

Secretariat of the Commission for Environmental Cooperation

**Article 15(1) Notification to Council that
Development of a Factual Record is Warranted**

Submitters: Waterkeeper Alliance
Lake Ontario Waterkeeper
Société pour Vaincre la Pollution
Environmental Bureau of Investigation
Upper St. Lawrence Riverkeeper/Save the River!
Party: Canada
Date of Receipt: 14 August 2003
Date of this determination: 19 April 2004
Submission I.D.: SEM-03-005 / Montreal Technoparc

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC) creates a mechanism allowing citizens to file submissions with the Secretariat (the “Secretariat”) of the Commission for Environmental Cooperation of North America (CEC) asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat reviews these submissions based on criteria contained in Article 14(1) of the NAAEC. If it finds that these criteria are met, the Secretariat then determines, based on factors listed in Article 14(2), whether the submission merits requesting a response from the Party concerned. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 14 August 2003, the Submitters listed above filed a submission with the Secretariat, along with supporting materials, asserting that Canada is failing to effectively enforce section 36(3) of the federal *Fisheries Act* against the city of Montreal in connection with the discharge of contaminated groundwater from the city’s Technoparc site to the Saint Lawrence River. Section 36(3) of the *Fisheries Act* prohibits the deposit of a deleterious substance into water frequented by fish unless the deposit is authorized by regulation.

On 15 September 2003, the Secretariat determined that the submission meets the requirements of Article 14(1) of the NAAEC and requested a response from the Party in accordance with

Article 14(2).¹ Canada submitted its response on 14 November 2003. The response explains Environment Canada's responsibilities in regard to administration of section 36(3) of the *Fisheries Act*, presents summary information concerning the history and environmental condition of the sector of the Montreal Technoparc, and describes enforcement and compliance promotion actions undertaken by Environment Canada in regard to deposits of deleterious substances from the sector of the Montreal Technoparc into the Saint Lawrence River.

The Secretariat has concluded that the response leaves open central questions that the submission raises regarding enforcement of section 36(3) in connection with discharges of deleterious substances to fish-bearing waters from the sector of the Montreal Technoparc site. Consequently, in accordance with Article 15(1), the Secretariat hereby informs the Council that the Secretariat considers that the submission, in light of the Party's response, warrants developing a factual record and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters are three Canadian and two United States nongovernmental organizations. They assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the alleged discharge of polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs) and other pollutants into the Saint Lawrence River from the Montreal Technoparc, the site of an historic domestic and industrial waste landfill now owned by the city of Montreal. Under section 36(3), it is an offense to deposit or permit the deposit of a deleterious substance in water frequented by fish or in any place under conditions where a deleterious substance may enter any such water, unless the deposit is authorized by regulation.

The Submitters assert that the Montreal Technoparc site functioned as a landfill for domestic and industrial wastes until it was redeveloped as a parking lot for Expo '67 and then, in 1988, as an industrial park.² They assert that the city of Montreal has been aware of PCB contamination of the site since at least 1995 and is responsible for discharges of deleterious substances from the site.³ According to the Submitters, the city's efforts to use booms to contain the contamination are not effective. They cite sampling results from October 2000 to January 2002 showing PCB levels at the discharge point up to 8.5 million times the Canadian Water Quality Guideline for the Protection of Freshwater Aquatic Life for Total PCBs, 941,000 times the PCB Guideline inside the boom, and 820 times the PCB Guideline outside the boom.⁴ The Submitters attach an April 2002 biologist's report concluding that PCBs, PAHs and other pollutants are being discharged to the Saint Lawrence River from the Montreal Technoparc in concentrations well in excess of provincial, federal and international

¹ SEM-03-005 (Montreal Technoparc), Determination under Articles 14(1) and (2) (15 September 2003).

² Submission at 4.

³ *Id.*

⁴ Submission at 6. According to the Submitters, the Guideline was established at 0.001 µg/L in 1987.

guidelines.⁵ The submission includes a detailed description of the alleged threats to human health and aquatic life of PCBs.⁶ The Submitters assert that PCBs are “highly toxic, persistent and bioaccumulative” and that Environment Canada identifies PCBs as a persistent toxic substance that is “too dangerous to the ecosystem and to humans to permit their release in any quantity.”⁷

The submission states that, following its receipt of a brief describing the alleged discharges, Environment Canada initiated a *Fisheries Act* investigation of the Montreal Technoparc in April 2002.⁸ According to the Submitters, Environment Canada explained in an April 2003 letter that “the investigation was stopped because the source of the contamination could not be determined.”⁹ The Submitters assert that their ability to bring a private prosecution in connection with the Montreal Technoparc is in question.¹⁰ They contend that the booms and absorbent pads that have been used to try to contain the alleged discharges are still ineffective and that the discharges are ongoing.¹¹

The Submitters assert that the alleged failure to enforce the *Fisheries Act* has resulted in harm to the Submitters and that further study of the matters raised in the submission would advance the goals of the NAAEC.¹² They request the CEC to prepare a factual record.

