

Secretariat of the Commission for Environmental Cooperation

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

Submitters: Friends of the Earth Canada
Friends of the Earth - U.S.
People to Save-the-Sheyenne River, Inc.
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Represented by: Sierra Legal Defence Fund

Parties: Canada and United States

Date received: 30 March 2006

**Date of this
determination:** 8 June 2006

Submission I.D.: SEM-06-002 (Devils Lake)

I. INTRODUCTION

On 30 March 2006, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or “Agreement”). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that Canada and the United States are failing to effectively enforce their treaty obligations under Articles IV, IX and X of the 1909 Treaty Relating to Boundary Waters between the United States and Canada (“Boundary Waters Treaty”) in connection with construction and operation by the state of North Dakota of an outlet to drain water from Devils Lake into the Sheyenne River, the Red River basin, Lake Winnipeg, and ultimately the Hudson Bay drainage system. Specifically, the Submitters contend that the Devils Lake outlet will result in transboundary water pollution that both countries are obligated to prevent, and that the countries are obligated to refer issues regarding this alleged transboundary pollution to the International Joint Commission (“IJC”), either jointly or unilaterally.

The Secretariat has determined that the submission does not satisfy Article 14(1) and provides the reasons for this determination below.

II. SUMMARY OF THE SUBMISSION

As noted above, the submission asserts that Canada and the United States are failing to effectively enforce their treaty obligations under Articles IV, IX and X of the Boundary Waters Treaty in connection with construction and operation by the state of North Dakota of an outlet to drain water from Devils Lake into the Sheyenne River, the Red River basin, Lake Winnipeg, and ultimately the Hudson Bay drainage system. The Submitters state that “[t]he perceived need to lower the level of Devils Lake has been created in part by the mostly unauthorized drainage of nearby wetlands and poor land use planning.”¹ The Submitters contend that the Devils Lake outlet project “will likely have direct and negative environmental impacts on Canadian waters, including the introduction of biological pollutants such as invasive species.”²

The submission asserts that the state of North Dakota began diverting water through the Devils Lake outlet in September 2005. They contend that the water in Devils Lake contains “biota of concern,” such as blue-green algae species and fish parasite species that are not found in the Canadian waters to which the diverted waters flow, as well as “high levels of pollutants such as sulphate, mercury, phosphorous and arsenic.”³ The Submitters assert that these biota of concern and other pollutants threaten irreparable harm to the ecosystem of Lake Winnipeg.

The submission asserts that the Devils Lake drainage outlet relates to a larger scheme to install an outlet from the Missouri River through Devils Lake and the Sheyenne River into the transboundary Red River system, and that the IJC issued a report in 1977 noting concerns regarding the impacts of such a diversion on Canadian waters.⁴ The submission asserts that despite public pressure to refer issues regarding the Devils Lake outlet project to the IJC in light of Canadian concerns, “both governments failed to refer the dispute either jointly or unilaterally to the IJC for a proper assessment and resolution of the issues.”⁵ Specifically, the Submitters contend that the United States government failed to accept formal invitations from the Canadian government in 2004 and 2005 for a joint referral of the Devils Lake project to the IJC, and that both governments failed to make a unilateral reference to the IJC thereafter.⁶

Based on these assertions, the Submitters contend that both Canada and the United States are failing to effectively enforce the Articles IV, IX and X of the Boundary Waters Treaty.⁷ With respect to Article IV, they contend the governments are failing to enforce the agreement reflected in the treaty that “boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.” With respect to Article IX, they assert that both governments are failing to enforce the mandate that “questions or matters of

¹ Submission at 1

² *Id.*

³ *Id.* at 2-3.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ *Id.* at 5-6.

⁷ *Id.* at 7-8.

difference arising between [Canada and the United States] involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other. . . shall be referred from time to time to the IJC for examination and report, whenever the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred . . .” (unilateral referral). Regarding Article X, the Submitters assert that both governments are failing to enforce the agreement that “questions or matters of difference arising between [Canada and the United States] involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or their respective inhabitants, may be referred for decision to the IJC by the consent of the two Parties . . .” (joint referral).

The Submitters assert that the alleged failure to enforce rights and obligations under the Boundary Waters Treaty “is not a reasonable exercise of discretion” and that “[l]ack of full scientific certainty should not be used as a reason for postponing effective measures to prevent environmental degradation.”⁸ They also contend that an alleged deferral of issues regarding the Devils Lake outlet project to the U.S. Council on Environmental Quality (“CEQ”) usurped the jurisdiction of the Boundary Waters Treaty and the IJC and that a temporary arrangement brokered through the CEQ “could not have prevented the pollution of Canadian waters.”⁹

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 determines whether the submission merits requesting a response from the Party named in the submission based upon a consideration of the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,¹⁰ Article 14(1) is not intended to be an insurmountable procedural screening device.

