

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.: SEM-97-006

Submitter(s): The Friends of the Oldman River

Party: Canada

Date of this plan: 14 December 2001

Background

On 4 October 1997, the Friends of the Oldman River presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The Submitters allege that “the Government of Canada is failing to apply, comply with and enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of the *Canadian Environmental Assessment Act* (CEAA) and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA”.¹ The Submitters contend that, as a matter of Canada-wide policy, Canada is failing to apply, comply with and enforce the *Fisheries Act* and CEAA by issuing informal “letters of advice” to project proponents listing environmental conditions that will avoid the need to obtain *Fisheries Act* authorizations for which they would have to carry out an environmental assessment under CEAA. The Submitters also contend that, throughout the country, Canada routinely fails to ensure compliance with or prosecute violations of the habitat protection provisions of the *Fisheries Act*. The Submitters cite the Sunpine Forest Products Forest Access Road case (the “Sunpine Project”) as an example.

On 16 November 2001, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, “on whether Canada, in the Sunpine Forest Products Access Road case, is failing to effectively

¹ Submission at 1.

enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA.” The Council directed the Secretariat, in developing the factual record, 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.

Under Article 15(4) of the NAAEC, in developing a factual record “...the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts.”

Overall Scope of the Fact Finding:

The Submitters assert that sections 35 and 37 of the *Fisheries Act* taken together and supported by appropriate regulations were to create a preventative and planning regime for works and undertakings with the potential to harm fish habitat. They assert that in practice, almost no section 37(2) orders are issued and the number of section 35(2) authorizations varies widely from province to province and has decreased significantly in recent years. They assert that the *Directive on the Issuance of Subsection 35(2) Authorizations* (Directive), which provides for the issuance of letters of advice in certain cases, invents a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool and as a mechanism for public participation. The Submitters also assert that there are very few prosecutions for violations of the habitat protection provisions of the *Fisheries Act* and they claim that there has been a *de facto* abdication of legal responsibilities by Canada to the provinces, which, they claim, have not done a good job of securing compliance with or enforcing the *Fisheries Act*.

The Submitters refer to the Sunpine Project as an example of Canada’s alleged failure to enforce the *Fisheries Act* and CEAA. The Sunpine Project involved the construction, by Sunpine Forest Products Ltd. (“Sunpine”), of a 40 kilometer road to access forest areas on the eastern slope of the Rocky Mountains, west of the town of Rocky Mountain House in Alberta.

The Submitters assert that they repeatedly urged Canada to initiate an environmental assessment of the Sunpine Project under CEAA on the basis that the Project triggered CEAA twice: first, it would result in the harmful alteration, disruption or destruction of fish habitat, thus requiring an authorization pursuant to section 35(2) of the *Fisheries Act*; and second, Canada had requested information from Sunpine and was evaluating it as provided by section 37(2) of the *Fisheries Act*. The Submitters assert that at the time of filing the submission, they had not

received a response from Canada regarding whether an environmental assessment would be triggered by the Sunpine Project.

In its response, Canada contends that sections 35(2) and 37 of the *Fisheries Act* are not invoked if there is no harmful alteration, disruption or destruction of fish habitat. With regard to the Sunpine Project, Canada asserts that the Department of Fisheries and Oceans (DFO) became aware of the Project and that it included 21 river crossings. DFO concluded that 8 such crossings had potential implications for fish habitat and subsequently concluded that 6 of these had no potential to damage fish habitat if constructed as proposed by Sunpine. For the remaining 2 crossings, DFO wrote letters of advice.

To prepare the factual record, the Secretariat will gather and develop information relevant to the facts concerning:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
- (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project; and
- (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in the context of the Sunpine Project.

Overall Plan:

Consistent with Council Resolution 01-08, execution of the overall work plan will begin no sooner than 14 January 2002. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). **[January 2002]**
- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Canada, as appropriate, and will consider any

information furnished by any of the Parties (Articles 15(4) and 21(1)(a) of the NAAEC).
[January 2002] Information will be requested relevant to the facts regarding:

- (i) application of section 35 of the *Fisheries Act* in connection with the Sunpine Project;
 - (ii) Canada's enforcement of sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in connection with the Sunpine Project; and
 - (iii) whether Canada is failing to effectively enforce sections 35, 37 and 40 of the *Fisheries Act*, section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the *Law List Regulations* made pursuant to paragraphs 59(f) and (g) of CEAA in the context of the Sunpine Project.
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. **[January through April 2002]**
 - The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. **[January through June 2002]**
 - The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested non-governmental organizations or persons, the JPAC or independent experts. **[January through June 2002]**
 - In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. **[June through September 2002]**
 - The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[end of September 2002]**
 - As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[November 2002]**
 - The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submission, the Party's response, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page www.cec.org or upon request to the Secretariat at the following address:

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