III. SUMMARY OF THE RESPONSE

On 15 September 2003, the Secretariat determined that the submission fulfills the criteria set out in Article 14(1) of the NAAEC and merited requesting a response from Canada, in light of the factors listed in Article 14(2).¹³ Canada responded to the submission on 14 November 2003.¹⁴ The response contains three sections: 1. Enforcement of the *Fisheries Act*, 2. Description of the Sector Comprising the Technoparc Site; 3. Procedure Followed by Environment Canada.¹⁵ In its introduction to the response, Canada explains that

⁵ Submission at 6-7.

⁶ Submission at 7-11.

⁷ Submission at 7-8.

⁸ Submission at 12.

⁹ *Ibid.*

¹⁰ Submission at 12-13.

¹¹ Submission at 13.

¹² Submission at 14-15.

¹³ SEM-03-005 (Montreal Technoparc) Determination in accordance with Articles 14(1) and (2) (15 September 2003).

¹⁴ “Deposits of Deleterious Substances in the Saint Lawrence River Opposite the Technoparc Site / Commission for Environmental Cooperation / Response to submission SEM-03-005,” prepared by Environment Canada for the Government of Canada (November 2003).

¹⁵ Response at i.

the information provided in [chapters 1 and 2] forms the context for the department's actions described in chapter three. These actions related to administrative procedure allow the department to ensure that fish and their habitat are protected within the shortest time possible.¹⁶

1. Enforcement of the *Fisheries Act*

Under "Enforcement of the *Fisheries Act*," Canada describes Environment Canada's responsibilities regarding the administration of section 36(3) of the *Fisheries Act*, identifies penalties applicable to violations of section 36(3), and describes the compliance promotion and enforcement programs established by Canada to achieve the department's primary objective of preventing pollution of waters frequented by fish through compliance with the *Fisheries Act*.¹⁷

Canada explains that the Minister of the Environment is responsible for administering the pollution prevention provisions of the *Fisheries Act*, including section 36(3).¹⁸ Canada states that contravention of section 36(3) is punishable on conviction by a fine and/or imprisonment, with separate offences being counted for every day on which the contravention continues. It notes that proceedings under section 36(3) may be instituted by a public department or a private party.¹⁹

Canada asserts that Environment Canada's compliance promotion program involves many activities intended to promote compliance with section 36(3), including education and information, consultation on proposed regulations, development of guidelines and reviewing new projects to provide technical advice on means of achieving compliance.²⁰ The law enforcement program includes two main activities, inspections and investigations, with the objective of requiring compliance with the Act through recourse to administrative and legal measures of law enforcement.²¹ The response sets out the law enforcement measures provided for in the *Fisheries Act* in the case of an infraction—inspectors' directions, Minister's orders, injunctions, recovery of costs as the result of prosecution, and penalties imposed by courts on summary conviction—noting that the *Fisheries Act* lists situations in which a particular measure can be used.²²

In the response, Canada states: "In order to respect basic principles of fairness, predictability and consistency, the department has framed administration of the two approaches [compliance promotion and enforcement] in a policy on compliance and enforcement of the Act."²³ Canada notes that under the Compliance and Enforcement Policy, "[t]he department

¹⁶ Response at 1.

¹⁷ Response at 2-4.

¹⁸ Response at 2.

¹⁹ *Ibid.*

²⁰ Response at 3.

²¹ *Ibid.*

²² Response at 4.

²³ Response at 3, note 7: Environment Canada, *Compliance and Enforcement Policy – Habitat Protection and Pollution Prevention Provisions – Fisheries Act* (November 2001) [hereinafter the "Compliance and Enforcement Policy"].

also has the administrative option of issuing a warning as a law enforcement measure.”²⁴ Canada explains that the Compliance and Enforcement Policy contains three criteria for deciding upon the appropriate law enforcement measure in regard to an infraction: the nature of the infraction; the effectiveness of the measure in obliging compliance by the alleged violator or in deterring re-offending; and consistency in enforcement.²⁵ Canada states that “[...] the measure chosen will be the measure that will secure compliance within the shortest time possible, or, if the infraction has already been corrected, the measure that will best serve to deter a reoccurrence.” Canada asserts:

In the light of the intended measure, the department has the responsibility of taking that measure, of making a recommendation to ministers or making a recommendation to the Department of Justice. In the latter case, the Department of Justice must also assess certain criteria before deciding to begin judicial proceedings.²⁶

2. Description of the Sector Comprising the Technoparc Site

The response then provides a description of the history, physical characteristics and ownership of the sector comprising the Technoparc site. Canada begins by noting that between 1864 and 1888, the city of Montreal acquired land with a view to establishing a dump at the south end of Ash Street in Pointe-Saint-Charles, in an area located on the shore of the Saint Lawrence River, on the south part of the Island of Montreal, between the Victoria and Champlain bridges.²⁷ Canada states:

