⁷ Response at 12–13.

¹⁸ Submission No. SEM-97-005 (26 May 1998).

¹⁹ The relevant part of Article 14(1) reads as follows: “The Secretariat may consider a submission from any nongovernmental organization or person *asserting that* . . .”

²⁰ Guideline 3.3.

Here, as indicated above, the Secretariat previously found (on 9 May 1997) that the submission meets the six criteria listed in Article 14(1)(a)–(f) for continued review.²¹ In brief, the analysis is as follows:

1. The submission is in French, one of the languages designated by Canada (14(1)(a)).
2. The submission clearly identifies the persons and organizations making the submission (14(1)(b)). (Submission at 2.)
3. The submission provides sufficient information to allow the Secretariat to review the submission, including several government and other reports relating to the issues covered in the submission (14(1)(c)).²²
4. The submission appears to be aimed at promoting enforcement, not at harassing industry (e.g., the Submitters are not competitors of entities that are the subject of the government “enforcement” practices at issue. Instead, the Submitters are organizations committed to environmental and public health protection and the submission focuses on purported government failures)(14(1)(d)).
5. The submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party’s response, if any (14(1)(e)).²³
6. The Submitters reside in or were established in Canada (14(1)(f)).

The submission also satisfies the three additional threshold criteria contained in the opening sentence of Article 14(1), notably that a submission must assert that a Party: 1) “is failing;” 2) “to effectively enforce;” 3) its “environmental law.” The Environment Quality Act and the Regulation qualify as “environmental law” for purposes of NAAEC.

²¹ The Council adopted revised Guidelines for the Article 14 process in June 1999. Guideline 7.2 requires the Secretariat to provide in its notifications concerning Article 14(1) and (2) an explanation of how the submission meets or fails to meet the Article 14(1) criteria as well as an explanation of the factors that guided the Secretariat in making its determination under Article 14(2). The revised Guidelines are available on the CEC web page, www.cec.org, under Citizen Submissions.

²² See, e.g., *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995–1996*, vol. I, chapter 2: “Aide financière offerte aux producteurs agricoles.” The submission also identifies the applicable statutes and regulations and contains a succinct account of the facts on which the assertions of failures of effective enforcement are based. See Guidelines 5.2 and 5.3.

²³ The submission summarizes some of the correspondence with the government on pages 3–4. This correspondence includes letters to the government on 2 February 1996, 5 February 1996, 12 March 1996, and 19 November 1996, and government responses dated 27 March 1996 and 4 December 1996. The Party apparently does not believe that the Submitters took full advantage of their opportunities to interact with government, while the Submitters apparently believe opportunities to participate were unduly limited in some situations. See, e.g., Response at 13; Submission at 14. The important point for our purposes at this juncture is that the Secretariat previously determined that the Submitters satisfied the criterion that the submission indicate that the matter has been communicated in writing to the relevant authorities and indicate the Party’s response, and the response has not persuaded the Secretariat that this previous determination was in error. The materials provided to the Secretariat, including the Auditor General’s report, reflect that the matter identified in the submission is well known to the Party as well as the public at large.

The submission appropriately focuses on the extent to which a Party has failed to effectively enforce those laws, not on the effectiveness of the environmental laws as written. Finally, the submission meets the temporal requirement in Article 14(1) because the assertions involve many alleged violations that occurred after 1 January 1994; indeed, the submission asserts that many of the alleged violations are ongoing.

The Secretariat also previously determined that a response from the Party was merited, based on the factors in Article 14(2) (on 9 July 1997). In deciding whether to request a response from a Party, the Secretariat is guided by the four factors listed in Article 14(2). Thus, during this phase of the process the Secretariat assigns weight to each factor as it deems appropriate in the context of a particular submission. Concerning the issue of harm (see Article 14(2)(a)), the submission alleges that significant environmental harm and harm to human health have resulted from the alleged violations and failure to effectively enforce.²⁴

Similarly, in the Secretariat's view the submission raises matters whose further study would advance the goals of NAAEC (Article 14(2)(b)). Submissions such as this, which focus on the effectiveness of enforcement in the context of asserted widespread violations, are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it obviously may be appropriate for the Commission to address the latter, depending on the circumstances. The asserted violations at issue in this submission also appear to have the potential for significant adverse environmental impacts. As discussed in more detail below, the fact that in 1997 the Party changed some of its laws governing management of pollution by agricultural operations does not negate the value of developing a factual record here.

