

***North
American
Environmental
Law and Policy***



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COOPÉRATION ENVIRONNEMENTALE
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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue being a source of future life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of fifteen citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico, and the United States.

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PREFACE

The growing economic and social links among Canada, Mexico and the United States prompted by the signing of the North American Free Trade Agreement (NAFTA) have increased the importance of public participation in conserving, protecting and enhancing the environment of the continent.

The North American Agreement on Environmental Cooperation (NAAEC) came into force in 1994 to support the environmental goals and objectives of NAFTA and mandated the creation of the Commission for Environmental Cooperation (CEC). The process, created by NAAEC Article 14, whereby private citizens or nongovernmental organizations, could file submissions with the CEC alleging that a government of one of the NAFTA Parties was failing in the effective enforcement of that Party's environmental laws, provides an unprecedented opportunity for the public to raise issues concerning the effective enforcement of environmental law in North America.

The Secretariat of the CEC implements this process, as specified in Articles 14 and 15 of NAAEC, and in accordance with the *Guidelines for Submissions on Enforcement Matters* initially adopted by the CEC Council in October 1995 and revised in June 1999. Under Article 14, the CEC Secretariat may consider a submission from any person or nongovernmental organization asserting that a Party to NAAEC is failing to enforce its environmental law effectively. With Council approval, this can launch a process that leads to further investigation of the matter and the publication of findings in a factual record, as provided under NAAEC Article 15.

The CEC has received 28 submissions since 1995. Eleven of these submissions are still active, while seventeen have been terminated at different stages of the process, including two that have led to the publication of factual records. The first factual record concerned the construction of a cruise ship pier on the island of Cozumel in the Mexican Caribbean, and the second one related to the effect of hydroelectric

operations on fish habitat in British Columbia, Canada. The Secretariat is currently preparing a third factual record concerning an abandoned lead smelter in the border city of Tijuana, Mexico.

Currently, there are three active submissions concerning Canada. A submission relating to fish habitat protection and environmental impact assessment in Alberta has been reviewed by the Secretariat, which concluded that preparation of a factual record was warranted; however, Council deferred its decision on this matter because the specific case presented in the submission was the subject of pending domestic proceedings in Canada. Two submissions concerning fish habitat in British Columbia, one in connection with mining operations and another relating to logging, are being considered by the Secretariat in light of the responses provided by Canada to determine if factual records are warranted.

Five submissions involving Mexico are active. Two are undergoing initial review: one concerning environmental justice for indigenous groups in the Sierra Tarahumara of Chihuahua and one relating to a molybdenum plant in the town of Cumpas, Sonora. The other two submissions—one that concerns municipal waste water discharges into the Magdalena River and the other relating to a hazardous waste landfill near the city of Hermosillo, both in the state of Sonora, Mexico—are being reviewed in light of Mexico's responses, to determine whether they warrant preparation of factual records. Finally, the Secretariat has notified Council that a factual record is warranted for a submission concerning shrimp farming operations in San Blas, Nayarit, Mexico. The Secretariat's notification explaining its reasons is not included in this volume, since the Guidelines do not allow the public disclosure of a determination prior to Council's decision on whether or not a factual record will be prepared.

The Secretariat is considering two submissions involving the United States, both of which are being reviewed in light of the Party's responses, to determine whether they warrant preparation of factual records. One concerns deposition in the Great Lakes of dioxins and furans from municipal and medical waste incinerators; the other relates to enforcement of the Migratory Bird Treaty Act with respect to logging operations.

The seventeen submissions no longer pending primarily concern the protection of biodiversity and natural resources, especially water. Six involved Canada, five involved Mexico and another six, the United States.

CEC Secretariat determinations and other documents issued through 31 August 1997, relating to specific submissions, were compiled in the Winter 1998 edition of this series. The present edition includes CEC Secretariat documents on specific submissions issued through 31 August 2000. For information about the Winter 1998 edition, or any other previous edition, please contact Les Éditions Yvon Blais Inc. at commandes@editionsyvonblais.qc.ca or <http://www.editionsyvonblais.qc.ca> or at (800) 363-3047 (Canada) or (450) 266-1086.

The following table captures the status of submissions and the actions taken by the CEC at different stages of the process: determinations under Articles 14(1) and 14(2); requests to a Party for additional information; notifications to Council that a submission warrants preparation of a factual record; and final factual records.¹ Secretariat documents and other information about each submission (summaries of the submissions and responses, list of communications with the Submitter, documents available in electronic format, etc.) are available in the Registry of Citizen Submissions on the CEC home page, at <http://www.cec.org>. Copies may also be requested by contacting info@ccemtl.org.

26 October 2000

1. Article 14(1) and 14(2) determinations issued after June 1999 must include explanations of the Secretariat's reasoning, per the revised Guidelines. Previous determinations finding that a submission met the 14(1) criteria and/or warranted a response under 14(2) typically did not contain such explanations. Thus, 14(1) and 14(2) determinations issued since June 1999 tend to be more detailed and elaborate than earlier determinations.

A History of NACEC Submissions on Enforcement Matters, January 1995—August 2000

History	Year					
	2000 (to 31 August)	1999	1998	1997	1996	1995
Submissions received*	SEM-00-001/ Molymex I (Mx) (27 January) SEM-00-002/ Neste Canada (US) (21 January) SEM-00-003/ Jamaica Bay (US) (2 March) SEM-00-004/ B.C Logging (Can) (15 March) SEM-00-005/ Molymex II (Mx) (6 April— Resubmitted 31 July) SEM-00-006/ Tarahumara (Mx) (9 June)	SEM-99-001/ Methanex (US) (18 October) SEM-99-002/ Migratory Birds (US) (19 November)	SEM-98-001/ Guadalajara (Mx) (9 January— Resubmitted 15 October 1999) SEM-98-002/ Ortiz Martinez (Mx) (Revised—4 August) SEM-98-003/ Great Lakes (US) (27 May—Resubmitted 5 January 1999) SEM-98-004/ B.C. Mining (Can) (29 June) SEM-98-005/ Cytrar (Mx) (23 July) SEM-98-006/ Aquanova (Mx) (20 October) SEM-98-007/ Metales y Derivados (Mx) (23 October)	SEM-97-001/ BC Hydro (Can) (2 April) SEM-97-002/ Rio Magdalena (Mx) (15 March) SEM-97-003/ Quebec Hog Farms (Can) (9 April) SEM-97-004/ Canadian Env. Defence Fund (Can) (26 May) SEM-97-005/ Biodiversity (Can) (21 July) SEM-97-006/ Oldman River II (Can) (4 October) SEM-97-007/ Lake Chapala (Mx) (10 October)	SEM-96-001/ Cozumel (Mx) (18 January) SEM-96-002/ Agee Tottrup (Can) (20 March) SEM-96-003/ Friends of the Oldman River I (Can) (9 September— Resubmitted 8 October) SEM-96-004/ Fort Huachuca (US) (14 November)	SEM-95-001/ Spotted Owl (US) (30 June) SEM-95-002/ Logging Rider (US) (30 August)

History	Year					
	2000 (to 31 August)	1999	1998	1997	1996	1995
14(1), 14(2)** Determinations continuing the process	SEM-00-002 (17 April, consolidated with SEM-99-001) SEM-00-004 (8 May)	SEM-98-007 (5 March) SEM-98-006 (17 March) SEM-99-001 (30 March) SEM-98-005 (9 April) SEM-98-004 (25 June) SEM-98-003 (8 September) SEM-99-002 (23 December)	SEM-97-002 (8 May) SEM-97-006 (23 January and 8 May) SEM-97-007 (2 October) SEM-98-004 (30 November)	SEM-96-004 (22 January) SEM-97-001 (1 and 15 May) SEM-97-002 (6 October) SEM-97-003 (8 May and 9 July)	SEM-96-001 (6 and 8 February) SEM-96-002 (17 April) SEM-96-003 (Revised) (18 October and 8 November) SEM-96-004 (16 December)	SEM-95-001 (19 July)
14(1), 14(2) Dismissals	SEM-98-001 (11 January) SEM-00-003 (12 April) SEM-00-001 (25 April) SEM-00-005 (13 July— Resubmitted 31 July 2000)	SEM-98-002 (18 March) SEM-98-001 (13 September)	SEM-97-005 (26 May) SEM-98-002 (23 June) SEM-98-003 (14 December)	SEM-97-004 (25 August)	SEM-96-002 (28 May) SEM-96-003 (1 October)	SEM-95-001 (21 September and 11 December) SEM-95-002 (8 December)

History	Year					
	2000 (to 31 August)	1999	1998	1997	1996	1995
Article 21(1)(b) Requests for additional information from the Party	SEM-98-003 (24 March)	SEM-97-002 (13 September)	SEM-97-003 (16 February)			
Dismissals following response	SEM-00-002 and SEM-99-001 (30 June) SEM-97-007 (14 July)			SEM-96-003 (2 April)		
Notifications that a factual record is warranted	SEM-98-007 (6 March) SEM-98-006 (4 August)	SEM-97-006 (19 July) SEM-97-003 (29 October)	SEM-97-001 (27 April)		SEM-96-001 (7 June)	
Final factual records completed	SEM-97-001 (11 June)			SEM-96-001 (24 October)		

* Total of submissions received January 1995 to 31 August 2000: 28.

** The Secretariat issued a single determination covering both Article 14(1) and 14(2) for several of these submissions.

**Secretariat Determinations
under Articles 14 and 15
of the North American
Agreement on Environmental
Cooperation—August 1997
Through August 2000**





SEM-97-001

(BC HYDRO)

SUBMITTER: B.C. ABORIGINAL FISHERIES COMMISSION,
ET AL.

PARTY: CANADA

DATE: 2 APRIL 1997

SUMMARY: The Submitters allege that the Canadian government is failing to enforce the Fisheries Act, and to utilize its powers pursuant to the National Energy Board Act, to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydro-electric dams.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(1 MAY 1997) have been met.

ART. 14(2) Determination pursuant to Article 14(2) that the
(15 MAY 1997) submission merits requesting a response from the Party.

ART. 15(1) Notification to Council of the Determination that
(27 APRIL 1998) a factual record is warranted in accordance with Article 15(1).

May 1, 1997

BY FAX AND REGISTERED MAIL

Mr. Gregory J. McDade, Q.C.
Sierra Legal Defense Fund
214 - 131 Water Street
Vancouver, B.C.
V6B 4M3

Ms. Patti Goldman
Sierra Club Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA
998104-1711

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s): B.C. Aboriginal Fisheries Commission et al.
Party: Canada
Date: 2 April 1997
Submission No.: SEM-97-001

Dear Sirs/Madams:

The Secretariat of the Commission for Environmental Cooperation has concluded that your submission satisfies the initial screening criteria under Article 14(1) of the North American Agreement on Environmental Cooperation. Accordingly, the submission will now be reviewed under Article 14(2) to determine whether the submission merits requesting a response from the Government of Canada.

We will keep you informed of the status of your submission in accordance with Articles 14 and 15 and the Guidelines for Submissions on Enforcement Matters.

Yours truly,

Commission for Environmental Cooperation – Secretariat

per: Greg Block
Director

c.c. Mr. H. Anthony Clarke, Environment Canada
Mr. William Nitze, U.S. EPA
Mr. José Luis Samaniego, SEMARNAP

15 May 1997

VIA FAX AND REGISTERED MAIL

The Honourable Sergio Marchi
Minister of the Environment
Government of Canada
Les Terrasses de la Chaudière
28th Floor
10 Wellington Street
Hull (Québec)
Canada K1A 0H3

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s): B.C. Aboriginal Fisheries Commission et al.
Party: Canada
Date: 2 April 1997
Submission No.: SEM-97-001

Dear Minister Marchi:

On 2 April 1997, the Secretariat of the Commission for Environmental Cooperation received a submission pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("Agreement") filed by Sierra Legal Defense Fund and Sierra Club Legal Defense Fund on behalf of B.C. Aboriginal Fisheries Commission et al. The submission alleges that the Government of Canada is failing to effectively enforce its environmental law, namely provisions of the Fisheries Act and the National Energy Board Act.

The Secretariat reviewed the submission under Article 14(1) of the Agreement and determined on 1 May 1997 that the submission met the criteria of Article 14(1).

Pursuant to Article 14(2) of the Agreement, the Secretariat has determined that the submission merits requesting a response from the Government of Canada. Accordingly, the Secretariat requests a response from the Government of Canada to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

Sincerely,

Commission for Environmental Cooperation – Secretariat

per: Victor Lichtinger
Executive Director

c.c. Ms. Carol M. Browner
Mtra Julia Carabias
Mr. Gregory J. McDade, Sierra Legal Defense Fund
Ms. Patti Goldman, Sierra Club Legal Defense Fund

Enclosures (2)

Secretariat of the Commission for Environmental Cooperation

Notification from the Secretariat to the Council of its Reasons for Considering that the Development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation is Warranted

Submission I.D.: SEM-97-001

Submitter(s):

B.C. Aboriginal Fisheries Commission
British Columbia Wildlife Federation
Trail Wildlife Association
Steelhead Society
Trout Unlimited (Spokane Chapter)
Sierra Club (U.S.)
Pacific Coast Federation of Fishermen's Association
Institute for Fisheries Resources
Represented by: Sierra Legal Defense Fund and Sierra Club Legal
Defense Fund

Concerned Party: Canada

I- EXECUTIVE SUMMARY

The Submission¹ alleges that Canada has failed to effectively enforce section 35(1) of the federal *Fisheries Act*,² and is permitting the ongoing, unauthorized destruction of fish and fish habitat in British Columbia (B.C.), distorting the hydro power market, and undermining the purposes of the North American Agreement on Environmental Coopera-

1. SEM-97-001. The complete text of both the Submission and the Response are available from the Secretariat by request or electronically at <http://www.cec.org>.
2. R.S.C. 1985, c. F-14.

tion (“NAAEC”). The Submission focuses on a failure to prosecute several incidents arising from the operation of various British Columbia Hydro (“B.C. Hydro”) dams. It is also alleged that Canada has failed to exercise its mandatory statutory jurisdiction, pursuant to section 119.06 of the *National Energy Board Act* (“NEB Act”),³ to examine the environmental impacts of the production of power for export.

As a preliminary matter, Canada states that the assertions concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings, and that, pursuant to Article 14(3)(a) of the NAAEC, factual records must not be prepared with respect to issues that are the subject of contemporaneous domestic proceedings. Further, Canada submits that it is enforcing its environmental laws and is in full compliance with its obligations under the NAAEC. Canada takes a broader view of “effective enforcement,” and submits that the focus should not be merely upon the issue of whether or not prosecutions are being pursued under section 35(1) of the *Fisheries Act*. Canada also contends that the National Energy Board (“NEB”) properly exercised its discretionary power under the *NEB Act*.

We are of the view that the phrase “judicial, quasi-judicial or administrative action” in Article 45(3)(a) of the NAAEC should be defined narrowly to fulfill the objectives and rationale of the NAAEC, and more particularly, Article 14(3). To fall within that term, a “judicial or administrative proceeding” must be specifically delineated in Article 45(3), be pursued by a Party in a timely manner, and be in accordance with a Party’s law. Further, to invoke the automatic termination clause under Article 14(3)(a), such a proceeding must be of the same subject matter as the allegations raised in the Submission.

None of the proceedings relied upon by Canada necessitates the automatic termination of the proceedings under Article 14(3)(a). The two judicial proceedings, *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans*⁴ and *R. v. British Columbia Hydro and Power Authority*⁵ are either not pursued by a Party, or are no longer pending. British Columbia’s Water Use Planning process and the Regional Technical Committees, in our view, do not constitute “administrative proceedings” as that term is used in Article 14(3)(a).

3. R.S.C. 1985, c. N-7.

4. Federal Court Action File No. T-1171-97.

5. [1997] B.C.J. No. 1744, Kamloops Registry No. 44436, July 19, 1997.

Canada's assertion that it employs a variety of regulatory measures, inclusive of prosecution, to effectively enforce its laws is consistent with the broad construct of "effective enforcement" articulated in Article 5 of the NAAEC and in other jurisdictions. Consequently, a lack of prosecutions under section 35 of the *Fisheries Act* may not be dispositive of the issue regarding Canada's effective enforcement of its environmental laws.

Additional information is required before an evaluation can be made that Canada is effectively enforcing its environmental laws. It is recommended that a factual record be developed in order to assemble further factual information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with section 35(1) of the *Fisheries Act*.

With respect to the allegations raised regarding the NEB, it is the view of the Secretariat that there is no information to suggest that the NEB's exercise of discretion in that matter was "unreasonable," and we recommend that a factual record should not be prepared in respect of this issue. As a result, the preparation of a factual record is recommended only in respect of the alleged failure to effectively enforce section 35 of the *Fisheries Act*.

II- BACKGROUND

On 2 April 1997, seven non-governmental organizations, the B.C. Aboriginal Fisheries Commission, the British Columbia Wildlife Federation, the Steelhead Society, the Trail Wildlife Association, the Pacific Coast Federation of Fishermen's Associations, the Sierra Club (Washington, D.C.) and the Institute for Fisheries Resources (collectively, the "Submitters")⁶ filed a submission with the Secretariat, pursuant to Article 14 of the NAAEC ("Submission"). The Submitters allege, in summary, "the failure of the Canadian Government to enforce section 35(1) of the *Fisheries Act*, and to utilize its powers pursuant to section 119.06 of the *National Energy Board Act*, to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydro-electric dams."

Under Article 14, the Secretariat may consider a submission from any non governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where

6. The Submitters are represented by the Canadian law firm Sierra Legal Defense Fund (S.L.D.F.) and the American law firm Sierra Club Legal Defense Fund (S.C.L.D.F.).

the Secretariat determines that the requirements of Article 14(1) have been met, it shall decide whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of the response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record. The final factual record may be made publicly available upon a two-thirds vote of the Council.

The Secretariat has reviewed the submission in light of Canada's response to determine whether the development of a factual record is warranted.

A. The Submission

The Submitters allege that Canada has failed to effectively enforce section 35(1) of the federal *Fisheries Act* permitting the ongoing unauthorized destruction of fish and fish habitat in British Columbia, distorting the hydro power market, and undermining the purposes of the NAAEC. B.C. Hydro, a Crown corporation wholly owned by the government of the Province of British Columbia, builds, owns, maintains and operates a system of hydro-electric dams across British Columbia. The Submitters allege that the operation of these dams causes substantial damage to fish and fish habitat.

Pursuant to sections 35(1) and 40(1) of the *Fisheries Act*, it is an offense to carry on work which results in the harmful alteration, disruption or destruction of fish habitat unless authorized by the Minister of Fisheries or by regulation.⁷ The Submitters allege that B.C. Hydro has consistently

7. Section 35 states:

- (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
- (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Section 40 states:

- (1) Every person who contravenes subsection 35(1) is guilty of:
 - (a) an offense punishable on summary conviction and liable, for a first offense to a fine not exceeding three hundred thousand dollars and for any subsequent offense, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
 - (b) an indictable offense and liable, for a first offense to a fine not exceeding one million dollars, for any subsequent offense, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years or to both.

violated section 35(1), but that the Department of Fisheries and Oceans (“DFO”), the federal department responsible for the administration of the *Fisheries Act*, has laid only two charges against B.C. Hydro since 1990 “despite clear and well documented evidence that B.C. Hydro’s operations have damaged fish habitat on numerous occasions.”⁸

The Submitters also allege that Canada has failed to utilize its powers pursuant to section 119.06 of the *NEB Act* to exercise its mandatory statutory jurisdiction to examine the environmental impacts of the production of power for export. Pursuant to section 119.06 of the *NEB Act*, the NEB may recommend to the federal Minister of Natural Resources that an application be subjected to a public review process. In determining whether to make that recommendation, the NEB is directed by section 119.06(2) to consider “the impact of the exportation on the environment” and to “avoid the duplication of measures taken in respect of the exportation by the applicant and the [provincial government].” The Submitters allege that the NEB is the only forum in which the environmental impacts of the production of electricity for export are addressed.

The Submitters state that in a 13 September 1996 decision, the NEB failed to address the environmental impacts of an application by Powerex Corp. to export power to Washington State. The Submitters assert that in rendering its decision the NEB concluded that the Government of British Columbia actively regulates the activity at issue. In the Submitter’s view, the Province exercises no such regulatory authority.

In addition to these general allegations, the Submission outlines six specific incidents illustrating the nature and extent of damage to fish and fish habitat caused by the operation of B.C. Hydro’s dams throughout the Province. Appendix A to the Submission includes certain additional information in respect of the alleged impact of B.C. Hydro’s operations at each of 39 sites.

B. The Canadian Response

In its Response, Canada submits that it is in fact enforcing its environmental laws and is in full compliance with its obligations under the NAAEC. In addition, Canada states that the assertions concerning the enforcement of the *Fisheries Act* are the subject of pending judicial or administrative proceedings, and that, pursuant to Article 14(3)(a) of the NAAEC, factual records must not be prepared with respect to issues that

8. Submission, *supra* note 1 at 1.

are the subject of contemporaneous domestic proceedings. Canada states that the Submission raises issues that are pending before both the Federal Court of Canada and the British Columbia Supreme Court, and that the federal government is participating in two comprehensive administrative proceedings (namely, in British Columbia's Water Use Planning initiative and at the Regional Technical Committees.) Canada contends that a primary objective of these proceedings is to ensure B.C. Hydro's compliance with federal and provincial laws with respect to protection of fish habitat and to ensure that environmental objectives are fully integrated into water use decisions.

Canada submits that it is fully enforcing the environmental provision of the *Fisheries Act*. Canada notes that support for the concept that enforcement encompasses actions broader than prosecutions, is found in Article 5 of the NAAEC, which provides a non-exhaustive list of appropriate enforcement actions. Canada states that the Submission is based on a limited view of enforcement which equates enforcement directly with legal and judicial sanctions, and fails to recognize that both Canada and the Province of British Columbia have a clear record of ongoing cooperative, comprehensive, and productive studies and projects to enhance fisheries interests. Canada suggests that the reports and studies relied upon by the Submitters are an important step in identifying problems and solutions. To the extent that such studies lead to solutions through cooperative means, more formal enforcement is often unnecessary. Canada says that it considers enforcement by means of prosecutions to be a last resort after cooperation and persuasion have failed. Canada suggests that the immediate and widespread use of prosecution as a primary enforcement tool would be ineffective and counterproductive.

