

**SUBMISSION
TO THE COMMISSION FOR
ENVIRONMENTAL COOPERATION**

**Pursuant to Article 14, *NORTH AMERICAN
AGREEMENT ON ENVIRONMENTAL COOPERATION***

Submitted by:
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INDEX	PAGE
I. SUMMARY OF SUBMISSION	1
II. DOMESTIC ENVIRONMENTAL LAW - FEDERAL REGULATION OF PULP AND PAPER EFFLUENT	2
A. The Pulp and Paper Industry in Canada	2
B. <i>The Fisheries Act</i>	3
C. <i>The Pulp and Paper Effluent Regulations</i> (the “ <i>PPER</i> ”)	4
III. CANADA’S FAILURE TO EFFECTIVELY ENFORCE ITS ENVIRONMENTAL LAWS	6
A. Violations of the <i>PPER</i> and Offences under the <i>Fisheries Act</i>	6
B. Failure to Effectively Enforce by Region	7
1. Quebec	
2. Ontario	
3. Atlantic Provinces	
C. Article 45.1 Not Applicable	11
D. Conclusions	12
IV. ARTICLE 14 REQUIREMENTS	12
A. This is a Submission the Secretariat “May Consider” – Article 14.1	12
B. The Issues Raised in this Submission Merit a Response from the Government of Canada – Article 14.2	13
VI. RELIEF REQUESTED	15

LIST OF APPENDICES

1. *Pulp and Paper Effluent Regulations* (the “PPER”), sections 5, 6, 7, and Schedules I and II
2. *Fisheries Act*, sections 34, 36, 40, 78 and 78.1
3. *Pulping the Law*, Sierra Legal Defence Fund, 2001
4. *Fisheries Act* Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy (the “Compliance and Enforcement Policy”)
5. Quebec, Ontario and Atlantic Provinces Pulp Mill Violation and Prosecution Data Summary Tables
6. Flow Chart of Acute Lethality Testing
7. Violations of Acute Lethality Follow-Up Test Procedures in Ontario and Quebec in the Year 2000
8. *Report of the Commissioner of the Environment and Sustainable Development* to the House of Commons, 1999, Ch.5, par. 5.45-5.6
9. Newspaper Articles
10. Summary of Presentation by Sierra Legal Defence Fund to the Standing Committee on Environment and Sustainable Development, 1998

I. SUMMARY OF SUBMISSION

This submission is made pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (the "NAAEC") by Sierra Legal Defence Fund ("Sierra Legal") on behalf of Friends of the Earth, Union Saint-Laurent, Grands Lacs, Conservation Council of New Brunswick, Ecology Action Centre and Environment North, ("the Submitters").

The Submitters have gathered data on pulp mills in central and eastern Canada and assert that the Government of Canada is in breach of its commitment under the *NAAEC* by failing to effectively enforce its *Fisheries Act* and *Pulp and Paper Effluent Regulations* (the "*PPER*"), primarily in Quebec and the Atlantic provinces.

Under the *Fisheries Act*, it is an offence in Canada to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation, such as the *PPER*.

The *PPER* prescribe certain "deleterious substances" contained in the effluent from pulp and paper mills and off-site treatment facilities. There is an absolute prohibition of the deposit of acutely lethal effluent, making it an offence under the *Fisheries Act*. However, deposits of limited quantities of other prescribed deleterious substances are authorized under certain conditions. If these conditions are not met, then the deposit is not authorized and an offence under the *Fisheries Act* has been committed.

This submission draws on the report *Pulping the Law*, published by Sierra Legal in 2001. The data on which that report was based has been updated, resulting in additional conclusions not contained in the earlier report.

In the period from 1995 to 2000 at mills in central and eastern Canada, this submission highlights more than 2,400 documented violations of the federal law (over 1093 in Quebec, 232 in Ontario, and 1081 in the Atlantic provinces). These are conservative calculations. In addition, in the year 2000 alone an estimated 350 required follow-up tests were not conducted in Quebec and Ontario, and an unknown number in the Atlantic provinces.

In spite of this record, there have been very few prosecutions of pulp and paper mills. Only 8 mills have been prosecuted under these federal laws: six in Ontario, two in the Atlantic provinces and none in Quebec. The data shows that the most effective use of prosecutions under the federal legislation as an enforcement tool has been in Ontario. Despite the large number of violations in the Atlantic provinces, there were only two prosecutions, with the last one in 1998. In Quebec, where there have been federal-provincial administrative agreements since 1994, there have not been any prosecutions under the federal laws. The only prosecutions in Quebec have been under its provincial legislation, and the data indicates that this has not been as effective in reducing the

number of federal violations as the enforcement measures taken in Ontario under the federal legislation.

Certain mills have committed large numbers of violations but have never been prosecuted or only prosecuted on one occasion. While the Submitters do not simply equate prosecutions (and fines) under the federal laws with effective enforcement, such prosecutions are an important enforcement tool that has been effective where used. There is a correlation between the continuing high number of violations in Quebec and the Atlantic provinces, and the low number of prosecutions under the federal laws in those provinces. In Quebec, this has occurred under an administrative agreement that has resulted in mills only being prosecuted under provincial legislation.

The Submitters acknowledge that there have been significant reductions in pulp mills effluent pollution. However, this was an industry that was targeted by regulation and the stated policy of the government was that enforcement measures would be directed towards ensuring that violators comply in the shortest possible time and that violations would not be repeated, and further, that all rules, sanctions and processes would be used so as to be fair, predictable and consistent.