The Secretariat also was satisfied that the Submitter had adequately pursued private remedies (Article 14(2)(c)). The Submitters have communicated numerous times with government officials regarding their concerns, although the Secretariat is not aware of any private legal actions filed against alleged violators. Some of the submitting organizations have corresponded with the government regarding their concerns and they participated in consultative meetings during the development of the new regulations.²⁵

²⁴ The submission, among other things, indicates that members of the submitting organizations "feel the direct or indirect effects of this environmental problem which affects numerous Quebec watercourses." Submission at 9. In "Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation", SEM 96-001 (7 June 1996), the Secretariat stated that in considering harm, "the Secretariat notes the importance and character of the resource in question," continuing that "[w]hile the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America," the nature of the resources at issue "bring the submitters within the spirit and intent of Article 14 of the NAAEC." The importance of the resources at issue in this proceeding support the same conclusion.

²⁵ See previous note summarizing the correspondence and see Submission at 3–4, 14.

The Submitters claim that the initiation of individual lawsuits against violators is not a satisfactory strategy to address the violations alleged here:

The problems posed by failure to enforce the legal provisions concerning livestock operations, as raised by the Submitters, have an impact on Quebec as a whole. The proliferation and concentration of operations of this type in certain Quebec regions causes major deterioration in the water quality of many watercourses, due to the *combined* action of various agricultural operations, many of which may not comply with the environmental standards in force. Thus it becomes extremely difficult for those affected to ensure that their rights are respected by using private remedies directed at many possible culprits, since the pollution comes from multiple sources.

. . . There is a persistent pattern of failure to enforce standards throughout Quebec. Given the significant number of violations, individual remedies cannot provide permanent solutions for the harm done to both environment and population.²⁶

Finally, the submission relies on a number of reports issued by government and others in support of its allegations and is not drawn exclusively from mass media reports (Article 14(2)(d)). One such report is the Quebec Auditor General's Report to the National Assembly of Quebec for 1995–96.²⁷

In sum, the Secretariat has previously found that the submission meets the criteria in Article 14(1) and it has previously determined that a response from the Party was merited based on the factors contained in NAAEC Article 14(2). Under Article 15(1), the Secretariat must now consider whether a factual record should be developed in light of the submission and response. As discussed in the following section, the Secretariat is persuaded that a factual record is warranted to develop additional information concerning the effectiveness of Canada's enforcement responses to the alleged widespread and ongoing violations of the environmental laws.

B. Why Preparation of a Factual Record is Warranted

The Secretariat believes that development of a factual record is warranted. The key provisions at issue are contained in the Environment Quality Act (EQA) and the Regulation respecting the prevention of water pollution in livestock operations (the Regulation). Among other things, the EQA prohibits the discharge into the environment

²⁶ Submission at 11, 14 (emphasis in submission). Canada submits that the Submitters have not pursued all the remedies that were available to them, such as the right to seek an injunction pursuant to sections 19.1, 19.2 and 19.3 of the Environment Quality Act.

²⁷ *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995–1996*, vol. I, chapter 2: “Aide financière offerte aux producteurs agricoles” (Annex 16).

of a contaminant in greater quantity than provided for by government regulation.²⁸ The EQA also provides that no one may undertake certain activities that seem likely to result in environmental contamination without first obtaining a certificate of authorization.²⁹ The Regulation contains a general prohibition, providing that the deposit or discharge of livestock manure, manure liquid or contaminated water into the environment is prohibited except where such deposit or discharge is carried out in accordance with the Regulation.³⁰ The Regulation establishes standards for different aspects of manure management, including the siting of facilities, manure storage, and manure-spreading. Producers must also comply with record-keeping requirements, providing information on, among other things, the date, place and quantity of manure-spreading on land that is not their property.