Canada goes on to outline those actions which have been taken with respect to the specific impacts and the specific incidents outlined in the Submission. The Response also asserts that the NEB properly exercised its power under the *NEB Act*. That *Act* gives the NEB the discretion to decide whether evidence filed about environmental impacts is sufficient to recommend a designation order for a public hearing. Canada states that the NEB acted within this discretion in making this determination on the basis of the evidence before it, which was not the same as that reflected in the attachments provided by the Submitters.

Canada also suggests that the NAAEC and the *Fisheries Act* cannot be applied retroactively. Finally, Canada states that the development of a factual record would not further the objectives of the NAAEC in light of the detailed information provided in its response.

III- SHOULD THE SUBMISSION PROCESS BE AUTOMATICALLY TERMINATED OWING TO A MATTER WHICH CONSTITUTES A PENDING JUDICIAL OR ADMINISTRATIVE PROCEEDING?

Article 14(3)(a) of the NAAEC provides that the Secretariat “shall proceed no further” where the responding Party has shown that the matter is the subject of a “pending judicial or administrative proceeding.” This suggests that the Parties intended to foreclose a review of enforcement matters actively being pursued by any Party. Article 45(3)(a) defines “judicial or administrative proceeding” for the purposes of Article 14(3). In its response, Canada states that the subject matter of the Submission is the subject of pending “judicial or administrative proceedings,” including the two court cases and the two examples of administrative proceedings referred to above, and that therefore the submission review process must end. We consider this assertion at the outset, since the fundamental issue of the preparation of a factual record need only be addressed if the Secretariat is so authorized.

As noted above, in making its assertion that the Secretariat is estopped from any review, Canada relies on two pending judicial proceedings. The first case is *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans*, currently underway in the Federal Court of Canada (the “Federal Court Case”). This case addresses the constitutionality of a minimum flow order made pursuant to section 22 of the *Fisheries Act*. The second case is *R. v. British Columbia Hydro and Power Authority*, a case decided by the Supreme Court of British Columbia after the Submission and Response were received by the Secretariat (the “Supreme Court Case”). That case involves charges brought against B.C. Hydro under, among other provisions, section 35 of the *Fisheries Act*.

Canada further argues that its participation in British Columbia’s Water Use Planning (“WUP”) initiative and on the Regional Technical Committees (“RTCs”) qualifies as administrative proceeding pursuant to Article 45(3)(a) of the NAAEC and consequently bars any further review. The WUP is an initiative sponsored by the government of British Columbia to review all B.C. Hydro water licenses and to develop water use plans for each facility. Canada has responded that, through DFO, the government participates in some aspects of the WUP. DFO also participates, along with representatives from the B.C. Ministry of Environment, Lands and Parks and B.C. Hydro, in the RTCs which are charged with reviewing fisheries issues at both individual facilities and on a broader basis.

In making its determination, the Secretariat first considers the meaning of the term “judicial or administrative proceedings” for the purposes of Article 14(3) of the NAAEC. Secondly, on the basis of that interpretation the Secretariat makes a determination regarding whether the proceedings put forward by Canada in its response fall within the scope of this term.

A. The Definition of a “Judicial or Administrative Proceeding”

In making a determination on the issue of whether any proceeding falls with the definition of a “judicial or administrative proceeding” under Article 14(3) the Secretariat has considered first the plain reading of Article 45(3)(a) of the NAAEC. Secondly, the Secretariat has considered the possible interpretation of the terms within the broader context of other provisions of the NAAEC. Finally, it is useful to refer to previous decisions by the Secretariat throughout the interpretive process, though we acknowledge that the Secretariat and the Council are not bound by the principle of *stare decisis*.⁹

(i) A Plain Reading of Article 45(3)

As stated above, the definition of the term “judicial or administrative proceeding” is provided in Article 45(3) of the NAAEC, which reads:

For the purposes of Article 14(3), “judicial or administrative proceeding” means:

- (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration;

9. At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of *The Vienna Convention on the Law of Treaties*. See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Editions Yvon Blais, 1991), c. 2; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), c. 8, and *The Vienna Convention on the Law of Treaties*, concluded at Vienna, May 23, 1969, entered into force January 27, 1980, 1155 U.N.T.S. 331 (“Vienna Convention”). The Vienna Convention is in force in both Canada and Mexico as of January 27, 1980. The United States signed the Vienna Convention on April 24, 1970 but has not ratified it. I.M. Sinclair notes in *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) that since 1969, provisions of The Vienna Convention have frequently been cited in judgments of the Courts of the United States and in state practice as accurate statements of the customary rules in relation to interpretation of treaties.

the process of issuing a license, permit or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and

- (b) an international dispute resolution proceeding to which the Party is party.

In order to constitute a “judicial or administrative proceeding,” the action must accordingly be pursued (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party’s law; and (iv) comprise one of the prescribed categories of activities.

As previously determined, the Secretariat has held that the term “by a Party” means that the action must be undertaken by a government signatory to the NAAEC.¹⁰ The requirement to proceed in a “timely fashion” appears to require that any such actions be pursued in a vigorous manner without undue delay. The third requirement is interpreted to mean that the proceedings must be grounded in the statutory or common law of the Party. Finally, as stated in Article 14(3) discussed more fully below, the “judicial or administrative proceeding” must address the same “matter” as the Submission.

(ii) Other Provisions of the NAAEC

We note that in the context of Article 5(3)(b), a compliance agreement is referred to as a type of sanction or remedy, along with the imposition of fines, imprisonment, injunctions and the closure of facilities. This suggests that the term “seeking an assurance of voluntary compliance or a compliance agreement” includes proceedings regarded as measures leading to sanctions or remedies.

(iii) The Object and Purpose of the NAAEC

Following an examination of the language in other provisions of the NAAEC, we next turn to the object and purpose of the NAAEC in order to seek guidance on the interpretation of the scope of Article 14(3).¹¹

10. Commission for Environmental Cooperation – Secretariat Determination pursuant to Articles 14 and 15 of the NAAEC, SEM-96-003, April 2, 1997.

11. Article 31 of the Vienna Convention, *supra* note 9, provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in light of its object and purpose.”

In order to promote the objectives of the NAAEC set out in its Article 1, and to give meaning to the Article 14 process, which is designed to scrutinize the Parties' commitments to effectively enforce their environmental laws, it is important to construe narrowly the definition of "judicial or administrative proceeding" in Article 45(3), which, in the context of Article 14(3), has the ultimate effect of terminating submission review processes. Only proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time should be considered as falling within Article 14(3)(a). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, should not be sufficient to trigger the automatic termination clause. If such proceedings were included within the definition, a Party could effectively shield non-enforcement of its environmental laws from scrutiny simply by commissioning studies or holding consultations.

We are in no way suggesting that Canada's attempt to invoke this clause represents a deliberate attempt to prematurely terminate the proceedings. However, to give full effect to the NAAEC, for the reason given a peremptory clause of this nature must be construed narrowly.

(iv) Further Considerations

In its Article 15(1) determination of Submission No. SEM-96-003, the Secretariat considered the rationale underlying Article 14(3)(a). The Secretariat stated that the exclusion of matters which are currently the subject of judicial or administrative proceedings was required for two reasons: (a) the need to avoid a duplication of effort; and (b) the need to refrain from interfering with pending litigation. These considerations apply to both proceedings that fall within the Article 45(3)(a) definitional requirements as well as to other proceedings outside of that specific provision. In another determination under Article 15(1), the Secretariat noted:

Civil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices. The Secretariat is reluctant to embark on a process which may unwittingly intrude on one or more of the litigant's strategic considerations.¹²

Nor would it be appropriate for the submission review process to "second guess" a domestic court on the meaning of a provision or on the disposition of factual and legal matters before that Court.

12. *Supra* note 10.

In sum, in order to fall within the definition of “judicial or administrative proceeding” in Article 45(3)(a), a proceeding must be: specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, and in accordance with a Party’s law. Further, such a proceeding must concern the same subject matter as the allegations raised in the submission. Thus, this initial threshold consideration should be construed narrowly so as to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3).

B. Should Review of the Submission Be Terminated Based upon the Proceedings Identified by Canada?

(i) *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans*

Canada relies on the case of *BC Hydro and Power Authority v. A.G. Canada and the Minister of Fisheries and Oceans* (the “Federal Court Case”) as a “pending judicial proceeding” within the meaning of Article 14(3)(a). While it is clearly a “judicial proceeding” as that term is used in Article 45(3)(a), it does not relate to the enforcement of section 35(1) of the *Fisheries Act*; rather, the case involves an application for judicial review of an order made under section 22 of the *Fisheries Act*. Accordingly, the “subject matter” of the case and the Submission is not the same. Furthermore, it does not appear that the proceeding was initiated by a Party, in this case Canada. Consequently, the Federal Court Case does not operate to automatically terminate the submission review process under Article 14(3).

With respect to the two-pronged criteria applied by the Secretariat; that is, avoidance of duplication and non-interference, the Secretariat has determined that the Federal Court Case will not resolve the issue raised in the Submission nor is there an identity of issues between the matters. There appears to be minimal risk that the preparation of a factual record will result in a duplication of effort. Second, the preparation of a factual record with respect to the Submission will not interfere with the pending litigation since the object of a full record inquiry would focus on the enforcement conduct of Canada, not the constitutionality of section 22 of the *Fisheries Act*.

(ii) *R. v. British Columbia Hydro and Power Authority*

Canada also relies on *R. v. British Columbia Hydro and Power Authority* (the “Supreme Court Case”) as evidence of effective enforce-

ment of environmental laws. The Supreme Court Case involved allegations that B.C. Hydro, in response to large inflows into the Bridge River drainage system, had “spilled large volumes of water from the Terzaghi Dam on three occasions and ended a long standing spill from the Seton dam rather abruptly.”¹³ The Court did find that these actions had killed fish and damaged fish habitat. However, B.C. Hydro was acquitted on the basis that it had exercised due diligence in the operation of the dams.

The subject matter of the Supreme Court Case did involve the enforcement of section 35(1). However, we note that the judgment in the case was rendered on July 10, 1997. As a result, the matter is no longer “pending” before the courts, and so the proceeding no longer falls within the Article 14(3)(a) barrier. Article 14(3)(b)(i) suggests that the fact that an issue was formerly the subject of a proceeding may nonetheless be of relevance. Therefore, while this case does not warrant termination of the process, the disposition of the case itself may constitute a fact worthy of notice in a factual record examining the effectiveness of current government enforcement strategies. Moreover, those allegations which relate to ongoing impacts not litigated in the lawsuit could be included in a factual record.

(iii) British Columbia’s Water Use Planning Initiative

Canada asserts that British Columbia’s WUP initiative is an ongoing administrative proceeding within the meaning of Article 14(3)(a). Canada advises that the WUP is a project to review all B.C. Hydro water licenses and to develop water use plans for each B.C. Hydro facility and that the plans will lead to changes in the water licenses of the individual facilities, and the System Operating Orders. Canada has advised that binding statutory constraints on B.C. Hydro operations will most likely result from the process. Canada states that the water use plans will be subject to *Fisheries Act* requirements, and that the intent of the WUP is to “ensure compliance both with the federal *Fisheries Act* and provincial legislation in the operation of B.C. Hydro facilities, and to ensure that all environmental, social and economic values are considered in water use decisions.”¹⁴ The WUP process is expected to take five years or more to complete.

As the WUP is a provincial initiative, it is arguable that the proceeding is not undertaken by “the Party” (since the Submission is brought against

13. [1997] B.C.J. No. 1744, DRS 97-13306, Kamloops Registry No. 44436, *supra* note 8 at paragraph 1.

14. Canadian Response to SEM-97-001, July, 1997 (the “Response”) at page 10.

Canada). However, Canada is participating in the project, and it is arguable that a certain degree of federal participation is sufficient to constitute a proceedings brought “by a Party.” However, it is unnecessary to consider that question since we have concluded that the WUP, for other reasons, does not operate to terminate the submission review process.

The WUP initiative may lead to greater protection of fish habitat by a determination to impose statutorily binding limits on B.C. Hydro’s water use. In fact, after the WUP process is completed, the conditions attached to B.C. Hydro’s water licenses may become a primary vehicle for protection of fish habitat. However, WUP process itself, in our view, is not a “judicial or administrative proceeding” as that term is used in Article 45(3)(a). The WUP does not fall into any of the categories listed under Article 45(3)(a). The process does not constitute “seeking an assurance of voluntary compliance or a compliance plan” as those terms are used in other contexts, or as they should be interpreted for the purposes of the NAAEC. To consider the WUP to be part of “the process of issuing a license” would unduly expand the definition of that phrase.

The fact that Canada is participating in a provincial process that may lead to a different manner of protecting fish and fish habitat does not preclude the development of a factual record concerning whether Canada is effectively enforcing the *Fisheries Act* under the legal means which exist at this time. Moreover, the development of a factual record in this case will not lead to a duplication of effort, nor will the outcome of the administrative proceedings interfere with or render moot the subject matter of the Submission.

(iv) Regional Technical Committees

Canada also relies on its participation in RTCs as constituting an administrative proceeding under Article 14(3). These committees, which include representatives from DFO, the B.C. Ministry of Environment, Lands and Parks and B.C. Hydro, review fisheries issues at both individual facilities and on a system-wide basis. As Canada states in its response to the Submission: “The committee work has primarily involved identifying and documenting areas of concerns for fish and fish habitat at existing hydro facilities and to obtain funding from B.C. Hydro for biophysical and fish inventory studies by independent consultants to identify improvement possibilities.”¹⁵

15. Response, *supra* at 19.

While the ultimate aim of the RTC work may be to secure compliance with the *Fisheries Act*, the work does not come within the definition of “judicial or administrative proceedings” in Article 45(3)(a), for the same reasons outlined above in our discussion of the WUP initiative. As well, the open-ended nature the RTC work provides additional arguments against including such initiatives within the scope of Article 45(3)(a). Finally, the subject matter of the Submission, namely the enforcement of section 35 of the *Fisheries Act*, is not the subject of the RTC discussions.

IV- IS THE PREPARATION OF A FACTUAL RECORD WARRANTED IN THIS CASE?

A. Failure to Effectively Enforce Section 35(1) of the *Fisheries Act* against B.C. Hydro

In the face of varied allegations respecting the application of section 35(1) of the *Fisheries Act*, Canada responds by outlining a range of actions undertaken to ensure B.C. Hydro’s compliance with section 35(1). However, little information is provided respecting (a) enforcement policies or directives utilized by Canada and (b) specific factual information regarding enforcement activity in respect of the allegations raised in the Submission. The development of a factual record will allow this information to be compiled, which will in turn facilitate an analysis of whether Canada has been effectively enforcing its environmental laws.

A number of examples will illustrate the point that genuine issues persist regarding the Submitters’ allegations. The Submitters allege that in the summer of 1996, B.C. Hydro dewatered Cranberry Creek, killing and stranding trout over a 10 km section.¹⁶ Canada’s Response states that the Walter Hardman development, which affects Cranberry Creek, is a priority for the WUP initiative, and that DFO has participated in the development of interim operating orders, which are not yet in effect.¹⁷ It is not clear from the Response what specific enforcement action Canada undertook (and the effectiveness of that action) in response to the incident at Cranberry Creek. Without the benefit of that information, including information in respect of Canada’s enforcement policies, it is difficult to evaluate whether there has been effective enforcement with respect to the incident at Cranberry Creek or the other specified incidents in the Submission.

16. Submission, *supra* at 5.

17. Response, *supra* at 27.

Similar questions apply to allegations which relate to ongoing operational problems. For example, the Submission suggests that with respect to the Shuswap Falls project, negative effects have resulted from low winter flows, dewatering, rapid flow ions, increased sediment levels, and reduced access, as well as impacts on benthic productivity.¹⁸ In response, Canada lists a number of actions taken, including the following: (a) commissioning a study on the impacts of ramping down on flows; (b) the development of a rule curve which B.C. Hydro is currently declining to use; (c) DFO's verbal statement to B.C. Hydro that the flow regime proposed by B.C. Hydro is unacceptable; and (d) DFO's request to B.C. Hydro for additional time to monitor work such as flash board removal. In addition, Canada refers to a request by the B.C. Ministry of Environment, Lands and Parks, not acceded to by B.C. Hydro, that the impacts of ramping on invertebrates be examined.¹⁹ Again, little information is provided on the effectiveness of these actions to ensure compliance with the law.

With respect to the Downton Lake and the LaJoie project, Canada states that it has deferred to the Province's decision not to prosecute B.C. Hydro with respect to a May 1996 drawdown. Canada notes that the Province chose not to proceed based on the lack of quantitative evidence of fish losses and the lack of a pre-impact survey.²⁰ This response does not contain sufficient information regarding the effectiveness of Canada's enforcement response. At a minimum, deferral to the Province does not address Canada's obligations regarding the enforcement of the federal *Fisheries Act*.

The Submission states that the Bennett Dam and the G.M. Shrum Station are associated with a decline in fish productivity, rapid flow fluctuations causing strandings, elevated gas levels and sedimentation. Canada responds that:

DFO was not involved at the time of construction in the 1960s. B.C. Hydro has not requested Fisheries Act authorization for the project. DFO's Eastern BC Habitat Unit was formed in 1990, two decades after operations were established at these facilities.²¹

18. Submission, *supra*, at 5.

19. Response, *supra*, 36-37.

20. *Ibid.*, at 32, 37.

21. *Ibid.*, at 32.

These statements do not appear germane to the issue of whether Canada is failing to currently effectively enforce its environmental laws. As the Secretariat noted in Submission No. SEM-96-001:²²

Article 47 of the NAAEC indicates the Parties intended the Agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.

The Vienna Convention on the Law of Treaties provides in section 28 that "unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the Treaty with respect to that party." (United Nations, Treaty Series, vol. 1155, p. 331.)

In that submission, the Secretariat noted "that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has *not* ceased to exist." It is appropriate to take a similar approach to this Submission. Canada's Response does not appear to be directed to the allegation of a present, continuing failure to effectively enforce its environmental law. More information is therefore required.

Another example is the allegation respecting the Keenleyside Dam. The Submission states that complete shut down of flows in April 1990 dewatered and stranded rainbow trout and kokanee fry on the Norns Creek fan.²³ Canada has responded that this event cannot be the subject of an Article 14 submission, since it occurred before the NAAEC came into force. The Secretariat concurs, and recommends that a factual record not be prepared in respect of this specific allegation.

However, if a situation arising in the past continues to exist, it may be the subject of an Article 14 submission. For example, if B.C. Hydro operations continue to damage fish habitat, it makes no difference if those activities were commenced prior to the entry into force of the NAAEC. As noted above, the Secretariat recognizes that a present duty to enforce

22. Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, SEM 96-001, June 7, 1997.

23. Submission, at *supra* 5.

may originate from a situation which continues to exist. If the construction of facilities in the past has led to a state of affairs which “has not ceased to exist,” then the facts surrounding this condition may be the subject of a factual inquiry.

Canada also asserts that the negative impacts of facilities at the Bennett Dam are offset, at least in part, by the Peace/Williston Compensation Program.²⁴ It is unclear that compensation is of any relevance to the effective enforcement of Canada’s environmental laws.

In asserting that Canada has failed to effectively enforce section 35(1) of the *Fisheries Act*, the Submitters point to the fact that only two prosecutions have been undertaken against B.C. Hydro since 1990. Canada, in its response, suggests that it undertakes a variety of activities which, when taken together, constitute effective enforcement of its environmental law. The Secretariat is mindful of the varied principles and approaches that can be applied to a definition or application of the term “effective enforcement.” For example, under certain circumstances, other enforcement measures may be deemed more effective in securing compliance than an exclusive reliance on prosecutions. In that regard, it is not clear how Canada selects its enforcement responses to secure compliance with its environmental law.

In summary, Canada’s response does not disclose sufficient factual information regarding the specific enforcement activity undertaken by Canada in each of the alleged incidents and the effectiveness of that activity in ensuring compliance with its environmental law. As a result, the preparation of a factual record is recommended in respect of the failure to effectively enforce section 35 of the *Fisheries Act*.

B. Failure to Effectively Enforce the *National Energy Board Act*

One of the Submitters, the B.C. Wildlife Federation, made an application in 1996 to the NEB for a public review of the environmental effects of the export of power to the United States by a wholly owned subsidiary of B.C. Hydro. The NEB denied this application, in part relying on the fact that the Province was “actively regulating” the activity at issue. The NEB indicated in its reasons that “the evidence tended to show that the Province was active with respect to ensuring appropriate operation of hydro-electric stations, and was taking steps to promote the public

24. Response at *supra* 32.

interest in this regard.”²⁵ The Submitters contend that there are no provincial laws or regulations that apply to the environmental impacts of the production of hydro power. The Submitters allege that the NEB is the only federal regulatory tribunal with the jurisdiction to examine the environmental impacts of the production of power for export and that the NEB’s failure to exercise that jurisdiction has resulted in a failure of both levels of government to regulate the impact of power generated for export on fish and fish habitat.

The B.C. Wildlife Federation applied for leave to appeal the decision of the NEB to the Federal Court of Appeal on the grounds that the NEB erred in failing to address the environmental effects of the production of energy for export. This application for leave to appeal was denied without reasons. The Submitters allege that the denial of leave to appeal effectively immunizes the NEB’s decision from review and exhausts any further recourse under domestic proceedings.

In its decision, the NEB characterizes the matters raised in the application as operational matters which fall within provincial jurisdiction. The NEB is of the view that, as a responsible federal regulator, it must be careful to ensure that it does not intrude into matters of provincial jurisdiction. The NEB concluded that the evidence raised by the B.C. Wildlife Federation related to operational issues. The record before the NEB demonstrated that B.C. had approved an Energy Removal Certificate on February 15, 1996. The NEB was entitled to conclude that the regulatory concerns of British Columbia in relation to the export application had been satisfied. The NEB found that the evidence present tended to show that the Province was active with respect to ensuring appropriate operation of hydro-electric facilities and was taking steps to promote the public interest in this regard. The NEB concluded that it should not duplicate provincial responsibilities where the record tends to show that the Province is actively regulating the activity at issue.