In 1925, noting the southern progression of the Pointe-Saint-Charles dump, the Harbour Commission (Société du Port de Montréal) authorized the city of Montreal to dump garbage on its swampy lands and to do so up to the water limits.²⁸

The response includes “an aerial photo of the sector in 1930 with a projection of future lands that would be formed in the riverbed by the garbage backfill.”²⁹ The response notes that in 1937, the city ceded part of the land at the southern end of Ash Street to Canadian National Railways (CNR) for a switching yard.³⁰ Later, large-capacity above ground storage tanks were installed there.³¹ Canada notes that

[b]uilt on the riverbed, the dump (in its post-1937 extension) continued to be used for landfill until its closing in 1966. From four to twelve metres of household and industrial waste along with dry material had been dumped in the area.³²

The response notes that in 1966, the area that now forms the Technoparc site was leveled and covered with a thin coat of gravel, for use as a parking lot during the Universal

²⁴ Response at 4.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Response at 5.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Response at 6.

³¹ *Ibid.*

³² *Ibid.*

Exposition of 1967 (EXPO '67). Canada notes that “[a]t that point, problems related to the production of gas by decomposing organic matter were encountered for the first time.”³³ According to the response, also at that time, the Bonaventure Autoroute was built along the southern edge of what is now the Technoparc site, “[...] using large quantities of external landfill dumped directly on the riverbed, between the Victoria and Champlain Bridges.”³⁴ The response states that after EXPO '67, the land was not used until 1976, when the federal Department of Transport installed a short-takeoff and landing airport in the sector, with a terminal, parking area and fuel storage tanks.³⁵ The site was again abandoned in 1977, with dismantling of final infrastructure ending in 1991.³⁶ The response states that in 1984, Via Rail built a maintenance center on the southwest part of the site that is now the Technoparc.³⁷ It also notes that part of the site was used for storage of granular material and as a snow dump during the winter of 1985.³⁸

In regard to the physical characteristics of the site, the response notes that because of the heterogeneous make-up of the subsoil, underground water moves slowly and at varying rates throughout the sector.³⁹ The response makes reference to environmental site characterization studies carried out between 1990 and 2002 by Environment Canada and different owners of land in the area.⁴⁰ A 1990 report prepared for Environment Canada and the Quebec Ministry of the Environment apparently “shows that the soil and water of the sector are contaminated by many substances, and some of them at a significant level.”⁴¹ According to the response, CNR conducted its own studies and in 1996 installed a system to recover floating hydrocarbons in underground water at the southern edge of its land.⁴² A 2002 study carried out by SNC-Lavalin for the city of Montreal

[...] confirmed the presence of a significant concentration of PAHs and PCBs in some of the observation wells located near the banks of the Saint Lawrence River. The SNC-Lavalin study also showed the presence of PCBs in a high number of the wells throughout the Technoparc site.⁴³

In the response, Canada states that during the summer of 2002, the city of Montreal conducted an ecotoxicological study with the participation of Environment Canada. The study “concluded that an analysis of underground water samples were harmful and represent a lethal and sub-lethal effect on fish.”⁴⁴

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Response at 7.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

In regard to site ownership, the response states that the Technoparc site, which covers an area of 456,057 m², was sold to the city of Montreal in 1989 by the Crown in right of the Province (Government of Quebec) and the Montreal Port Corporation (legal representative of Her Majesty in right of Canada).⁴⁵ The site consists of 30 separate lots, of which the city owns 24.⁴⁶ Between 1989 and 1999, the city sold the other six lots to Teleglobe Canada Inc. (1 lot); Bell Mobility Cellular Inc. (1 lot); Cité du cinéma (MEL) inc. (3 lots); and Société immobilière Partech inc. (1 lot).⁴⁷ According to the response, the land immediately north of the Technoparc site is used by CNR as a switching yard, while part of the land immediately south of the site (toward the river), on which is located the Bonaventure Autoroute, is owned in part by the Quebec Ministry of the Environment. The response states that “ownership of the other part is unknown.”⁴⁸

Under the caption “Deposits in the Saint Lawrence River,” the response states that at the eastern end of “the sector under study,” “deposits in the river, characterized by a floating hydrocarbon phase, [...] are contaminated by PCBs, among others. Booms are now in place to recover the contaminated oil film to the extent possible.”⁴⁹

3. Procedure Followed by Environment Canada

The response contains a description of actions taken by Environment Canada with respect to the Technoparc site since 1991. Canada states:

Environment Canada is concerned about the deposits in the Saint Lawrence River between the Victoria and Champlain Bridges. Its main objective is protection of the environment. The department has acted and continues to take action to resolve this problem.⁵⁰

Canada states that Environment Canada has employed both compliance promotion and enforcement approaches to resolving the problem of deposits in the river. Canada explains:

One approach consists of promotion of the *Fisheries Act* by acting as a technical adviser and the other approach is by law enforcement. The two approaches are mutually inclusive in achieving the objective of protecting the environment with the result that they reinforce each other.⁵¹

Under the caption “Compliance Promotion Program,” Canada states:

Since 1998, the scientific staff of Environment Canada’s compliance promotion program has been increasingly concerned by deposits of substances in the Saint Lawrence River bordering on the Bonaventure Autoroute between the Victoria and Champlain Bridges.⁵²

⁴⁵ *Ibid.*

⁴⁶ Response at 7-8.