Further, the Regulation requires producers to obtain a certificate of authorization to begin or expand livestock operations or to make certain modifications of their facilities. The Deputy Minister of Environment must ensure that the project complies in all respects with the Environment Quality Act and the Regulation before issuing a certificate of authorization.³¹

As noted above, the Submitters allege widespread violations of the EQA and Regulation and the Certificates of Authorization issued under these authorities and a failure to effectively enforce with respect to these violations. While the response describes some of the measures Quebec has employed to enforce the EQA and the Regulation, additional information should be developed concerning the central issue of the effectiveness of these measures, particularly in light of the widespread violations asserted to exist in the submission and described in the government reports appended to the submission. Additional information should also be developed concerning the actual use of the various enforcement tools. This section: 1) summarizes the types of violations asserted to exist;

²⁸ Section 20 provides:

Emission of a contaminant. – No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Government.

Emission of a contaminant. – The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Government or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wild life or property. 1972, c. 49, s. 20.

²⁹ Section 22 provides: “No one may erect or alter a structure, undertake to operate an industry, carry on an activity or use an industrial process or increase the production of any goods or services if it seems likely that this will result in an emission, deposit, issuance or discharge of contaminants into the environment or a change in the quality of the environment, unless he first obtains from the Minister a certificate of authorization. However, no one may erect or alter any structure, carry out any works or projects, undertake to operate any industry, carry on any activity or use any industrial process or increase the production of any goods or services in a constant or intermittent watercourse, a lake, pond, marsh, swamp or bog, unless he first obtains a certificate of authorization from the Minister.”

³⁰ Division IV, General Manure Management Standards, section 17.

³¹ Section 3 of the regulation reads as follows: “Compliance: Before granting a certificate of authorization, the Deputy Minister must ensure that the project complies in all respects with the Act and this Regulation.”

2) reviews the Party's enforcement responses to these asserted violations; and 3) identifies some of the questions that remain, concerning the nature of the Party's responses and their effectiveness.

1. Assertions that far more animal units are produced than are permitted under Certificates of Authorization

Livestock operators who wish to establish, expand or modify an operation must first obtain a certificate of authorization.³² Such certificates limit the number of "animal units" the operation may raise, based on a variety of factors such as manure-spreading capability, storage capacity, and the like.³³ Applicants for a certificate of authorization are required to furnish the Government of Quebec with information about their proposed project, including location, construction plans, and the means and methods of manure disposal.³⁴ The Quebec Ministry of Environment and Wildlife (MEF) then analyzes the information provided for compliance with applicable regulations and, where necessary, projects are modified so that they will comply with the standards.³⁵ The Party asserts that Quebec places significant importance on analysis of project design, carrying out quality control before a project goes ahead.³⁶

The Submitters assert that substantially more animal units are raised than is allowed by the certificates.³⁷ The Auditor General's Report (Annex 16) indicates the practice of raising unauthorized animal units is widespread. For example, the Report cites the results of a 1995 investigation which found a discrepancy of approximately 23 percent between the number of units of hogs authorized by the certificates of authorization and the number of livestock units actually owned by pork producers.³⁸ A 1996 article in *Le Soleil* (Annex 25) summarizing another report that was endorsed by, among others, the MEF, the Ministry of Agriculture (MAPAQ), and organizations representing livestock producers, found that nearly one third of herds in some parts of the Chaudière-Appalaches regions do not appear on official registers.³⁹ The article reports that "The

³² Response at 26.

³³ Div. II of Regulation, Response at 25–27, Auditor General's Report 2.103; Submitters' Annex 21.

³⁴ Response at 26.

³⁵ Response at 26.

³⁶ Response at 26–27.

³⁷ See, e.g., Submission at 12.

³⁸ Auditor General's Report, 2.110, 2.111. When the Auditor General compared the number of declared animal units as reflected on government record cards with the number of hogs insured by RAAQ in one river basin, it found that declared animal units had been underestimated by approximately 220,000 hogs. This underestimation represents 15,950 tanker-truck loads of animal waste, each containing 40,000 litres. Auditor General's Report, 2.122.

³⁹ Article in *Le Soleil*, 28 February 1996, by Michel Corbeil, entitled "Illegal Pig Herds: The MEF can no longer keep track of surplus manure" (Annex 25). This article covers a report called "Surplus Manure in the Chaudière-Etchemin Basin" ("Les surplus de fumier dans le bassin Chaudière-Etchemin") and indicates the report was endorsed by the MEF and the Ministry of Agriculture (MAPAQ), as well as by organizations representing producers.