In its reply, Canada asserts that it has properly exercised its power under the *NEB Act*. Canada claims that the *NEB Act* gives the NEB the discretion to decide whether evidence filed about environmental impacts is sufficient to recommend a designation order for a public hearing. Canada contends that the NEB acted within this discretion in making this determination on the basis of the evidence before it. Canada notes that

25. Decision of the National Energy Board, NEB File # 6200-B007-5, September 13, 1996.

the NEB decided the matter on the evidence filed before it in relation to the application, and that the evidence filed before the NEB is not the same as that reflected in the attachments provided by the Submitters. Accordingly, Canada suggests that it cannot be said that Canada failed to enforce the relevant provisions of the NEB.

Article 45 (1) of the NAAEC states:

A Party has not failed to “effectively enforce its environmental law” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters.

On this matter, the Submission does not meet the threshold necessary to merit further review. Where an environmental law grants discretionary decision-making power, a Submitter must adduce evidence that under the circumstances the Party acted “unreasonably” in exercising discretion in respect of such matters. The Submitters have failed to meet this standard. As a result, the preparation of a factual record with respect to the allegations concerning the *NEB Act* is not warranted.

V- RECOMMENDATION

The Secretariat considers that, in light of the response provided by Canada, the Submission warrants developing a factual record to compile further factual information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with section 35(1) of the Fisheries Act.

As noted above, the factual record should not re-examine the underlying facts which formed the basis of the Supreme Court of British Columbia action with respect to the Terzaghi and Seton Dams. However, the ongoing impacts which result from operation of those projects may be examined, and the disposition of the case itself may be relevant to determining the effectiveness of Canada’s enforcement efforts. Nor should the factual record examine acts or events preceding the entering into force of the NAAEC, unless such acts or events are in relation to allegations of a continuing failure to effectively enforce environmental law.

For the reasons set out above, the Secretariat submits that the preparation of a factual record is not warranted with respect to the allegations concerning non-enforcement of the *NEB Act*.

Respectfully submitted on this 27th day of April, 1998,

Janine Ferretti
Interim Executive Director

SEM-97-002
(RÍO MAGDALENA)

SUBMITTER: COMITÉ PRO LIMPIEZA DEL RÍO
MAGDALENA

PARTY: UNITED MEXICAN STATES

DATE: 15 MARCH 1997

SUMMARY: The Submitters allege that waste water originating in the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican state of Sonora, is being discharged into the Magdalena River without prior treatment. According to the Submitters, the above contravenes Mexican environmental legislation governing the disposal of waste water.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(6 OCTOBER 1997) have been met.

ART. 14(2) Determination pursuant to Article 14(2) that the
(8 MAY 1998) submission merits requesting a response from the Party.

6 de octubre de 1997

POR FAX Y CORREO CERTIFICADO

Sr. Enrique Montaña Guzmán
Sr. Jesús Alberto Sánchez S.
Ing. Luis Felipe Ayala S.
Comité pro limpieza del Río Magdalena
Av. Jesús Arellano No. 103
Pte, Magdalena de Kino
Sonora, México
C.P. 84160

Asunto: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Comité pro limpieza del Río Magdalena
Parte: Estados Unidos Mexicanos
Fecha: 15 de marzo de 1997
No. de petición: SEM-97-002

Señores:

Por este conducto me permito informarles que el Secretariado de la CCA ha concluido la revisión de su petición conforme a los criterios establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte. De dicha revisión se concluye que la petición cumple con los requisitos establecidos y procederemos a la evaluación de la misma de acuerdo al artículo 14(2).

Atentamente,

Secretariado de la Comisión para la Cooperación Ambiental

por: Greg Block
Director

8 de mayo de 1998

POR FAX Y MENSAJERÍA

Mtra. Julia Carabias Lillo
Semarnap
Periférico Sur # 4209 6º Piso
Fracc. Jardines en la Montaña
14210 México, D.F.
México

Ref.: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Comité Pro-Limpieza del Río Magdalena

Parte: Estados Unidos Mexicanos

Fecha: 15 de marzo de 1997

Petición: SEM-97-002

Estimada maestra Carabias:

Como es de su conocimiento, el Secretariado de la CCA recibió el día 7 de abril de 1997 una petición del Comité Pro-Limpieza del Río Magdalena con relación a la falta de aplicación efectiva de la legislación ambiental mexicana respecto de las descargas de aguas residuales provenientes de los Municipios de Imuris, Magdalena de Kino y Santa Ana en el Estado de Sonora, México. El peticionario asevera que dichas descargas son vertidas al Río Magdalena sin tratamiento previo, en contravención de lo dispuesto por la legislación ambiental estatal y federal en materia de prevención y control de la contaminación del agua. Con fecha 6 de octubre de 1997, el Secretariado determinó que la petición cumple con los requisitos establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte.

El Secretariado ha revisado la petición de conformidad con el artículo 14(2) del ACAAN. Considerando los criterios allí enunciados, el Secretariado ha determinado que la petición amerita solicitar una respuesta de la Parte. Al efecto, solicitamos del Gobierno de México una respuesta a la petición de referencia y anexamos una copia de la misma y de toda la información de apoyo que la acompaña.

Conforme al artículo 14(3), estaremos en espera de la respuesta del Gobierno de México en un plazo de 30 días posteriores a la entrega de la presente, salvo que por circunstancias excepcionales se requiera ampliar el plazo a 60 días.

Sometido respetuosamente a su consideración,

Secretariado de la Comisión para la Cooperación Ambiental

por: Janine Ferretti
Directora Ejecutiva Interina

c.c. Lic. José Luis Samaniego, Semarnap
Mr. Avrim Lazar, Environment Canada
Mr. William Nitze, US-EPA
Sr. Enrique Montaña Guzmán, Comité Pro-Limpieza
del Río Magdalena

SEM-97-003
(QUEBEC HOG FARMS)

SUBMITTER: CENTRE QUÉBÉCOIS DU DROIT DE
L'ENVIRONNEMENT (CQDE)

PARTY: CANADA

DATE: 9 APRIL 1997

SUMMARY: The Submitters allege a failure to enforce several environmental standards related to agricultural pollution originating from animal production on the territory of the Province of Quebec.

SECRETARIAT DETERMINATIONS:

ART. 14(1)
(8 MAY 1997) Determination that criteria under Article 14(1) have been met.

ART. 14(2)
(9 JULY 1997) Determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.

ART. 15(1)
(29 OCTOBER 1999) Notification to Council of the Determination that a factual record is warranted in accordance with Article 15(1).

Le 8 mai 1997

Centre québécois du droit de l'environnement
a/s Monsieur Yves Corriveau
2360, rue Notre-Dame Ouest
Suite 307
Montréal (Québec)
H3J 1N4

Objet: Communication sur les questions d'application visées aux Articles 14 et 15 de l'Accord nord-américain de coopération dans le domaine de l'environnement

Auteurs: Centre québécois du droit de l'environnement (CQDE) et al.

Partie concernée: Canada

Date: 9 avril 1997

Communication n°: SEM-97-003

Mesdames/Messieurs,

Le Secrétariat de la Commission de coopération environnementale a déterminé que votre communication rencontre les critères énoncés à l'article 14(1) de l'Accord nord-américain de coopération dans le domaine de l'environnement. En conséquence, le Secrétariat procédera maintenant à l'étude de la communication en vertu de l'article 14(2) afin de déterminer si la communication justifie la demande d'une réponse au gouvernement du Canada.

Conformément aux articles 14 et 15 et aux Lignes directrices relatives aux communications sur les questions d'application, nous vous tiendrons au courant de l'évolution de votre communication.

Veillez agréer, Mesdames, Messieurs, nos salutations distinguées.

Commission de coopération environnementale – Secrétariat

par: Greg Block
Directeur

c.c.: M. H. Anthony Clarke, Environnement Canada
M. William Nitze, US-EPA
M. José Luis Samaniego, SEMARNAP

Le 9 juillet 1997

PAR TÉLÉCOPIEUR ET COURRIER RECOMMANDÉ

L'honorable Christine Stewart
Ministre de l'Environnement
Gouvernement du Canada
Les Terrasses de la Chaudière
28^e étage
10, rue Wellington
Hull (Québec)
Canada K1A 0H3

Objet: Communication sur les questions d'application visées
aux articles 14 et 15 de l'Accord nord-américain de
coopération dans le domaine de l'environnement

Auteur(s): Centre québécois du droit de l'environnement
(CQDE) et al.

Partie: Canada

Date: 9 avril 1997

Communication n°: SEM-97-003

Madame la Ministre,

Le 9 avril 1997, le Secrétariat de la Commission de coopération environnementale a reçu une communication visée à l'article 14 de l'Accord nord-américain de coopération dans le domaine de l'environnement (« l'Accord ») déposée par le Centre québécois du droit de l'environnement (CQDE) et al. La communication allègue que le gouvernement du Canada omet d'assurer l'application efficace de sa législation de l'environnement, plus précisément la *Loi sur la qualité de l'environnement* et le *Règlement sur la prévention de la pollution des eaux par les établissements de production animale* du Québec.

Le Secrétariat a examiné la communication à la lumière du paragraphe 14(1) de l'Accord et en est arrivé à la conclusion, le 1^{er} mai 1997, qu'elle respecte les critères exposés audit paragraphe.

S'appuyant sur les dispositions du paragraphe 14(2) de l'Accord, le Secrétariat a déterminé qu'il est justifié de demander au gouvernement du Canada de répondre à ladite communication. En conséquence, le Secrétariat demande une réponse du gouvernement du Canada à la communication susmentionnée dans les délais prescrits au paragraphe 14(3) de l'Accord. Vous trouverez en annexe, en français et en anglais, copie de la communication et des principales informations fournies à l'appui de la communication. Nous joignons également copie d'une lettre reçue des auteurs de la communication nous indiquant les informations principales fournies à l'appui de la communication.

Veillez agréer, Madame la Ministre, notre haute considération.

Le Secrétariat de la Commission de coopération environnementale

Par: Victor Lichtinger
Directeur exécutif

c.c.: M^{me} Carol M. Browner
M^{me} Julia Carabias
M. Yves Corriveau, Centre québécois du droit
de l'environnement

Pièce jointe (1)

Secretariat of the Commission for Environmental Cooperation

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

Submission I.D.: SEM-97-003

Submitter(s):

Centre québécois du droit de l'environnement
Centre de recherche et d'intervention environnementale
du Grand-Portage
Comité de citoyens "À bon port" (L'Assomption)
Comité de citoyens de Grande-Piles (Mauricie)
Comité de citoyens de Saint-André de Kamouraska
(bas-Saint-Laurent)
Comité de citoyens de Sainte-Luce (Bas-Saint-Laurent)
Comité de citoyens de St-Roch-de-Mékinac (Mauricie)
Comité de citoyens pour un Shipton propre (Estrie)
Comité de protection de la santé et de l'environnement
de Gaspé)
Comité de protection Panmassawipi (Estrie)
Comité de la santé publique et de l'environnement
Comité de qualité de vie de Saint-Jean-de-Dieu
(bas-Saint-Laurent)
Les Ami-e-s de la Terre de Québec
Mouvement Vert Mauricie
Regroupement écologique de Val-d'Or et de ses
environs
Réseau québécois des groupes écologistes
Union québécoise pour la conservation de la nature
Union Saint-Laurent Grands Lacs (Canada-États-Unis)

Concerned Party: Canada

Date Received: 9 April 1997

Date of this Determination: 29 October 1999

I. EXECUTIVE SUMMARY

The Submitters, a number of nongovernmental organizations,¹ assert that many livestock operations in the Province of Quebec are operating in violation of various environmental laws. The Submitters further claim that the pollution discharged from these operations in violation of the law is causing significant harm to the environment and human health. The Submitters identify the Chaudière, Yamaska and l'Assomption river basins as having suffered especially adverse impacts. The Submitters, finally, claim that Canada has failed to effectively enforce the environmental laws with respect to these violations. The Submitters rely on a variety of government reports, among other sources of information, in making these claims.

Canada asserts that it is effectively enforcing the environmental laws concerning agricultural operations in Quebec. Canada points to a wide variety of strategies it has developed and is implementing in order to promote compliance with these laws. One of these strategies involves prosecutions, but Canada has pursued a number of other approaches as well. Canada claims that its efforts have contributed to an improving environment in Quebec and lessened the impacts of agricultural operations on this environment.

Having considered the submission in light of the response, the Secretariat believes that developing a factual record is warranted. The submission and response leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue. We identify two of the main assertions here in order to provide an introduction to the issues discussed below:

- The Submitters assert that the Party is failing to enforce effectively limits on the number of authorized livestock. The Submitters assert that the Party establishes legally binding, enforceable limits on the number of animal units an operation may produce, that there are widespread violations of these limits, and that the Party is failing to effectively enforce with respect to these limits. Further, a government study cited by the Submitters found that the Party subsidizes continuation of such illegal practices through various financial assistance mechanisms it administers.² The Party offers some information concerning the asserted illegal over-production and the Party's efforts to

1. A complete list of the parties filing the Submission is provided above.

2. See Annex 16 of the submission: *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995-1996*, vol. I, chapter 2: "Aide financière offerte aux producteurs agricoles."

promote compliance, but more information is needed concerning the nature of these efforts and their effectiveness.

- The Submitters assert that the Party is failing to effectively enforce standards for manure storage and spreading. The Submitters assert that there are legally enforceable requirements governing these practices, that there are widespread violations of these requirements, and that the Party is failing to effectively enforce with respect to them. Again, the Party offers some information concerning the alleged illegal manure-spreading and storage practices and the Party's efforts to promote compliance, but more information is needed concerning the nature of these efforts and their effectiveness.

Outstanding questions of fact concerning these assertions, and a number of other assertions of ineffective enforcement that the Submitters have made, are discussed in more detail below.

In sum, the Secretariat believes that it is appropriate to develop a factual record concerning the use and effectiveness of the different enforcement tools the Party employs to promote compliance with various environmental laws governing livestock operations in the Province of Quebec. Conducting such a review would be consistent with a broad interpretation of enforcement, an interpretation contemplated by Article 5 of the North American Agreement on Environmental Cooperation (NAAEC).

II. BACKGROUND

On 9 April 1997, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of NAAEC. The submission alleges that the Quebec government is failing to enforce environmental laws concerning pollution originating from livestock operations, primarily from hog farms.

Under Article 14 of NAAEC, the Secretariat may consider a submission from any non-governmental 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). On 8 May 1997 the Secretariat determined that the submission met these criteria.

Article 14(2) provides that the Secretariat is to determine whether a submission that meets the criteria in Article 14(1) merits a response from a

Party. In a determination dated 9 July 1997, the Secretariat found that the submission merited a response from Canada. Canada submitted its response on 9 September 1997. In its response, Canada asserts that Quebec effectively enforces its environmental laws with respect to agricultural pollution and that development of a factual record is inappropriate given, among other things, new provisions respecting agricultural pollution enacted by the Province of Quebec.

On 16 February 1998 the Secretariat requested further information from Canada, pursuant to Article 21(1)(b). In May 1998, the Secretariat received Canada's response to the Secretariat's Article 21 request for information. This determination represents the Secretariat's Notification to Council that the submission warrants developing a factual record pursuant to Article 15(1) of NAEEC.

A. The Submission

The Submitters assert that the Party is failing to enforce its environmental laws that regulate the management of manure produced in livestock operations in the Province of Quebec.³ The Submitters further assert that this failure has caused significant harm both to the environment and to human populations, especially those living near places where livestock operations are concentrated.⁴ The submission, for example, provides that:

Pollution of watercourses from agricultural sources is one of the most important environmental problems in Quebec. . . . Legal tools have been set up in order to prevent the negative environmental impacts of these agricultural activities, but failure to enforce these laws and regulations makes it impossible to respond effectively to these problems.⁵

The submission relies in part on government reports, including a report to the National Assembly of Quebec by the Quebec Auditor General for the year 1995–96,⁶ to support its assertions.

3. See, e.g., Submission at 3, 4, 9, 11.

4. Submission at 3, 9, 13.

5. Submission at 9.

6. Rapport du *Vérificateur général à l'Assemblée nationale pour l'année 1995-1996*, vol. I, chapter 2: "Aide financière offerte aux producteurs agricoles" (Annex 16). The submission also cites other government reports, such as: *Vision stratégique 1. Les grands enjeux 1996-2001* and *État de l'environnement au Québec 1992*, chap. 7: "L'activité agricole." The former, provided as Annex 1 to the submission, found that the volume of manure "stored in facilities that do not comply with regulations exceeds 9 million cubic meters per year and the spreading surface available near the production sites is only sufficient for 3.6 million cubic meters per year," cited in the submission, page 3.

In particular, the submission and its annexes (including the Auditor General's Report) assert that there is evidence of widespread violations of the Environment Quality Act (EQA) and the Regulation respecting the prevention of water pollution in livestock operations (the Regulation).⁷ Such alleged violations include production of unauthorized animal units, illegal manure-spreading, operation of noncompliant storage facilities, and noncompliance with record-keeping requirements.⁸ In addition, the submission and its annexes (including, again, the Auditor General's Report) claim that there are a number of weaknesses in government efforts to enforce the law. They assert, for example, that monitoring is ineffective, and that government is hampered by a lack of basic information about the regulated sector.⁹ Further, the Auditor General's Report found that government programs provide financial aid to producers who do not comply with the Regulation and thereby subsidize illegal practices.¹⁰

B. The Response

In its response, Canada submits that it has acted consistently with its obligations under NAAEC in enforcing environmental legislation in the agricultural sector.¹¹ First, Canada claims that Quebec effectively enforces the Environment Quality Act and the Regulation, utilizing a wide array of "innovative regulatory enforcement methods" that "for the most part use incentive measures to ensure enforcement and to reach environmental goals" as well as prosecutions and related tools.¹² The Party asserts that Quebec's strategies and enforcement methods fully satisfy Article 5 of NAAEC, which presents a "non-comprehensive list of governmental measures aimed at ensuring the enforcement of laws and regulations."¹³

Second, Canada points out that Quebec adopted new laws with respect to agricultural pollution in 1997, "taking on new measures that improve

The latter government report, attached as Annex 2 to the submission, states that there were approximately 10,000 livestock operations that had not complied with the regulations in 1991. Cited in Submission, page 3.

7. R.R.Q., 1981, c. Q-2, reg. 18 in force from 1981 to 1997. This regulation has been replaced by the Regulation respecting the Reduction of Pollution from Agricultural Sources (1997), which came into force 3 July 1997. Response at 9. We discuss below the impact of the adoption of new regulations on this submission.
8. See, e.g., Submission at 3, 7, 9, 12-13.
9. Submission; Auditor General's Report at 2.110, 2.162-2.166.
10. Auditor General's Report at 2.111-2.113, 2.141.
11. Response at 1.
12. Response at 2. Section III contains a more detailed presentation of the enforcement measures identified by the Party in its response.
13. Response at 2.

enforcement of the Environmental Quality Act¹⁴ Canada asserts that this effort to improve the state of regulation of this industry renders preparation of a Factual Record inappropriate, in accordance with Article 3 of NAAEC concerning improvement of environmental laws and regulations.¹⁵

Third, Canada argues that the preparation of a Factual Record would not produce any new information or “present the matter in a new light,” in view of the level of detail provided in the response.¹⁶

The Party appears to claim that the Submitters would have enjoyed legal standing under the Environment Quality Act to pursue this issue and that they have not pursued all of the remedies available to them under domestic law.¹⁷

Finally, Canada submits that NAAEC should not be interpreted as having retroactive effect.

III. ANALYSIS

A. Introduction

We are now at the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it is appropriate to request a response from a Party based upon a review of the factors contained in NAAEC Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations, the requirements contained in Article 14 are not intended to place an undue burden on submitters. In the determination concerning the Animal Alliance submission (SEM-97-005), for example, the Secretariat states as follows:

The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC¹⁸

In its discussion in the Animal Alliance determination of the burden under Article 14, the Secretariat noted that use of the word “assertion” in

14. Response at 5.

15. Response at 5.

16. Response at 5.

17. Response at 12-13.

18. Submission No. SEM-97-005 (26 May 1998).

the opening sentence of Article 14(1) “supports a relatively low threshold under Article 14(1),”¹⁹ while also indicating that “a certain amount of substantive analysis is nonetheless required at this initial stage” because “[o]therwise, the Secretariat would be forced to consider all submissions that merely ‘assert’ a failure to effectively enforce environmental law.”

The recent revisions to the Guidelines provide further support for the proposition that the Article 14(1) and (2) stages of the citizen submission process are not intended to serve as an “insurmountable” screening mechanism. The Guidelines limit submissions to 15 pages in length.²⁰ The revised Guidelines require a submitter to address a minimum of 13 criteria or factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) and (2) for more in-depth consideration.

Here, as indicated above, the Secretariat previously found (on 9 May 1997) that the submission meets the six criteria listed in Article 14(1)(a)–(f) for continued review.²¹ In brief, the analysis is as follows:

1. The submission is in French, one of the languages designated by Canada (14(1)(a)).
2. The submission clearly identifies the persons and organizations making the submission (14(1)(b)). (Submission at 2.)
3. The submission provides sufficient information to allow the Secretariat to review the submission, including several government and other reports relating to the issues covered in the submission (14(1)(c)).²²

19. The relevant part of Article 14(1) reads as follows: “The Secretariat may consider a submission from any nongovernmental organization or person *asserting that . . .*”

20. Guideline 3.3.

21. The Council adopted revised Guidelines for the Article 14 process in June 1999. Guideline 7.2 requires the Secretariat to provide in its notifications concerning Article 14(1) and (2) an explanation of how the submission meets or fails to meet the Article 14(1) criteria as well as an explanation of the factors that guided the Secretariat in making its determination under Article 14(2). The revised Guidelines are available on the CEC web page, www.cec.org, under Citizen Submissions.

22. See, e.g., *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995-1996*, vol. I, chapter 2: “Aide financière offerte aux producteurs agricoles.” The submission also identifies the applicable statutes and regulations and contains a succinct account of the facts on which the assertions of failures of effective enforcement are based. See Guidelines 5.2 and 5.3.

4. The submission appears to be aimed at promoting enforcement, not at harassing industry (e.g., the Submitters are not competitors of entities that are the subject of the government "enforcement" practices at issue. Instead, the Submitters are organizations committed to environmental and public health protection and the submission focuses on purported government failures)(14(1)(d)).
5. The submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party's response, if any (14(1)(e)).²³
6. The Submitters reside in or were established in Canada (14(1)(f)).

