DISTRIBUTION: General

ORIGINAL: English

BY FAX AND REGISTERED MAIL

2 April 1997

The Friends of the Oldman River
c/o Ms. Martha Kostuch
Vice-president
Box 1288, Rocky Mountain House
Alberta T0M 1T0

Re: Submission on enforcement matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation

Submitter(s):	The Friends of the Oldman River
Party:	Canada
Date:	8 October 1996
Submission No.:	**SEM-96-003**

Dear Ms. Kostuch:

Please find attached the Secretariat's Article 15(1) determination in connection with your amended submission on enforcement matters filed on 8 October 1996 under Article 14 of the North American Agreement on Environmental Cooperation.

Yours truly,

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

c.c. Ms. Carol M. Browner
Mtra Julia Carabias
Hon. Sergio Marchi

A14/SEM/96-003/12/15(1)
DISTRIBUTION: General
ORIGINAL: English

Commission for Environmental Cooperation - Secretariat

Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation

Submission ID: SEM-96-003

Submitter(s) : The Friends of the Oldman River

Concerned Party: Canada

I- PROCEDURAL HISTORY

On 9 September 1997, the Submitter filed with the Secretariat submission SEM-96-003 ("Submission") under Article 14 of the North American Agreement on Environmental Cooperation ("the Agreement"). On 1 October 1996, the Secretariat determined that the submission did not meet the criteria of Article 14(1). On 8 October 1996, the Submitter filed an amended submission satisfying the criteria of Article 14(1). The Secretariat then reviewed the submission under Article 14(2) and requested a response from the Government of Canada on 8 November 1996. On 13 December 1996, the Government of Canada advised the Secretariat that it would respond to the submission within 60 days of the receipt of the submission. On 13 January 1997, the Government of Canada filed its response with the Secretariat.

In accordance with Article 15(1) of the Agreement, the Secretariat now reviews the Submission, in light of the response provided by the Government of Canada, to determine whether a factual record is warranted.

II- NAAEC ARTICLES 14 AND 15

Article 14 of the Agreement allows the Secretariat to 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. The Secretariat may consider any submission that meets the criteria set out in Article 14(1). Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission (Article 14(2)). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared in accordance with Article 15(1). The Council, comprised of the Minister of the Environment (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission (Article 15(2)). Final factual records are made publicly available upon a 2/3 vote of the Council (Article 15(7)).

III- SUMMARY OF THE SUBMISSION

The Submitter alleges that "[t]he Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the *Fisheries Act* and with CEAA [Canadian Environmental Assessment Act]. In particular 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 CEAA and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA." [Submission at p.1.]

According to the Submitter the Department of Fisheries and Oceans released a Directive (*Directive on the issuance of subsection 35(2) authorizations*, May 25, 1995) that creates "a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and

decision making tool." [Submission at p.2]. The Submitter further alleges that "[t]here are very few prosecutions under the habitat provisions of the *Fisheries Act* and the prosecutions that do occur are very unevenly distributed across the country." [Submission at p.3].

IV- SUMMARY OF THE RESPONSE

In its response, the Government of Canada states:

> "Pursuant to Article 14(3) of the Agreement, I [Minister of the Environment] advise the Secretariat that the matter raised in this submission is the subject of a pending judicial or administrative proceeding before the Federal Court of Canada.
>
> On November 7 [1996], the Friends of the West Country Association filed an Originating Notice of Motion in the Trial Division of the Federal Court of Canada in Alberta, *The Friends of the West Country Association* v. *The Minister of Fisheries and Oceans and the Attorney General of Canada* (Federal Court case No. T2457-96), I enclose the supporting documentation. At issue in both the submission to the NAAEC and the case before the Federal Court are the application and interaction of sections 35, 37 and 40 of the *Fisheries Act* and of the *Canadian Environmental Assessment Act*.
>
> Moreover, as referred to in Article 14(3), private remedies in connection with the matter raised in the above-mentioned submission are available and are being pursued in the Federal Court action."

V- SUMMARY OF RELATED JUDICIAL PROCEEDINGS

The Friends of the West Country has initiated a judicial proceeding against the Minister of Fisheries and Oceans and the Attorney General of Canada (*The Friends of the West Country Association* v. *The Minister of Fisheries and Oceans and the Attorney General of Canada*, Federal Court case No. T2457-96). The Federal Court case involves the issuance of "letters of advice" to Sunpine Forest Products Ltd. ("Sunpine") regarding Sunpine's proposal to construct and operate a mainline road and associated bridges.

The Applicant in its Originating Notice of Motion seeks to characterize the "letters of advice" furnished to Sunpine by the Minister of Fisheries and Oceans as "authorizations" under section 35(2) of the Fisheries Act, as "orders" under section 37(2) of the Fisheries Act or as invalid, without legal force or effect. The Applicant further seeks declarations requiring the Department of Fisheries and Oceans to comply fully with both the Fisheries Act and the Canadian Environmental Assessment Act and prohibiting the Minister or his delegates from issuing "letters of advice" in substitution for "authorizations" under section 35(2) of the Fisheries Act.