The evidence is clear that for years certain mills were “free riders” at the expense of their competitors and the environment. Some of these mills belatedly turned their records around by the end of 1996, but many were still operating with apparent impunity up to the end 2000.

The Submitters therefore respectfully ask that the Commission for Environmental Cooperation (the “CEC”) prepare a factual record of the assertion that the Government of Canada is in breach of its commitment under the *NAAEC* to effectively enforce the *PPER* (sections 5 and 6, and Schedules I and II)¹, and the *Fisheries Act* (sections 34, 36, 40, 78 and 78.1)² against those pulp and paper mills in central and eastern Canada identified in Part III herein.

II. DOMESTIC ENVIRONMENTAL LAW - FEDERAL REGULATION OF PULP AND PAPER EFFLUENT

A. The Pulp and Paper Industry

Four out of every five tonnes of paper produced in Canada is for export, much of it to the United States. Pulp and paper is Canada’s largest net export sector.³

Canada has approximately 157 pulp and paper mills that use enormous amounts of water. A 1994 report found that the average Canadian pulp mill released 50,000 to 150,000 cubic metres of waste water per day—enough to fill 53 to 159 Olympic-size swimming pools.⁴ That daily waste water, or effluent, can contain as much as 40 tonnes of solid organic waste.⁵ In addition, most pulp mill effluent also contains large amounts of chemicals. In 1997, the pulp and paper industry reported the release of more than 2,000 tonnes of chemicals into Canadian waters.⁶ Since 1995, the amount of water used to

produce paper has only been marginally reduced.⁷ The pulp and paper process is described more fully in the report “*Pulping the Law*”, Appendix 3.

Mills have added tonnes of harmful substances to our waterways and caused extensive harm to aquatic ecosystems.⁸ As a trans-boundary example, the International Joint Commission, which implements the United States-Canada Great Lakes Water Quality Agreement, has indicated that in 1995, pulp and paper mills were partly responsible for the environmental degradation found in 15 of their 43 “Areas of Concern” in the Great Lakes basin.⁹

While the pulp and paper industry responded to public pressure and made progress at the beginning of the 1990’s in reducing the amount of water used and later with the virtual elimination of certain persistent organic pollutants (organochlorines such as dioxins and furans), investment in environmental upgrades has dropped sharply since 1995. According to industry figures, investment in 1999 was reduced to approximately 8% of the 1995 high, and about 15% of the average annual investment between 1989 and 1994.¹⁰

B. *The Fisheries Act*

The federal government regulates pulp mill effluent as part of its responsibility for Canadian fisheries. It has exclusive legislative authority over “Sea Coast and Inland Fisheries” under section 91.12 of the *Constitution Act, 1867*. The *Fisheries Act* was enacted pursuant to this authority to regulate and protect Canada’s fisheries.

Under the pollution provisions of the *Fisheries Act*, it is an offence to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation.

The provisions of the *Fisheries Act* most relevant to this submission are the:

- definition of “deleterious substance” (s. 34),
- prohibition against the deposit of deleterious substances (s. 36 (3)),
- exception for deposits authorized by regulation (s. 36 (4)),
- specific offence provision regarding s. 36 (s. 40 (2)),
- general offence provision (s. 78), and
- continuing offence provision (s. 78.1).

The full text of these provisions is attached as Appendix 2.

The federal Minister of Fisheries and Oceans has the legislative responsibility for the administration and enforcement of the *Fisheries Act*. However, in 1978 the Minister of the Environment was assigned responsibility for administration and enforcement of the pollution prevention provisions of the *Fisheries Act*. In 1985, the Department of Fisheries and Oceans and the Department of the Environment entered into a memorandum of understanding and subsequently they developed a *Fisheries Act* Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy (the

“Compliance and Enforcement Policy”), for general guidance and not as a substitute for the *Fisheries Act*.¹¹ The policy document is attached as Appendix 4.

The Compliance and Enforcement Policy guides government officials in the proper application of the Act. A stated principle is that “fair, predictable, and consistent enforcement govern application of the law, and responses by enforcement personnel to alleged violations.”¹² The Compliance and Enforcement Policy is intended to ensure that violators will comply with the *Fisheries Act* within the shortest possible time, that violations are not repeated and that all available enforcement tools are used. The range of responses to alleged violations is: warnings, directions by Fishery Inspectors, orders by the Minister, injunctions and prosecutions.

C. The Pulp and Paper Effluent Regulations (the “PPER”)

The preamble to the *PPER* describes itself as “Regulations prescribing certain deleterious substances related to the effluent from pulp and paper mills and off-site treatment facilities and authorizing the deposit of limited quantities of those deleterious substances in certain circumstances”.¹³

Background

Federal standards governing the discharge from pulp and paper mills of harmful substances into Canadian waters are relatively new, with the first set of regulations under the *Fisheries Act* coming into force in 1971. These only applied to new mills and expansions of old mills. By the 1980’s the federal government became aware that only a minority of pulp mills was in compliance with the regulations,¹⁴ and by 1990, only 10 per cent of the pulp and paper mills in Canada were even subject to the regulations.¹⁵ Public pressure led the federal government to establish new regulations governing pulp mill effluent in December 1991, after lengthy negotiations with the industry.¹⁶

The regulatory scheme that the federal government introduced in 1991 imposed three new requirements on mills:

- to change bleaching processes to prevent the formation of dioxins and furans;¹⁷
- stop the use of defoamers and wood chips that led to the formation of dioxins and furans;¹⁸ and
- under the *PPER*, implement a secondary treatment system for effluent and abide by limits to control the discharge of certain harmful pollutants.¹⁹ These regulations came into effect on July 1, 1992.