The submission also satisfies the three additional threshold criteria contained in the opening sentence of Article 14(1), notably that a submission must assert that a Party: 1) "is failing;" 2) "to effectively enforce;" 3) its "environmental law." The Environment Quality Act and the Regulation qualify as "environmental law" for purposes of NAAEC. The submission appropriately focuses on the extent to which a Party has failed to effectively enforce those laws, not on the effectiveness of the environmental laws as written. Finally, the submission meets the temporal requirement in Article 14(1) because the assertions involve many alleged violations that occurred after 1 January 1994; indeed, the submission asserts that many of the alleged violations are ongoing.

The Secretariat also previously determined that a response from the Party was merited, based on the factors in Article 14(2) (on 9 July 1997). In deciding whether to request a response from a Party, the Secretariat is guided by the four factors listed in Article 14(2). Thus, during this phase of the process the Secretariat assigns weight to each factor as it deems appropriate in the context of a particular submission. Concerning the

23. The submission summarizes some of the correspondence with the government on pages 3-4. This correspondence includes letters to the government on 2 February 1996, 5 February 1996, 12 March 1996, and 19 November 1996, and government responses dated 27 March 1996 and 4 December 1996. The Party apparently does not believe that the Submitters took full advantage of their opportunities to interact with government, while the Submitters apparently believe opportunities to participate were unduly limited in some situations. See, e.g., Response at 13; Submission at 14. The important point for our purposes at this juncture is that the Secretariat previously determined that the Submitters satisfied the criterion that the submission indicate that the matter has been communicated in writing to the relevant authorities and indicate the Party's response, and the response has not persuaded the Secretariat that this previous determination was in error. The materials provided to the Secretariat, including the Auditor General's report, reflect that the matter identified in the submission is well known to the Party as well as the public at large.

issue of harm (see Article 14(2)(a)), the submission alleges that significant environmental harm and harm to human health have resulted from the alleged violations and failure to effectively enforce.²⁴

Similarly, in the Secretariat's view the submission raises matters whose further study would advance the goals of NAAEC (Article 14(2)(b)). Submissions such as this, which focus on the effectiveness of enforcement in the context of asserted widespread violations, are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it obviously may be appropriate for the Commission to address the latter, depending on the circumstances. The asserted violations at issue in this submission also appear to have the potential for significant adverse environmental impacts. As discussed in more detail below, the fact that in 1997 the Party changed some of its laws governing management of pollution by agricultural operations does not negate the value of developing a factual record here.

The Secretariat also was satisfied that the Submitter had adequately pursued private remedies (Article 14(2)(c)). The Submitters have communicated numerous times with government officials regarding their concerns, although the Secretariat is not aware of any private legal actions filed against alleged violators. Some of the submitting organizations have corresponded with the government regarding their concerns and they participated in consultative meetings during the development of the new regulations.²⁵ The Submitters claim that the initiation of individual lawsuits against violators is not a satisfactory strategy to address the violations alleged here:

The problems posed by failure to enforce the legal provisions concerning livestock operations, as raised by the Submitters, have an impact on Quebec as a whole. The proliferation and concentration of operations of this

24. The submission, among other things, indicates that members of the submitting organizations "feel the direct or indirect effects of this environmental problem which affects numerous Quebec watercourses." Submission at 9. In "Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation", SEM 96-001 (7 June 1996), the Secretariat stated that in considering harm, "the Secretariat notes the importance and character of the resource in question," continuing that "[w]hile the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America," the nature of the resources at issue "bring the submitters within the spirit and intent of Article 14 of the NAAEC." The importance of the resources at issue in this proceeding support the same conclusion.

25. See previous note summarizing the correspondence and see Submission at 3-4, 14.

type in certain Quebec regions causes major deterioration in the water quality of many watercourses, due to the *combined* action of various agricultural operations, many of which may not comply with the environmental standards in force. Thus it becomes extremely difficult for those affected to ensure that their rights are respected by using private remedies directed at many possible culprits, since the pollution comes from multiple sources.

... There is a persistent pattern of failure to enforce standards throughout Quebec. Given the significant number of violations, individual remedies cannot provide permanent solutions for the harm done to both environment and population.²⁶

Finally, the submission relies on a number of reports issued by government and others in support of its allegations and is not drawn exclusively from mass media reports (Article 14(2)(d)). One such report is the Quebec Auditor General's Report to the National Assembly of Quebec for 1995-96.²⁷

In sum, the Secretariat has previously found that the submission meets the criteria in Article 14(1) and it has previously determined that a response from the Party was merited based on the factors contained in NAAEC Article 14(2). Under Article 15(1), the Secretariat must now consider whether a factual record should be developed in light of the submission and response. As discussed in the following section, the Secretariat is persuaded that a factual record is warranted to develop additional information concerning the effectiveness of Canada's enforcement responses to the alleged widespread and ongoing violations of the environmental laws.

B. Why Preparation of a Factual Record is Warranted

The Secretariat believes that development of a factual record is warranted. The key provisions at issue are contained in the Environment Quality Act (EQA) and the Regulation respecting the prevention of water pollution in livestock operations (the Regulation). Among other things, the EQA prohibits the discharge into the environment of a

26. Submission at 11, 14 (emphasis in submission). Canada submits that the Submitters have not pursued all the remedies that were available to them, such as the right to seek an injunction pursuant to sections 19.1, 19.2 and 19.3 of the Environment Quality Act.

27. *Rapport du Vérificateur général à l'Assemblée nationale pour l'année 1995-1996*, vol. I, chapter 2: "Aide financière offerte aux producteurs agricoles" (Annex 16).

contaminant in greater quantity than provided for by government regulation.²⁸ The EQA also provides that no one may undertake certain activities that seem likely to result in environmental contamination without first obtaining a certificate of authorization.²⁹

The Regulation contains a general prohibition, providing that the deposit or discharge of livestock manure, manure liquid or contaminated water into the environment is prohibited except where such deposit or discharge is carried out in accordance with the Regulation.³⁰ The Regulation establishes standards for different aspects of manure management, including the siting of facilities, manure storage, and manure-spreading. Producers must also comply with record-keeping requirements, providing information on, among other things, the date, place and quantity of manure-spreading on land that is not their property.

Further, the Regulation requires producers to obtain a certificate of authorization to begin or expand livestock operations or to make certain modifications of their facilities. The Deputy Minister of Environment must ensure that the project complies in all respects with the Environment Quality Act and the Regulation before issuing a certificate of authorization.³¹

28. Section 20 provides:

Emission of a contaminant. – No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Government.

Emission of a contaminant. – The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Government or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wild life or property. 1972, c. 49, s. 20.

29. Section 22 provides: “No one may erect or alter a structure, undertake to operate an industry, carry on an activity or use an industrial process or increase the production of any goods or services if it seems likely that this will result in an emission, deposit, issuance or discharge of contaminants into the environment or a change in the quality of the environment, unless he first obtains from the Minister a certificate of authorization. However, no one may erect or alter any structure, carry out any works or projects, undertake to operate any industry, carry on any activity or use any industrial process or increase the production of any goods or services in a constant or intermittent watercourse, a lake, pond, marsh, swamp or bog, unless he first obtains a certificate of authorization from the Minister.”

30. Division IV, General Manure Management Standards, section 17.

31. Section 3 of the regulation reads as follows: “Compliance: Before granting a certificate of authorization, the Deputy Minister must ensure that the project complies in all respects with the Act and this Regulation.”

As noted above, the Submitters allege widespread violations of the EQA and Regulation and the Certificates of Authorization issued under these authorities and a failure to effectively enforce with respect to these violations. While the response describes some of the measures Quebec has employed to enforce the EQA and the Regulation, additional information should be developed concerning the central issue of the effectiveness of these measures, particularly in light of the widespread violations asserted to exist in the submission and described in the government reports appended to the submission. Additional information should also be developed concerning the actual use of the various enforcement tools. This section: 1) summarizes the types of violations asserted to exist; 2) reviews the Party's enforcement responses to these asserted violations; and 3) identifies some of the questions that remain, concerning the nature of the Party's responses and their effectiveness.

1. Assertions that far more animal units are produced than are permitted under Certificates of Authorization

Livestock operators who wish to establish, expand or modify an operation must first obtain a certificate of authorization.³² Such certificates limit the number of "animal units" the operation may raise, based on a variety of factors such as manure-spreading capability, storage capacity, and the like.³³ Applicants for a certificate of authorization are required to furnish the Government of Quebec with information about their proposed project, including location, construction plans, and the means and methods of manure disposal.³⁴ The Quebec Ministry of Environment and Wildlife (MEF) then analyzes the information provided for compliance with applicable regulations and, where necessary, projects are modified so that they will comply with the standards.³⁵ The Party asserts that Quebec places significant importance on analysis of project design, carrying out quality control before a project goes ahead.³⁶

The Submitters assert that substantially more animal units are raised than is allowed by the certificates.³⁷ The Auditor General's Report (Annex 16) indicates the practice of raising unauthorized animal units is widespread. For example, the Report cites the results of a 1995 investigation which found a discrepancy of approximately 23 percent between

32. Response at 26.

33. Div. II of Regulation, Response at 25-27, Auditor General's Report 2.103; Submitters' Annex 21.

34. Response at 26.

35. Response at 26.

36. Response at 26-27.

37. See, e.g., Submission at 12.

the number of units of hogs authorized by the certificates of authorization and the number of livestock units actually owned by pork producers.³⁸ A 1996 article in *Le Soleil* (Annex 25) summarizing another report that was endorsed by, among others, the MEF, the Ministry of Agriculture (MAPAQ), and organizations representing livestock producers, found that nearly one third of herds in some parts of the Chaudière-Appalaches regions do not appear on official registers.³⁹ The article reports that "The Ministry of Environment and Wildlife (MEF) has lost control of the pork production industry in the Chaudière-Appalaches regions; delinquent producers have significant illegal herds. . . ."⁴⁰

The Auditor General also found that the Party is directly subsidizing unauthorized animal units. One investigation cited by the Auditor General found that, of \$ 4.4 million in compensation remitted by the Régie des Assurance Agricoles (RAAQ) in 1994 to approximately 50 producers, more than \$ 800,000 was for unauthorized animal units.⁴¹

The response states that the government has initiated an enforcement response in connection with this problem:

The Government of Quebec has taken significant measures toward finding solutions to the manure-spreading problem. . . . A pilot project dealing with pork production is currently underway. Its goal [is to] ensure that insurable stock is limited to the units authorized by the MEF. . . .

Once the results of the project have been evaluated, this policy will be incorporated into the regulatory overhaul of the stabilization insurance program . . . and will be in effect for all livestock operations.⁴²

It would be relevant to obtain the following types of information concerning the asserted violations of the limits on animal production units

38. Auditor General's Report, 2.110, 2.111. When the Auditor General compared the number of declared animal units as reflected on government record cards with the number of hogs insured by RAAQ in one river basin, it found that declared animal units had been underestimated by approximately 220,000 hogs. This underestimation represents 15,950 tanker-truck loads of animal waste, each containing 40,000 litres. Auditor General's Report, 2.122.
39. Article in *Le Soleil*, 28 February 1996, by Michel Corbeil, entitled "Illegal Pig Herds: The MEF can no longer keep track of surplus manure." (Annex 25). This article covers a report called "Surplus Manure in the Chaudière-Etchemin Basin" ("Les surplus de fumier dans le bassin Chaudière-Etchemin") and indicates the report was endorsed by the MEF and the Ministry of Agriculture (MAPAQ), as well as by organizations representing producers.
40. Article in *Le Soleil*, 28 February 1996, by Michel Corbeil, entitled "Illegal Pig Herds: The MEF can no longer keep track of surplus manure." (Annex 25).
41. Auditor General's Report, 2.111.
42. Response at 58.

and the nature and effectiveness of the Party's response to these asserted violations:

1. Information concerning the scope of the violations and noncompliance. Relevant information here would include information concerning the number and distribution of unauthorized animal units. In its report, the Auditor General indicated that it was unable to determine what percentage of the \$ 145 million remitted from RAAQ to 1,644 pork producers in 1994 went to unauthorized units, because information concerning authorized herds was unavailable.⁴³ Also relevant would be the nature of the Party's efforts to monitor compliance with limits on the number of animal units. The Party indicates that it gives priority to monitoring farms' compliance with environmental standards,⁴⁴ and it would be relevant to develop information concerning the nature of these monitoring approaches and, in particular, the extent to which they are effective in identifying unauthorized practices such as maintenance of unauthorized animal units.
2. Information concerning the nature and effectiveness of the Party's pilot project. It would be relevant to develop additional information concerning: 1) the nature of the pilot project; 2) efforts to monitor its impacts, including the evaluation the Party indicated it would complete; and 3) the actual effect of the pilot project on the extent of noncompliance in the areas covered by the project.
3. Information concerning the status of the effort to incorporate the lessons learned from the pilot project into revised regulations for the stabilization insurance program. It would be relevant to develop information concerning the extent to which the pilot project or lessons learned from it have been incorporated into regulations. It would also be relevant to develop information concerning efforts to monitor the impacts of such an initiative and concerning the extent to which this broader initiative has affected the extent of noncompliance.
4. Information concerning other enforcement efforts to promote compliance. It also would be relevant to develop information concerning any other strategies that the Party is implementing to address the violations involving maintenance of unauthorized

43. Auditor General's Report, para 2.112.

44. See, e.g., Response to Article 21 request at 6.

units. Information should also be developed concerning the steps the Party has taken to evaluate the success of any such strategies and concerning the effectiveness of such strategies. Related, it would be worthwhile to develop information concerning whether the Party is of the view that reducing or eliminating subsidies will address the noncompliance, or whether the Party is concerned that substantial violations will continue even if subsidies are reduced.

2. *Surplus Manure-spreading*

Another type of violation asserted in the submission and supporting documentation is surplus manure-spreading. The Regulation provides that manure must be uniformly spread on cropland over a minimum area of 0.3 hectares per animal unit contained in the operation.⁴⁵ Under the Regulation, producers are required to either own enough cropland to spread the manure generated by the animal units that they raise at or below the maximum application level allowed by the Regulation or arrange to spread the manure on the land of a third party.⁴⁶ Producers must also comply with record-keeping requirements, maintaining information on, among other things, the date, place and quantity of manure spread on land that is not their property.⁴⁷

The Auditor General's report found violations of manure-spreading requirements, including lack of effective monitoring, noncompliance with record-keeping requirements, and violations of substantive requirements.⁴⁸ The Auditor General found that "in the absence of effective monitoring, spreading agreements are rarely taken seriously by producers and records are not kept."⁴⁹ Similarly, a *Le Soleil* article reported that, among the "several failures on the part of the MEF," MEF officials do not ask producers for the manure-spreading records that the Regulation requires them to keep, and do not ensure compliance with spreading agreements.⁵⁰ The Auditor General found excess manure-spreading to be the leading source of nonpoint source pollution.⁵¹

45. Division VI, section 40. Application at a higher rate is allowed if a technical study signed by a duly authorized professional attests that the nature of the crops allows a higher application rate. *Id.*

46. Division VI, section 40. Consigning management of surplus manure to MEF-recognized agencies is another option. Response at 8.

47. Auditor General's Report, 2.103; Response at 8.

48. Auditor General's Report, 2.108, 2.110, 2.113.

49. Auditor General's Report, 2.110.

50. *Le Soleil*, 28 February 1996, by Michel Corbeil, "Illegal Pig Herds: The MEF can no longer keep track of surplus manure." (Annex 25).

51. Submission at 12, cites Auditor General's Report, 2.6.

The Auditor General also reports that the Party provides financial aid to operators that are violating spreading requirements. The Report indicates that “producers continue to receive financial assistance from MAPAQ and its organizations, even if they do not comply with MEF requirements and spread farm manure inappropriately.”⁵²

The response asserts that the Government of Quebec has “taken significant measures toward finding solutions to the manure-spreading problem.”⁵³ The response identifies the pilot project intended to ensure that insurable stock is limited to the units authorized by the MEF as one such measure. It would be relevant to develop more information concerning this pilot project and any expansion of it, as indicated above. Information regarding other enforcement strategies to address violations of spreading requirements would be relevant as well.

The Party refers to specific programs to address manure-spreading problems in areas with particularly high concentrations of livestock operations. The response indicates that “[m]anure management agencies have been established in the most problematic areas of the Chaudière, Yamaska and l’Assomption river basins, where there is an overall manure surplus in relation to the whole region.”⁵⁴ The mission of the surplus manure management agencies is to “appropriately use and dispose of the manure in their respective regions, taking into account agronomic, environmental and economic factors.”⁵⁵ The agencies are monitored by committees made up of representatives from the municipal, provincial, environmental and public health sectors.⁵⁶ The Regulation was amended to give powers to manure management agencies in 1996.⁵⁷ As a result, producers with surplus liquid manure in regions with “high breeding concentrations” are required to use the services of the regional management agency to construct or expand breeding-related facilities.⁵⁸ The Quebec government can revoke the powers of an agency at any time if it does not comply with its requirements.⁵⁹

52. Auditor General’s Report, 2.113. The Auditor General’s Report also states: “Even though the purpose of these subsidies is environmental protection, MAPAQ does not ensure that the producers targeted adopt sound environmental practices. Thus, subsidies for proper manure storage have not been conditional upon the establishment of a fertilization plan that includes environmentally friendly manure-spreading methods.” Auditor General’s Report, 2.61.

53. Response at 58.

54. Response at 58.

55. Response at 45.

56. Response at 45.

57. Response at 45.

58. Response at 45.

59. Response at 45.

The Party estimates that Quebec will have granted nearly C \$10 million to manure management agencies by 1999.⁶⁰ The response sums up as follows concerning these agencies: "In short, these management agencies promote regional cooperation among the various stakeholders while giving the Quebec government the final say if an agency cannot guarantee that its activities are environmentally sound."⁶¹

The Auditor General's Report found that, since their creation, manure management organizations have carried out studies aimed at accurately determining volumes of surplus manure and have recruited producers to join the organizations.⁶² The Report also found, however, that only a small percentage of high surplus producers are members because MAPAQ does not require producers of surplus manure to belong to a manure management organization.⁶³ Thus, the Auditor General found that manure management agencies only manage 10 to 20 percent of the pollutant load in their respective river basins, and MAPAQ cannot be sure that manure surpluses are being managed adequately.⁶⁴ The Report states that "few concrete measures have been taken to manage previously existing surpluses or the surpluses brought about by the 15 percent increase in pork production over the last five years."⁶⁵

It would be relevant to develop facts on several issues relating to the creation of the manure management agencies. Such issues include the following:

- the nature of the strategies the agencies have developed to deal with surplus manure in order to promote compliance with manure-spreading requirements;
- the nature of the Party's efforts to monitor the effectiveness of these strategies in promoting compliance;
- the extent to which the strategies have been effective; and
- the nature and extent of the Party's plans to pursue other enforcement approaches to the extent the strategies have not proven effective (for example, enforcement approaches taken concerning the many "high

60. Response at 45.

61. Response at 45.

62. Auditor General's Report, 2.132.

63. Auditor General's Report, 2.133. The Report states that between 5 and 27 percent of high surplus producers are members, depending on the region.

64. Auditor General's Report, para 2.133.

65. Auditor General's Report, para 2.130.

surplus producers” in these regions that apparently have not associated with the agencies).⁶⁶

The response references the new Regulation as part of its strategy to improve manure-spreading practices:

The new regulation makes several modifications to the old Regulation respecting the prevention of water pollution in livestock operations, particularly with respect to manure-spreading conditions, spreading agreement rules, ownership of the land where spreading occurs and record-keeping. It establishes distance limits for spreading near sources of water and renews those for aquatic environments. Formal agreements are required for spreading on land of which the producer of the manure is not the owner. Prior provisions concerning manure management agencies were incorporated into the new legislation. New record-keeping requirements for operations that are particularly large or that pose a hazard to the environment have been added to existing rules concerning the consignment of manure to other operators. The MEF can also require operators to submit records of manure-spreading and shipping activities. Spreading on frozen or snow-covered ground continues to be prohibited, to which is added a ban on spreading between 1 October and the following 1 March, and the use of canons to spread liquid manure.⁶⁷

The response points out that the new regulation requires the 25,000 producers with the highest environmental risk factors to develop agri-environmental fertilization plans over the next six years. These plans are intended to establish a balance between crop needs and the use of all types of fertilizer.⁶⁸ Because the Party has identified the new regulation as part of its strategy to address the environmental and public health concerns at issue in this submission, the Secretariat believes it would be appropriate to develop facts concerning the extent to which there is compliance with this regulation. The factual record would not develop facts concerning the effectiveness of the regulation itself but instead would be limited to the question of effectiveness of enforcement. For example, the Auditor General notes that no follow-up measures have been taken to ensure that the plans prepared under the new regulation are implemented.⁶⁹ It would be appropriate to develop information concerning the nature and extent of such follow-up.

66. The Party has provided policies that appear to set forth its approach to monitoring and other issues (see, e.g., Annex 2 to the Response to the Article 21 Request) but there is little information concerning actual implementation of these strategies. This information seems particularly relevant in light of the Auditor General’s findings relating to an absence of effective monitoring.

67. Response at 9.

68. Response at 10.

69. Auditor General’s Report, 2.62.

3. *Noncompliant manure storage facilities.*

Another type of violation of the Regulation asserted in the submission involves noncompliant manure storage facilities. The Auditor General reports that a 1987 inventory by the MEF found that 86 percent of agricultural buildings were neither adequate nor compliant with manure storage regulations.⁷⁰ In 1988, the government initiated the Manure Management Assistance Program (PAAGF) to remedy this problem. By 1996, the government had invested \$ 98 million in improving manure storage facilities.⁷¹ Livestock producers also contributed to the cost of the improvements.⁷²

The response asserts that Quebec has made significant progress in bringing manure storage facilities into compliance with the Regulation, in large part due to this program.⁷³ Canada explains that Quebec has prioritized liquid manure storage, which has a higher polluting potential, and that subsequent government actions will be aimed at the storage of solid manure.⁷⁴ Canada indicates that the above-referenced grants have “resulted in the proper storage of more than 12 million cubic meters of manure produced by nearly 698,000 animal units.”⁷⁵

Canada reports that “[o]ver a period of five years, it should resolve the problems surrounding manure storage. . . .”⁷⁶ The response indicates that “new measures will allow operations with more than 100 animal units to comply with manure storage regulations,” starting in March 1999, and that operations with fewer than 50 animal units will be compliant by March 2002.⁷⁷

The Auditor General estimated that the remaining program budget would be sufficient to resolve the 1,200 to 1,500 cases of farms with serious storage problems.⁷⁸ Citing MAPAQ calculations, the Auditor General estimated that an additional investment of \$ 210 million would be necessary to resolve the 8,000 less critical cases that remain.⁷⁹

70. Auditor General’s Report, 2.105.

71. Auditor General’s Report, 2.106. Canada advises in its response that from 1988 to 1997, “\$ 114 million was granted to 6,965 projects for the construction or modification of storage facilities.” Response at 23.