Ministry of Environment and Wildlife (MEF) has lost control of the pork production industry in the Chaudière-Appalaches regions; delinquent producers have significant illegal herds. . . .⁴⁰

The Auditor General also found that the Party is directly subsidizing unauthorized animal units. One investigation cited by the Auditor General found that, of \$4.4 million in compensation remitted by the Régie des Assurances Agricoles (RAAQ) in 1994 to approximately 50 producers, more than \$800,000 was for unauthorized animal units.⁴¹

The response states that the government has initiated an enforcement response in connection with this problem:

The Government of Quebec has taken significant measures toward finding solutions to the manure-spreading problem. . . . A pilot project dealing with pork production is currently underway. Its goal [is to] ensure that insurable stock is limited to the units authorized by the MEF. . . .

Once the results of the project have been evaluated, this policy will be incorporated into the regulatory overhaul of the stabilization insurance program . . . and will be in effect for all livestock operations.⁴²

It would be relevant to obtain the following types of information concerning the asserted violations of the limits on animal production units and the nature and effectiveness of the Party's response to these asserted violations:

1. Information concerning the scope of the violations and noncompliance. Relevant information here would include information concerning the number and distribution of unauthorized animal units. In its report, the Auditor General indicated that it was unable to determine what percentage of the \$145 million remitted from RAAQ to 1,644 pork producers in 1994 went to unauthorized units, because information concerning authorized herds was unavailable.⁴³ Also relevant would be the nature of the Party's efforts to monitor compliance with limits on the number of animal units. The Party indicates that it gives priority to monitoring farms' compliance with environmental standards,⁴⁴ and it would be relevant to develop information concerning the nature of these monitoring approaches and, in particular, the extent to which they are effective in identifying unauthorized practices such as maintenance of unauthorized animal units.

⁴⁰ Article in *Le Soleil*, 28 February 1996, by Michel Corbeil, entitled "Illegal Pig Herds: The MEF can no longer keep track of surplus manure." (Annex 25).

⁴¹ Auditor General's Report, 2.111.

⁴² Response at 58.

⁴³ Auditor General's Report, para 2.112.

⁴⁴ See, e.g., Response to Article 21 request at 6.

2. Information concerning the nature and effectiveness of the Party's pilot project. It would be relevant to develop additional information concerning: 1) the nature of the pilot project; 2) efforts to monitor its impacts, including the evaluation the Party indicated it would complete; and 3) the actual effect of the pilot project on the extent of noncompliance in the areas covered by the project.
3. Information concerning the status of the effort to incorporate the lessons learned from the pilot project into revised regulations for the stabilization insurance program. It would be relevant to develop information concerning the extent to which the pilot project or lessons learned from it have been incorporated into regulations. It would also be relevant to develop information concerning efforts to monitor the impacts of such an initiative and concerning the extent to which this broader initiative has affected the extent of noncompliance.
4. Information concerning other enforcement efforts to promote compliance. It also would be relevant to develop information concerning any other strategies that the Party is implementing to address the violations involving maintenance of unauthorized units. Information should also be developed concerning the steps the Party has taken to evaluate the success of any such strategies and concerning the effectiveness of such strategies. Related, it would be worthwhile to develop information concerning whether the Party is of the view that reducing or eliminating subsidies will address the noncompliance, or whether the Party is concerned that substantial violations will continue even if subsidies are reduced.

2. Surplus Manure-spreading

Another type of violation asserted in the submission and supporting documentation is surplus manure-spreading. The Regulation provides that manure must be uniformly spread on cropland over a minimum area of 0.3 hectares per animal unit contained in the operation.⁴⁵ Under the Regulation, producers are required to either own enough cropland to spread the manure generated by the animal units that they raise at or below the maximum application level allowed by the Regulation or arrange to spread the manure on the land of a third party.⁴⁶ Producers must also comply with record-keeping requirements, maintaining information on, among other things, the date, place and quantity of manure spread on land that is not their property.⁴⁷

The Auditor General's report found violations of manure-spreading requirements, including lack of effective monitoring, noncompliance with record-keeping requirements,

⁴⁵ Division VI, section 40. Application at a higher rate is allowed if a technical study signed by a duly authorized professional attests that the nature of the crops allows a higher application rate. *Id.*

⁴⁶ Division VI, section 40. Consigning management of surplus manure to MEF-recognized agencies is another option. Response at 8.