⁴⁷ Response at 8.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Response at 9.

⁵¹ *Ibid.*

⁵² *Ibid.*

Canada explains that as regards compliance promotion, since 1998, Environment Canada has been in talks with the province of Quebec and more recently, with the city of Montreal and owners of other sites in the contaminated sector, to find an overall solution to the problem.⁵³ In 2002, the city proposed installing a system for containing and recovering floating hydrocarbon phases at the site.⁵⁴ Canada states that Environment Canada expressed concerns about the capacity of such a system to contain substances present in a dissolved phase.⁵⁵ In the summer of 2002, Environment Canada “participated in an ecotoxicological study of a dissolved phase of the underground water to measure the harmful and lethal and sub-lethal effects on fish.”⁵⁶

Regarding enforcement, Canada states that in August 1991, Environment Canada received information from a representative of the Montreal Port Corporation concerning an oil film on the Saint Lawrence River, under the Victoria Bridge.⁵⁷ According to Canada:

[...] Environment Canada conducted an inspection and took an open water sample. Since the source of the pollution was unknown, Environment Canada incurred the cost of installing an oil containment system in the river. Soon after, CN decided to take charge of the operation. Subsequently, CN and the city of Montreal agreed on cost sharing to maintain booms at locations where deposits were observed and on recovery of hydrocarbons. In 1996, CN withdrew its contribution from the operation for the purpose of working on recovery of floating hydrocarbons on the surface of underground water along the limits of its property.⁵⁸

According to the response, in November 1998, Environment Canada issued a warning to the city of Montreal because of “the poor condition of the booms and the cessation of oil pumping.”⁵⁹ From that time until August 2003, Canada states that Environment Canada has carried out twenty visual inspections of the booms and three times asked the city “to correct the situation.”⁶⁰ Through regular inspections, Environment Canada says it “ensures that the equipment for containing and recovering hydrocarbons is operational.”⁶¹ Canada recognizes that the booms and pumping of hydrocarbons are not a permanent solution and do not solve the overall problem.⁶²

Canada states that, following a request by some of the Submitters in April 2002, Environment Canada conducted an investigation for violation of section 36(3) of the *Fisheries Act*.⁶³ According to Canada,

⁵³ Response at 9-10.

⁵⁴ Response at 9.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Response at 10.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Response at 13.

⁶³ Response at 10.

[t]he investigation consisted of an exhaustive search of the different existing studies in the department on soil and underground water contamination in the sector making up the Technoparc site. Information was also collected on departmental actions regarding deposits in the river at that location. As part of the investigation, consultations took place with departmental personnel involved as technical advisers to various parties in the sector to whom the deposits might be attributed. Finally, a search of title documents was made in the Montreal land register of the land registry office, and in documents of the Quebec Ministry of Natural Resources to trace the history of the transfer of title documents and to identify current title owners in the sector comprising the Technoparc.⁶⁴

According to Canada, “the information collected showed that the different lands forming the study sector are contaminated by many pollutants resulting from diverse activities (household and industrial waste burial site, installation of petroleum product tanks and of liquid residue lagoons, snow dumping, and dump for material of unknown origin).”⁶⁵ The response states that “[w]hile the owners of the different lots forming what was previously the dump are now known, there is not sufficient proof to attribute the fact that the contaminants deposited in the river come directly from the Technoparc site, from one of the sites of other owners or from all these sites.”⁶⁶

Under the caption “Conclusion of the Investigation,” the response states: “Having failed to establish sufficient proof of the infraction covered by section 36(3) of the *Fisheries Act*, an overriding condition for successful pursuit of legal proceedings, the department decided to close the investigation.”⁶⁷ The response states that “[f]or these reasons [and following an assessment of the criteria of the Compliance and Enforcement Policy⁶⁸], the department [...] has decided to continue its interventions with the different parties potentially responsible for the deposits in the river to find a lasting solution to this environmental problem.”⁶⁹

The response contains a two-page Annex entitled “Environment Canada clarification of certain statements by the authors of submission SEM-03-005.”⁷⁰ Clarifications concern the contents of the Compliance and Enforcement Policy, the lack of information regarding the origin of the contamination responsible for the deposits in the river, Environment Canada’s response to a January 2002 phone call reporting an oil slick discharging from the Technoparc site, the purpose of criminal investigations, and the effect of Environment Canada’s ending its investigation on the Submitters’ ability to bring a private prosecution under the *Fisheries Act*.⁷¹ With regard to a statement by the Submitters that “[t]he Montreal Technoparc is one of Quebec’s largest hazardous waste sites [...]”,⁷² Canada affirms:

The Technoparc site is part of a sector that used to be a household and industrial waste burial site. It has been the location of and the neighbour of sites where many types of activities have also

⁶⁴ Response at 11.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Response at 12.