The provisions of the *PPER* most relevant to this submission are the:

- “prescribed deleterious substances” (s. 5);
- authority to deposit deleterious substances (s. 6);
- conditions governing deposits (s. 7); and
- testing for acute lethality (Schedule II, s. 6).

The full text of these provisions is found at Appendix 1.

Prescribed Deleterious Substances and Their Deposit

Acutely lethal effluent, biological (or biochemical) oxygen demand (“BOD”) matter, and total suspended solids (“TSS”) are all deemed to be deleterious substances under the *PPER*.²⁰ See the *Pulping the Law* Report at Appendix 3 for further descriptive information on acutely lethal, BOD, and TSS effluent.

The deposit of BOD matter or TSS is not a violation of the *Fisheries Act* if the deposit is authorized under the *PPER*.²¹ The authorization of the deposit of BOD matter and TSS is based on a formula set out in section 14 of the *PPER*. However, the deposit of acutely lethal effluent is now strictly prohibited, as the transitional authorization period referred to below, is over.

Transitional Authorizations

When the *PPER* first came into effect, mill operators were given the opportunity to apply for a “transitional authorization” under sections 20 to 26 if they could not comply with the regulations at the time of their commencement on December 1, 1992. Transitional authorizations allowed mills to discharge acutely lethal effluent and effluent above the maximum allowed by the regulations until December 31, 1993. Under “extraordinary circumstances” transitional authorization could be extended until December 31, 1995.²² The mills, therefore, had up to three years after the *PPER* came into force to implement the changes necessary to comply with the law.

Conditions Governing Deposits (BOD matter and TSS)

The *PPER* contains conditions governing deposits that only apply to BOD matter and TSS (s. 7), because the deposit of any acutely lethal effluent is not authorized. The conditions relate to monitoring equipment, monitoring reports, preparing a remedial plan in case the effluent fails certain acute lethality tests, preparing and implementing an emergency response plan, and preparing environmental effects monitoring studies.

If a mill fails to comply with any of the above conditions, then the authority to deposit any deleterious substance under the *PPER* ceases during the period of non-compliance.

Test Methods and Effluent Monitoring Requirements

The test methods for acute lethality, BOD and TSS are set out in Schedule I of the *PPER* and the effluent monitoring requirements, including sampling methods and testing for acutely lethal effluent, BOD and TSS are set out in Schedule II.

Effluent is tested for acute lethality on both trout and *Daphnia magna*.²³ A trout test failure under the *PPER* identifies acutely lethal effluent, the deposit of which is an offence under the *Fisheries Act*. However, an effluent test failure on *Daphnia magna* is not itself a violation of the *PPER*, nor an offence under the *Fisheries Act*. Where effluent fails the *Daphnia magna* acute lethality test, then there must be an immediate trout test and three *Daphnia* tests per week until there is three consecutive passes. A flow chart that assists in making the distinction between acute lethality test failures and follow-up test procedure failures is attached as Appendix 6.

The testing of BOD matter and TSS is more straightforward. The failure to meet conditions governing these deposits means that the deposits are not authorized and therefore illegal. Such deposits are violations of the *PPER* and offences under the *Fisheries Act*.

Under section 78.1 of the *Fisheries Act*, “Where any contravention of this Act or the regulations is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.” Therefore, if a mill violates the *PPER*, then each day on which it fails to perform the necessary follow-up test procedures under the *PPER* is a separate offence.

Even where the pulp mill effluent standards are being effectively enforced, authorized deposits of effluent cause pollution. For that reason, in Canada, the pulp and paper industry is also required to undertake Environmental Effects Monitoring of the receiving environment including environmental conditions and the cumulative effects of toxic effluent. This is intended to supplement the effluent standards by monitoring for environmental effects at each receiving water site.²⁴

III. CANADA’S FAILURE TO EFFECTIVELY ENFORCE ITS ENVIRONMENTAL LAWS

A. Violations of the *PPER* and Offences under the *Fisheries Act*

Article 5 of the *NAAEC* provides:

With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each party shall effectively enforce its environmental laws and regulations through appropriate governmental action. The *Fisheries Act* and *PPER* are environmental laws and regulations within the meaning of Articles 5 and 45.2 of the *NAAEC*.

For the purposes of this submission, violations of the *PPER* fall into two categories:

- pulp mill effluent that fails a prescribed “deleterious substance” test (i.e. acute lethality, BOD or TSS); and
- the failure to carry out the prescribed follow-up self-testing procedures when there is an effluent test failure.

In both scenarios, an offence under the *Fisheries Act* has been committed.²⁵

Acute lethality tests are performed on trout and *Daphnia magna*. In the event of a trout acute lethality test failure, further trout tests are conducted on an accelerated basis. Effluent that fails a *Daphnia magna* acute lethality test is not a violation of the *PPER*, but it must be retested on both trout and *Daphnia magna* on a set schedule. In the case of BOD and TSS test failures, testing continues on the usual frequent basis. To illustrate, see the violation and offence flow chart attached as Appendix 6.