⁴⁷ Auditor General's Report, 2.103; Response at 8.

and violations of substantive requirements.⁴⁸ The Auditor General found that “in the absence of effective monitoring, spreading agreements are rarely taken seriously by producers and records are not kept.”⁴⁹ Similarly, a *Le Soleil* article reported that, among the “several failures on the part of the MEF,” MEF officials do not ask producers for the manure-spreading records that the Regulation requires them to keep, and do not ensure compliance with spreading agreements.⁵⁰ The Auditor General found excess manure-spreading to be the leading source of nonpoint source pollution.⁵¹

The Auditor General also reports that the Party provides financial aid to operators that are violating spreading requirements. The Report indicates that “producers continue to receive financial assistance from MAPAQ and its organizations, even if they do not comply with MEF requirements and spread farm manure inappropriately.”⁵²

The response asserts that the Government of Quebec has “taken significant measures toward finding solutions to the manure-spreading problem.”⁵³ The response identifies the pilot project intended to ensure that insurable stock is limited to the units authorized by the MEF as one such measure. It would be relevant to develop more information concerning this pilot project and any expansion of it, as indicated above. Information regarding other enforcement strategies to address violations of spreading requirements would be relevant as well.

The Party refers to specific programs to address manure-spreading problems in areas with particularly high concentrations of livestock operations. The response indicates that “[m]anure management agencies have been established in the most problematic areas of the Chaudière, Yamaska and l’Assomption river basins, where there is an overall manure surplus in relation to the whole region.”⁵⁴ The mission of the surplus manure management agencies is to “appropriately use and dispose of the manure in their respective regions, taking into account agronomic, environmental and economic factors.”⁵⁵ The agencies are monitored by committees made up of representatives from the municipal, provincial, environmental and public health sectors.⁵⁶ The Regulation

⁴⁸ Auditor General’s Report, 2.108, 2.110, 2.113.

⁴⁹ Auditor General’s Report, 2.110.

⁵⁰ *Le Soleil*, 28 February 1996, by Michel Corbeil, “Illegal Pig Herds: The MEF can no longer keep track of surplus manure.” (Annex 25).

⁵¹ Submission at 12, cites Auditor General’s Report, 2.6.

⁵² Auditor General’s Report, 2.113. The Auditor General’s Report also states: “Even though the purpose of these subsidies is environmental protection, MAPAQ does not ensure that the producers targeted adopt sound environmental practices. Thus, subsidies for proper manure storage have not been conditional upon the establishment of a fertilization plan that includes environmentally friendly manure-spreading methods.” Auditor General’s Report, 2.61.

⁵³ Response at 58.

⁵⁴ Response at 58.

⁵⁵ Response at 45.

⁵⁶ Response at 45.

was amended to give powers to manure management agencies in 1996.⁵⁷ As a result, producers with surplus liquid manure in regions with “high breeding concentrations” are required to use the services of the regional management agency to construct or expand breeding-related facilities.⁵⁸ The Quebec government can revoke the powers of an agency at any time if it does not comply with its requirements.⁵⁹ The Party estimates that Quebec will have granted nearly C \$10 million to manure management agencies by 1999.⁶⁰ The response sums up as follows concerning these agencies: “In short, these management agencies promote regional cooperation among the various stakeholders while giving the Quebec government the final say if an agency cannot guarantee that its activities are environmentally sound.”⁶¹

The Auditor General’s Report found that, since their creation, manure management organizations have carried out studies aimed at accurately determining volumes of surplus manure and have recruited producers to join the organizations.⁶² The Report also found, however, that only a small percentage of high surplus producers are members because MAPAQ does not require producers of surplus manure to belong to a manure management organization.⁶³ Thus, the Auditor General found that manure management agencies only manage 10 to 20 percent of the pollutant load in their respective river basins, and MAPAQ cannot be sure that manure surpluses are being managed adequately.⁶⁴ The Report states that “few concrete measures have been taken to manage previously existing surpluses or the surpluses brought about by the 15 percent increase in pork production over the last five years.”⁶⁵

It would be relevant to develop facts on several issues relating to the creation of the manure management agencies. Such issues include the following:

- the nature of the strategies the agencies have developed to deal with surplus manure in order to promote compliance with manure-spreading requirements;
- the nature of the Party’s efforts to monitor the effectiveness of these strategies in promoting compliance;
- the extent to which the strategies have been effective; and
- the nature and extent of the Party’s plans to pursue other enforcement approaches to the extent the strategies have not proven effective (for example, enforcement

⁵⁷ Response at 45.