72. Auditor General’s Report, 2.105.

73. Response at 16, 23, 53.

74. Response at 53.

75. Response at 23.

76. Response at 23.

77. Response at 53.

78. Auditor General’s Report, 2.106.

79. Auditor General’s Report, 2.106.

Facts relevant to Canada's enforcement response to resolve violations of manure storage requirements include:

- information relevant to the nature and extent of efforts to promote compliance at the 1,200 to 1,500 farms that the Auditor General's Report indicates have serious storage problems; this would include information relating to the financial assistance program referenced on page 23 of the response and covered in Annex 11, among others;
- information relating to the Party's efforts to monitor compliance at such farms;
- information relating to the effectiveness of the Party's efforts in promoting and producing compliance;
- information relating to the Party's plans to the extent that significant noncompliance exists;
- the same questions with respect to the 8,000 "less critical cases" of noncompliance the Auditor General identifies; and
- the point made by the Auditor General's Report that improvements in manure storage have led to an increase in manure to be spread.⁸⁰ Thus, it would be relevant to learn the nature and effectiveness of government efforts to monitor the connection between storage practices (including coming into compliance with storage requirements) and spreading practices, if any. Related, it would be relevant to learn the nature and extent of government efforts to ensure that enhanced compliance with storage requirements does not cause or exacerbate noncompliance with spreading requirements.

4. Information Concerning Enforcement Activity and Information Management

The use of formal enforcement (investigations, prosecutions, etc.) and management of information are two issues that relate to all three types of alleged violations discussed above. It would be relevant to develop additional information in each of these areas.

With respect to the former, for example, the Party asserts that, in recent years, the MEF has increased its monitoring efforts and initiated more

80. Auditor General's Report, 2.108.

legal actions to enforce the Regulation.⁸¹ As noted above, however, the Auditor General's Report raises questions about the adequacy or effectiveness of compliance-monitoring. The Report indicates that widespread violations of the spreading requirements and limits in numbers of authorized animal units may occur at least in part because of deficiencies in such monitoring:

Respect for such regulations is even more vital than is recognized by both the MEF and MAPAQ, as, in the absence of effective monitoring, spreading agreements are rarely taken seriously by producers and records are not kept. Moreover, herds are larger than authorized.⁸²

Thus, it would be worthwhile to develop additional information concerning, among other things, the effectiveness of monitoring practices in uncovering violations of the law concerning numbers of authorized units and manure-spreading practices, as well as concerning record-keeping requirements.

It also would be relevant to develop information concerning the policies the Party has developed for initiating prosecutions (e.g., the types of violations that warrant prosecutions) as well as information concerning actual implementation of those policies. As discussed above, the Auditor General's Report and other documents suggest that there are thousands of ongoing violations. The Party has provided certain information concerning its prosecution activities in recent years.⁸³ It would be relevant to determine the Party's policies for prioritizing among violations and determining when prosecutions are appropriate, and actual implementation of these policies, among other information in order to supplement the information already provided.

The Auditor General identifies lack of accurate information about the regulated population as another obstacle to effective enforcement.⁸⁴ In its comments to the Auditor General's report, the MEF states that it "only has access to partial data," "making the identification of surplus municipalities difficult" and "prevent[ing] it from accurate knowledge of farms in the area."⁸⁵ The Party states that one response of the MEF to data-related concerns has been to undertake a "unique identification project" that "will lead to a better understanding of the agricultural community."⁸⁶

81. Response at 28.

82. Auditor General's Report, para 2.110.

83. See, e.g., Response at 28-41.

84. See, e.g., Auditor General's Report, 2.147-2.166.

85. Auditor General's Report, 2.166.

86. Response at 59.

The following information on the identification project would be useful in evaluating the effectiveness of this program:

- the nature of the unique identification project, and
- the effectiveness of the project in enabling the Party to develop information necessary to evaluate compliance.

It would also be relevant to develop information concerning other efforts Canada is making to improve accuracy of information needed to monitor compliance. Canada references other efforts to improve data, including facilitating interagency exchanges of information. It would be relevant to develop information concerning such efforts and their effectiveness in addressing some of the issues identified above (such as enhancing the government's ability to monitor the number of authorized animal units and enhancing its ability to limit subsidies to authorized units).

Operators are obligated to provide accurate information to the government.⁸⁷ The Auditor General's Report suggests that there may be violations of this obligation. The Report indicates that the three government bodies that hold information on livestock producers (MEF, MAPAQ, and RAAQ) found numerous inconsistencies in data held by the different sources.⁸⁸

The response states that information provided in applications for a certificate of authorization is "rigorously analyzed" for compliance with applicable regulations.⁸⁹ The response indicates that the MEF has had 26 people to analyze the nearly 5,000 requests for certificates of authorization received between April 1994 and the filing of the submission in 1997.⁹⁰ Based on this limited information and the Auditor General's findings, additional inquiry would seem to be appropriate concerning the nature of the Party's efforts to analyze the applications rigorously, including means employed to verify information provided (such as cross-checking with other government agencies, which the Auditor General suggests rarely occurs).⁹¹

87. See, e.g., Response at 7, discussing EQA Article 122's authorizing the Government to amend or cancel a certificate where the certificate is issued based on incorrect information, among other reasons.

88. Auditor General's Report, 2.158.

89. Response at 26.

90. Response at 25 and 41. Specifically, page 41 says that the MEF "received 5,039 requests for official documents in this period, most of which were requests for authorization. 4,624 were processed. . . ."

91. Auditor General's Report, 2.155-2.166.

5. *Other Issues*

It appears that Canada is asserting that its upgrade of its standards should operate to render moot an Article 14 submission alleging a failure to enforce earlier standards effectively. The Secretariat does not believe that the regulations adopted in July 1997 justify termination of this proceeding. The Secretariat does not believe that, as a general matter, submissions alleging failures to enforce effectively should be automatically terminated on the ground that new standards have been adopted. The enactment of the new Regulation does not address the allegations of a failure to effectively enforce the previous Regulation between 1994 and 1997.

There conceptually may be submissions where the consequence of adoption of a new law is that the matters raised in the submission do not merit further study under Article 14(2)(b). This submission does not appear to qualify for such treatment. Canada notes in its response that “the new regulation governs livestock operations in much the same way as the preceding one. . . .”⁹² Thus, the development of a factual record on the effectiveness of Quebec’s enforcement practices regarding agricultural pollution and, more specifically, livestock production operations is not solely a matter of historical interest but rather would improve the state of knowledge about ongoing enforcement of laws regulating livestock waste in Quebec.

Finally, assuming a factual record is developed, the question has been raised concerning the time period of activity it should address. The Council provided the following direction to the Secretariat in Council Resolution 98-07:

[T]he Secretariat, in developing the factual record, [is] to consider whether the Party concerned ‘is failing to effectively enforce its environmental law’ since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record. . . .⁹³

This direction would seem to be equally applicable in the context of this submission.

92. Response at 42, noting that “The response also notes that the new regulation focuses much more on manure-spreading. . . .”

93. Council Resolution 98-07 (24 June 1998).

IV. CLOSING COMMENT

The Secretariat considers that the submission, in light of the response provided by Canada, warrants developing a factual record to compile further factual information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with various sections of Canadian environmental law. The submission highlights the significant environmental and public health concerns at stake in connection with these laws. The response does not take issue with the importance of the environmental laws and natural resources at issue in this submission. Instead, it reflects an appreciation of their significance. Further, while the response asserts that the Party's strategies are effective in preventing and addressing violations of these laws, the Submitters' assertions (supported by the Auditor General and others) that violations are widespread, and to some extent subsidized by the government, supports developing additional information concerning the use and effectiveness of these tools.

Respectfully submitted on this 29 day of October 1999.

Janine Ferretti
Executive Director

SEM-97-005
(BIODIVERSITY)

SUBMITTER: ANIMAL ALLIANCE OF CANADA, ET AL.

PARTY: CANADA

DATE: 21 JULY 1997

SUMMARY: The Submitters alleged that Canada is failing to enforce its regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on 11 June 1992 and subsequently ratified pursuant to an Order-in-Council on 4 December 1992.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(26 MAY 1998) have not been met.

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submission ID:	SEM-97-005
Submitter(s):	Animal Alliance of Canada Council of Canadians Greenpeace Canada
Concerned Party:	Canada
Date Received:	July 22, 1997
Date of this Determination:	May 26, 1998

I. INTRODUCTION

On July 21, 1997, the Submitters¹ 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"). This is the Secretariat's determination as to whether the Submission meets the requirements of Article 14(1) so that it may be considered by the Secretariat.

II. SUMMARY OF THE SUBMISSION

The Submission alleges that Canada has a serious and growing endangered species problem, and that it has failed to enact federal legislation designed to protect endangered species. It also alleges that Canada's

1. The Submitters include Animal Alliance of Canada, Council of Canadians and Greenpeace Canada.

failure to enact such legislation has implications for the other signatory countries to the NAAEC.

The Submission states that on June 4, 1992, the Governor in Council passed Order in Council No. P.C. 1992, 1204,² authorizing the Prime Minister or Secretary of State for External Affairs to sign and ratify the *United Nations Convention on Biological Diversity* ("*Biodiversity Convention*"). On June 11, 1992, Canada's Prime Minister signed the *Biodiversity Convention* on behalf of Canada at the U.N. Earth Summit in Rio de Janeiro. On December 4, 1992, Canada's Prime Minister ratified the *Biodiversity Convention* on behalf of Canada by issuing an Instrument of Ratification.³

The Submission alleges that the Instrument of Ratification, made pursuant to the authority of Order in Council P.C. 1992, 1204 (the "Ratification Instrument"), is an "environmental law" as that term is defined in Article 45 of the NAAEC, and that Canada is failing to enforce that environmental law. The Submitters suggest that the legal effect of the Ratification Instrument is to "commit Canada to be bound by the *Biodiversity Convention* and fulfill its requirements in good faith." Article 8(k) of the *Biodiversity Convention* requires a signatory nation to, "as far as possible and as appropriate" [...] "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations." The Submitters state that Canada's failure to enact endangered species legislation contravenes Article 8(k) of the *Biodiversity Convention*, which in turn constitutes a "failure to enforce" the Ratification Instrument.

The Submission also notes that the Submitters have communicated their concerns to the Canadian Government through various means, and concludes by arguing that the Submission merits a response from Canada as well as the preparation of a factual record.

III. ANALYSIS

1. *Article 14(1) of the NAAEC*

Article 14 of the NAAEC allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the

2. Attached as Appendix 5 to the Submission.

3. Attached as Appendix 7 to the Submission.

requirements of Article 14(1). Where the Secretariat determines that the Article 14(1) requirements are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission.

The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable procedural screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC⁴ and the provisions of the Vienna Convention on the Law of Treaties.⁵ However, the Secretariat also recognizes that meaning must be given not only to the specific criteria delineated in Article 14(1)(a)-(f), but also to the opening words of the section; that is, an “assertion” that a “Party” is “failing to effectively enforce its environmental law.”

While recognizing that the language of an “assertion” supports a relatively low threshold under Article 14(1), a certain amount of substantive analysis is nonetheless required at this initial stage. Otherwise, the Secretariat would be forced to consider all submissions that merely “assert” a failure to effectively enforce environmental law. The fact that the term “environmental law” is expressly defined in Article 45(2) for the purposes of Article 14(1) supports the conclusion that some initial screening is appropriate at the 14(1) stage.

This Submission raises a particularly challenging question that requires the Secretariat to determine whether or not the Submission involves an assertion relating to “environmental law.”

2. *The Subject Matter of the Submission*

The Secretariat is of the view that the Submission, on the basis of its subject matter, is relevant to the work of the Commission for Environmental

4. See Article 1 of the NAAEC.

5. Adopting such an interpretative approach is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of *The Vienna Convention on the Law of Treaties*. See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Éditions Yvon Blais, 1991), c. 2; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), c. 8, and *The Vienna Convention on the Law of Treaties*, concluded at Vienna, May 23, 1969, entered into force January 27, 1980, 1155 U.N.T.S. 331 (“Vienna Convention”). The Vienna Convention is in force in both Canada and Mexico as of January 27, 1980. The United States signed the Vienna Convention on April 24, 1970 but has not ratified it. I.M. Sinclair notes in *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) that since 1969, provisions of The Vienna Convention have frequently been cited in judgments of the Courts of the United States and in state practice as accurate statements of the customary rules in relation to interpretation of treaties.

Cooperation. The concerns raised by the Submitters regarding endangered species find expression in the NAAEC itself. Article 1(c) provides that one of the objectives of the NAAEC is to “increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna.” Further, the definition of “environmental law” in Article 45(2), which applies directly to Article 14, extends to laws for “the protection of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas.”

Notwithstanding the above, the Secretariat must first determine under Article 14(1) whether the Submission asserts that Canada is failing to effectively enforce its environmental law.

3. *Is the Ratification Instrument “Environmental Law?”*

Article 45(2) of the NAAEC defines the term “environmental law” for the purposes of Article 14(1) in the following manner:

2. For the purposes of Article 14(1) and Part Five:

(a) “**environmental law**” means any statute or regulation of Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through

(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas

in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

Consistent with Article 14(1), the Secretariat is of the view that the term “environmental law” should be interpreted expansively. It would not be consistent with the purposes of the NAAEC to adopt an unduly restrictive view of what constitutes a statute or regulation which is primarily aimed at protection of the environment or prevention of a danger to human life or health.

The central argument in the Submission is that the Ratification Instrument “obligates” Canada to fulfill the obligations of the *Biodiversity Convention*. The Submission argues that Canada has not met the requirements of Article 8(k) of the *Biodiversity Convention*, and so has therefore failed to “enforce” the Ratification Instrument. However, with respect, the Secretariat is of the view that the Submission fails to make a critical distinction between “international” and “domestic” legal obligations. The purpose and effect of the Ratification Instrument is simply to confirm Canada’s international obligations in respect of the *Biodiversity Convention*.⁶ In Canada, there is a fundamental and long-standing constitutional principle, derived from Canada’s legal heritage, that the ratification process does not import international obligations into domestic law. Until international obligations are implemented by way of statute or regulation pursuant to a statute, those obligations do not constitute the domestic law of Canada.⁷

The Secretariat acknowledges that an Order in Council can, in certain circumstances, constitute a “regulation,” as that term is used in Article 45(2).⁸ However, in this case, the Ratification Instrument is not, in the opinion of the Secretariat, a “regulation.” The Ratification Instrument simply evidences and constitutes a one-time administrative act by a representative of the executive branch of the Canadian government, in this case, the Prime Minister of Canada. It is properly distinguished from a “regulation,” which is authorized by statute and is subjected to the formal process of registration, Parliamentary scrutiny and publication.⁹ The Ratification Instrument is not legislative in nature, and has not been subjected to the rigours of the *Statutory Instruments Act*. While formally confirming international obligations, the Ratification Instrument has no effect on Canada’s domestic law, and so cannot be considered as an “environmental law” of Canada for the purposes of Article 14(1).

In making this determination, the Secretariat does not wish to exclude the possibility that future submissions may raise issues in respect of a Party’s international obligations that would meet the criteria of Article 14(1). Further, as noted above, the Secretariat acknowledges that the subject matter of the Submission raises important environmental con-

6. See generally A. Jacomy-Millette, *Treaty Law in Canada*, U. of Ottawa Press, 1975, pp. 50-68 and 196-207.

7. P. Hogg, *Constitutional Law in Canada* (2d) (loose-leaf version) 1997, p.11-5; *International Law Chiefly as Applied and Interpreted in Canada.*, eds. H. Kindred et al. (5th ed), Emond Montgomery, 1993, p.168.; Jacomy-Millette, *ibid.*, p. 196-207.

8. See R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, Vol. 1 (2nd ed.) (Toronto: Carswell, 1985) at 326-329.

9. See the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.

cerns that should be the subject of debate and discussion between the NAAEC state Parties. However, it is not the role of the Secretariat to attempt to resolve these issues within the Article 14(1) process. The Secretariat is bound to interpret the provisions of Article 14(1) in a manner consistent with the language and purposes of the NAAEC.

IV. CONCLUSION

The Secretariat finds that it is precluded from further considering the Submission because it does not assert a failure by Canada to effectively enforce its environmental law. In accordance with Article 6(2) of the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the NAAEC*, the Submitters may provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement, within 30 days of receipt of this notification.

per: Janine Ferretti
Interim Executive Director

SEM-97-006
(OLDMAN RIVER II)

SUBMITTER: THE FRIENDS OF THE OLDMAN RIVER

PARTY: CANADA

DATE: 4 OCTOBER 1997

SUMMARY: The Submitter alleges that Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and the Canadian Environmental Assessment Act.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(23 JANUARY 1998) have been met.

ART. 14(2) Determination pursuant to Article 14(2) that the
(8 MAY 1998) submission merits requesting a response from the Party.

ART. 15(1) Notification to Council of the Determination that
(19 JULY 1999) a factual record is warranted in accordance with Article 15(1).

23 January 1998

REGISTERED MAIL

The Friends of the Old Man River
c/o Ms. Martha Kostuch
Box 1288
Rocky Mountain House, Alberta
T0M 1T0

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s):	The Friends of the Oldman River
Party:	Canada
Date:	October 4, 1997
New Submission No.:	SEM-97-006

Dear Ms. Kostuch:

The Secretariat of the Commission for Environmental Cooperation has concluded that your submission satisfies the initial screening criteria under Article 14(1) of the North American Agreement on Environmental Cooperation. Accordingly, the submission will now be reviewed under Article 14(2) to determine whether the submission merits requesting a response from the Government of Canada.

We take this opportunity to ask that you please provide us with an electronic copy of your submission, if available, in order to make it available to the public on HomePage of the CEC.

We will keep you informed of the status of your submission in accordance with Articles 14 and 15 and the Guidelines for Submissions on Enforcement Matters.

Yours truly,

Commission for Environmental Cooperation—Secretariat

per: Greg Block
Director

c.c. Mr. Avrim Lazar, Environment Canada
Mr. William Nitze, US EPA
Mr. José Luis Samaniego, SEMARNAP

8 May 1998

VIA FAX AND REGISTERED MAIL

The Honorable Christine Stewart
Minister of the Environment
Government of Canada
Les Terrasses de la Chaudière
28th Floor
10 Wellington Street
Hull (Québec)
Canada K1A 0H3

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s): The Friends of the Oldman River
Party: Canada
Date: 10 October 1997
Submission No.: SEM-97-006

Dear Minister:

On 10 October 1997, the Secretariat of the Commission for Environmental Cooperation received a submission pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("Agreement") filed by The Friends of the Oldman River. The submission alleges that the Government of Canada "is failing to apply, comply with and enforce the habitat protection sections of the *Fisheries Act* and with the *Canadian Environmental Assessment Act* (CEAA). In particular, it is alleged that 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."

The Secretariat reviewed the submission under Article 14(1) of the Agreement and determined on 23 January 1998 that the submission met the requirements of Article 14(1).

Guided by the considerations provided in Article 14(2) of the Agreement, the Secretariat has determined that the submission merits requesting a response from the Government of Canada. Accordingly, the Secretariat requests a response from the Government of Canada to the above-mentioned submission, within the 30 day time frame provided in Article 14(3) of the Agreement, or in exceptional circumstances, within 60 days of delivery of this request. We are not attaching the submission or the supporting information as they have been previously sent.

Sincerely,

Commission for Environmental Cooperation—Secretariat

per: Janine Ferretti
Interim Executive Director

c.c. Mr. Avrim Lazar, Environment Canada
Mr. William Nitze, US-EPA
Lic. José Luis Samaniego, SEMARNAP
Ms. Martha Kostuch, The Friends of the Oldman River

Secretariat of the Commission for Environmental Cooperation

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

Submission I.D.:	SEM-97-006
Submitter(s):	The Friends of the Oldman River
Concerned Party:	Canada
Date of this Notification:	19 July 1999

I- EXECUTIVE SUMMARY

The Submitter, a nongovernmental organization known as “The Friends of the Oldman River” (FOR or the Submitter), claims that Canada is failing to effectively enforce its Fisheries Act and the Canadian Environmental Assessment Act (CEAA)¹ in at least two significant ways.² First, the Submitter asserts that Canada’s approach to reviewing proposed projects is fundamentally flawed. The Submitter focuses particularly on projects that, as originally proposed to Canada, could harm fish habitat in violation of Fisheries Act Section 35(1),³ but which Canada and the applicant agree will be modified to avoid such harm.

The Submitter alleges that Canada’s standard enforcement response to such projects typically involves engaging in discussions with the project proponent and issuing a “Letter of Advice.” The Submitter argues that this standard approach to project review harms the interest of FOR and

1. *Fisheries Act*, R.S.C.1985, c.F-14 and various supplements; *Canadian Environmental Assessment Act*, S.C.1992, c. 37.

2. The complete text of the submission and the response are available from the Secretariat by request or electronically at <<http://www.cec.org>>.

3. *Fisheries Act*, Section 35(1) provides that “[n]o person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.” The acronym often used to describe such harm is HADD. For purposes of convenience, the Secretariat refers to such HADD of fish habitat as harm to fish habitat.

the public in protection of fish habitat and compliance with Fisheries Act Section 35(1). The submission annex characterizes Canada's standard approach as "a powerful force for the reduction of the protection afforded to fish habitat."⁴ The Submitter believes that Canada should use an alternative approach for project reviews that would enhance the effectiveness of project reviews in achieving the goals of Fisheries Act Section 35(1). The Submitter asserts that Canada should evaluate such projects using the procedures established by the CEAA and, if it decides such projects should proceed, it should authorize them pursuant to Fisheries Act Section 35(2).⁵ The Submitter claims that Canada's use of a purportedly less effective approach to project review constitutes a systematic failure to effectively enforce Canadian environmental law for purposes of Article 14 of the North American Agreement on Environmental Cooperation (NAAEC).