According to Environment Canada’s Enforcement and Compliance Policy, federal enforcement officials are to examine every suspected violation of which they have

knowledge, and are to take action consistent with the criteria in the policy. The available federal tools to deal with violations include warnings, written directions by inspectors, orders by the Minister, injunctions and prosecutions.²⁶

B. Failure to Effectively Enforce by Region

This Submission is limited to Quebec, Ontario and the Atlantic provinces, where approximately 116 mills are in operation.²⁷ The Submitters made access to information requests to obtain relevant data. In general, data has been obtained for the periods 1995 to 2000 for Quebec, 1996 to 2000 for Ontario and 1995 to 2000 (except 1999), for the Atlantic provinces. The mills for which data was obtained are identified in Appendix 5. While the Submitters obtained data regarding violations going back to 1995, they have focused on the year 2000 data in respect of follow-up test violations. See Appendix 7.

1. Quebec

There are about 61 regulated pulp and paper mills in Quebec. The federal government has entered into pulp and paper administrative agreements with Quebec since 1994. These agreements do not relieve the industry from the obligation to comply with the *Fisheries Act* and federal regulations, such as the *PPER*. The province collects information to determine compliance with provincial legislation and forwards the information to Environment Canada, which must satisfy itself that there has been compliance with the federal legislation.²⁸

In the 1999 Annual Report, the federal Commissioner of the Environment, who reports to the Auditor General, considered the problems of enforcement of the *Fisheries Act* against Quebec pulp mills.²⁹ The Commissioner found that:

5.54 ...From 1995 to 1997 there were no federal enforcement responses taken against any non-compliant pulp and paper mills in the province of Quebec.

The Submitters obtained data for the period from 1995 to 2000 for nine Quebec mills, selected because they had multiple violations in 1995 and 1996. The selected mills were responsible for over 960 acute lethality, BOD and TSS violations over the six year period.³⁰

In the year 2000 alone, 26 mills were responsible for 171 violations. In that same year, 28 mills failed the *Daphnia magna* acute lethality test.³¹

As mentioned above, under normal circumstances, a mill is required to do one trout acute lethality test per month and one *Daphnia magna* acute lethality test per week. Whenever a mill fails a trout lethality test, it is required to conduct another trout test once a week (i.e. within 7 days). Whenever a mill fails a *Daphnia magna* test, it is required to immediately conduct a trout test and to do three *Daphnia magna* tests per week, until three consecutive tests have passed.³²

Of the Quebec mills, 24 failed the trout acute lethality test in the year 2000. Of these, 33.3 per cent also violated the acute lethality trout follow-up test procedure.³³

While failing the *Daphnia magna* acute lethality test is not a violation of the *PPER* on its own, of the 28 mills that failed this test, all 28 also failed to conduct the acute lethality follow-up test procedures, which failures are violations of the *PPER*, and therefore the *Fisheries Act*.³⁴ 24 mills that had *Daphnia magna* test result failures had a 100 per cent failure rate of follow-up test procedures. The follow-up test procedure failure rate was over 70 per cent for three mills, and 33 per cent for the last mill.³⁵

The Submitters further calculated the total number of offences in Quebec arising out of the failure to follow the *PPER* follow-up test procedures. On this basis, the reported number of potential offences was 250 for the year 2000 alone. This is a conservative estimate. If the *Fisheries Act* continuing offence section 78.1 is strictly followed, then there were 1,183 potential violations in just one year.³⁶

Despite the numerous violations of the *PPER* and offences committed by so many Quebec mills, the Submitters could not find any prosecutions or convictions of Quebec mills under the *Fisheries Act* regarding these federal regulations, although there have been some prosecutions under the provincial *Environmental Quality Act*.³⁷ On the basis of the year 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding the following mills:³⁸

Year 2000				
Company	Location	Test Failures	Follow-up Test Failures	Total Violations
Fjordcell Inc.	Jonquiere	66	22	88
Produits Forestieres Malette Quebec	St. Leonard de Portneuf	28	3	31
Uniforet Sciere-Pate Inc.	Port Cartier	23	9	32
Tembec Inc.	Temiscaming	7	4	11
FF Soucy Inc.	Riviere-du-Loup	4	36	40
La Comangnie J. Ford Limitee	Portneuf	4	27	31

One of the above mills, Tembec Inc. in Temiscaming, consistently had the poorest record (at least 268 violations) in the period from 1995 to 1999. The performance of this mill was hi-lighted in the *Pulping the Law* report attached as Appendix 3, at pages 27 to 31. Its poor record was not turned around until late 1999 and 2000 (7 violations in the latter year).³⁹ Therefore, there were numerous violations at this Tembec mill 6 1/2 years after the *PPER* came into force and 3 1/2 years after the transition period expired. Yet, this company was never prosecuted under either the federal or provincial pulp mill effluent regulations. The following is a summary of its record from 1995 to 2000.

Tembec Inc., Temiscaming	1995	1996	1997	1998	1999	2000	Total
Test Failure Violations	101	13	70	51	33	7	275

2. Ontario

In the province of Ontario, there are approximately 33 regulated pulp and paper mills. 13 mills with three or more violations in 1996, were responsible for over 225 acute lethality, BOD and TSS test result failures between 1996 and 2000.⁴⁰ In the year 2000, 7 mills were responsible for 18 test result failures.⁴¹

Again, in addition to calculating the number of test result failures reported by the mills, the Submitters have calculated the total number of offences under the *Fisheries Act* in Ontario resulting from *PPER* follow-up test procedure violations. On this basis, the reported number of violations was 94 for the year 2000.⁴²

Six of the Ontario mills failed the trout acute lethality test in the year 2000. Two of these also violated the trout acute lethality follow-up test procedures.⁴³