In its submission to the Secretariat, the Submitter makes specific reference to the Sunpine Proposal as an example of an allegedly wider departmental practice. Drawing this distinction, the Submitter states: "[t]his submission is related to the general failure of the Government of Canada to apply, comply with and enforce the Fisheries Act and the Canadian Environmental Assessment Act and not this particular case [the Sunpine Proposal] which is provided only as an example." [Submission at p.3].

VI- ANALYSIS

The Secretariat first considers whether Article 14(3)(a) compels the Secretariat to terminate review of the submission because the matter is currently pending before a Canadian court of law. Article 14(3) applies when the Secretariat has requested a response from a government following the initial review of a Submission. The Article provides that the Party "shall advise" the Secretariat within a prescribed time period "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further".
Article 45(3)(a) defines a "judicial or administrative proceeding" for the purposes of Article 14(3) to mean:

> a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;

The pending Federal Court case called to the attention of the Secretariat by Canada is not an action *pursued by the Party* within the meaning of Article 45(3)(a). The term "Party" is employed consistently throughout the North American Agreement on Environmental Cooperation to refer to a government signatory to the Agreement. *See e.g.*-- Arts. 1(a), 2-8, 10-12, 48(1) and 50. Articles 14 and 15 clearly ascribe this meaning to "Party" as well. *See, e.g.* Arts. 14(1), 14(2)(c), 14(3) and 15(1).

By limiting the ambit of "judicial or administrative proceedings" to those actions pursued by governments, the provision appears to contemplate the peremptory nature of directed efforts undertaken by a government in a timely manner to secure compliance with environmental law. In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.

Since the current matter before the Canadian court was initiated and is being pursued by a private entity, and not a "Party" as that term appears to be employed in Article 45(3)(a), the Secretariat may consider other factors in its review of the Submission at this stage.

Notwithstanding the determination that Article 14(3) does not compel the Secretariat to terminate the submission process, the Secretariat nonetheless regards the pending judicial action as pertinent to our decision whether to recommend the development of a factual record. For the reasons discussed below, the Secretariat considers as relevant to its determination both the similarity of the issues which are the subject of the Submission and pending judicial action, and the impact that the remedy sought in a court of law may have on the enforcement-related matters under consideration in this Submission. We regard these considerations as implicit in the guidance criteria set forth in Article 14(2) and in the information a Party can call to the attention of the Secretariat and Parties in Article 14(3).

The matters raised in the submission bear a close resemblance to the issues currently before the Federal Court of Canada in the "Friends of the West Country Association" case cited by Canada. Paragraphs 1-6 of the Originating Notice of Motion seek relief for the specific instance of alleged non-compliance relating to the Sunpine Proposal. These paragraphs address the fact specific example provided by the Submitter to illustrate the allegedly widespread practice of issuing "letters of advice."

Paragraphs 7 and 8 of the Originating Notice of Motion are of a more general nature:

> 7. Declaring that the Department of Fisheries and Oceans' policy, as set out in the "Directive on the Issuance of Section 35(2) Authorizations," of issuing "letters of advice" in substitution for "authorizations" under section 35(2) of the *Fisheries Act* is unlawful and *ultra vires*;
>
> 8. Prohibiting the Minister or his delegates from issuing "letters of advice" in substitution for "authorizations" under section 35(2) of the *Fisheries Act*.

A decision by the Federal Court declaring the policy of issuing "letters of advice" unlawful or *ultra vires* and/or prohibiting the Minister or his delegates from issuing "letters of advice" would effectively curtail the practice giving rise to the alleged failure to effectively enforce the Fisheries Act and CEAA. Additionally, a decision rendered in favor of the Applicant under Paragraphs 7 and 8 of the Originating Notice of Motion would no longer require a group or individual objecting to the departmental practice of issuing "letters of advice" to seek separate relief in each instance and in each venue where such letters are issued or take effect.

Although it is possible that the Federal Court may not rule on the arguments advanced under these paragraphs, the similarity of issues presented in both the submission and the lawsuit at this stage creates a risk that the preparation of a factual record may duplicate important aspects of the judicial action.

In addition to the possibility of duplication, the preparation of a factual record at this time presents a substantial risk of interfering with the pending litigation. Civil litigation is a complex undertaking

governed by an immensely refined body of rules, procedures and practices. The Secretariat is reluctant to embark on a process which may unwittingly intrude on one or more of the litigants' strategic considerations. These consideration may pertain, for example, to planning and preparation regarding the undertaking of discovery, or the development and presentation of evidence and legal theories.

In this instance, similar legal issues are before both the Federal Court and the Secretariat. The central issues addressed in the Submission could be rendered moot should the Federal Court rule in favor of the Applicant regarding the contentions they raise in paragraphs 7 and 8 of the Originating Notice of Motion. Both of these considerations weigh in favor of allowing the domestic proceeding to advance without risking duplication or interference by considering parallel issues under the Agreement.

Accordingly, the Secretariat considers that the submission does not warrant developing a factual record. *The Guidelines for Submissions on Enforcement Matters* do not empower the Secretariat to suspend submissions pending the resolution of judicial proceedings. However, the Submitter may wish in the future to file a new submission following a decision, dismissal or other resolution of paragraphs 7 and 8 of the Originating Notice of Motion currently before the Federal Court of Canada.

Montreal, this 2nd day of April 1997.

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director