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North American Environmental Commission Investigating Tailings Ponds Leakage Not Deterred by Private Prosecution

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Decision commented on: Notification to the Submitters and to Council regarding a proceeding notified by Canada (SEM-10-002) (*Alberta Tailings Ponds*)

Much has been written recently about the *Fisheries Act,* RSC 1985 c F-14, that often (and perhaps excessively) venerated piece of federal environmental legislation so maligned by industry and other private interests that the Conservative government, in its 2012 omnibus budget legislation, decided to tamper with its provisions in what has been described as a "gutting" (see here, here, here, here, and here) but that upon closer examination appears more like cosmetic surgery (which is to say, still unnecessary and unhelpful but mostly superficial; see e.g. the new policy from Fisheries and Oceans Canada). Still more ink has been spilled in the wake of the recently enacted *Regulations Establishing Conditions for Making Regulations under Subsection 36(5.2) of the Fisheries Act*, which the Dept of Fisheries and Oceans (DFO) initially stated would have no impact on regulatees or the public at large while the private bar and environmental groups described them as marking a "significant shift in the regulatory regime for managing water quality in Canada" and as "another tangible and integral step in the overall de-regulation agenda." Following the April 14 release of a decision of the Secretariat of the Commission for Environmental Cooperation (CEC) in relation to the alleged non-enforcement of section 36 of the *Fisheries Act* to Alberta's oil sands (CEC Decision), I decided that it was time to spill some ink of my own.

Background

The CEC was established pursuant to Article 8 of the *North American Agreement on Environmental Cooperation* (United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994)) (*NAAEC*). Pursuant to Articles 14 and 15, members of the North American public can assert that a party to the *NAAEC* (Canada, the United States or Mexico) is failing to effectively enforce its environmental laws by way of the "Submissions on Enforcement Matters" (SEM) process. Although the SEM process is not a dispute resolution mechanism and the CEC has no power to require specific action, it can and does provide the public with relevant (if not always timely) information regarding the enforcement of domestic environmental laws.

Back in 2010, Environmental Defence Canada (EDC) and the U.S.-based Natural Resources Defense Council (NRDC), together with Canadian residents John Rigney, Don Deranger, and Daniel T'seleie, filed Submission SEM-10-002, wherein they asserted that tailings ponds associated with oil sands "contain a large variety of substances that are deleterious to fish," that "these substances migrate to groundwaters and the surrounding soil and surface waters," and that Canada is failing to enforce subsection 36(3) of the *Fisheries Act, the* well-known and strict prohibition *against* 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."

The Secretariat's Decision

On January 31, 2014, Canada responded to the Submission alleging the existence of a "pending judicial proceeding" with respect to the same "matter" as the Submission, which pursuant to *NAAEC* Article 14(3), if true, would require the Secretariat "to proceed no further." More specifically, Canada informed the CEC Secretariat that a private citizen, Anthony Neil Boschmann, swore an information (the Boschmann Information):

> …in accordance with section 504 of the *Criminal Code*, before the Alberta Provincial Court alleging that Suncor Energy Inc., a company operating in the Alberta oil sands region, permitted the deposit of deleterious substances into the Athabasca River, in violation of subsection 36(3) of the *Fisheries Act*. The Court is set to hold a process hearing on the matter on February 27, 2014, in which Government of Canada prosecutors will participate. (CEC Decision at para 5).

The CEC Secretariat thus had to consider whether the "matter" of the Submission is the subject of the Boschmann Information, whether the Boschmann Information constitutes a "pending judicial or administrative proceeding," and whether it is "pursued" by Canada.

On all three fronts, Canada was unsuccessful. On the first front, the Secretariat noted that the Boschmann Information alleges violations of subsection 36(3) but makes no reference to tailings ponds and does not include any particulars about alleged locations of such violations or how these occurred (CEC Decision at para 12). On the second, the Secretariat observed that a "process hearing" is only a preliminary step and that an actual criminal prosecution cannot be said to have been initiated until a summons or warrant has been issued by a judge, and further that no such summons or warrant was issued following the February 27, 2014 process hearing (CEC Decision at paras 15 – 25). Finally, on the third front and perhaps most obviously, the CEC Secretariat concluded that since any future proceedings related to the Boschmann Information depend on action being taken by the *informant*, Canada cannot be considered to be pursuing an action within the meaning of Article 14 (CEC Decision at para 27).