In the same year, 10 mills failed the *Daphnia magna* acute lethality test. Nine of those mills also violated the *PPER* acute lethality follow-up test procedures. Five mills had a 100 per cent record of *Daphnia magna* follow-up test procedure violations, three mills had a 50 per cent violation rate, and one mill had a 96 per cent rate.⁴⁴

The above totals for test result failures and follow-up test procedure failures in the year 2000 are also conservative estimates. Again, if the *Fisheries Act* continuing offence section 78.1 is strictly adhered to, then there were 412 potential test failures and violations of the *PPER* in that year.⁴⁵

The data obtained by the Submitters indicates that in the period from 1995 to 2000, six of the 33 Ontario mills have been prosecuted under the *PPER*.⁴⁶

In Ontario, there has been a pattern of a lower number of violations and a higher number of prosecutions under the federal laws, as compared to Quebec and the Atlantic provinces. Nevertheless, as this pattern should be the rule and not the exception, and on the basis of the year 2000 data, the Submitters have concerns about the apparent lack of effective enforcement of the federal laws regarding the following mills:⁴⁷

Year 2000				
Company	Location	Test Failures	Follow-up Test Failures	Total Violations
Interlake Pap.	St. Catherines	9		9
Abitibi Cons.	Iroquois Falls	2	33	35

3. Atlantic Provinces

Environment Canada's Atlantic Region includes the provinces of Nova Scotia, New Brunswick and Newfoundland, where approximately 22 pulp and paper mills are located. For the period from 1995 to 2000, the Submitters only obtained partial data for certain years in New Brunswick (for 1996: January to October; for 1998: January to June) and Newfoundland (for 1998: January to June). No 1999 data was obtained for any of the mills and therefore, the number of violations is understated.

The data that has been obtained shows that between 1995 and 2000, 19 of the mills in the Atlantic provinces reported 1,081 acute lethality, TSS and BOD effluent test failures under the *PPER*.⁴⁸ Undoubtedly, this number is substantially lower than the actual total because of the limited data.

The Submitters did not obtain data with sufficient details to calculate the number of *PPER* follow-up test procedure violations, as they were able to do for Quebec and Ontario.

Despite the large number of test result violations, the Submitters could only find information on two prosecutions of mills in the Atlantic Region under the federal laws since the *PPER* came into force.⁴⁹ On the basis of the year 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding the following mills:

Year 2000				
Company	Location	Test Failures	Follow-up Test Failures	Total Violations
AV Cell	Ahtol, N.B.	33	unknown	33 plus
Irving	Saint John, N.B.	22	unknown	22 plus
Bowater	Brooklyn, N.S.	15	unknown	15 plus
Abitibi	Grand Falls, Nfld.	9	unknown	9 plus

The Irving Saint John mill noted above, and the Kruger Cornerbrook mill referred to in Appendix 5 require further mention. The former is the leader in violations in the Atlantic provinces in the period from 1995 to 2000. It was prosecuted under the federal laws only once in 1998. It still had 22 test failure violations in 2000, and an unknown number of follow-up test violations. The Cornerbrook mill had an even greater number of violations than Irving in 1996 and 1997. However, it was prosecuted once and the number of violations dropped to nil by 1998.

C. Article 45.1 Not Applicable

The phrase “effectively enforce its environmental law” used in Articles 5 and 14. 1 is defined in Article 45. 1. In effect, it operates as an exclusion clause by providing that:

A Party has not failed to “effectively enforce its environmental law” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.

1. No Reasonable Exercise of Discretion

The large number and repetition of effluent test failure violations and acute lethality follow-up test procedure violations are the best evidence that there has not been a reasonable exercise of discretion in respect of investigatory and prosecutorial matters under the *PPER* and the *Fisheries Act*.

The federal government’s own Compliance and Enforcement Policy states that the exercise of discretion must ensure that “violators comply with the *Fisheries Act* within the shortest possible time and that violations are not repeated.”⁵⁰ The data referred to in this Part is evidence that this standard was not met. This is best illustrated by the data on the Tembec Temiskaming and Irving Saint John mills, and the number of violations in Quebec and the Atlantic provinces in the year 2000.

It is not a reasonable exercise of discretion where an available enforcement tool, such as prosecutions, is used so infrequently in the face of widespread and numerous violations.

The Compliance and Enforcement Policy also affirms as a guiding principle that: “[e]nforcement personnel will administer the provisions and regulations in a manner that is **fair, predictable, and consistent**. Rules, sanctions and processes securely founded in law **will be used**.”⁵¹ (Emphasis added.) It is neither fair, predictable, nor consistent, to have allowed “free riders” in certain regions; the same regions where prosecutions under the federal laws have been rarely used, or not used at all.

2. No *bona fide* decision to allocate resources to other environmental matters

In the period for which data was obtained, there is no evidence that the Government of Canada had decided to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. To the contrary, the government’s stated position in its 1999-2000 Inspection Report is that compliance verification of the *PPER* had a high regional priority in Quebec and Ontario.⁵²

The very existence of the *Fisheries Act* and the *PPER* demonstrate the public interest in giving a high priority to the protection of Canadian fish and water resources from pollution by pulp mill effluent.