⁶⁸ Response at 13.

⁶⁹ Response at 12.

⁷⁰ Response at 14.

⁷¹ Response at 14-16.

⁷² Response at 14, submission at 4.

contributed to the contamination of the Technoparc soil and neighbouring land. By the nature of their foundations, underground water moves according to a complex hydrogeological system, with the result that information concerning the source of substances deposited in the river does not exist.⁷³

In the Annex to the response, Environment Canada notes that the Submitters contend that “[...] it is the purpose of a criminal investigation to establish the identity of the accused where the evidence of an offence exists.”⁷⁴ Environment Canada states:

The purpose of a criminal investigation of an infraction of strict responsibility, such as provided for in section 36(3) of the *Fisheries Act*, is to collect sufficient evidence on each of the elements constituting an infraction, and information surrounding the infraction, where there are reasonable grounds for believing that an infraction has occurred. If the law enforcement measure being considered by the department is a criminal penalty imposed by a court, the evidence is assessed by the Attorney General of Canada who also considers the public interest in deciding whether to begin legal proceedings.⁷⁵

IV. ANALYSIS

The Secretariat considers that the submission, in light of Canada’s response, warrants developing a factual record as recommended in this notification. The reasons for the Secretariat’s recommendation are set forth below.

A. Why a factual record is warranted

The submission, taken together with Canada’s response, leaves open central questions regarding whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to Montreal’s Technoparc site. As a result, additional information is required for a proper consideration of the allegations contained in the submission. This information would be gathered during development of a factual record. A factual record would present information relevant to a full and objective understanding of Canada’s actions to enforce and promote compliance with section 36(3) in connection with the Technoparc site, in particular as regards application of criteria from Environment Canada’s Compliance and Enforcement Policy such as the nature of the infraction, the goal of ensuring that alleged violators comply within the shortest time possible, and consistency in enforcement.

i) Infractions of section 36(3)

Section 36(3) of the *Fisheries Act* provides:

[s]ubject to subsection (4) [authorization by regulation], no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

⁷³ Response at 14.

⁷⁴ Response at 15, submission at 12.

⁷⁵ Response at 15.

The submission identifies ongoing contraventions of section 36(3) of the *Fisheries Act* related to discharges of deleterious substances—including PCBs—from the area of a former municipal dump located on the bed and shore of the Saint Lawrence River near downtown Montreal.⁷⁶ The Submitters assert that Environment Canada has identified PCBs as a persistent toxic substance that is “too dangerous to the ecosystem to permit their release in any quantity.”⁷⁷ In its response to the submission, Canada acknowledges the existence of the deposits⁷⁸ and the deleterious nature of the substances being deposited,⁷⁹ as well as the growing concern of Environment Canada scientists since 1998 regarding those deposits.⁸⁰

The Submitters claim that “[s]ince October 1995 and possibly before, the city [of Montreal] has been aware of the PCB contamination of the [Technoparc] site. The governments of Quebec and Canada, as past owners of the site, have also been aware of the contamination risks linked to the Technoparc.”⁸¹ In its response, Canada states that in 1990, Environment Canada and the Quebec Ministry of the Environment commissioned a report that showed “[...] that the soil and water of the sector are contaminated by many substances, and some of them at a significant level.”⁸² Canada acknowledges that zinc, nickel, silver, cadmium, arsenic, phenols, PAHs and PCBs were detected in soil samples from the sector, while ethylbenzene, benzene, toluene, styrene, xylene, PAHs, chlorophenols, and methylene chloride were detected in ground- and surface waters.⁸³ The deleterious nature of many of these chemicals is a factor weighing in favor of development of a factual record.

ii) Inspections for compliance with section 36(3)

In the response, under the caption “Law Enforcement Program,” Canada states that in August 1991, Environment Canada received information from a representative of the Montreal Port Corporation⁸⁴ concerning an oil film on the Saint Lawrence River under the Victoria Bridge.⁸⁵ The response states that Environment Canada conducted an inspection and took an open water sample.⁸⁶ It adds: “Since the source of the pollution was unknown, Environment Canada incurred the cost of installing an oil containment system in the river.”⁸⁷ According to Canada, operation of that system was soon taken over by CNR, then carried out jointly by CNR and the

⁷⁶ Submission at 5-6.

⁷⁷ Submission at 8.

⁷⁸ Response at 8, 15.

⁷⁹ Response at 7: “During the summer of 2002, the city of Montreal conducted an ecotoxicological study with the participation of Environment Canada. The study concluded that an analysis of underground water samples were harmful and represent a lethal and sub-lethal effect on fish.” See also response at 15.