Discussion

The CEC's decision is noteworthy for several reasons. First, the Secretariat has demonstrated the utility of its process, which has been touted as a "spotlighting" procedure for promoting public participation, transparency and government accountability in relation to environmental law enforcement (see David L. Markell, "The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability" (2010) 45 Wake Forest L. Rev. 425; closer to home, my colleague Nigel Bankes has made similar observations with respect to Alberta's Environmental Appeal Board in his article "Shining a light on the management of water

resources: the role of an environmental appeal board" (2006) 16 J. Env. L. & Prac. 131). Second, the decision comes at a time of continued heightened public and international scrutiny of the oil sands and Canada's environmental record generally. Finally, it is also directly relevant to the above-noted regulation pursuant to subsection 36(5.2) of the *Fisheries Act*.

Like the authorizing omnibus legislation that spawned it, this new regulation is itself omnibus in nature, dealing as it does with aquaculture, aquatic research (think Experimental Lakes Area), and finally "any other subject matter in Canada." It is this third group that is of relevance to *Alberta Tailings Ponds* and that some might be tempted to view as industry's salvation, whether oil sands or otherwise. If passed, the regulations would authorize the Minister of Environment (as opposed to the Governor-in-Council) to pass regulations to authorize the deposit of deleterious substances where the following conditions are met (section 4):

> (*a*) the deleterious substance to be deposited, its deposit or the work, undertaking or activity that results in the deposit is authorized under federal or provincial law, or is subject to guidelines issued by the federal or provincial government, and is subject to an enforcement or compliance regime;
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> (*b*) the federal or provincial law or guidelines set out conditions that result in a deposit that is not acutely lethal and contains a quantity or concentration of deleterious substance that when measured in the deposit, or in the relevant waters frequented by fish, satisfies
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> > (i) the recommendations of the *Canadian Water Quality Guidelines for the Protection of Aquatic Life* that were published in 1999 by the Canadian Council of Ministers of the Environment, as amended from time to time, or the recommendations that were derived from those guidelines on their site-specific application, as amended from time to time, or
> >
> > (ii) the recommendations of any peer-reviewed guidelines that are established for the purpose of protecting aquatic life and adopted by a federal or provincial body; and
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> (*c*) the effects of such a deposit on fish, fish habitat and the use by man of fish have been evaluated in accordance with generally accepted standards of good scientific practice.

In direct contrast to the (at least) half-century-old wisdom of the section 36 prohibition, the 21st century "responsible resource development" solution to pollution is dilution. Except that we know it is not. I can do no better here than to cite the words of the Court in the similarly vintage *R v Canadian Forest Products Ltd.*, [1978] 2 FPR 16 (at para 27) in response to an argument that the deposit of deleterious substances in question there was trivial (or "low risk" as DFO has put it in its Regulatory Impact Analysis Statement for these regulations): "All pollution legislation is concerned not only with the immediate damage of a pollutant *but also by the cumulative effect of any substance*." In other words, dilution only gets you so far. In addition, as the Environmental Law Centre's Jason Unger observed in his excellent post on these very same provisions, it is also a fairly complex affair: "This approach to regulation…requires significant knowledge of the assimilative capacity of water bodies at all relevant times as well as a fulsome understanding of cumulative contributions (both anthropogenic and natural) to water quality."

Returning to *Alberta Tailings Ponds* and the impact of these regulations more generally, several points emerge. While they clearly do represent a shift in the water quality regulatory regime,

they are but a first step; further regulations are required to actually authorize any deposits. Moreover, in order for such further regulations to be enacted in the oil sands context, industry and government will have to first *acknowledge* that tailings ponds are in fact leaking, which would be awkward and certainly doesn't jive with the promotion internationally of a "world class" regulatory system. They would then have to demonstrate that the substances therein, which include naphthenic acids, ammonia, benzene, cyanide, oil and grease, phenols, toluene, polycyclic aromatic hydrocarbons, arsenic, copper and iron – several of which are known to be toxic, meet peer-reviewed water quality guidelines. When they do, these assessments will be made public as part of that regulatory process and will be subject to all kinds of public scrutiny, which could well include some further "spotlighting" by the CEC.

Certainty for industry to be sure, but also for its opposition. And while transparency and political accountability may not be perfect tools in the environmental context, they're arguably better than the shadowy world of denial and non-enforcement that is the *status quo*.