D. Conclusions

The following conclusions can be drawn from the data:

- the *PPER* came into force in 1992. The absolute deadline for compliance was December 1995. There were still numerous violations in 2000;
- prosecutions under the federal legislation were non-existent in Quebec and rarely used in the Atlantic provinces;
- there were “free riders” in Quebec and the Atlantic provinces;
- some “free riders” have turned their compliance record around which shows that compliance was always possible;
- in 2000 there were a large number of follow-up test procedure violations;
- violators have not complied with the *Fisheries Act* within the shortest possible time and violations have been repeated, contrary to the federal government’s own *Compliance and Enforcement Policy*;
- enforcement has not been fair, predictable, and consistent when “free riders” have been allowed to operate in certain regions. This too is contrary to the *Compliance and Enforcement Policy*;
- in Ontario, where prosecutions under the federal laws have been used as an enforcement tool, there have been the fewest number of violations; and
- it is difficult to obtain mill compliance data that is current. The access to information process is cumbersome, and reporting delays mean that the most current data is not available. Enforcement information is not centrally compiled and not readily accessible. There is no central web-based information retrieval system for mill compliance and enforcement data.

There has not been a reasonable exercise of discretion by the Canadian government in respect of investigation, prosecution, regulation or compliance under the *PPER* and the *Fisheries Act*, and there have been no *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities under Article 45.1 of the *NAAEC*.

IV. ARTICLE 14 REQUIREMENTS

A. This is a Submission the Secretariat May Consider – Article 14.1

This Submission meets the threshold requirements established under Article 14.1 of the *NAAEC*.

Article 14.1.(a). The Submission is presented in English.

Article 14.1.(b). Sierra Legal presents the Submission on behalf of the non-governmental organizations Friends of the Earth, Union Saint-Laurent, Grands Lacs, Conservation Council of New Brunswick, Ecology Action Centre and Environment North, (the “Submitters”).

Article 14.1.(c). This Submission is based on information and documentary evidence contained in compliance and enforcement data obtained from the Government of Canada

under access to information legislation, scientific studies and reports, government and industry web-sites and correspondence.

Article 14.1.(d). The Submitters have a long-standing interest and involvement in the protection of the environment including water pollution issues such as the effects of pulp mill effluent. The Submitters do not have a financial interest in pulp mill operations. The Submitters present this Submission with the aim of promoting enforcement.

Article 14.1.(e). This matter has been communicated in writing to the Government of Canada in a report released in 2001 entitled *Pulping the Law*, prepared by Sierra Legal⁵³ that provided data on non-compliance and non-enforcement in the pulp mill industry. The report indicated that a submission to the CEC would follow. It is clear that the Government of Canada was aware of the contents of the report by its response in the media including the assertions that it had put a special effort into enforcing pollution laws in the pulp and paper industry and that “the department is committed to enforcing any and all complaints where regulations aren’t being followed.”⁵⁴

These matters were also the focus of a submission by Sierra Legal to the House of Commons Standing Committee on Environment and Sustainable Development in 1998.⁵⁵ The submission provided data on pulp mill non-compliance and non-enforcement, and called for improved enforcement measures. The Committee conducted hearings and published a report in 1998 entitled *Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!*⁵⁶ It found that as a result of inadequate resources and insufficient political will, Canada’s environmental laws were not being enforced. The report also voiced concerns that “the pendulum may be swinging too far in the direction of voluntary approaches” and that effective enforcement is necessary for, among other things, motivating corporate compliance and ensuring that Canada lives up to its international obligations, such as those under the *NAAEC*. It concluded that “Canadians are not getting the high level of environmental protection that they expect and deserve.” The federal Committee urged the government to take dramatic steps to ensure that the environmental laws of Canada would be enforced and made a number of formal recommendations in that regard.

In addition, the reporting requirements under the *PPER* provide Environment Canada with a regular statement of the level of pollution in each pulp mill’s effluent as well as the total amount of pollution for which that mill is responsible. Within each of the Ontario, Quebec and Atlantic provinces, designated staff receive the reports from the mills, and therefore have written notification of violations of the *PPER* and offences under the *Fisheries Act*.

Article 14.1.(f). The Submitters are not-for-profit organizations residing or established in the territory of Canada and the United States.

B. The Issues Raised in this Submission Merit a Response from the Government of Canada – Article 14.2

The Submitters respectfully submit that they have met the criteria set out in Article 14.1, and ask that the Secretariat request a response from the Government of Canada.

Article 14.2(a)-Harm to the Submitters

The Submitters are non-governmental environmental organizations whose members include thousands of individuals who have a shared interest in protecting the waters of Canada, including the reduction and elimination of pollution from pulp and paper mills in central and eastern Canada. The members of the Submitters make use of these waters and water pollution harms the entire ecosystem, including people, fish and their habitat.

The Sierra Legal *Pulping the Law* report (Appendix 3) describes and refers to:

- numerous studies that have shown that aquatic ecosystems are severely compromised by pulp and paper effluent⁵⁷ by dramatically changing waterways and aquatic life by killing, or genetically altering or disfiguring fish, causing population explosions of aquatic microorganisms, which use up the oxygen necessary to support fish and other organisms, and contaminate river and lake beds with persistent organic pollutants;
- the effects of pollution by pulp mill effluent on birds and mammals, including humans, that drink and swim in the same water that is toxic to fish, and consume fish and shellfish that have been exposed to pulp mill effluent;
- the effect on local economies when water quality is degraded by pulp mill effluent, such as lower ecological productivity and the loss of commercial and recreational opportunities such as swimming, fishing and hunting.⁵⁸ Whole commercial fisheries have been closed as a result of pulp mill contamination;⁵⁹ and
- local communities, and federal and provincial governments being burdened with remediation and clean up expenses.⁶⁰

Article 14. 2(b)-Advancing the Goals of the NAAEC

This Submission raises matters whose further study in this process would advance the goals of the NAAEC. In particular, the preparation of a factual record would:

- foster the protection and improvement of the environment for present and future generations (Preamble par.1, Article 1(a));
- ensure that activities in Canada do not cause damage to the environment shared with the United States (Preamble, par. 2);
- promote sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1(b));
- increase cooperation between governments to better conserve, protect, and enhance the environment, particularly the shared fisheries (Articles 1(c), and 10(2)(i));
- avoid trade distortions by Canada's failure to enforce the *Fisheries Act*, by permitting its pulp and paper producers to enjoy a competitive advantage over their counterparts in the United States by polluting Canadian waters as a free resource and not investing in necessary equipment (Article 1(e));

- strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices (Article 1(f));
- enhance compliance with, and enforcement of, environmental laws and regulations (Articles 1(g), and 10(2)(p)); and
- promote pollution prevention policies, practices, techniques and strategies (Articles 1(j), and 10(2)(b)).

It is noted that other submissions on related issues have been made to the Secretariat. In August 2000 the Secretariat presented a factual record that concerned the *Fisheries Act* in *BC Aboriginal Fisheries Commission et al.* SEM-97-001. The Secretariat has recently been instructed by the Council to prepare additional factual records that deal with the *Fisheries Act*.⁶¹

Article 14. 2(c)-Private Remedies

There are no realistic alternative private remedies available. The Submitters either do not have status for civil remedies or they would be impractical to pursue. While Canadian citizens do have the right to commence private prosecutions under the *Fisheries Act* and its regulations where the government refuses to enforce the law, such proceedings do not address the systemic problem of persistent non-enforcement by the Canadian government. Also, private prosecutions can be stayed by the Crown. Private prosecutions are beyond the financial capacity of most citizens, and are not a viable option for effective enforcement where there are numerous violations of federal law. The Government of Canada has the resources and the obligation to effectively enforce these domestic environmental laws.

Article 14. 2(d)-Mass Media Reports

This Submission is based primarily upon information obtained from the federal government, industry, and research resources, and not simply mass media reports.

V. RELIEF REQUESTED

The Submitters therefore respectfully ask that the CEC prepare a factual record of the assertion that the Government of Canada is in breach of its commitment under the *NAAEC* to effectively enforce the *PPER* (in particular, sections 5 and 6, and Schedules I and II)⁶², and the *Fisheries Act* (in particular, sections 34, 36, 40, 78 and 78.1)⁶³ against those pulp and paper mills in central and eastern Canada identified in Part III herein.

All of which is respectfully submitted this 6th day of May, 2002, by

Robert V. Wright
Sierra Legal Defence Fund
Counsel for the Submitters

End Notes

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- ¹ *Pulp and Paper Effluent Regulations* (the “PPER”), extracts, Appendix 1
- ² *Fisheries Act*, extracts, Appendix 2
- ³ *Pulp & Paper Operations in Canada*, Canadian Pulp and Paper Association, www.cppa.org
- ⁴ Robinson et al., 1994 “Survey of Receiving-Water Environmental Impacts Associated with Discharges From Pulp Mills. 1. Mill Characteristics, Receiving-Water Chemical Profiles and Lab Toxicity Tests” *Environmental Toxicology and Chemistry* 13: 7: 1075-1088.
- ⁵ Data reported by pulp and paper mills to Environment Canada pursuant to *Pulp and Paper Effluent Regulations*, SOR/92-269 (PPER) obtained pursuant to federal access to information laws.
- ⁶ Environment Canada National Pollutant Release Inventory (NPRI), 1997. Data is based on the discharge of chemicals only, and does not take into account the massive amounts of solids.
- ⁷ Forest Products Association of Canada Environmental Progress Report 2000-2001 at page 21. URL: www.fpac.ca
- ⁸ Doering, Ronald et al., *Environmental Regulation in the Pulp and Paper Industry: An Examination of the Porter Strategy*. National Round Table on the Environment and Economy, Ottawa: November, 1992.
- ⁹ The International Joint Commission (IJC) identified “Areas of Concern” around the Great Lakes basin where there was “significant degradation and ecosystem impairment” in an effort to begin the task of restoring ecosystem health to the Great Lakes. In its report entitled “1993-1995 Priorities and Progress under the Great Lakes Water Quality Agreement”, the Great Lakes Water Quality Board of the IJC focused on the pulp and paper industry in its chapter entitled “Review of Developments in the Pulp and Paper Industry”, and indicated that 15 of the 43 (at that time) Areas of Concern were negatively affected by pulp and paper mills. These 15 Areas of Concern remain on the list. URL: www.ijc.org/comm/pr9395.html
- ¹⁰ *Supra*, note 7 at p.25.
- ¹¹ *Fisheries Act* Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy, July 2001, Government of Canada, Introduction, Appendix 4
- ¹² *Ibid*.
- ¹³ *Pulp and Paper Effluent Regulations* (“PPER”), preamble, Appendix 1
- ¹⁴ Environment Canada, enforcement reports and publications. URL: <http://www.ec.gc.ca>
- ¹⁵ *Supra*, note 8.
- ¹⁶ VanNijnatten, Debora L., and William Leiss, *Environment’s X-File: Pulp Mill Effluent Regulation in Canada*, Working Paper Series 97-1 (Environmental Policy Unit, School of Policy Studies, Queen’s University, 1997).
- ¹⁷ *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*, SOR/92-267, introduced under the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-16 (4th Suppl.).

¹⁸ *Pulp and Paper Mill Effluent Defoamer and Woodchip Regulations*, SOR/92-268, introduced under the also under the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-16 (4th Suppl.).

