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Environmental Law in the Public Interest

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Victor Lichtinger
Executive Director
Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montreal (Quebec) Canada
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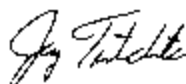
Re: Response: Submission T.D. # SEM-95-001, Biodiversity
Legal Foundation, et al. v. United States of America

Dear Mr. Lichtinger:

Please accept the enclosed Response, submitted pursuant to Item 8.1 of the Draft Procedures for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, for your review. An electronic copy of the Response on computer disk (WordPerfect 6.0 for Windows format) is also enclosed for your convenience.

If you have any questions or concerns regarding the submission of this Response please do not hesitate to call.

Sincerely,



Jay Tutchton, Esq.
Earthlaw
Attorney for Petitioners

Earthlaw

Environmental Law in the Public Interest

October 17, 1995

ORIGINAL

Victor Lichtinger
Executive Director
Secretariat, Commission for Environmental Cooperation
393, rue St. Jacques Ouest, Bureau 200
Montreal (Quebec) Canada
H2Y 1N9

RE: Submission I.D. # SEM-95-001, *Biodiversity Legal
Foundation, et al. v. United States of America*

Dear Mr. Lichtinger:

On behalf of the Biodiversity Legal Foundation, Consejo Asesor Sierra Madre, Forest Guardians, Greater Gila Biodiversity Project, and Southwest Center for Biological Diversity (collectively "Petitioners"), Earthlaw offers the following response to your letter of September 21, 1995 (the "Decision").

In its Decision, the Secretariat found that our submission (SEM-95-001) failed to satisfy the criteria found in Article 14:2 of the North American Agreement on Environmental Cooperation (NAAEC). As a result, the Secretariat indicated that it would not request a response to our submission from the United States, and that in the absence of any new or supplemental information, provided within 30 days, it would conclude its consideration of our submission. Accordingly, as provided in the Decision and in the *Draft Procedures for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC* at 8.1, Petitioners submit the following new and supplemental information for the Secretariat's consideration. As set forth below we urge the Secretariat to reconsider its decision, or in the alternative to pursue other avenues available to the Secretariat to address the Petitioners' concerns.

BACKGROUND

Article 14:2 of the NAAEC provides that in deciding whether a submission merits requesting a response from a Party, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.¹

The Secretariat's Decision does not evaluate our submission under Article 14:2(a), (c), or (d). Presumably, the Secretariat concluded the submission satisfied these criteria. Rather, the Decision focuses on Article 14:2(b) asking "whether the goals of the Agreement will be advanced by considering this matter under Articles 14 and 15."² The Secretariat concluded that the goals of the NAAEC would not be advanced by further review of our submission. This is an unfortunate decision, and it is devastating to the Petitioners' interests. We urge the Secretariat to reconsider its position, or to pursue an alternative course of action to address the Petitioners' concerns.

DISCUSSION

I. THE SECRETARIAT'S DECISION IGNORES U.S. PRECEDENT AND THE FACTS OF THIS CASE

The Secretariat correctly frames the question presented by our submission as "whether a *failure to effectively enforce* under Article 14 may result from the enactment of a law which suspends the implementation of certain provisions of another statute."³ Unfortunately, the Secretariat concludes:

¹ NAAEC, Article 14:2.
² Decision at 4.
³ Decision at 4 (emphasis added).

The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes part of the greater body of environmental laws and statutes on the books. . . . The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.⁴

This reasoning ignores U.S. legal authority and the facts of this case. The Secretariat's conclusion that it "cannot characterize the application of a new legal regime as a failure to enforce an old one," can only be read as a finding the Rescissions Act (Public Law 104-6) is a "quasi-amendment" of the Endangered Species Act (ESA). The Secretariat's conclusion is in direct conflict with the conclusion of the United States District Court for the District of Arizona. Silver, et al. v. Babbitt, et al., Civ. No. 94-337 PHX CAM (May 10, 1995) ("there is no substantive amendment in the ESA by the [Rescissions Act]").⁵ Furthermore, the Secretariat's position that it does not matter "if pre-existing law is not amended or rescinded"⁶ is misguided. The NAAEC charges all Parties with effectively enforcing their environmental laws.⁷ The NAAEC also explicitly recognizes the right of all Parties to amend or modify their environmental laws.⁸ Accordingly, contrary to the Secretariat's position, the issue of whether or not a Party has amended or modified its environmental laws is critical. In the present case, the Secretariat has elected to answer the question of whether or not the United States has amended or modified the ESA in conflict with the federal courts of the United States. The Secretariat should explain its position. At a minimum, the Secretariat should inform the public as to whose construction of U.S. law will control: the Secretariat's; or the United States' judiciary.