⁵⁸ Response at 45.

⁵⁹ Response at 45.

⁶⁰ Response at 45.

⁶¹ Response at 45.

⁶² Auditor General’s Report, 2.132.

⁶³ Auditor General’s Report, 2.133. The Report states that between 5 and 27 percent of high surplus producers are members, depending on the region.

⁶⁴ Auditor General’s Report, para 2.133.

⁶⁵ Auditor General’s Report, para 2.130.

approaches taken concerning the many “high surplus producers” in these regions that apparently have not associated with the agencies).⁶⁶

The response references the new Regulation as part of its strategy to improve manure-spreading practices:

The new regulation makes several modifications to the old Regulation respecting the prevention of water pollution in livestock operations, particularly with respect to manure-spreading conditions, spreading agreement rules, ownership of the land where spreading occurs and record-keeping. It establishes distance limits for spreading near sources of water and renews those for aquatic environments. Formal agreements are required for spreading on land of which the producer of the manure is not the owner. Prior provisions concerning manure management agencies were incorporated into the new legislation. New record-keeping requirements for operations that are particularly large or that pose a hazard to the environment have been added to existing rules concerning the consignment of manure to other operators. The MEF can also require operators to submit records of manure-spreading and shipping activities. Spreading on frozen or snow-covered ground continues to be prohibited, to which is added a ban on spreading between 1 October and the following 1 March, and the use of canons to spread liquid manure.⁶⁷

The response points out that the new regulation requires the 25,000 producers with the highest environmental risk factors to develop agri-environmental fertilization plans over the next six years. These plans are intended to establish a balance between crop needs and the use of all types of fertilizer.⁶⁸ Because the Party has identified the new regulation as part of its strategy to address the environmental and public health concerns at issue in this submission, the Secretariat believes it would be appropriate to develop facts concerning the extent to which there is compliance with this regulation. The factual record would not develop facts concerning the effectiveness of the regulation itself but instead would be limited to the question of effectiveness of enforcement. For example, the Auditor General notes that no follow-up measures have been taken to ensure that the plans prepared under the new regulation are implemented.⁶⁹ It would be appropriate to develop information concerning the nature and extent of such follow-up.

⁶⁶ The Party has provided policies that appear to set forth its approach to monitoring and other issues (see, e.g., Annex 2 to the Response to the Article 21 Request) but there is little information concerning actual implementation of these strategies. This information seems particularly relevant in light of the Auditor General’s findings relating to an absence of effective monitoring.

⁶⁷ Response at 9.

⁶⁸ Response at 10.

⁶⁹ Auditor General’s Report, 2.62.

3. Noncompliant manure storage facilities.

Another type of violation of the Regulation asserted in the submission involves noncompliant manure storage facilities. The Auditor General reports that a 1987 inventory by the MEF found that 86 percent of agricultural buildings were neither adequate nor compliant with manure storage regulations.⁷⁰ In 1988, the government initiated the Manure Management Assistance Program (PAAGF) to remedy this problem. By 1996, the government had invested \$98 million in improving manure storage facilities.⁷¹ Livestock producers also contributed to the cost of the improvements.⁷²

The response asserts that Quebec has made significant progress in bringing manure storage facilities into compliance with the Regulation, in large part due to this program.⁷³ Canada explains that Quebec has prioritized liquid manure storage, which has a higher polluting potential, and that subsequent government actions will be aimed at the storage of solid manure.⁷⁴ Canada indicates that the above-referenced grants have “resulted in the proper storage of more than 12 million cubic meters of manure produced by nearly 698,000 animal units.”⁷⁵

Canada reports that “[o]ver a period of five years, it should resolve the problems surrounding manure storage. . . .”⁷⁶ The response indicates that “new measures will allow operations with more than 100 animal units to comply with manure storage regulations,” starting in March 1999, and that operations with fewer than 50 animal units will be compliant by March 2002.⁷⁷

The Auditor General estimated that the remaining program budget would be sufficient to resolve the 1,200 to 1,500 cases of farms with serious storage problems.⁷⁸ Citing MAPAQ calculations, the Auditor General estimated that an additional investment of \$210 million would be necessary to resolve the 8,000 less critical cases that remain.⁷⁹

Facts relevant to Canada’s enforcement response to resolve violations of manure storage requirements include:

⁷⁰ Auditor General’s Report, 2.105.