¹⁹ *PPER*, Appendix 1

²⁰ *PPER*, s.5, Appendix 1

²¹ *PPER* s.6; *Fisheries Act* ss.34, 36, Appendices 1 and 2

²² *PPER* ss.20-26, Appendix 1

²³ *PPER* Schedule I, ss.1, 2; Schedule II, s.5, Appendix 1

²⁴ See publications relating to EEM at the Environment Canada site at <http://www.ec.gc.ca/eem/English/default.htm>

²⁵ Either s.40 or s.78 of the *Fisheries Act*, Appendix 2

²⁶ *Fisheries Act Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy*, July 2001, pp.20-21, Appendix 4

²⁷ See Appendix 5 for listings.

²⁸ *Report of the Commissioner of the Environment and Sustainable Development* to the House of Commons, 1999, Ch.5, par. 5.45-5.68, Appendix 8

²⁹ *Ibid*

³⁰ Appendix 5, p. 2 and pp. 5-9

³¹ *Ibid*, pp. 7-9

³² *Supra*, note 23

³³ Appendix 5, pp. 7-9 and Appendix 7, pp. 2-17

³⁴ *Fisheries Act*, s. 78, Appendix 2

³⁵ Appendix 7, pp. 2-17

³⁶ Appendix 7, p. 24

³⁷ Appendix 5, p. 1

³⁸ See Appendix 7, pp. 2-17 and Appendix 5, p. 1

³⁹ Appendix 5, p. 2

⁴⁰ Appendix 5, p. 3

⁴¹ Appendix 5, p. 3

⁴² Appendix 7, p. 1, 18-23

⁴³ Appendix 7, p. 2, 18-23

⁴⁴ *Ibid*, p. 2

⁴⁵ Appendix 7, p. 25

⁴⁶ Appendix 5, p. 1

⁴⁷ See Appendix 7, pp. 18-23 and Appendix 5, p. 3

⁴⁸ Appendix 5, pp. 1, 4, and 13-17

⁴⁹ Appendix 5, p. 1

⁵⁰ *Supra*, note 26, p.20

⁵¹ *Ibid*, p.6

⁵² *Results in Fiscal Year 1999-2000*, Part 2 Habitat Program Delivery, <http://www.dfo-mpo.gc.ca/habitat/annrep99/english/part2>

⁵³ E. Christie and G. McEachern, *Pulping the Law*, Sierra Legal Defence Fund, 2001, Appendix 3

⁵⁴ Various newspaper articles, Appendix 9

⁵⁵ Summary of Presentation by Sierra Legal Defence Fund to the Standing Committee on Environment and Sustainable Development, 1998, Appendix 10.

⁵⁶ Canada, *Enforcing Canada's Pollution Laws: The Public Interest Must Come First!*, 3rd Report of the Standing Committee on Environment and Sustainable Development, May 1998: URL: <http://www.parl.gc.ca/InfoComDoc/36/1/ENSU/Studies/Reports/ensurp03/06-rep-e.htm>

⁵⁷ S.M. Adams et al., "Downstream gradients in bioindicator responses: point source contaminant effects of fish health" (1996) 53 Canadian Journal of Fish Aquatic Sciences 2177-2187.

S. Marshall Adams et al., "Responses of Fish Populations and Communities to Pulp Mill Effluents: A Holistic Assessment" (1992) 24 Ecotoxicology and Environmental Safety 347-360.

Kjell Johnsen et al., "Experimental Field Exposure of Brown Trout to River Water Receiving Effluent from an Integrated Newsprint Mill" (1998) 40 Ecotoxicology and Environmental Safety 184-193.

Kelly R. Munkittrick et al., Survey of Receiving-Water Environmental Impacts Associated with Discharges From Pulp Mills. 2. Gonad Size, Liver Size, Hepatic EROD Activity and Plasma Sex Steroid Levels in White Sucker" (1994) 13:7 Environmental Toxicology and Chemistry 1089-1101.

Mark R. Servos et al., "Survey of receiving-water environmental impacts associated with discharges from pulp mills. 3. Polychlorinated dioxins and furans in muscle and liver of white sucker (*Scatostomus commersoni*)" (1994) 13:7 Environmental Toxicology and Chemistry 1103-1115.

James William Owens, "The Hazard Assessment of Pulp and Paper Effluents in the Aquatic Environment: A Review" (1991) 10 Environmental Toxicology and Chemistry 1511-1540.

⁵⁸ "1995 Survey of Recreational Fishing in Canada", Department of Fisheries and Oceans Canada, URL: <http://www.dfo-mpo.gc.ca/communic/statistics/recfsh95/recfsh95.htm>

⁵⁹ Van Nijnatten and Leiss, *supra*, note 16.

⁶⁰ *Supra*, note 9. For instance, the expenses of treating previously potable water, purchasing more of their food rather than relying upon fish, cleaning up contaminated sites, and restoring degraded habitat. In 1995, the International Joint Commission identified 15 of the 43 *Areas of Concern* around the Great Lakes Basin where at least part of the problem was pulp and paper mill effluent. The *Remedial Action Plans* developed to restore the environmental health of the “Areas of Concern” have and will continue to cost hundreds of millions of dollars. Most of the money will come from Canadian citizens via the federal and provincial governments.

⁶¹ They are: Oldman River II (SEM-97-006), BC Mining (SEM-98-004) and BC Logging (SEM-00-004).

⁶² *PPER* extracts, Appendix 1

⁶³ *Fisheries Act* extracts, Appendix 2