⁸⁰ Response at 9.

⁸¹ Submission at 4.

⁸² Response at 7.

⁸³ *Ibid.*

⁸⁴ “Montreal Port Authority” since 1 March 1999.

⁸⁵ Response at 10.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

city of Montreal, and is now conducted solely by the city.⁸⁸ The response does not contain information regarding why CNR and the city of Montreal agreed to operate and maintain the oil-pumping system, nor does it contain information about the cost of operating and maintaining the system, or information regarding the system's relative effectiveness in stopping deposits of deleterious substances into waters frequented by fish. This information is relevant to a consideration of whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to the Technoparc site and would be gathered by the Secretariat during development of a factual record.

In the response, Canada states that in November 1998, Environment Canada sent the city of Montreal a warning for an infraction of section 36(3) of the *Fisheries Act* because of the poor condition of the booms and the cessation of oil pumping.⁸⁹ Environment Canada's Compliance and Enforcement Policy provides that enforcement personnel may use warnings when they have reasonable grounds to believe that a violation of the *Fisheries Act* has occurred; where the degree of harm or potential harm to the fishery resource, its supporting habitat and to human use of fish or both appears to be minimal; and where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the alleged offenses. In addition to considering whether such reasonable efforts have been taken, enforcement personnel are to consider the alleged violator's *Fisheries Act* compliance history and whether the alleged violator has taken sufficient action to prevent future offenses. Canada asserts that since 1998, Environment Canada has used regular inspections to ensure that the city of Montreal maintains the oil-containment system.⁹⁰ According to Canada, "[a]n inspection consists of a verification of compliance with the Act [...]."⁹¹ Canada acknowledges that "[...] the booms and pumping of hydrocarbons are not a permanent solution and do not solve the overall problem."⁹²

In the response, Canada states that pursuant to the Compliance and Enforcement Policy, in selecting among a range of available measures for achieving compliance with section 36(3) of the *Fisheries Act*, "[...] the measure chosen will be the measure that will secure compliance within the shortest time possible [...]."⁹³ In regard to compliance promotion and enforcement actions taken by Environment Canada with respect to discharges to the Saint Lawrence River from the area of the Technoparc site, Canada has stated: "these actions related to administrative procedure allow the department to ensure that fish and their habitat are protected within the shortest time possible."⁹⁴

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* According to Canada, although warnings are not mentioned in the *Fisheries Act*, Environment Canada "[...] has the administrative option of using a warning as a law enforcement measure." Response at 4.

⁹⁰ Response at 10.

⁹¹ Response at 3.

⁹² Response at 13.

⁹³ Response at 4.

⁹⁴ Response at 1.

During development of a factual record, the Secretariat would gather information regarding Environment Canada's reliance on inspections as a primary enforcement tool in regard to known, ongoing discharges of deleterious substances to the Saint Lawrence River from the Technoparc sector, both before and after the issuance of a warning in 1998. The Secretariat would also gather additional information on the circumstances surrounding the issuance of a warning in 1998 and actions taken in response to it.

iii) Investigation for an infraction of section 36(3)

Under the caption "Investigation," Canada's response states:

Following the 11 April 2002 request from SVP and EBI [two of the Submitters], Environment Canada decided to conduct an investigation for an infraction of section 36(3) of the *Fisheries Act* resulting from deposits of deleterious substances in the Saint Lawrence River opposite the Technoparc site.⁹⁵

According to Canada, an investigation is sometimes undertaken by Environment Canada when there are reasonable grounds for believing that an infraction of the Act has been committed.⁹⁶ In regard to the Technoparc site, it states:

Environment Canada conducted an investigation that would allow consideration of legal proceedings so that protection of the environment through compliance with the *Fisheries Act* could be achieved in the shortest time possible.⁹⁷

In light of the above, a factual record is warranted to gather information regarding the lead-up to, timing of, and other circumstances surrounding Environment Canada's investigation in 2002–03 in regard to the ongoing deposits of deleterious substances to the Saint Lawrence River in the area of the Montreal Technoparc. Since Canada states that the decision to conduct an investigation followed a request from the Submitters,⁹⁸ the Secretariat would also gather information regarding the role of such a request in prompting an investigation by Environment Canada under section 36(3) of the *Fisheries Act*.⁹⁹

iv) Laying charges and prosecution under section 36(3)

In the response, Canada explains:

An investigation is conducted, either to gather additional information that will allow a choice of the appropriate law enforcement measure, or to seek proof of the infraction and additional information surrounding the infraction to support legal action, when the measure being considered is a penalty imposed by the court.

⁹⁵ Response at 10.

⁹⁶ Response at 3.

⁹⁷ Response at 13.

⁹⁸ *Ibid.*

⁹⁹ Response at 4.