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 [..].” An initial question arises whether Articles IV, IX and X of the Boundary Waters Treaty constitute “environmental law” within the meaning of NAAEC Article 45(2)(a). However, in view of the conclusion reached below that the submission does not present a matter that can be considered under Article 14 even if those provisions did constitute “environmental law”, the Secretariat need not address this question.

The root of the submission is the assertion that the Devils Lake outlet causes transboundary water pollution in violation of Article IV of the Boundary Waters Treaty. Aside from any

⁸ *Id.* at 9.

⁹ *Id.* at 10. The submission indicates that the temporary arrangement involved the use of a gravel filter at the Devils Lake outlet.

¹⁰ See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

provisions of domestic water pollution laws that might apply to the outlet,¹¹ the treaty itself provides a mechanism for seeking resolution of disputes relating to the two governments' agreement in Article IV that "boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." Disputes over whether such transboundary pollution is occurring or, if so, how to address it, may be referred to the IJC either unilaterally or jointly under Articles IX and X. Indeed, referral to the IJC (either joint or unilateral) is the sole mechanism for addressing concerns over transboundary pollution resulting from the Devils Lake outlet that the Submitters assert is not being effectively enforced. However, neither Article IX nor Article X imposes an obligation to refer a matter to the IJC with the kind of specific, enforceable legal mandate that the Secretariat has recognized as necessary to support an assertion of a failure to effectively enforce under Article 14. The mandatory language in Article IX does not by itself create such an obligation. Article IX states that "questions or matters of difference" regarding rights and obligations under the treaty "shall be referred from time to time to the IJC for examination and report *whenever* the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred." Despite the mandatory language, the apparent mandate in Article IX to make a unilateral referral is conditional, and appears to be entirely dependent on one of the governments exercising its discretion, first to determine that a "question or matter of difference" exists, and then to seek a referral. By contrast, Article X uses discretionary language (*may*), not mandatory language (*shall*), and it makes joint referral of issues to the IJC entirely dependent on the discretionary consent of the governments.

The discretion involved in the decision to make a joint or unilateral referral to the IJC is qualitatively different from the discretion involved in making enforcement decisions that the Secretariat has accepted for review in considering previous submissions. For example, in SEM-98-003 (Great Lakes), the Secretariat determined that an asserted failure to enforce section 115(a) of the U.S. Clean Air Act could be considered under Article 14.¹² Section 115(a) provides as follows:

Whenever the Administrator [of EPA], upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

42 USC. § 7415(a). Even though the EPA Administrator has discretion to make the so-called endangerment finding that triggers the mandate to notify states in which the emissions of concern originate, the question of whether "reports, surveys or studies from any duly constituted international agency" provide a reason to believe that pollution originating in the United States

¹¹ The Submitters do not base any of their assertions on any such domestic water pollution laws or regulations, and the Secretariat has not considered whether any such laws or regulations would apply to the outlet.

¹² See SEM-98-003 (Great Lakes), Article 15(1) Determination that Development of a Factual Record is Not Warranted (5 October 2001).

“may reasonably be anticipated to endanger public health or welfare in a foreign country” is subject to a fact-based, objective inquiry to which a factual record could be suited.¹³

The Boundary Waters Treaty, however, does not mandate referral to the IJC whenever a government has reason to believe that transboundary water pollution is occurring. Instead, unilateral referral is mandated “from time to time” only if a government decides that a question or matter of difference regarding rights or obligations under the treaty exists and also that it wishes to seek a referral to the IJC as opposed to employing other means to resolve the dispute. Thus, even if factual information were to indicate that because of the Devils Lake outlet, “boundary waters and waters flowing across the boundary” from North Dakota into Canada are “polluted ... to the injury of health or property” in Canada, in apparent violation of Article IV of the treaty, the mandate to refer the matter to the IJC does not automatically follow. Indeed, it appears that the United States and Canada have a practice of referring matters to the IJC only through joint referral, and never through a unilateral reference. In the Secretariat’s view, because Articles IX and X provide no factual criteria for assessing the exercise of government discretion in deciding whether to seek a referral to the IJC, the dispute resolution mechanism they establish for enforcing apparent violations of Article IV does not create an obligation whose enforcement can be reviewed under NAAEC Articles 14 and 15.

IV. DETERMINATION

For the foregoing reasons, the Secretariat has determined that submission SEM-06-002 (Devils Lake) does not contain assertions that can be considered under Article 14. Pursuant to Guideline 6.2 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat will terminate the Article 14 process with respect to this submission, unless the Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) and the guidelines within 30 days after receipt of this determination.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

William V. Kennedy

Executive Director

c.c.: Judith E. Ayres, US-EPA
David McGovern, Environment Canada
Jose Manuel Bulas, SEMARNAT
Submitters

¹³ See also SEM-03-001 (Ontario Power Generation), Determination under Articles 14(1) and (2) (19 September 2003), which concerned enforcement of Sections 166 and 176 of the Canadian Environmental Protection Act, 1999, which are similar to section 115(a) of the U.S. Clean Air Act.