⁴ Decision at 6.

⁵ A copy of this court order was attached as Exhibit 3 to Petitioners' original submission. The quoted statement appears at page 7 of the Court's order.

⁶ Decision at 6.

⁷ NAAEC, Article 5(1).

⁸ NAAEC, Article 3.

Moreover, the Secretariat's conclusion that the Rescissions Act is part of the "greater body of environmental laws and statutes on the books," ignores the facts of this case. The Rescissions Act is not an environmental law. It is a budgetary measure. As the Secretariat noted in its Decision, the Rescission Act removes \$1,500,000(US) from the budget of the U.S. Fish and Wildlife Service for enforcing Section 4 of the ESA.⁹ The removal of this money from the budget of the U.S. Fish and Wildlife Service does not change the ESA. If the U.S. Congress elected to restore this funding in the future, the ESA would be unaffected. It is disingenuous of the Secretariat to equate the U.S. Congress cutting the budget of an environmental enforcement agency with the U.S. Congress amending the underlying "body of environmental laws and statutes on the books." The Secretariat should reconsider, or at least explain, its position on the facts of this case.

II. EXEMPTING THE LEGISLATIVE BRANCH FROM SCRUTINY UNDER THE NAAEC WILL RENDER THE NAAEC INEFFECTIVE

Perhaps the most troubling aspect of the Secretariat's Decision is that it creates the "exception" that will no doubt swallow the "rule." By holding that the Rescissions Act is a "quasi-amendment" of the ESA and concluding that "[t]he Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one,"¹⁰ the Secretariat has effectively granted the legislative branch of government an exemption to the effective enforcement promise in NAAEC, Article 5:1. The Secretariat notes:

Article 14:1 allows the Secretariat to consider a submission asserting that "... a Party is failing to effectively enforce its environmental law..." On its face, there is little to support the notion in Article 14:1 that the word *Party* is restricted to include only the executive functions of agencies or departments, or that the term should mean

⁹ Decision at 2.

¹⁰ Decision at 6.

anything other than "government" in a broader sense, including its separate branches."¹¹

It is an old axiom of legal construction that if a statute, or in this case an agreement, is clear "on its face," that should be the end of the inquiry. Unfortunately; however, the Secretariat elected to discount the plain meaning of NAAEC, Article 14:1, and instead embarked on a search for "guidance" and "support"¹² elsewhere in the NAAEC for the proposition that "Articles 14 and 15 of the Agreement were [only] intended to address failures by enforcement agencies or departments, and not inaction mandated by law."¹³ Accordingly, unless the Secretariat reconsiders its position and returns to the plain meaning of Articles 5:1 and 14:1, the legislative branch of government will not be covered by the NAAEC's requirement that all countries effectively enforce their environmental laws.

This emerging loophole will render the NAAEC useless as a tool to promote the effective enforcement of environmental laws. If the Secretariat does not find that the protections of Articles 5:1 and 14:1 extend to legislative decisions to suspend the enforcement of environmental laws, then industrial and commodity interests, which wish to avoid compliance with environmental laws, will simply lobby the legislative bodies in their respective countries to grant them a suspension. Environmental laws will remain on the books, but will not be enforced. The preferred method of non-compliance will shift. Instead of influencing or corrupting the "agencies or officials"¹⁴ of a Party, commodity and industrial interests will switch to influencing and corrupting the legislative branch of government. As is discussed below, this is not a theoretical problem.

¹¹ Decision at 4 (underline added).

¹² Decision at 4-5.

¹³ Decision at 5.

¹⁴ NAAEC, Article 45:1.

**III. INCLUDING THE LEGISLATIVE BRANCH OF GOVERNMENT IN
ARTICLE 14 WOULD ADVANCE THE GOALS OF THE AGREEMENT**

Requiring the effective enforcement of environmental laws is a principle goal of the NAAEC.¹⁵ As discussed above, the Secretariat's Decision has granted the legislative branch of government an exemption to this rule.