In the case of the Technoparc site, Canada states:

The investigation was carried out with the aim of finding evidence for each of the factors constituting an infraction and for information concerning the infraction, which are essential to support legal proceedings.¹⁰⁰

Although the submission identifies the city of Montreal as being responsible for deposits of deleterious substances to the Saint Lawrence from the Technoparc site,¹⁰¹ Canada claims that after an exhaustive investigation, “[...] there is not sufficient proof to attribute the fact that the contaminants deposited in the river come directly from the Technoparc site, from one of the sites of other owners or from all these sites.”¹⁰²

Together, the submission and response do not present sufficient information to allow for a full and objective assessment of Canada’s decision in regard to the laying of charges under section 36(3) of the *Fisheries Act* in connection with discharges of deleterious substances from the sector of the Technoparc site. In the context of developing a factual record, the Secretariat would gather information on what needs to be known about the source of a deposit to support laying charges under section 36(3) in the case of a contaminated site like the Technoparc. This would include information regarding what constitutes “any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water” for the purpose of laying charges under section 36(3) in connection with multi-owner contaminated sites. A factual record would also present detailed information regarding what is known about the Technoparc sector and what is missing to lay and pursue charges under section 36(3) in connection with discharges from the Technoparc site, as well as any obstacles to prosecution.

Canada’s response to the submission does not include any supporting documents. Relevant supporting information referred to in Canada’s response that would be gathered in the course of preparing a factual record includes the materials reviewed by Environment Canada during its 2002 investigation. This information consists of existing environmental reports; information on departmental actions regarding deposits in the river; results of consultations with departmental personnel involved as technical advisers to various parties in the sector to whom the deposits might be attributed; and results from a search of title documents.¹⁰³ The Secretariat would thus review in detail what is known about the environmental condition of the area that includes the Montreal Technoparc site, with a view to presenting information relevant to Canada’s claim that available information does not allow for the identification of the source of the deposits. The Secretariat would also gather or develop information regarding available methods for tracking the source of deposits and for gathering other missing information relevant to taking enforcement action in connection with the Technoparc site, including information on obstacles to employing these methods.

¹⁰⁰ Response at 11.

¹⁰¹ Submission at 2.

¹⁰² Response at 11.

¹⁰³ *Ibid.*

In its response, Canada states that Environment Canada uses a dual approach to addressing the problem of deposits in the river, with some of its staff acting as technical advisers to owners of property in the area and others pursuing law enforcement.¹⁰⁴ According to Canada, “[t]he two approaches are mutually inclusive in achieving the objective of protecting the environment with the result that they reinforce each other.”¹⁰⁵ For a consideration of this assertion in the context of the Technoparc site, in developing a factual record, the Secretariat would review information regarding departmental actions in regard to deposits in the river as well as the views expressed to Environment Canada enforcement personnel by Environment Canada’s scientific advisers, and the role of such actions and views in determining further enforcement action by Environment Canada.

In the response, Canada states:

Since it is not possible to make the link between the activities that led to the contamination responsible for the deposits in the river, it is necessary to determine who has authority over the contaminants that are escaping from the contaminated land or lands. This is a very complex determination in view of the hydrogeological system of sector.¹⁰⁶

In developing a factual record, to allow for a consideration of the division in land ownership as an obstacle to enforcement of section 36(3) of the *Fisheries Act*, the Secretariat would review information related to each property in the area, including location in relation to the Technoparc site, proximity to the shore, what is known about its environmental condition and history of ownership and use, and what types of environmental conditions were attached to the transfer of title to the property to its current and/or previous owners.

In its response, Canada states: “If the law enforcement measure being considered by the department is a criminal penalty imposed by a court, the evidence is assessed by the Attorney General of Canada who also considers the public interest in deciding whether to begin legal proceedings.”¹⁰⁷ While the response states that the 2002 investigation “[...] did not produce sufficient evidence to assign criminal responsibility to one or more offenders,”¹⁰⁸ the response does not contain information regarding assessment of the evidence and consideration of the public interest by the Attorney General of Canada. Such information would be gathered by the Secretariat, as appropriate, in the course of preparing a factual record.

v) Promoting compliance with section 36(3)

In its response to the submission, Canada identifies compliance promotion activities undertaken by Environment Canada in regard to deposits of deleterious substances from the

¹⁰⁴ Response at 9.

¹⁰⁵ *Ibid.*

¹⁰⁶ Response at 15.

¹⁰⁷ *Ibid.*

¹⁰⁸ Response at 13.

area of the Technoparc site.¹⁰⁹ These activities consist of: discussions with the Quebec Ministry of the Environment, the city of Montreal, and owners of other properties in the contaminated sector to find an overall solution to the problem;¹¹⁰ reviewing and expressing concern about a proposal by the city of Montreal to build a containment and recovery system for floating hydrocarbon phases at the Technoparc;¹¹¹ and participating in an ecotoxicological study of a dissolved phase of the underground water to measure its harmful and lethal and sub-lethal effects on fish.¹¹²

In developing a factual record, the Secretariat would gather relevant information on past and ongoing discussions between Environment Canada and other parties regarding “[...] the problem and possible plans for its solution.”¹¹³ This would include information on the extent to which such discussions led to actions consistent with the Compliance and Enforcement Policy’s objective of achieving compliance in the shortest time possible.¹¹⁴

The Secretariat would gather information regarding Environment Canada’s review of the city of Montreal’s proposed containment system, and would gather or develop comparative information regarding technical options for addressing pollution of fish-bearing waters from heterogeneous contaminated sites like the Technoparc site.