The Submitter also asserts that Canada's approach to prosecutions, when projects violate Fisheries Act, Section 35(1), constitutes a failure to effectively enforce for the purposes of Article 14 of the NAAEC. The Submitter claims that Canada rarely prosecutes violations of Section 35(1) of the Fisheries Act, that "prosecutions that do occur are very unevenly distributed across the country," and that Provincial prosecutions do not offset the shortfall in federal enforcement.

The Submitter cites the Sunpine Road project as an example of the government's purported failure to effectively enforce its environmental laws.

There is some common ground between the submission and the Canadian response. Consistent with the submission, Canada states that its standard approach to project review is to work with the project proponent and issue Letters of Advice for projects that could harm fish habitat but which Canada and the proponent agree will be modified to avoid such harm. For such projects, Canada advises the proponent of the changes necessary to avoid harm to fish habitat and the proponent agrees to implement such. (Response at 5). Canada sets out this standard approach in its 1995 *Directive on the Issuance of Subsection 35(2) Authorizations* (hereafter: *Directive*).⁶

4. The annex is attached to the submission and is referenced by it, and the Secretariat has reviewed the annex as part of its consideration of the submission.

5. *Fisheries Act*, Section 35(2) provides that "No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act."

6. Canada's Department of Fisheries and Oceans (DFO) issued this *Directive*. The *Directive* is attached to the response and is referenced by it, and the Secretariat has reviewed the *Directive* as part of its consideration of the response.

The Canadian response parts company from the submission concerning the effectiveness of this standard Canadian response for projects that could harm fish habitat but which Canada and the proponent mutually agree will be modified to avoid such harm. Canada explains that its strategy is intended to prevent the occurrence of violations in the first place. As Canada explains, “[t]hrough this consultative process,” DFO “provides advice to proponents regarding . . . mitigation measures . . . so that in the technical judgment of DFO, a HADD of fish habitat will not be incurred.” (Response at 5). Canada advises that it uses Section 35(2) authorizations and CEEA reviews for appropriate projects, notably those that will harm fish habitat and therefore violate Section 35(1) of the Fisheries Act.

Canada indicates that prosecutions are another enforcement tool it uses. It contends that federal prosecutions must be considered in tandem with Provincial enforcement efforts as well as government approaches such as Letters of Advice and Fisheries Act Section 35(2) authorizations, and it claims that its use of prosecutions constitutes an element of its effective enforcement effort.

Canada recommends that the Secretariat not consider the Sunpine Road situation because of ongoing litigation concerning that project.

The Secretariat does not view the submission to be a challenge to the effectiveness of the environmental laws of Canada.⁷ The Submitter does not appear to allege that the Fisheries Act and the CEEA are ineffective as written. Instead, this submission alleges that Canada’s application or implementation of these laws (i.e., Canada’s approach to project reviews, as reflected primarily in the above-referenced 1995 *Directive*, and its approach to prosecutions) constitutes a systematic failure to enforce them for purposes of Article 14 of the NAAEC. Our analysis is based on this understanding of the submission.

Having considered the submission in light of the response, the Secretariat believes that developing a factual record is warranted. The response and submission leave open several central questions of fact relating to whether the Party is effectively enforcing the environmental laws at issue. Concerning the Party’s approach to project review, as discussed in more detail in Section III below, for example, the Secretariat has been provided quite limited information concerning the current use of Letters of Advice (e.g., the numbers of Letters of Advice issued annually). Similarly, the Secretariat has only received limited information concerning

7. Cf. SEM-95-001, SEM-95-002, involving challenges to a Party’s environmental laws.

use of Letters of Advice and related enforcement tools over time. Also, there is a lack of information concerning the extent to which Canada's strategy of using a consultative process and issuing Letters of Advice is effective in achieving its goal of preventing harm to fish habitat and violations of Fisheries Act Section 35(1). Regarding prosecutions, limited information has been provided as to Canada's statement that "when . . . the Fisheries Act is contravened, such that habitats supporting fisheries are harmfully altered, destroyed or degraded, enforcement action is taken." (Response at 9-10). For example, the number of Section 35(1) violations discovered each year and the number of prosecutions involving such violations have not been provided.

The Secretariat believes that it is appropriate to develop a factual record concerning these enforcement tools. Conducting such a review would be consistent with a broad interpretation of enforcement that encompasses Canada's "preventative" project review enforcement strategy as well as its approach to prosecutions, an interpretation contemplated by NAAEC Article 5.

II- BACKGROUND

Under NAAEC Article 14, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the requirements of Article 14(1) have been met, it shall decide whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of the response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record. The final factual record is made publicly available upon a two-thirds vote of the Council.

On 9 September 1996, the Submitter filed a submission with the Secretariat, pursuant to Article 14 of the NAAEC. On 1 October 1996, the Secretariat rejected this submission on the ground that it failed to meet the Article 14(1) criterion that it indicate that the matter (the alleged general failure to enforce) had been communicated to the relevant authorities of the Party. Following the Submitter's 8 October 1996 re-submission, which contained information regarding communications to Canada about the alleged general failure to enforce, on 18 October 1996, the Secretariat determined that the submission met the criteria under Article 14(1).

On 8 November 1996 the Secretariat requested a response from Canada under Article 14(2). On 10 January 1997, Canada responded by stating that the submission was the subject of a pending judicial or administrative proceeding. On 2 April 1997, the Secretariat dismissed the submission. The Secretariat determined that while the court case at issue was not a “pending judicial or administrative proceeding” for purposes of Article 14(3)(b) of the NAAEC [as it was not commenced by a Party, see Article 45(3)(a) of the NAAEC], the subject matter was sufficiently similar in nature that it would not be appropriate to proceed to a factual record under Article 15(1).

On 4 October 1997, the Submitter re-submitted the submission, noting that the litigation had been discontinued. On 23 January 1998, the Secretariat determined that the submission met the criteria in Article 14(1). On 8 May 1998, the Secretariat determined pursuant to Article 14(2) that a response from Canada was warranted. Canada submitted its response on 13 July 1998.

The Secretariat has reviewed the most recent submission in light of Canada’s response in considering whether the development of a factual record is warranted.

A. The Submission

The Submitter asserts that the stakes are high with respect to the government practices at issue in this proceeding. It claims that the two environmental laws involved, the Fisheries Act and the CEAA, are the “most important legislation for the protection of fish habitat in Canada.” (Submission at 1) The submission annex similarly notes that the “strong federal power” relating to marine and freshwater environments “makes the habitat-protection regime and the prohibitions against the discharge of deleterious substances in the Fisheries Act potentially the most powerful and universally applicable provisions of federal environmental law in Canada.” The Submitter asserts that “protection of the environment and particularly protection of rivers and riparian ecosystems[] are very much affected by how the Fisheries Act and CEAA are applied.” (Submission at 1)

The Submitter asserts that Canada’s strategy for “applying, complying with, and enforcing” the Fisheries Act and the CEAA is deficient in two primary respects. First, the Submitter contends that Canada’s process for reviewing projects that may violate Section 35(1) of the Fisheries Act

and cause harm to fish habitat constitutes a failure to effectively apply, comply with, and enforce Sections 35 and 37 of the Fisheries Act.⁸ The Submitter claims that these sections “were to create a preventative and planning regime for works and undertakings with the potential to harm fish habitat.” (Submission at 1).

The Submitter contends that Canada’s strategy is a “clear attempt to avoid issuing [Fisheries Act Section] 35(2) authorizations and to circumvent CEAA,” because it contemplates use of Letters of Advice rather than Section 35(2) and the CEAA for a substantial number of projects that as proposed would harm fish habitat. (Submission at 2). In the Submitter’s view, Canada’s failure to use Section 35(2) as “intended” and its “circumvention” of CEAA constitutes an ineffective approach to implementing these laws because the approach fails adequately to prevent projects from violating Section 35(1) and harming fish habitat. The Submitter alleges that Canada:

invents a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool. . . . [Under the *Directive* that outlines Canada’s policy] [t]he question of whether effects on fisheries and fish habitat are acceptable and can be properly mitigated is prejudged without any public input. (Submission at 2).

The submission annex characterizes the *Directive* in the following way: “The most worrisome development of recent years [concerning implementation of the Fisheries Act] is the *Directive on the Issuance of Subsection 35(2) Authorizations* (1995). . . . [T]he *Directive* has serious negative implications for the protection of fish habitat and Canada’s environment.” The submission annex asserts that a lack of opportunity for public involvement and a narrower scope of environmental assessment under the *Directive* are particular deficiencies that will undermine protection of fish habitat:

As DFO would have the administration of Sections 35(2) and 37, multiple determinations are made regarding impacts, project design, mitigation, and even compensation without ever conducting screening or comprehensive study under CEAA as an early planning and decision-making tool. This denies Canadians the right to be informed of projects and to participate in decision making. It also means, for example, that cumulative effects of projects may never be considered.

8. As noted above, this process is outlined in Canada’s 1995 *Directive on the Issuance of Subsection 35(2) Authorizations*. This *Directive* is discussed in Section II.B.1 below.

The Submitter claims that there has been a decline in recent years in use of the allegedly more effective Fisheries Act Section 35(2) authorization approach to project review and asserts that this decline is evidence of Canada's failure to apply, comply with, and enforce Canadian environmental law. In terms of empirical support for this claim, the Submitter indicates that in 1995–96, DFO issued no more than 339 authorizations under Section 35(2) of the Fisheries Act, while more than 12,000 authorizations were issued in 1990–91. (Submission at 3). As is discussed in more detail below, the Secretariat has also been provided with limited information by Canada, suggesting that the Party uses the allegedly ineffective Letter of Advice approach to project review far more frequently than it uses the supposedly more effective CEAA and Fisheries Act Section 35(2) approach. Finally, the Submitter asserts that the fact that “the number of Section 35(2) authorizations varies widely from province to province” supports its claim that there is a failure to effectively apply, comply with and enforce the law. (Submission at 2).⁹

In addition to its claim that Canada's review of proposed projects constitutes a failure to effectively enforce, the Submitter contends that the federal record on prosecutions constitutes a similar failure. The Submitter asserts that Canada's small number of prosecutions for violations of Fisheries Act Section 35(1) means that it has effectively abdicated its legal responsibilities to the provinces. The Submitter claims that the paucity of Canadian prosecutions is compounded by the fact that in some parts of the country prosecutions are rarely if ever brought at all; and by the fact that the provincial prosecutions of such conduct fall far short of curing problems with the federal performance. To quote the submission:

There 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. (Submission at 3).

Finally, while affirming that the “general failure” of Canada to apply, comply with, and enforce the Fisheries Act and CEAA is the subject matter of the submission, the Submitter outlines in detail the facts of one “specific example” of the general allegations. The example relates to a

9. Along the same lines, the Submitter claims that “[a]pplication of 35(2) is far from consistent.”
The Submitter also asserts that Canada under-utilizes Section 37. (See Submission at 2).

road construction by Sunpine Forest Products in Alberta that entailed some 21 stream crossings. The Submitter indicates that neither authorizations nor Letters of Advice were issued for 19 of the crossings. Letters of Advice were issued for the remaining two (Prairie Creek and Ram River) following an environmental assessment triggered under the Navigable Waters Protection Act.

B. The Response

Canada submits that it is effectively enforcing its environmental laws with respect to projects that may harm fish habitat in violation of Fisheries Act Section 35(1), and it is therefore in full compliance with its obligations under the NAAEC. Canada asserts that, as a result, the development of a factual record is not warranted.

In asserting that it effectively enforces its environmental laws Canada, like the Submitter, addresses both the process it uses to evaluate proposed projects, and Canada's prosecution of violators of the prohibition in Section 35(1) against harming habitat without a Section 35(2) authorization. Canada claims that its enforcement approach is effective. It also asserts that its approach constitutes reasonable exercise of its discretion and therefore is exempt from consideration under Articles 45 and 14 of the NAAEC.

1. Canada's Process for Preventing and Minimizing Violations

Canada disagrees with the Submitter's assertion that the *Directive* establishes a process for reviewing proposed projects that fails to effectively apply, comply with, and enforce Fisheries Act Section 35. Canada asserts, instead, that the *Directive* effectively applies, complies with, and enforces this Section because it does not allow harm to fish habitat prohibited by Section 35(1), and it does not preclude the genuine need for an authorization. (Response at 4).¹⁰

10. Canada also addresses the Submitter's allegation that the *Directive* is illegal because it is inconsistent with the CEAA and the Fisheries Act. (Response at 7-9). The Secretariat does not address the latter issue in this document. Canada appears to agree with the Submitter that Section 35(1) prohibits harm to fish habitat, and that Section 35(2) qualifies this absolute prohibition by empowering the Minister of Fisheries and Oceans to authorize such harm to fish habitat under certain circumstances. Canada indicates, for example, that "[b]oth the [Fisheries] Act and the *Directive* are explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act." (Response at 4). Further, Canada and the Submitter appear to agree that the Minister's exercise of this regulatory power to issue a Section 35(2) authorization triggers an environmental assessment under the CEAA. (Response at 4).

Canada explains the process its implementing Department, the Department of Fisheries & Oceans (DFO), follows under the *Directive* when a project proponent applies for review of a project relative to Section 35 of the Fisheries Act.¹¹

- On receiving a proposal, DFO representatives examine it to determine whether the project will result in harm to fish habitat. (Response at 5). DFO's *Directive* makes applicants "responsible for providing sufficient information with respect to their projects to allow" DFO to assess "potential impacts to fish habitat, including information concerning proposed measures to prevent, mitigate or compensate for damage to fish habitat." (*Directive* at 4).¹²
- If DFO decides that no harm to fish habitat will result if the proposed work is carried out as specified in the plans provided to DFO, DFO notifies the applicant that a Section 35(2) authorization is not needed. DFO cautions the applicant that "if harmful alteration, disruption or destruction of fish habitat occurs as a result of the failure to implement the work as proposed, a violation of Section 35(1) of the Fisheries Act may occur." (Response at 5).
- In cases in which the project as proposed would harm fish habitat, DFO tries to help the proponent to "develop and propose mitigation measures that will avoid these effects." If DFO and the applicant identify such measures, DFO informs the proponent that "inclusion of the measures, if carried out as outlined, will avoid [harm to fish habitat] and consequently subsection 35(2) will not apply." (Response at 5). If the applicant agrees to do so, DFO will provide the applicant with a Letter of Advice in which, as appropriate, DFO "set[s] out measures aimed at ensuring that harmful effects do not occur." (*Directive* at 4). The Letter of Advice will further indicate that DFO believes that the project will not cause harm to fish habitat if the applicant implements specified measures. As the *Directive* provides, "[a]lthough such written advice does not constitute an authorization, proponents will have some protection against enforcement action where due diligence has been applied in implementing the provided written advice." (*Directive* at 4).

11. Some of this discussion of DFO's process is quoted directly from the response or from the *Directive* itself, while other parts paraphrase the response or *Directive*. Canada notes its view that DFO does **not** have authority to require a project proponent to seek or obtain a Section 35(2) authorization. Instead, a proponent "can proceed with the work at its own risk should it wish to do so": Section 35 of the Fisheries Act "does not create a mandatory obligation for a proponent to seek an authorization." (Response at 2, 8).

12. This DFO review occurs informally and is not done pursuant to the CEAA. DFO's view concerning when review under the CEAA is warranted is discussed below.

DFO summarizes this consultative process as one of providing advice to proponents at the planning stage of a project in order to avoid harm to fish habitat where possible. DFO explains that, in its view, if there is no harm to fish habitat, there is no possible violation of Section 35(1) and therefore there is no need for a Section 35(2) authorization. DFO notes, however:

Although it is not mandatory for proponents to obtain letters of advice or authorizations with respect to their projects, failure to do so could result in enforcement action being taken if adverse effects to fish habitat occur as a result of project implementation. In addition, failure to implement measures set out in letters or authorizations which result in harmful effects to habitat could lead to enforcement action. (*Directive* at 5).

- If the project will harm fish habitat and the applicant refuses, or is unable, to include measures DFO determines are necessary to avoid such harm, DFO informs the applicant that it must obtain a Section 35(2) authorization in order to avoid violating Fisheries Act Section 35(1). The consideration of whether to issue a Section 35(2) authorization triggers the CEAA. Through this process, DFO obtains additional information and determines whether to issue or deny the authorization. DFO identifies any particular terms or conditions to be included in the authorization as part of this process as well.¹³ It appears from the *Directive* that DFO's intention was to create a narrow universe of projects for which Section 35(2) authorizations would be issued:

Subsection 35(2) authorizations should only be issued... "when it prov[e]s impossible or impractical to maintain the same level of habitat productive

13. As a general matter, DFO notes that it prefers to proceed on a voluntary basis to obtain information necessary to deal with Section 35 issues rather than use the powers of Section 37 to do so. DFO expresses the view that the question of whether to use Section 37(1) and (2) to obtain information and require modifications in order to avoid harm to fish habitat, or whether to accomplish these goals using other approaches, is a matter for its discretion. Canada notes: When, in the opinion of DFO officials, the information and/or required amendments to plans or changes to undertakings will occur without invoking the powers under Section 37 of the Act, such officials are reflecting a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters as explicitly allowed for under the NAAEC Article 45 definitions. (Response at 7). The Submitter challenges the legality of this interpretation. We do not address this legal issue, but instead focus on questions of fact relating to the nature and effectiveness of Canada's enforcement responses. The Submitter attaches to its submission a 7 May 1997 decision from the Federal Court of Canada, Trial Division (Muldoon, J.), in which the Judge concluded that Canada's approach improperly circumvented the requirements of the Fisheries Act and the CEAA.

capacity by altering the design of the project or using mitigating measures." . . . In practical terms, authorizations should only be issued for works or undertakings which could result in damage to fish habitat which cannot be avoided through relocating or redesigning the project or through mitigation. (*Directive* at 3).

Canada's conclusion is that:

Since the Directive is explicit that any HADD of fish habitat requires an authorization in order to avoid a violation of the Fisheries Act, its characterization as a device or mechanism which facilitates or enables the government to fail to apply, comply with or enforce Section 35 of the Fisheries Act is unfounded. (Response at 5).

Canada provides limited information concerning the level of Canada's activity in providing authorizations and Letters of Advice, based on the *1996/97 Annual Report to Parliament on the Administration and Enforcement of the Fish Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (hereafter: *Annual Report*). Canada notes:

[T]here were 91 authorizations issued and advice provided in 3689 instances to private proponents and in 3223 instances to federal, provincial or territorial agencies for a total of 7003 instances where efforts were made to ensure compliance with Section 35. (Response at 10).

As discussed in more detail in Section III below, information is not provided concerning the number of authorizations and Letters of Advice issued in other years, or concerning the extent to which Letters of Advice are effective in accomplishing their objective—*i.e.*, to prevent projects that receive them from harming fish habitat in violation of Fisheries Act Section 35(1).

2. *Prosecutions*

Canada rejects the Submitter's allegation that the small number of federal prosecutions involving violations of Section 35(1) of the Fisheries Act, or their uneven distribution throughout the country, means that "there has been a de facto abdication of legal responsibilities by the Government of Canada to the inland provinces." Canada offers the following points in asserting that its pattern of program implementation and enforcement across the country is appropriate:

1. It is misleading to look only at federal enforcement prosecutions because the provinces, under provincial law, address, including

prosecute, some activities that constitute violations of Section 35(1). While DFO has primary responsibility for enforcing the habitat protection provisions of the Fisheries Act, provinces, particularly the inland provinces, also have the authority to enforce these provisions. Further, "provinces have developed their own conservation legislation . . . which may deal with similar development." Canada indicates that, "[a]s a result, activity that could risk legal action under the federal Fisheries Act is often subject to legal sanction under provincial statute where this is chosen to be the most appropriate route by enforcement officers." (Response at 3, 10). Canada notes that "fish habitat related matters frequently find redress through provincial court action under provincial statute." (Response at 11).

Canada indicates that it "has identified provincial personnel responsible for the implementation of the habitat provisions and enforcement of the Fisheries Act for every province in Canada." It provides a very brief overview of the provincial staffing devoted to such work. (Response at 11).

2. The uneven distribution of federal prosecutions among the provinces is understandable because of a variety of factors, such as the distribution of habitat and varying levels of economic activity. Canada states that "[t]he pattern of enforcement and referral/assessment activity . . . reflects the level and variety of economic development activity across the country. . . . Further, proximity to fisheries waters is not uniform across the country so that related enforcement cannot be expected to be uniformly distributed." (Response at 10).
3. The level of federal enforcement activity reflects a reasonable exercise of enforcement discretion, as contemplated under Article 45 of the Agreement.¹⁴

14. As a general matter, Canada takes the position that its enforcement of Section 35 of the Fisheries Act, and the implementation of the 1995 *Directive*, constitute a reasonable exercise of its discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters. It notes that Article 45 of the *NAAEC* recognizes that Parties may exercise their discretion in relation to such matters. Canada suggests that a factual record is not warranted because the *Agreement* "does not permit the review of the legitimate exercise of a Party's discretion." (Response at 3). Canada urges that its approach to enforcement is contemplated by the *Agreement*. Canada points to Article 5, which lists "seeking assurances of voluntary compliance" as an appropriate governmental action for effectively enforcing environmental law. It indicates that the Canadian *Directive* cited above, among others, establishes a strategy intended to assure voluntary compliance. Canada suggests that the fact that its

4. The “allocation of [federal enforcement] resources to do the job is consistent with Article 45 definitions of NAAEC.” (Response at 9). Related, “the pattern of enforcement reflects the level of resources allocated by federal and provincial governments.” (Response at 3).
5. “The pattern of prosecutions and convictions under the habitat provisions of the Fisheries Act reflects the compliance-based approach taken to habitat protection. . . . DFO prefers to prevent damage to habitat and avoid losses to the fisheries resource in the first phase, before proponents proceed with projects.” (Response at 9). Canada continues: “However, when voluntary compliance fails, and the Fisheries Act is contravened, such that habitats supporting fisheries resources are harmfully altered, destroyed or degraded, enforcement action is taken.” (Response at 9-10).

