

Secretariat of the Commission for Environmental Cooperation

Secretariat Determination in accordance with Article 14(1) of the North American Agreement on Environmental Cooperation

Submitters: *Centro Mexicano de Derecho Ambiental, A.C.*
Conservación de Mamíferos, A.C.
Party: Canada
Original submission: 26 June 2007
Date of determination: 13 July 2007
Submission no.: **SEM-07-003 (Seal Hunting)**

I. INTRODUCTION

On 26 June 2007, *Centro Mexicano de Derecho Ambiental, A.C.* (CEMDA) and *Conservación de Mamíferos, A.C.* (COMARINO) (the “Submitters”) filed a citizen submission with the Secretariat (the “Secretariat”) of the Commission for Environmental Cooperation pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC or “Agreement”). The Submitters assert that Canada is failing to effectively enforce provisions of its environmental law with respect to the harp seal hunt that takes place every year off the East Coast of Canada.

The Secretariat has determined that submission SEM-07-003 (Seal Hunting) does not meet all the requirements of NAAEC Article 14(1), for the reasons set out below.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada, in particular the Department of Fisheries and Oceans,¹ is failing to effectively enforce Section 2(1) of the *Canadian Environmental Protection Act, 1999* (CEPA)² and the preamble to Canada’s *Oceans Act*³ by failing to apply the precautionary principle when it sets the annual harp seal hunting quota, and by having allowed the quota to be exceeded in four of the last five years.⁴

The Submitters also allege that Canada is not implementing the precautionary principle by setting the Total Allowable Catch above the sustainable yield (replacement yield);⁵ by ignoring uncertainty in available scientific data when it determines the replacement yield on the basis of an average estimate, without acknowledging that there is a 50%

¹ Submission, p. 1 (page references are to the original, Spanish language version of the submission).

² *Ibid.*, pp. 2-3.

³ *Ibid.*, pp. 3-4.

⁴ *Ibid.*, pp. 6-10.

⁵ *Ibid.*, p. 7.

probability that the “true” amount is above or below this calculation;⁶ by extending the closing date for hunting after authorities were aware that the Total Allowable Catch had been reached;⁷ and by allowing seal hunting to continue despite widespread concern over the effect of the decrease in ice cover on the survival of harp seal young.⁸

The Submitters also maintain that the vast majority of hunters do not comply strictly with legislative provisions prescribing instruments and methods for killing seals (Sections 28 and 29 of the *Marine Mammal Regulations* adopted under the federal *Fisheries Act*).⁹ The Submitters assert that “it is forbidden to hunt a seal without having confirmed that the previous one is, in fact, dead” (by using the blinking reflex test),¹⁰ “let alone skin a seal that isn’t dead.”¹¹ The Submitters also assert the following:

The above procedure is clearly designed to **minimize the cruelty in hunting and the suffering of harp seals** [emphasis in original]. Nevertheless, we can observe *de facto* that given the conditions in which hunting occurs, this method is not strictly followed by the vast majority of hunters [...].¹²

According to the Submitters, this demonstrates that authorities have failed to effectively enforce these provisions¹³ and the section of the Criminal Code outlawing cruelty to animals (446.1).¹⁴

The submission is accompanied by the full texts of studies conducted by non-governmental organizations dedicated to promoting animal welfare, as well as other documents cited in the submission and a video.

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then considers whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As noted by the Secretariat in previous determinations, Article 14(1) is not intended to be an insurmountable procedural

⁶ *Ibid.*, p. 8.

⁷ *Ibid.*, p. 7.

⁸ *Ibid.*, pp. 8-9.

⁹ *Ibid.*, pp. 5-6.

¹⁰ *Ibid.*, p. 5.

¹¹ *Ibid.*, p. 5.

¹² *Ibid.*, pp. 5-6.

¹³ *Ibid.*, p. 6.

¹⁴ *Ibid.*

screening device.¹⁵ The Secretariat considered the submission with this perspective in mind.

A. Opening Phrase of Article 14(1)

The opening phrase of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]”¹⁶ The Submitters are nongovernmental, civil associations.¹⁷ The submission is focused on an alleged failure to effectively enforce the law and does not allege deficiencies in the law itself.¹⁸ The allegations also comply with the temporal requirement that the submission assert an ongoing failure to effectively enforce an environmental law.¹⁹ Nevertheless, as will be explained below, not all of the provisions identified in the submission are “environmental law” for the purposes of the NAAEC, and those that are do not apply to the facts at issue in the submission.²⁰

Under the NAAEC, “environmental law” means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through, *inter alia*, the protection of wild flora or fauna, including endangered species, their habitat and specially protected natural areas.²¹

Sections 28 and 29 of the *Marine Mammal Regulations* prescribe instruments and methods for killing seals. Article 446 of the Criminal Code of Canada prohibits cruelty to animals. The primary purpose of these three provisions is preventing cruelty to animals. Consequently, while the purpose of these provisions is to protect wild fauna (seals), their primary purpose is the prevention of cruelty to animals and not the protection of the environment or the prevention of a danger to human life or health, as required by Article 45(2) of the NAAEC.

Therefore, the Secretariat determines that pursuant to the first paragraph of Article 14(1) and the definition of environmental law contained in Article 45(2) of the NAAEC, it cannot examine the assertions in the submission alleging a failure to effectively enforce

¹⁵ In this regard see SEM-97-005 (Biodiversity), Determination in accordance with Article 14(1) (26 May 1998); and SEM-98-003 (Great Lakes), Determination in accordance with Article 14(1) and (2) (8 September 1999).