⁷¹ Auditor General’s Report, 2.106. Canada advises in its response that from 1988 to 1997, “C \$114 million was granted to 6,965 projects for the construction or modification of storage facilities.” Response at 23.

⁷² Auditor General’s Report, 2.105.

⁷³ Response at 16, 23, 53.

⁷⁴ Response at 53.

⁷⁵ Response at 23.

⁷⁶ Response at 23.

⁷⁷ Response at 53.

⁷⁸ Auditor General’s Report, 2.106.

⁷⁹ Auditor General’s Report, 2.106.

- information relevant to the nature and extent of efforts to promote compliance at the 1,200 to 1,500 farms that the Auditor General's Report indicates have serious storage problems; this would include information relating to the financial assistance program referenced on page 23 of the response and covered in Annex 11, among others;
- information relating to the Party's efforts to monitor compliance at such farms;
- information relating to the effectiveness of the Party's efforts in promoting and producing compliance;
- information relating to the Party's plans to the extent that significant noncompliance exists;
- the same questions with respect to the 8,000 "less critical cases" of noncompliance the Auditor General identifies; and
- the point made by the Auditor General's Report that improvements in manure storage have led to an increase in manure to be spread.⁸⁰ Thus, it would be relevant to learn the nature and effectiveness of government efforts to monitor the connection between storage practices (including coming into compliance with storage requirements) and spreading practices, if any. Related, it would be relevant to learn the nature and extent of government efforts to ensure that enhanced compliance with storage requirements does not cause or exacerbate noncompliance with spreading requirements.

4. Information Concerning Enforcement Activity and Information Management

The use of formal enforcement (investigations, prosecutions, etc.) and management of information are two issues that relate to all three types of alleged violations discussed above. It would be relevant to develop additional information in each of these areas. With respect to the former, for example, the Party asserts that, in recent years, the MEF has increased its monitoring efforts and initiated more legal actions to enforce the Regulation.⁸¹ As noted above, however, the Auditor General's Report raises questions about the adequacy or effectiveness of compliance-monitoring. The Report indicates that widespread violations of the spreading requirements and limits in numbers of authorized animal units may occur at least in part because of deficiencies in such monitoring:

Respect for such regulations is even more vital than is recognized by both the MEF and MAPAQ, as, in the absence of effective monitoring, spreading agreements are rarely taken seriously by producers and records are not kept. Moreover, herds are larger than authorized.⁸²

Thus, it would be worthwhile to develop additional information concerning, among other things, the effectiveness of monitoring practices in uncovering violations of the law

⁸⁰ Auditor General's Report, 2.108.

⁸¹ Response at 28.

⁸² Auditor General's Report, para 2.110.

concerning numbers of authorized units and manure-spreading practices, as well as concerning record-keeping requirements.

It also would be relevant to develop information concerning the policies the Party has developed for initiating prosecutions (e.g., the types of violations that warrant prosecutions) as well as information concerning actual implementation of those policies. As discussed above, the Auditor General's Report and other documents suggest that there are thousands of ongoing violations. The Party has provided certain information concerning its prosecution activities in recent years.⁸³ It would be relevant to determine the Party's policies for prioritizing among violations and determining when prosecutions are appropriate, and actual implementation of these policies, among other information in order to supplement the information already provided.

The Auditor General identifies lack of accurate information about the regulated population as another obstacle to effective enforcement.⁸⁴ In its comments to the Auditor General's report, the MEF states that it "only has access to partial data," "making the identification of surplus municipalities difficult" and "prevent[ing] it from accurate knowledge of farms in the area."⁸⁵ The Party states that one response of the MEF to data-related concerns has been to undertake a "unique identification project" that "will lead to a better understanding of the agricultural community."⁸⁶

The following information on the identification project would be useful in evaluating the effectiveness of this program:

- the nature of the unique identification project, and
- the effectiveness of the project in enabling the Party to develop information necessary to evaluate compliance.