Canada cites its *1996/97 Annual Report* in reporting that there were 48 convictions under Section 35(1) during that time period. (Response at 10).

3. *Sunpine Road*

The final topic Canada covers in its response is the Sunpine Forest Products Forest Access Road. The Sunpine Road project involves a road project that would cross 21 streams. DFO determined that 8 of the 21 had potential implications for fish habitat. For two of the streams, Ram River and Prairie Creek, DFO permits for bridge construction were required under the Navigable Waters Protection Act (NWPA). This triggered DFO’s responsibility to conduct CEAA screenings for these bridges. The screenings were completed and permits issued. DFO issued Letters of Advice for these crossings. DFO concluded that six crossings did not have a HADD potential if constructed as proposed by the company and therefore no further action by DFO was required. Project construction, except for the Prairie Creek Bridge, was completed in 1997. Alberta Fish and Wildlife officials have inspected the 40 km road and have confirmed that the bridges and culverts have been constructed as proposed and that fish habitat has been protected. (Response at 11).

The permits and Environmental Assessments are currently subject to judicial review. Canada suggests that because an appeal is now pending, further review of Sunpine is not appropriate at this time. (Response at 12).

enforcement strategy is one of those expressly acknowledged in Article 5 of the NAAEC reinforces its position that a factual record is not warranted because Canada’s enforcement approach is a legitimate exercise of a Party’s discretion.

III- IS THE PREPARATION OF A FACTUAL RECORD WARRANTED IN THIS CASE?

A. Introduction

We are now at the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it is appropriate to request a response from a Party based upon a review of the factors contained in NAAEC Article 14(2). For this submission, the Secretariat has found that the submission meets the Article 14(1) criteria on two occasions (on 18 October 1996, and on 23 January 1998). With respect to Article 14(1)(e), the Secretariat initially found the submission deficient on this point (see Secretariat's *Determination* of 1 October 1996),¹⁵ but the Secretariat was persuaded by the Submitter's re-submission on 8 October 1996, that the matter had been communicated in writing to the Party in compliance with this requirement. (See the Secretariat's *Determination* of 18 October 1996). The Secretariat similarly determined that the submission met NAAEC Article 14(1)(d) and a series of factors persuaded the Secretariat that the submission satisfied Article 14(1)(c), including the fact that the submission focuses on "systemic" practices rather than on an alleged failure to effectively enforce involving a single incident and the burden on a submitter of establishing non-enforced violations in this context;¹⁶ the importance of the environmental laws involved and, related, the significance of fish habitat as a resource intended to be protected by the laws; and the operation of the precautionary principle (the project review practices that are a central element of the Party's enforcement response are intended to prevent violations in the first place, which is consistent with the notion that it is easier to prevent violations and environmental harm from occurring than to repair the damage once a violation exists).

Finally, as noted at the outset, the Secretariat believes that this submission does not focus on the effectiveness of the environmental laws as written; instead, it addresses the extent to which a Party has failed to effectively implement or enforce those laws.

Similarly, the Secretariat has determined on two occasions that a response from the Party was warranted based on the factors in Article

15. See SEM-96-003, "The Friends of the Oldman River."

16. Here, the submission not only takes a "systemic" approach, it also is broad-ranging in that it challenges a Party's project review approaches as well as its approach to traditional prosecutions. The Submitter claims, among other things, that the Party's project review practices are not effective because they lack certain features and protections provided by alternative processes available to the Party.

14(2) (on 8 November 1996 and on 8 May 1998).¹⁷ The Secretariat previously determined that the submission alleges harm [see Article 14(2)(a)].¹⁸ Similarly, in the Secretariat's view the submission raises matters whose further study would advance the goals of the NAAEC, notably the effectiveness of a Party's various enforcement practices under one of the most important environmental laws of that Party. The Secretariat also was satisfied that the Submitter had adequately pursued private remedies (among other things, the Submitter filed a lawsuit challenging the Party's practices), and that the submission was not drawn exclusively from mass media reports (the submission cites a number of reports, as well as information obtained from the government, in support of its allegations).

Once the Secretariat requests, and receives, the Party's response, Article 15(1) of the NAAEC provides the following direction to the Secretariat for this third step of the factual record process:

If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

Thus, having previously found that the submission meets the criteria in Article 14(1) and having previously evaluated the submission in light of the factors contained in NAAEC Article 14(2) and determined that a response from the Party was merited, the Secretariat must now consider the impact of the response on the issues raised in the submission.

The language of the legal provision that is central to this submission, Section 35(1) of the Fisheries Act, is quite clear and direct: "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."¹⁹ Section 35(2) provides the only qualification on the broad language of Section 35(1). Section 35(2)

17. See SEM-96-003 and SEM-97-006. As noted above, the Secretariat has actually made these determinations twice each in connection with this submission because of its history.

18. See *Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, SEM-96-001 (7 June 1996), stating that in considering harm, "the Secretariat notes the importance and character of the resource in question" and continuing that "[w]hile the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America," the nature of the resources at issue "bring the submitters within the spirit and intent of Article 14 of the NAAEC." In the Secretariat's view, the importance of the resources at issue in this proceeding support the same conclusion.

19. R.S.C. 1985, c. F-14.

provides that “No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.”²⁰ Under the CEAA and the *Law List Regulations*, a Section 35(2) authorization “triggers”²¹ commencement of an environmental assessment.²² Section 37(2) of the Fisheries Act, which allows various orders to be made respecting modifications to a project, is also a “trigger.”²³

20. R.S.C. 1985, c. F-14.

21. The term “trigger” is used to describe a provision of a federal statute which is listed in the *Law List Regulations*, and which instigates an environmental assessment when an action is taken by the federal government under that statutory provision.

22. The key provisions of CEAA are as follows:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

...

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or license, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

59. (1) The Governor in Council may make regulations

(f) prescribing the provisions of any Act of Parliament or any regulation made pursuant thereto that confer powers, duties or functions on federal authorities the exercise or performance of which requires an environmental assessment. under paragraph 5(1)(d).

23. Section 37 of the Fisheries Act provides as follows:

(1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat . . . the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(a), provide the Minister with such plans, specifications, studies, procedures, schedules, analysis, samples or other information relating to the work or undertaking and with such analysis, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine.

(a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof. . . .

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council.

(a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

The Party enforcement response at issue in this submission is intended to promote compliance with Fisheries Act Section 35(1). The response consists primarily of advance review of projects that have the potential to harm fish habitat (sometimes using Fisheries Act Section 35(2) and the CEAA) and after-the-fact prosecutions in some cases when violations of Fisheries Act Section 35(1) occur. The level and nature of advance project review varies depending on Canada's judgment concerning whether harm from a project can and will be avoided. The fundamental question is whether the Party's approach to project review and to prosecutions constitutes effective enforcement of Fisheries Act Section 35(1).

B. Why Preparation of a Factual Record is Warranted

1. Canada's "Preventative Enforcement Response"

In the Secretariat's view, the response leaves open several central questions concerning the effectiveness of Canada's approach to project review. From Canada's response it appears clear that consultations with project proponents leading to issuance of Letters of Advice is a key element of its effort to "seek . . . assurances of voluntary compliance." (Response at 3). Important information concerning use of this strategy to promote voluntary compliance, however, is not provided. With a particular focus on projects for which Canada issues "Letters of Advice" in an effort to prevent violations of Fisheries Act Section 35(1), four key areas of information that warrant further development are as follows:

1. What is the extent of use of this strategy and how has the use of this approach shifted over time? Canada provides information concerning the number of times it provided "advice" during fiscal year 1996-97 (6,912 times, 3,689 times to proponents and 3,223 times to "others"). (Response at 10). It is not clear, however, whether these instances of providing "advice" were embodied in Letters of Advice. Basic information concerning the number of Letters of Advice issued annually is not provided in the submission or response. Such information is essential to understand use of this enforcement tool.

Such information is especially pertinent in light of the Submitter's claim that the number of authorizations issued has dropped

(b) restrict the operation of the work or undertaking, and with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

significantly in recent years. It reports that in 1995–96, Canada issued no more than 339 authorizations under Section 35(2) of the Fisheries Act, while more than 12,000 authorizations were issued in 1990–91.²⁴

Because of the potential relationship between authorizations and Letters of Advice, information concerning the number of Fisheries Act Section 35(2) authorizations applied for and issued annually is also relevant. Canada only provides information concerning the number of authorizations issued in 1996–97,²⁵ while the Submitter provides some information concerning the number of authorizations provided in 1995–96 and 1990–91.

Similarly, information would be relevant concerning the nature and extent of information required by the Department prior to issuance of letters of Advice, and how this information differs from that required prior to issuance of Fisheries Act Section 35(2) authorizations.

2. What is the nature and extent of Canada's efforts to monitor projects that receive Letters of Advice to identify violations of Section 35(1), in terms of numbers of violations and severity of violations? Canada justifies use of Letters of Advice on the basis that they are effective in preventing violations of Section 35(1) from occurring—that they help to produce voluntary compliance. Information directly relevant to this claim, however, is not provided. First, no information is provided concerning the nature of Canada's efforts to monitor the extent to which projects that receive Letters of Advice violate Section 35(1). [See, e.g., NAAEC Article 5(1)(b).] With respect to monitoring, it would be relevant to have information relating to the amount of compliance-related monitoring conducted on projects that receive Letters of Advice. It would also be relevant to have information relating to any differences in the

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24. The submission annex provides as follows on this point:
[T]he effect [of the *Directive*] is to radically reduce the number of cases where DFO will be involved in protecting fish habitat and the scope of Sections 35(2) and 37(2) as CEEA triggers. It allows officials and proponents to simply sidestep application of the fish-habitat protection regime of the Fisheries Act and CEEA.
ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the Fisheries Act, Proposed Subsection 35(3) and Consequences for Federal Environmental Assessment, Prepared by the Quebec Environmental Law Centre, January 1996 (Principal Consultants: Yves Corriveau, Franklin S. Gertler), 2.
 25. Canada indicates that during fiscal year 1996–97, DFO issued 91 authorizations under Section 35(2), as well as Sections 26 and 32, without providing a breakdown.

nature of, and resources dedicated to, monitoring of compliance, depending on whether a Letter of Advice or an authorization is issued.

In addition, information concerning the number and severity of violations of Section 35(1) committed by projects that receive such Letters is directly relevant to Canada's claim that Letters of Advice are effective in preventing violations of Fisheries Act Section 35(1), but is not provided. It would be relevant to develop such information in connection with the Party's claim.

3. What is the nature and extent of Canada's enforcement response with respect to projects that receive Letters of Advice and violate Section 35(1)? [See, e.g., NAAEC Article 5(1)(j).] The *Directive* indicates that "failure to implement measures set out in Letters of Advice which result in harmful effects to habitat could lead to enforcement action." (*Directive* at 5). The response, however, provides little information concerning this aspect of Canada's enforcement approach. Relevant information would include any Canadian policies concerning the array of possible enforcement actions in response to violations of Fisheries Act Section 35(1) and the circumstances under which Canada would use such. Information concerning the actual use of these enforcement approaches, both in an absolute sense and in the context of the number and severity of violations, is relevant as well.
4. How effective are these follow-up efforts in promoting and achieving compliance with Section 35(1)?

To sum up, the questions listed above focus primarily on Canada's use of Letters of Advice as an enforcement tool to review project applications and to prevent violations of Section 35(1) from occurring. Canada asserts that its overall approach to habitat protection is "compliance-based." That is, Canada tries to prevent damage from being caused in the first place. (Response at 10, 11). Information, however, is lacking concerning the details of Canada's compliance-based approach and the extent to which Canada's approach is effective in achieving the purposes of the Fisheries Act and the CEEA. As the questions above reflect, while the response provides some information concerning this approach, we believe that there are significant information gaps and that a factual record is warranted to fill those gaps.²⁶

26. For a variety of reasons, the Secretariat is not persuaded that it is warranted to extend the scope of a factual record concerning the project review stage to include (*Fisheries Act*) Section 37-related issues. Among other things, the Secretariat views

2. *Prosecutions*

The Secretariat is similarly of the view that important information is lacking concerning the use of prosecutions as an enforcement tool. Canada advises that when Canada's "voluntary compliance fails, and the Fisheries Act is contravened, such that habitats supporting fisheries resources are harmfully altered, destroyed or degraded, enforcement action is taken." (Response at 9, 11). The Party, however, offers only limited information concerning the nature of enforcement activity, notably the number of convictions in 1996/97. (Response at 10).²⁷ Additional information necessary to substantiate the statement that enforcement action is taken when the Fisheries Act is contravened that is lacking, for example, includes the number and severity of violations, the nature and extent of Canada's enforcement responses, and the effectiveness of those responses. This is true for projects that receive Letters of Advice as well as for other projects (e.g., those that receive authorizations and "outliers"—i.e., projects that have been built without government review).²⁸

Canada asserts that it is misleading to look only at federal enforcement prosecutions because the provinces address some violations of Section 35(1). As noted above, the response indicates that "activity that could risk legal action under the federal Fisheries Act is often subject to legal sanction under provincial statute" . . . "and that the provinces have authority to enforce the Fisheries Act as well. (Response at 3, 10, 11). Yet, little information is provided concerning provincial enforcement activity under provincial law or under the Fisheries Act, other than the number of provincial employees involved in certain activities. (Response at 11). Because of Canada's apparent view that provincial prosecutions are an integral element of the effort to enforce Fisheries Act Section 35(1), information concerning the provinces' prosecution efforts is relevant as well and should be developed.

the submission and annex as focusing primarily on the *Directive on the Issuance of Subsection 35(2) Authorizations* in their challenge to Canada's project review practices.

27. The submission annex reports that in 1991–92 there were a total of 145 prosecutions and four injunctions relating to the habitat protection and pollution prevention provisions of the *Fisheries Act*.

28. The Submitter asserts that federal prosecutions for violations are particularly important because federal practice significantly constrains private actions when violations occur. The Submitter claims that the issuance of Letters of Advice frustrates prosecutions by private parties, as do interventions in and stays of such prosecutions by the Attorney General. (Submission at 1).

3. *Other issues concerning the Party's enforcement practices*

1. As noted above, Canada asserts that its enforcement approach reflects a reasonable exercise of its discretion in respect of investigatory, prosecutorial, regulatory or compliance matters. In particular, Canada asserts that:

The method by which Canada enforces and applies Section 35 of the Fisheries Act and the issuance of the Directive is a legitimate application of [its] discretion. Furthermore, the Agreement acknowledges, in Article 5, that seeking assurances of voluntary compliance, as Canada does through the Directives, is an appropriate government enforcement action. As such, Canada respectfully submits that the development of a factual record in this case is not warranted since the Agreement does not permit the review of the legitimate exercise of a Party's discretion. (Response at 3).

The Secretariat agrees that strategies intended to assure voluntary compliance may qualify as effective enforcement under Articles 5 and 14 of the NAAEC. Respectfully, however, the Secretariat does not believe that Canada's response establishes adequately that Canada's enforcement approach constitutes a legitimate exercise of its discretion. Article 45(1)(a) provides that a Party has not failed to "effectively enforce its environmental law" where its action or inaction reflects a reasonable exercise of its discretion in relation to investigatory, prosecutorial, regulatory or compliance matters. As the questions listed above reflect, Canada's response provides very little information concerning key issues necessary to evaluate its exercise of its discretion, such as the number and severity of violations, the nature of Canada's enforcement responses, and the effectiveness of those responses. Canada's response also fails to provide information concerning its overall policy context—for example, information concerning its policies regarding the nature of monitoring that is appropriate, the circumstances under which it is appropriate to pursue various types of enforcement action, and the circumstances in which enforcement action is not needed. Finally, Canada has failed to provide information concerning the extent to which it is implementing the strategies set forth in its policy context.

Thus, there is no basis for the Secretariat or the Council to evaluate whether Canada has exercised its discretion in a reasonable way. The extent to which it is appropriate for the Secretariat to conduct such an evaluation has never been addressed and the Secretariat does not seek to address it here. The Secretariat, however, believes that a Party must provide more support for a statement under Article 45 that it has reasonably exercised its discretion than is contained in this response in order to exempt its enforcement practices from scrutiny under Article 14.

2. Canada also asserts that its enforcement approach results from **bona fide** decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. As is the case with respect to the exercise of discretion, virtually no information is provided to support this assertion. There is little information, for example, concerning the overall level of resources available for enforcement, the relative priority of various environmental matters, or the level of resources devoted to enforcement in the area covered by the submission. Again, the extent to which it is appropriate for the Secretariat to evaluate a claim under Article 45(1)(b) has never been addressed and the Secretariat does not seek to address it here. The Secretariat, however, believes that a Party must provide more support for a statement that it has made **bona fide** decisions to allocate resources to enforcement concerning higher priority matters than is contained in this response.

4. *Sunpine Road project*

As noted above, the Submitter has provided the "Sunpine Road" example as a specific illustration of Canada's alleged failure to effectively enforce the Fisheries Act and CEAA. The Party, on the other hand, urges that the pendency of a lawsuit relating to the road renders it inappropriate to delve further into the project as part of a factual record.²⁹

The Secretariat has previously addressed the issue of pending judicial proceedings in connection with this submission, among others. Briefly, the NAAEC is clear that the Secretariat must "proceed no further" when the subject matter of the submission is also the subject of an ongoing judicial or administrative proceeding being pursued by a Party.³⁰ This

29. Two judicial proceedings are relevant to the submission. The first one is *The Friends of the West Country Association v. The Minister of Fisheries and Oceans and Attorney General of Canada*, Federal Court Trial Division (Docket T2457-96). This proceeding was initiated in November 1996 but then abandoned by the Submitters in November 1997. The second court case is *The Friends of the West Country Association v. Minister of Fisheries and Oceans and Director, Marine Programs, Canadian Coast Guard*, Federal Court Trial Division (unreported, 7 July 1998, Docket T-1893-96; Gibson J.). A decision was rendered in July 1998 but then appealed by the Canadian Government in September 1998. The appeal is currently under way (*Minister of Fisheries and Oceans and Director, Marine Programs, Canadian Coast Guard v. Friends of West Country Association*, Federal Court of Appeal (Docket A-550-98)).

30. See, e.g., *Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (27 April 1998), regarding SEM 97-001 at 9. Article 14(3) of the NAAEC provides that the Secretariat "shall proceed no further" where the responding Party has shown that the matter is the subject of "pending judicial or administrative proceedings." Article 45(3) defines a "judicial or administrative proceeding" for purposes of Article 14(3) to mean: "a domestic judicial, quasi-

provision does not apply here because the pending litigation was not pursued by a Party. The Secretariat may also deem it appropriate not to consider a matter because, as it had stated in an April 1997 *Determination*, the “similarity of issues presented in both the submission and the lawsuit . . . creates a risk that the preparation of a factual record may duplicate important aspects of the judicial action” and interfere with the pending litigation.³¹

As stated in this *Determination*, the Secretariat considered that this submission did not warrant developing a factual record because a court case pending at the time involved similar issues, notably the use of Letters of Advice under the Fisheries Act. The Secretariat noted that the Submitter “may wish in the future to file a new submission following a . . . resolution” of the court case involving these issues.³² The Submitter later abandoned the court case.

The currently ongoing court proceedings appear to create less overlap with the submission than the case pending in April 1997. The current court case appears to be concerned primarily with the interpretation of the Canadian Environmental Assessment Act and the Navigable Waters Protection Act.³³ In contrast, as discussed above, the factual record

judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. . . .”

31. Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation for SEM-96-003 (2 April 1997).

32. *Ibid.*

33. On 7 July 1998, the Federal Court Trial Division decided that the environmental assessments conducted concerning the construction of two bridges as part of the Sunpine project were inadequate, and the approvals were set aside. The Court found that the Coast Guard failed in its requirement to consider the cumulative environmental effects from other projects or activities that had been or would be carried out [Section 16(1)(a), CEEA], to assess various other undertakings [Section 15(3), CEEA], and to ensure convenient public access to all documents in the public registry [Section 55, CEEA]. Together with the related statutory preliminary steps, the approvals were referred back to the Minister of Fisheries and Oceans for “redetermination in manner consistent with the Canadian Environmental Assessment Act, the Navigable Waters Protection Act and these reasons.” *The Friends of the West Country Association v. Minister of Fisheries and Oceans and Director, Marine Programs, Canadian Coast Guard*, Federal Court Trial Division (unreported, 7 July 1998, Docket T-1893-96) (Gibson J.), at 33. The Attorney General of Canada appealed the decision to the Federal Court of Appeal based on the following grounds:

- a) the Court erred in the standard of review applied to the circumstances of the case;
- b) the Court erred in its interpretation of Section 15 of CEEA.
- c) the Court erred in law in its interpretation of Section 16 of CEEA; and
- d) the Court erred in its opinion that the public registry established by the Coast Guard failed to meet the requirements of Section 55 of CEEA so as to constitute a further reviewable error.

would concentrate on the development of factual information concerning the Party's project review strategy under the Fisheries Act, with a particular focus on the Letter of Advice strategy, and information concerning the Party's approach to prosecutions. Thus, the risk of substantial duplication or interference seems minimal, unlike in the previous court case that led to the Secretariat's termination of the submissions process in April 1997.

Weighed against the possible downside of duplication or interference is the reality that it would seem relatively straightforward to fill the gaps in the information provided to the Secretariat concerning the handling of this project under the Fisheries Act. Based on the submission and response, it appears that three types of information have not been provided. First, the Submitter asserts that the government was concerned, at least early on, that several of the projects could harm fish habitat in violation of Fisheries Act Section 35(1). Information concerning such possible impacts and possible violations has not been provided. Second, the Secretariat has not been provided with the Letters of Advice issued to prevent harm or violations from occurring due to two of the crossings. Finally, while the Secretariat has been advised that Alberta officials have inspected the road and concluded that the construction did not harm fish habitat, the Secretariat has not been provided with a copy of the report of the Alberta enforcement officials concerning their assessment of the final impacts on fish habitat as a result of the construction.

