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Oldman River II

Submission ID: **SEM-97-006**

Party concerned: **Canada**

Date filed: **04/10/1997**

Status: **Closed**

**Latest update:** 11/08/2003

The final factual record was publicly released.

## Summary of the matter addressed in the submission:

The Submitter alleges that «[t]he Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and with CEAA (Canadian Environmental Assessment Act). In particular the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the Fisheries Act, Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA.» According to the Submitter the Department of Fisheries released a Directive (Directive on the Issuance of Subsection 35(2) Authorizations) which creates «a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool.». The Submitter further alleges that «[t]here are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the

country. In fact there has been a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces. And the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act.» According to the Submitter, «228 projects were reviewed by the Department of Fisheries and Oceans in the Central and Arctic Region (the Prairie Provinces, Ontario and the Northwest Territories), as of June 21, 1996. For these projects, 78 Letters of advice were issued. The other 150 projects listed were handled by providing advise to provincial or territorial agencies or to the permitting agency.»

**Summary of the response provided by the Party:**

"Canada submits it is effectively enforcing its environmental laws and is therefore in full compliance with its obligations under the NAAEC. Therefore, the development of a factual record is not warranted.

Canada rejects [the Submitter's] allegations based on [among others] the following arguments: the method by which Canada enforces Section 35 of the Fisheries Act and the implementing Directives thereof, is a legitimate exercise of its regulatory and compliance discretion as recognized in Article 45 of the Agreement; Subsection 35 (1) is not invoked if no [Harmful Alteration, Disruption of Destruction] HADD occurs; Subsection 35(2) is not required if there is no HADD; Section 37 of the Act is not required and therefore is not invoked where proponents voluntarily provide project information and agree to necessary alterations; Section 37(1) is not invoked if no HADD occurs or is imminent; Section 37(1) of the Act, due to its requirement for Order-in-Council approval in order to effect changes, was never intended to be utilized on a day-to-day basis, but was intended to provide powers to deal with extraordinary situations as is indicated by the requirement for Governor-in-Council approval of Ss. 37(2) orders; Section 40 of the Act is not invoked if Section 35 is not contravened; and, CEAA is not triggered if DFO does not exercise the decision-making authorities of Sections 35(2) or 37(1), (2) of the Fisheries Act as described in the CEAA Law List Regulation.

Canada contends that the pattern of program implementation and enforcement across the country is appropriate and that current arrangements for the delivery of habitat management are neither a real nor a de facto abdication of legal responsibilities for the protection of Canada's fish habitat in the context of the Canadian federation. Rather cooperation with provinces increases the enforcement resources and allows more effective enforcement."

Canada's response provides factual information pertaining to the Sunpine log hauling road cited as an example in the Submission. However, Canada submitted that "This matter being the subject of active litigation, it is respectfully suggested that the Sunpine example should not be considered further by CEC."

**Names and citations of the environmental laws in question:**

1. Fisheries Act, R.S.C. 1985, c. F-14, s. 35, 37 and 40
2. Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(d); 59(f)(g), Schedule 1, Part 1
3. Law List Regulations, Item 6, SOR/94-636

**Submitter(s):**

The Friends of the Oldman River

 Submission timeline

04/10/1997

The Secretariat received a submission and began a preliminary analysis of it under the guidelines.

 Submission - Submission authored by Submitter(s) on 04/10/1997

The Secretariat began reviewing the submission under Article 14(1).


23/01/1998

The Secretariat determined that the submission met the Article 14(1) criteria and the Secretariat began considering whether to request a response from the concerned government Party.

 Determination - Secretariat Determination under Article 14 (1) authored by Secretariat on 23/01/1998


08/05/1998

The Secretariat determined that the submission met the Article 14(2) criteria and requested a response from the concerned government Party.

 Determination - Secretariat Determination under Article 14(2) authored by Secretariat on 08/05/1998


13/07/1998

The Secretariat received a response from the concerned government Party and began considering whether to recommend a factual record.

 Party Response - Response from the Party under Article 14 (3) authored by Canada on 13/07/1998

19/07/1999


The Secretariat informed Council that the Secretariat considers that the submission warrants development of a factual record.

 Recommendation - Secretariat Notification to Council under Article 15(1) authored by Secretariat on

19/07/1999

16/05/2000


The Council decided to defer voting on whether to instruct the Secretariat to prepare a factual record.

 Resolution - Council decision concerning the development of a factual record authored by Council on

16/05/2000

16/11/2001

The Council voted to instruct the Secretariat to develop a Factual Record.

 Resolution - Council decision concerning the development of a factual record authored by Council on

16/11/2001


14/12/2001

The Secretariat placed a work plan on its web site or otherwise made it available to the public and stakeholders.

 Workplan - Overall workplan for factual record authored by Secretariat on 14/12/2001

07/02/2002

The Secretariat posted a request for information relevant to the factual record on its web site.

 Secretariat Information Request - Document related to the preparation of a Factual record authored by Secretariat on 07/02/2002

17/04/2003

The Secretariat submitted a draft factual record to Council, for a 45-day comment period on the accuracy of the draft.

29/05/2003

The Secretariat received comments from the United States.

05/06/2003

The Secretariat received comments from Canada.

27/06/2003

The Secretariat submitted a final factual record to Council for Council's vote on whether to make the final factual record publicly available.

07/08/2003


Council voted to instruct the Secretariat to make the final factual record publicly available.

[Resolution](#) - Council decision on whether the factual record will be made publicly available authored by Council on 07/08/2003

11/08/2003

The final factual record was publicly released.

[Final Factual Record](#) - Final Factual Record authored by Secretariat on 27/06/2003

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