

## NAFTA scrutiny of oilsands tailings ponds opposed by Canada

Posted by Joan Russow

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Officials from Canada, Mexico and U.S. poised to vote on whether to allow investigation

By Margo McDiarmid, environment reporter, [CBC News](#)

<http://www.cbc.ca/news/politics/nafta-scrutiny-of-oilsands-tailings-ponds-opposed-by-canada-1.2896100>

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An aerial view shows a tailings pond near Fort McMurray, Alta. Canada is trying to block an investigation of the tailings ponds by an environmental watchdog set up as part of the North

Canada is trying to stop NAFTA's environmental watchdog from taking a closer look at the environmental effects of the huge tailings ponds produced by Alberta's oilsands, and it appears Mexico and the U.S. will go along with efforts to stop a formal investigation.

If that happens, it would be the third time in a year Canada has stopped North American Free Trade Agreement scrutiny of its environmental record.

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The tailings ponds are a touchy political issue for both the Alberta and Canadian governments. They've become a symbol of the environmental footprint of oilsands production. The ponds cover more than 176 square kilometres and contain a toxic mixture of water, clay and chemicals, what's left over when the oil is removed.

Evidence suggest the ponds are seeping into the nearby ground and water.

'Through a council resolution in December 2014, Canada, Mexico and the U.S. unanimously voted to terminate the submission' Danny Kingsberry, Environment Canada spokesman

Two environmental groups and three private citizens from Alberta, Saskatchewan and the N.W.T. want the Commission on Environmental Co-operation to find out whether Canada is breaking its own Federal Fisheries Act by failing to prevent tailings from leaking into the Athabasca River and nearby creeks in northern Alberta.

'It was important for us know whether this was happening and whether environmental laws were being broken and whether the government is upholding those laws or ignoring them,' said Dale Marshall of Environmental Defence, one of the groups that launched the complaint in 2010.

## **Commission set up under NAFTA**

The Commission on Environmental Co-operation was in set up in 1994 as part of the North American Free Trade Agreement to resolve environmental disputes and to provide the public an outlet for environmental concerns.

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Commission staff investigate public complaints in Canada, Mexico and the U.S. and can recommend an in-depth investigation, called a factual record, if they find there are grounds. But it has no power to compel the countries to do anything.

The final decision to conduct an investigation is made by a council of the environment ministers from the three countries, which is about to decide whether to allow a factual record into the tailings ponds. But negotiations are already going on — and it looks as if Canada may be getting its way.

“Through a council resolution in December 2014, Canada, Mexico and the U.S. unanimously voted to terminate the submission,” said Environment Canada spokesman Danny Kingsberry in an email to CBC News.

That statement raised some eyebrows, because the final vote hasn't actually happened. U.S. and Canadian officials who are familiar with the file and who spoke on background say it's “highly unusual”; Canada would reveal what's going on behind the scenes.

'To my knowledge we have never received such a firm position as we have from Canada as we have in this case' Hugh Benevides, legal officer for the Commission on Environmental Cooperation

“Typically they don't say anything,” said one U.S. official.

When asked to clarify, in a followup email Kingsberry only said “a final decision by the council is expected to be taken shortly on this matter.”

But it's clear that Environment Canada, the department involved, is trying to stop further investigation into the tailings ponds.

### **'A new approach'**

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Last January, Dan McDougall, the assistant deputy minister for the department's international affairs branch, wrote a letter to the commission telling it to "proceed no further with this submission," claiming the issue was the subject of a court case. The rules say that if there's a pending court case no factual report can be done.

But commission staff discovered the court case wasn't proceeding and recommended the investigation go ahead.

McDougall wrote again, arguing the commission had no jurisdiction to check into domestic law and telling it to "cease this analysis."

Canada is the only country taking this approach, according to Hugh Benevides, who is legal officer for the commission.

"To my knowledge we have never received such a firm position as we have from Canada as we have in this case," he said in an interview.

"I think it's safe to say it's a new approach."

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In 2014, Canada, with Mexico's support, blocked investigations into protection of polar bears and B.C. salmon farms.

"The council have voted against the preparation of a factual record only four times in 20 years and two of those votes have happened in 2014," said Benevides.

The tailings ponds decision would make it five.

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But while Canada is kicking up the biggest fuss, none of the countries like the NAFTA environmental agreement, according to Debra Steger. She's an expert in international trade law at the University of Ottawa.

"It produces a report that can be critical of what the government is doing and no government wants that scrutiny," said Steger in an interview.

Steger said the three countries may be willing to quash the tailings pond investigation because it could affect trade and because it's so political.

"This is an issue that the three parties probably just don't want to go too near at this point," she said.

Marshall, of Environmental Defence, thinks it's all about the getting the controversial Keystone XL pipeline approved in the U.S.

"It's clear that [U.S. Barack] President Obama is looking at Canada's record when he is thinking about approving or not approving certain pipelines going through the U.S.," said Marshall. "If this is one more stain on Canada's record then that plays into his decision potentially."

The three countries are expected to have a final vote on the tailings ponds issue as early as this week.

They can also vote to keep the reasons for their decision secret.