In the United States, this is already a major problem. At the time our original submission was filed, the Petitioners informed the Secretariat that the U.S. Congress was currently considering several legislative riders tacked onto various budget bills which, similar to the Rescissions Act, suspend the enforcement of environmental laws with respect to particular activities. On August 30, 1995, the Secretariat received a second Article 14 submission, filed by the Sierra Club Legal Defense Fund, which challenges the suspension of environmental laws related to logging on federal lands. Just as in the present case, the second submission challenges a legislative suspension - not an amendment of environmental laws - contained in another budgetary rescissions act. Petitioners have prepared an informal list of 65 additional anti-environmental riders contained in various budget bills currently pending in the U.S. Congress.¹⁶ While not all of these additional riders can be considered suspensions of environmental law, they do indicate the scope of the "legislative exception" the Secretariat is creating in the NAAEC's effective enforcement requirement. If these new riders are considered together with the first two Article 14 submissions - both of which challenge legislative acts - the Secretariat should have more than enough information to conclude that including the legislative branch of government within the NAAEC's effective enforcement requirement would further the purposes of the Agreement.

¹⁵ NAAEC, Article 5:1.

¹⁶ Attached as Exhibit A.

IV. IN THE ALTERNATIVE THE SECRETARIAT SHOULD PURSUE OTHER AVENUES TO ADDRESS THE PETITIONERS CONCERNS WITH THE LEGISLATIVE RIDER PROBLEM AND WITH BIODIVERSITY

Petitioners original submission asked the Secretariat to prepare a factual record pursuant to Articles 14 and 15 of the NAAEC. As discussed above, Petitioners still maintain this is the appropriate course. However, Article 13 also allows the Secretariat to prepare reports on certain issues. Additionally, Article 13 allows the Secretariat to retain experts, sponsor conferences, seminars, and symposia. Accordingly, if the Secretariat maintains its current position that our submission does not warrant further review under Articles 14 and 15, Petitioners ask the Secretariat to consider preparing an Article 13 Report on two issues raised by our original submission.

First, as discussed above, Petitioners are concerned that the United States Congress is engaged in a wholesale onslaught on environmental laws and protections. Petitioners continue to believe that these legislative riders, which suspend the enforcement and funding of environmental laws, should be addressed as direct failures to effectively enforce under Article 14. However, at a minimum, Petitioners request the Secretariat to investigate whether the U.S. Congress' gutting of numerous environmental laws, as detailed in the first two Article 14 submissions received by the Secretariat and in the attached Exhibit A, is a violation of the United States' Article 3 duty to strive to improve its environmental laws. The U.S. Congress' current behavior directly challenges the NAAEC's premise that environmental protection and economic development are not mutually exclusive goals. An Article 13 report on this issue may help remind the U.S. Congress of this premise, and prevent the spread of legislative "end-runs" of environmental laws both in the United States and in other NAAEC Parties.

Second, Petitioners' submission deals directly with the ESA and the protection of biodiversity. Petitioners view the ESA as a model biodiversity protection statute. As expressed by the United States Supreme Court, the ESA is "the most comprehensive legislation for the preservation of endangered species ever

enacted by any nation."¹⁷ As explained in Petitioners' original submission, the ESA is now under attack in the U.S. Congress. The protection of biodiversity is a matter which should be of concern to the Secretariat.¹⁸ If the Secretariat is not persuaded that the U.S. Congress' current refusal to enforce the ESA can be redressed under Article 14, then the Secretariat should prepare an Article 13 Report discussing alternative methods to protect biodiversity. The Report should also examine the value of biodiversity,¹⁹ and thereby perhaps persuade the legislative bodies of the NAAEC Parties that biodiversity is a societal resource worth protecting.

CONCLUSION

Petitioners appreciate this opportunity to respond to the Secretariat's September 21, 1995 Decision and to provide new and supplemental information. Petitioners sincerely hope that the Secretariat will reconsider its decision to exempt the legislative bodies of the NAAEC Parties from compliance with the Agreement's requirement that environmental laws be effectively enforced. If the Secretariat does not, the NAAEC will lose much of its promise as a tool to promote the effective enforcement of environmental laws.

In the alternative, Petitioners request that the Secretariat avail itself of its authority under Article 13 to address the issues raised by Petitioners' submission.

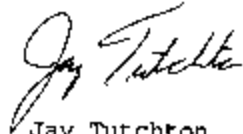
¹⁷ Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

¹⁸ See e.g. NAAEC, Article 10:2(i) &(j).

¹⁹ See e.g. E.O. Wilson, The Diversity of Life at 281-305 (1992); Commodity, Amenity and Morality: The Limits of Quantification in Valuing Biodiversity, in Biodiversity 200, 203 ("[t]he value of biodiversity is the value of everything that there is.").

Dated: October 17, 1995

Respectfully submitted,



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