It would also be relevant to develop information concerning other efforts Canada is making to improve accuracy of information needed to monitor compliance. Canada references other efforts to improve data, including facilitating interagency exchanges of information. It would be relevant to develop information concerning such efforts and their effectiveness in addressing some of the issues identified above (such as enhancing the government's ability to monitor the number of authorized animal units and enhancing its ability to limit subsidies to authorized units).

⁸³ See, e.g., Response at 28–41.

⁸⁴ See, e.g., Auditor General's Report, 2.147–2.166.

⁸⁵ Auditor General's Report, 2.166.

⁸⁶ Response at 59.

Operators are obligated to provide accurate information to the government.⁸⁷ The Auditor General's Report suggests that there may be violations of this obligation. The Report indicates that the three government bodies that hold information on livestock producers (MEF, MAPAQ, and RAAQ) found numerous inconsistencies in data held by the different sources.⁸⁸

The response states that information provided in applications for a certificate of authorization is "rigorously analyzed" for compliance with applicable regulations.⁸⁹ The response indicates that the MEF has had 26 people to analyze the nearly 5,000 requests for certificates of authorization received between April 1994 and the filing of the submission in 1997.⁹⁰ Based on this limited information and the Auditor General's findings, additional inquiry would seem to be appropriate concerning the nature of the Party's efforts to analyze the applications rigorously, including means employed to verify information provided (such as cross-checking with other government agencies, which the Auditor General suggests rarely occurs).⁹¹

5. Other Issues

It appears that Canada is asserting that its upgrade of its standards should operate to render moot an Article 14 submission alleging a failure to enforce earlier standards effectively. The Secretariat does not believe that the regulations adopted in July 1997 justify termination of this proceeding. The Secretariat does not believe that, as a general matter, submissions alleging failures to enforce effectively should be automatically terminated on the ground that new standards have been adopted. The enactment of the new Regulation does not address the allegations of a failure to effectively enforce the previous Regulation between 1994 and 1997.

There conceptually may be submissions where the consequence of adoption of a new law is that the matters raised in the submission do not merit further study under Article 14(2)(b). This submission does not appear to qualify for such treatment. Canada notes in its response that "the new regulation governs livestock operations in much the same way as the preceding one. . ."⁹² Thus, the development of a factual record on the effectiveness of Quebec's enforcement practices regarding agricultural pollution and, more specifically, livestock production operations is not solely a matter of historical

⁸⁷ See, e.g., Response at 7, discussing EQA Article 122's authorizing the Government to amend or cancel a certificate where the certificate is issued based on incorrect information, among other reasons.

⁸⁸ Auditor General's Report, 2.158.

⁸⁹ Response at 26.

⁹⁰ Response at 25 and 41. Specifically, page 41 says that the MEF "received 5,039 requests for official documents in this period, most of which were requests for authorization. 4,624 were processed . . ."

⁹¹ Auditor General's Report, 2.155–2.166.

⁹² Response at 42, noting that "The response also notes that the new regulation focuses much more on manure-spreading. . ."

interest but rather would improve the state of knowledge about ongoing enforcement of laws regulating livestock waste in Quebec.

Finally, assuming a factual record is developed, the question has been raised concerning the time period of activity it should address. The Council provided the following direction to the Secretariat in Council Resolution 98-07:

[T]he Secretariat, in developing the factual record, [is] 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. . . .⁹³

This direction would seem to be equally applicable in the context of this submission.

⁹³ Council Resolution 98-07 (24 June 1998).

IV. CLOSING COMMENT

The Secretariat considers that the submission, in light of the response provided by Canada, warrants developing a factual record to compile further factual information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with various sections of Canadian environmental law. The submission highlights the significant environmental and public health concerns at stake in connection with these laws. The response does not take issue with the importance of the environmental laws and natural resources at issue in this submission. Instead, it reflects an appreciation of their significance. Further, while the response asserts that the Party's strategies are effective in preventing and addressing violations of these laws, the Submitters' assertions (supported by the Auditor General and others) that violations are widespread, and to some extent subsidized by the government, supports developing additional information concerning the use and effectiveness of these tools.

Respectfully submitted on this 29 day of October 1999.

Janine Ferretti
Executive Director