¹⁶ The Secretariat has already determined the parameters in the first sentence of Article 14(1) of the Agreement. See SEM-99-002 (Migratory Birds), Determination pursuant to Article 14 (1) and (2) (23 December 1999).

¹⁷ The submission does not contain information regarding COMARINO.

¹⁸ Submission, pp. 1-2, 14.

¹⁹ *Ibid.*

²⁰ See Article 45(2) of the NAAEC.

²¹ Article 45(2)(a)(iii) of the NAAEC.

Sections 28 and 29 of the *Marine Mammal Regulations* and Article 446 of the Criminal Code of Canada.

The submission asserts that Canada is failing to effectively enforce CEPA Section 2(1) and the preamble to Canada's *Oceans Act* by allegedly failing to apply the precautionary principle in setting and enforcing the annual harp seal hunting quota.²² These provisions of CEPA and the *Oceans Act* are environmental law because they meet the definition of "environmental law" in Article 45(2) of the NAAEC. However, they do not apply to setting and enforcing the harp seal hunting quota pursuant to the legislative framework of the federal *Fisheries Act*.

Thus, as provided in CEPA Section 2(1), this provision applies only to the actions of the Government of Canada in the administration of CEPA, not in the administration of the *Fisheries Act*. The *Oceans Act*, for its part, specifies that the oceans strategy to be adopted by the Government of Canada must be based on the principle of the precautionary approach.²³ However, the assertions in the submission focus on quotas set in Atlantic seal hunting management plans which are adopted under the framework of the *Fisheries Act*, not the *Oceans Act*. Consequently, the Secretariat finds that with respect to the assertions in the submission regarding setting and enforcing the annual harp seal hunting quota, these do not identify the legislative provisions that Canada is allegedly failing to effectively enforce.

B. Six Criteria under NAAEC Article 14(1)

Even though the submission does not meet the requirements contained in the opening phrase of Article 14(1), the Secretariat reviewed the submission to verify whether it meets the six criteria contained in that article and determined that it does not satisfy all of them. The Secretariat's reasons are set out below.

- a. The submission meets the requirement in Article 14(1)(a), as it is in writing and in Spanish, a language designated by the Parties for presenting submissions.²⁴
- b. The submission meets the requirement in Article 14(1)(b) as regards CEMDA but not COMARINO, as no mailing address is provided for COMARINO.²⁵
- c. The submission does not meet the requirement stipulated in Article 14(1)(c) as the submission does not provide sufficient information for the Secretariat to review it. The appendices to the submission contain copies of studies and presentations referred

²² Submission, pp. 2-4 and 10.

²³ Article 30(c) of the *Oceans Act*.

²⁴ Guideline 3.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [hereinafter "Guidelines"]: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."

²⁵ Guideline 3.4: "Submissions must include the complete mailing address of the Submitter."

to in the submission. However, as was noted above, the submission does not refer to environmental law provisions that apply to setting and enforcing harp seal hunting quotas.

Furthermore, in accordance with the Guidelines, a submission should address the factors for consideration in Article 14(2) of the NAAEC.²⁶ The submission does not mention the issue of harm (Article 14(2)(a) of the NAAEC). Nor does the submission mention actions, including private remedies, available under the Party's law that have been pursued, in accordance with Article 14(2)(c).

- d. The submission appears to be aimed at promoting enforcement and not at harassing industry. And it does not appear to be frivolous.²⁷
- e. The Secretariat finds that the matter has been adequately communicated to Canadian authorities. The submission is accompanied by a copy of a letter (in Spanish) sent by CEMDA to the Canadian ambassador in Mexico on 4 June 2007, and a copy of the response from the Embassy (in Spanish) dated 7 June 2007.²⁸ It should be noted that the Guidelines specify that the relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental legislation in question.²⁹ Canada's Department of Fisheries and Oceans is the authority responsible for enforcing the federal *Fisheries Act* and its regulations. In this case, the letter of response from the embassy speaks on behalf of Fisheries and Oceans Canada, and indicates that the Submitters' viewpoint is being taken into account by Fisheries and Oceans Canada when it makes administrative decisions. The Secretariat determines that in this case, the submission meets the requirement specified in Article 14(1)(e) of the NAAEC.
- f. Finally, in the case of CEMDA, the submission has been presented by a nongovernmental organization established in the territory of one of the Parties. In the case of COMARINO, it is not possible to verify compliance with this criterion, since information regarding its domicile is not provided in the submission.

²⁶ Guideline 5.6.

²⁷ Also see Guideline 5.4, which indicates that when the Secretariat determines whether or not the submission is aimed at promoting enforcement of environmental legislation, and not at harassing industry, it will consider: (i) "whether or not the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, especially if the Submitter is a competitor that may stand to benefit economically from the submission;" and (ii) "whether or not the submission appears frivolous."

²⁸ Appendix 1 of the submission.

²⁹ Guideline 5.5.

IV. DETERMINATION

For the foregoing reasons, the Secretariat determines that submission SEM-07-003 (Seal Hunting) does not meet all the criteria of Article 14(1). Pursuant to Guidelines 6.1 and 6.2, the Secretariat hereby notifies CEMDA that the Submitters have 30 working days within which to file a revised submission that meets all of the requirements of Article 14(1), or the Secretariat will terminate the Article 14 process with respect to the submission.

Secretariat of the Commission for Environmental Cooperation

(signature in original)
per: Katia Opalka
Legal Officer
Submissions on Enforcement Matters Unit

ccp: Enrique Lendo, Semarnat
David McGovern, Environment Canada
Judith E. Ayres, US-EPA
Adrián Vázquez Gálvez, CEC
Gustavo Alanís Ortega, CEMDA