The Secretariat would also gather information regarding the basis for Environment Canada’s participation in an ecotoxicological study regarding the effects of the deposits on fish. Although under the Compliance and Enforcement Policy, priority for action to deal with suspected violations is guided by degree of harm or risk of harm to fish, fish habitat or human health, to establish an offense under section 36(3) of the *Fisheries Act*, it is not necessary to prove that the deposit has actually resulted in harmful effects on fish in the environment if the substance deposited is acknowledged to be inherently deleterious to fish.¹¹⁵

The response states that Environment Canada’s compliance promotion and law enforcement approaches to administration of section 36(3) of the *Fisheries Act* are mutually inclusive in

¹⁰⁹ Response at 9.

¹¹⁰ Response at 9-10.

¹¹¹ Response at 9.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Response at 4.

¹¹⁵ In determining whether a substance is deleterious, it is sufficient to prove that the substance deposited is capable of making water harmful to fish. For instance, in *R. v. MacMillan Bloedel (Alberni) Limited* (1978), 42 C.C.C. (2d) 70 (B.C. Co. Ct.) at 73-74; affirmed 47 C.C.C. (2d) 118 (B.C.S.C.); leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.), the Court held that “[t]he effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*.” See also *R. v. Abitibi Consolidated* (2000), 190 Nfld. and P.E.I.R. 326; 2000 Nfld. and P.E.I.R. LEXIS 238; 576 A.P.R. 326 (Nfld. Prov. Ct.) at para. 51: “In determining whether the Crown has established that there was a deposit of a deleterious substance beyond a reasonable doubt, I agree with the Crown’s assertion that it is not necessary to establish actual harm or damage to fish or fish habitat.”

achieving the objective of protecting the environment, “with the result that they reinforce each other.”¹¹⁶ Under the caption “Conclusion of the Investigation,” Canada’s response states:

Having failed to establish sufficient proof of the infraction covered by section 36(3) of the *Fisheries Act*, an overriding condition for successful pursuit of legal proceedings, the department decided to close the investigation.

For these reasons, the department sent notice of the closing of the investigation to the applicants by letter dated April 24, 2003, and has decided to continue its interventions with the different parties potentially responsible for the deposits in the river to find a lasting solution to this environmental problem.¹¹⁷

In developing a factual record, the Secretariat would gather information regarding the progress and success of Environment Canada’s compliance promotion activities in connection with the sector that includes the Technoparc site since the time Environment Canada closed the investigation for lack of evidence.

V. RECOMMENDATION

For the foregoing reasons, the Secretariat considers that this submission, in light of Canada’s response, warrants the development of a factual record and hereby so informs the Council. The submission and response leave open matters for which a more detailed presentation of factual information will assist in considering whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to Montreal’s Technoparc site, as the Submitters allege.

As discussed above in detail, a factual record is warranted to develop and present information regarding the following matters in relation to effective enforcement of section 36(3) of the *Fisheries Act* in regard to deposits of deleterious substances from the area of the Montreal Technoparc site to the Saint Lawrence River: a) Environment Canada’s use of inspections and a warning as enforcement tools in connection with ongoing deposits; b) the lead-up to and timing of Environment Canada’s decision to undertake an investigation in response to a request from members of the public; c) characteristics and fate of contamination in the sector of the Montreal Technoparc; d) effectiveness and cost of oil containment and pumping system(s) in place since the early 1990s; e) availability and cost of options for addressing pollution of fish-bearing waters from heterogeneous contaminated sites such as the sector of the Montreal Technoparc; f) evidence needed to lay charges for an infraction of section 36(3) of the *Fisheries Act* in the case of multi-owner contaminated sites such as the Montreal Technoparc; g) considerations of the Attorney General in making its determinations in regard to the Montreal Technoparc site, as appropriate; h) the ecotoxicological study carried out in 2002, in regard to enforcement of section 36(3); i) effects of division of ownership in the Technoparc sector on success of enforcement efforts; j) effects, if any, of Environment Canada

¹¹⁶ Response at 9.

¹¹⁷ Response at 12.

technical actions and advice on success of enforcement efforts; k) ongoing discussions between Environment Canada, the Quebec Ministry of the Environment, the city of Montreal, and owners of others sites in the sector; l) compliance promotion efforts following the decision not to seek charges.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this notification, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 19th day of April 2004.

(original signed)
per: William V. Kennedy
Executive Director