V. RECOMMENDATION

The Secretariat considers that, in light of Canada's response, the submission warrants developing a factual record to compile further information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with Section 35(1) of the Fisheries Act. The response does not take issue with the importance of the environmental laws and natural resources at issue in this submission. Instead, it reflects an appreciation for their significance. The 1996/97 DFO *Annual Report* to Parliament concerning administration and enforcement of the Fisheries Act, cited in the response, notes that "[t]he fish habitat protection . . . provisions of the Fisheries Act" are among the "main tools for the conservation and protection of fish habitat." Further, while the response asserts that the project review and prosecution approaches the Party uses are effective in preventing and addressing violations of Fisheries Act Section 35(1), the lack of information concerning the actual extent of use of different enforcement tools, and concerning the effect of these tools in achieving compliance with the

Fisheries Act, has led the Secretariat to conclude that it is appropriate to use the factual record process to develop facts concerning these questions.

Respectfully submitted on this 19 day of July 1999.

Janine Ferretti
Executive Director

SEM-97-007
(LAKE CHAPALA)

SUBMITTER: INSTITUTO DE DERECHO AMBIENTAL

PARTY: UNITED MEXICAN STATES

DATE: 10 OCTOBER 1997

SUMMARY: The Submitters allege that Mexico is failing to enforce environmental law, in connection with the citizen complaint filed on 23 September 1996, concerning the degradation of the Lerma Santiago River—Lake Chapala Basin.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2)
(2 OCTOBER 1998) Determination that criteria under Article 14(1) have been met and determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.

ART. 15(1)
(14 JULY 2000) Dismissed following Party's response in accordance with Article 15 (1).

2 de octubre de 1998

POR FAX Y MENSAJERO

Mtra. Julia Carabias Lillo
Semarnap
Periférico Sur # 4209
6º Piso
Fracc. Jardines en la Montaña
14210 México, D.F.
México

Ref.: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Instituto de Derecho Ambiental
Parte: Estados Unidos Mexicanos
Fecha: 10 de octubre de 1997
Petición: SEM-97-007

Estimada maestra Carabias:

Como es de su conocimiento, el Secretariado de la CCA recibió el día 10 de octubre de 1997 una petición del Instituto de Derecho Ambiental, A.C. en unión de ciudadanos de la rivera del Lago de Chapala. Los peticionarios aseveran que ha habido una omisión en la aplicación efectiva de la legislación ambiental mexicana respecto de "la denuncia popular interpuesta el 23 de septiembre de 1996, relativa a la problemática de la Cuenca Hidrológica formada por el Río Lerma Santiago-Lago de Chapala" que presentaron ante la Procuraduría Federal de Protección al Ambiente "para el efecto de que declarara el estado de emergencia ambiental para el ecosistema Lago de Chapala..."

El Secretariado ha revisado la petición y ha determinado que cumple con los requisitos establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte. Asimismo, considerando los criterios previstos en el artículo 14(2) del ACAAN, el Secretariado ha determinado que la petición amerita solicitar una respuesta de la Parte. Al efecto, solicitamos del Gobierno de México una respuesta a la petición de referencia y anexamos una copia de la misma y de la información de apoyo que la acompaña.

Conforme al artículo 14(3), estaremos en espera de recibir la respuesta del Gobierno de México el día 16 de noviembre de 1998, esto es, en un plazo de 30 días hábiles posteriores a la entrega de la presente, salvo que por circunstancias excepcionales se requiera ampliar el plazo a 60 días.

Sometido respetuosamente a su consideración,

Secretariado de la Comisión para la Cooperación Ambiental

por: Janine Ferretti
Directora Ejecutiva Interina

c.c. Lic. José Luis Samaniego, Semarnap
Mr. Jim Wall, Environment Canada
Mr. William Nitze, US-EPA
Dra. Raquel Gutiérrez Nájera y/o Lic. Jacqueline Brockmann,
Instituto de Derecho
Ambiental, A.C.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionario:	Instituto de Derecho Ambiental, A.C.
Parte:	Estados Unidos Mexicanos
Número de petición:	SEM-97-007
Fecha de recepción:	10 de octubre de 1997
Fecha de esta determinación:	14 de julio de 2000

I. INTRODUCCIÓN

En conformidad con los artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (ACAAN), el Secretariado de la Comisión para la Cooperación Ambiental (Secretariado) puede examinar peticiones que aseveren que una Parte del ACAAN está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. El 10 de octubre de 1997, el Secretariado recibió una petición del Instituto de Derecho Ambiental, A.C. que asevera que México ha incurrido en una omisión en la aplicación efectiva de la legislación ambiental mexicana al no resolver el fondo de la Denuncia Popular sobre la degradación del ecosistema del Lago de Chapala, presentada el 23 de septiembre de 1996 (Denuncia Popular),¹ y al no declarar una emergencia ambiental en el Lago de Chapala como resultado de la verificación de los hechos planteados en la Denuncia Popular.

El 2 de octubre de 1998, el Secretariado determinó que la petición cumple con los requisitos establecidos en el artículo 14(1) del ACAAN. Considerando los factores previstos en el artículo 14(2) del ACAAN,

1. Anexo 11 de la petición.

el Secretariado decidió que la petición ameritaba una respuesta de la Parte, por lo que en ese mismo documento del 2 de octubre de 1998 solicitó a México una respuesta. Estas determinaciones del Secretariado se explican en la sección siguiente de este documento.

El 30 de octubre de 1998, a dos años de haberse presentado la Denuncia Popular motivo de la petición, la Profepa emitió una contestación a la Denuncia Popular señalando a los denunciantes que el Lago de Chapala no se encuentra en una situación que amerite declarar una emergencia ambiental. La Parte mexicana incorporó la contestación a la Denuncia Popular en la respuesta a la petición que envió al Secretariado el 14 de diciembre de 1998, y que se resume en la sección III de esta determinación. La Parte afirma en la respuesta, que no obstante su retraso, dio cabal trámite a la Denuncia Popular y que en la contestación a la Denuncia Popular demostró a los denunciantes que no era procedente declarar la emergencia ambiental. El Secretariado estudió la posibilidad de contactar a los Peticionarios para confirmar si ante la contestación a la Denuncia Popular aún consideran que la Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, más no encontró fundamento para hacerlo ni en el ACAAN ni en las *Directrices para la presentación de peticiones conforme a los artículos 14 y 15 del ACAAN (Directrices)*.

El análisis del Secretariado de la petición y de la respuesta de la Parte, se plantea en la sección IV de este documento. Sin embargo, al Secretariado no le es posible considerar si esta petición en particular, a luz de la respuesta de la Parte, amerita que se elabore un expediente de hechos conforme al artículo 15(1), debido a que la respuesta de la Parte se basa en un acto de la Parte posterior a la petición, y dado que, el Secretariado no puede confirmar con los Peticionarios si sus aseveraciones se mantienen ante ese acto de la Parte. Ante esta situación, el Secretariado se ve en la necesidad de concluir el proceso iniciado por la petición SEM-97-007 por las razones procesales que se plantean en este documento.

II. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

En esta sección el Secretariado explica las razones por las que la petición cumple con los requisitos del artículo 14(1) del ACAAN, y explica las consideraciones por las que ameritó solicitar una respuesta de la Parte

conforme al artículo 14(2) del Acuerdo, según su determinación del 2 de octubre de 1998.²

En su primera sección, el artículo 14 del Acuerdo establece:

1. El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
 - (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
 - (b) identifica claramente a la persona u organización que presenta la petición;
 - (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
 - (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
 - (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
 - (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

El Secretariado considera que este artículo no pretende establecer requisitos infranqueables para las peticiones, pero que deben revisarse con cierto detenimiento estas cuestiones para avanzar en la consideración de una petición.³ El Secretariado analizó con este enfoque la petición presentada por el Instituto de Derecho Ambiental, A.C.

El preámbulo del artículo 14(1) exige que las peticiones aseveren que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. Los Peticionarios aseveran que México está

2. Este análisis se hizo estando en vigor las Directrices anteriores a las modificaciones adoptadas en junio de 1999, que no exigían al Secretariado explicar su razonamiento en cada paso, como lo hacen ahora en el apartado 7.2 de las Directrices.

3. Véanse la Determinación conforme al artículo 14(1) en relación con la petición SEM-97-005/Animal Alliance of Canada, et al; la Determinación conforme a los artículos 14(1) y (2) relativa a la petición SEM-98-003/Department of the Planet Earth, et al, en su versión revisada; entre otras.

incurriendo en omisiones en la aplicación efectiva de su legislación ambiental en el caso de la Denuncia Popular sobre la degradación del Lago de Chapala, presentada el 23 de septiembre de 1996. La petición contiene aseveraciones de omisiones en la aplicación efectiva de la LGEEPA en los artículos 189 al 194 (anteriores a las Reformas de diciembre de 1996 y de acuerdo a la cual se interpuso la Denuncia Popular) y del Reglamento Interior de la Semarnap en su artículo 62. La petición señala expresamente que ésta no alude "...al fondo del asunto planteado [en la Denuncia Popular], ya que éste nunca se abordó por la autoridad competente." La petición asevera que la Parte mexicana viola los artículos 5, 6 y 7 del ACAAN, que se refieren a las medidas gubernamentales para la aplicación de leyes y reglamentos, al acceso de los particulares a los procedimientos y a las garantías procesales, haciendo referencia también a los artículos 14 y 16 de la Constitución Política de los Estados Unidos Mexicanos, "que establecen las garantías de legalidad y de debido proceso, [y] forman parte de la columna del Derecho Procesal Mexicano", que los Peticionarios consideran vulnerado por la Parte en su tramitación de la Denuncia Popular. La petición declara que "...tiene por objeto el fortalecimiento de la cooperación en la elaboración de leyes, reglamentos procedimientos, políticas y prácticas ambientales, así como el mejorar la observancia y aplicación de las leyes y reglamentos ambientales en los términos del artículo 1o. del Acuerdo de Cooperación Ambiental.⁴" Estas aseveraciones de la petición satisfacen el preámbulo del artículo 14(1) del ACAAN.

A efecto de calificar para el proceso del artículo 14(1), las peticiones deben referirse a disposiciones que satisfagan la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN, que se refiere al propósito principal de tales disposiciones.⁵ En el caso de esta petición, se satisface la definición del ACAAN porque las disposiciones que establecen el procedimiento de denuncia popular y las facultades de la Profepa citadas por los Peticionarios, son disposiciones adjetivas cuyo propósito principal es la protección del medio ambiente⁶ y porque

4. Páginas 5 a 7 de la petición (énfasis eliminado).

5. Véase el artículo 45(2) del ACAAN. Aun cuando el Secretariado no se rige por el principio de *stare decisis*, en ocasiones anteriores, al examinar otras determinaciones, ha señalado que las disposiciones citadas deben satisfacer la definición de legislación ambiental. Véanse las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).

6. Véanse los artículos 189 al 194 de la LGEEPA en su versión anterior a la reforma de diciembre de 1996 y el artículo 62 del Reglamento Interior de la Semarnap de fecha 8 de julio de 1996. (página 7 de la petición)

las disposiciones sustantivas en las que se basó a su vez la Denuncia Popular, tienen también como propósito principal la protección del medio ambiente.⁷ Las disposiciones sustantivas más relevantes a esta definición, en las que se basó la Denuncia Popular son los artículos 1, 7, 13, 119 y 122 de la Ley de Aguas Nacionales (LAN), 117 al 129 de la LGEEPA entonces en vigor, y 21 normas oficiales mexicanas que establecían los límites máximos permisibles de contaminantes en las descargas de aguas residuales de diversas fuentes, entonces en vigor.⁸ Esas disposiciones se ajustan a la definición del artículo 45(2) porque su propósito principal es la protección del medio ambiente a través de la prevención y el control de la contaminación del agua y de los ecosistemas acuáticos.

La petición cumple también los seis requisitos enlistados en el artículo 14(1). Esta se presentó por escrito en español, idioma designado por la Parte mexicana.⁹ Los Peticionarios se identificaron como el Instituto de Derecho Ambiental, A.C., organización sin vinculación gubernamental establecida en Guadalajara, Jalisco, México.¹⁰ El Secretariado hace notar que la petición fue presentada por persona distinta a quienes presentaron la Denuncia Popular objeto de la petición, sin que ello resulte un impedimento para su examen.¹¹ El artículo 14 del Acuerdo no señala que la persona que formule una petición deba ser la misma persona que por escrito comunicó el “asunto” a las autoridades de la Parte correspondiente, sino que pone énfasis en la coincidencia del “asunto” en cuestión, coincidencia que resalta en este caso. La petición contiene suficiente información, lo cual permitió al Secretariado revisarla. Incluye copia de la Denuncia Popular, información acerca del trámite que dio la autoridad a la Denuncia Popular, algunos documentos sobre los problemas de contaminación del Lago de Chapala en los que se basó la Denuncia Popular, y descripciones de las actividades que presuntamente contribuyen a la degradación de la cuenca.¹² La petición no parece encaminada a hostigar una industria, sino a promover la

7. En particular, el Secretariado determinó en la mencionada Determinación respecto de la SEM-98-002, que las disposiciones relativas a la denuncia popular califican como legislación ambiental a efecto del artículo 14 del ACAAN siempre que el asunto a que se refiera la denuncia popular se ajuste a su vez a la definición del ACAAN.
8. Véase la Denuncia Popular (anexo 11 de la petición).
9. Véanse el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
10. Véanse el artículo 14(1)(b) y (f) del ACAAN y la página 10 de la petición.
11. Firmaron y presentaron conjuntamente la Denuncia Popular: Raquel Gutiérrez Nájera, Jacqueline Brockmann C., Pedro Díaz Martínez, Luis Alberto López Herrera, Alvaro Gómez Minakata, Adolfo Alejandro López Aguayo y Fabián Oscar Monsalve Agraz. La primera es presidenta del Instituto de Derecho Ambiental, A.C., organización que presentó la petición objeto de esta determinación.
12. Véanse el artículo 14(1)(c) del ACAAN y las páginas 3 a 5 de la petición.

aplicación de la legislación ambiental para la protección del ecosistema de la cuenca Lerma-Chapala y se centra en la actuación de las autoridades de la Parte respecto del problema.¹³ La petición incluye copias de las comunicaciones dirigidas a las autoridades, de una denuncia popular anterior a la que es objeto de la petición, de la Denuncia Popular y de diversas comunicaciones oficiales al respecto.¹⁴

Habiendo revisado la petición conforme al artículo 14(1) del ACAAN y constatado que cumple con los requisitos allí establecidos, el Secretariado consideró los factores señalados en el artículo 14(2) y determinó que la petición ameritaba solicitar una respuesta a la Parte mexicana. El artículo 14(2) dispone:

2. Cuando considere que una petición cumple con los requisitos estipulados en el párrafo 1, el Secretariado determinará si la petición amerita solicitar una respuesta de la Parte. Para decidir si debe solicitar una respuesta, el Secretariado se orientará por las siguientes consideraciones:
 - (a) si la petición alega daño a la persona u organización que la presenta;
 - (b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;
 - (c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y
 - (d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Al tomar la decisión de que la petición ameritaba solicitar una respuesta de la Parte, el Secretariado consideró los alegatos de la petición respecto del daño a la organización que la presenta: tanto los alegatos relativos a la importancia de los mecanismos que permiten la participación pública en la protección del medio ambiente, como los alegatos relacionados con la importancia del ecosistema del Lago de Chapala y la gravedad de la presunta degradación del mismo.

Los Peticionarios alegan denegación de justicia por la falta de estudio por parte de la Profepa del fondo del asunto planteado en la Denuncia

13. Véanse el artículo 14(1)(d) del ACAAN y el apartado 5.4(a) de las Directrices.

14. Véase el artículo 14(1)(e) del ACAAN y las páginas 3 a 5 y anexos 11 a 24 de la petición.

Popular. La petición indica que la Profepa es la autoridad responsable de resolver las denuncias populares, y que con base en la Denuncia Popular "...debió haber entrado a estudiar a fondo qué estaba pasando ambientalmente en el Lago de Chapala", debió cubrir las etapas procesales y debió dictar resolución administrativa sobre el fondo. Los Peticionarios señalan que en vez de cumplir de esta manera con sus atribuciones conforme a la LGEEPA y el Reglamento Interior de la Semarnap, la Profepa permitió que el asunto se tramitara como una cuestión de responsabilidad de funcionarios públicos y que delegó su competencia en la CNA.¹⁵ Sobre este punto, el Secretariado tomó en cuenta junto con los alegatos, la reconocida importancia en el marco del ACAAN de la participación ciudadana en la protección del medio ambiente, a través de la vigilancia pública del cumplimiento de la legislación ambiental para la prevención de la contaminación y de su aplicación por parte de las autoridades competentes.¹⁶

Respecto de la importancia del ecosistema al que se refiere esta petición, el Secretariado tomó en cuenta las dimensiones del Lago de Chapala, la reconocida importancia de la cuenca Lerma-Chapala en la actividad económica de la región y su reconocida importancia ecológica, cuya grave degradación en supuesta violación de la legislación ambiental según los Peticionarios es "... en detrimento del patrimonio de las generaciones presentes y futuras...".

La Denuncia Popular describe la importancia de la Cuenca Lerma-Santiago y la gravedad del problema ambiental, en los términos siguientes. El Lago de Chapala con una longitud máxima de 82.18 km se ubica en la parte sur de la Altiplanicie Mexicana, en la Mesa Central, entre los Estados de Jalisco y Michoacán y es el lago más grande de la República Mexicana y el tercero en tamaño en América Latina. Funge como vaso regulador de la Cuenca Lerma-Santiago, que abarca aproximadamente 129,263 Km² en los Estados de Querétaro, Estado de México, Guanajuato, Michoacán, Aguascalientes, Jalisco y Nayarit. Señala la Denuncia Popular, que según algunos informes la contaminación de las diferentes regiones de la Cuenca Río Lerma-Santiago, varía de acuerdo a las actividades que se realicen en sus áreas de influencia.¹⁷ Indica que a su paso en el Norte del Estado de Michoacán, el Río Lerma presenta elevadísimos niveles de contaminación por desechos industriales, aguas negras y basura, y que en la Piedad, Guanajuato, el problema se agrava por la cercanía al lecho del río de

15. Página 10 de la petición.

16. Véanse el preámbulo y los artículos 1, 5, 6, y 14 del ACAAN.

17. Informe publicado por la Universidad de Guadalajara titulado "Jalisco a tiempo". Anexo 3 de la petición.

importantes granjas porcinas que tiran al agua los excrementos de casi un millón de animales.¹⁸ La Denuncia Popular concluye que el Lago de Chapala “presenta un alto grado de degradación por la presencia de metales pesados en sus aguas lo que ocasiona graves enfermedades en su población piscícola, extracción de agua y serios niveles de azolvamiento, aunado a la gran cantidad de nutrientes que generan la sobrepoblación del lirio acuático”.¹⁹

En particular, el Secretariado tomó en cuenta la supuesta gravedad de los riesgos para la vida y la salud humana y para la supervivencia de especies, los daños que según los Peticionarios se han causado al ecosistema por la presunta descarga sin tratamiento de aguas residuales industriales, agropecuarias y municipales, el vertido de desechos en los ríos que alimentan el lago, y la explotación desmedida del agua de la cuenca, en supuesta violación de la legislación que se invoca en la Denuncia Popular.²⁰ Por lo anterior, en opinión del Secretariado la petición plantea un asunto cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, especialmente con relación a sus artículos 1 y 5.²¹

Se aborda ahora la consideración de si se ha acudido a los recursos disponibles conforme a la legislación de la Parte. Si bien es claro que le corresponde al Secretariado llevar a cabo esta consideración como antecedente a que solicita una respuesta a la Parte, cabe referirse aquí a la opinión que ha expresado la Parte sobre este punto. La Parte en su respuesta manifiesta que la denuncia popular no es un recurso y que considera que la petición transgrede el artículo 14(2)(c) porque los Peticionarios no agotaron los recursos legales correspondientes.²² La Parte en su respuesta parece interpretar ese artículo 14(2)(c) como estableciendo el *requisito* de que los peticionarios *agoten* los recursos legales disponibles, en lugar de disponiendo una *consideración* del Secretariado sobre si los peticionarios han *acudido* a ellos. Al parecer del Secretariado, que difiere respetuosamente con lo asentado en la respuesta de la Parte, el texto del ACAAN es claro en este aspecto. Según lo que señala ese artículo 14(2), los factores en él listados, son consideraciones que orientan al Secretariado para decidir si una petición amerita solicitar una respuesta a la Parte, a diferencia del artículo 14(1),

18. Informe del Foro Mexicano de la Sociedad Civil sobre Medio Ambiente y Desarrollo. Anexo 4 de la petición.

19. Página 2 de la petición.

20. Páginas 5 a 7 de la petición.

21. Ver artículo 14(2)(a) y (b) del ACAAN.

22. Páginas 2 y 3 de la respuesta de la Parte.

que establece los requisitos que deben cumplir las peticiones. Entre esas consideraciones, el artículo 14(2)(c) incluye la cuestión de "...si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte...". Por otra parte, los apartados 5.6(c) y 7.5(b) de las Directrices, proporcionan mayor dirección sobre el sentido de este factor del artículo 14(2)(c), al señalar respectivamente, que "la petición deberá abordar [...] los recursos que estén al alcance de los particulares y disponibles bajo las leyes de la Parte, que se han perseguido..." y que, para evaluar este asunto "...el Secretariado se orientará por las siguientes consideraciones:(b) si con anterioridad a la presentación de la petición se han tomado las acciones razonables para acudir a dichos recursos...²³"

El Secretariado consideró que los Peticionarios *abordaron* en la petición los recursos que se han perseguido, y que se tomaron medidas razonables para *acudir* a ellos con anterioridad a la presentación de la petición. Según la petición, se ha perseguido el recurso de denuncia popular conforme a la LGEEPA, primero el 16 de mayo de 1996, para reportar la aplicación de plaguicidas para el control de lirio acuático en el Lago de Chapala, y luego el 23 de septiembre de 1996, respecto de las violaciones a la legislación ambiental y la degradación del ecosistema del Lago de Chapala, que los denunciantes consideran amerita la declaración de emergencia ambiental. Según afirma la petición, en ambos casos el asunto planteado por los denunciantes no se resolvió conforme a derecho, no abordándose el fondo del mismo.²⁴ También es claro en opinión del Secretariado, que para efectos del artículo 14 del ACAAN, la denuncia popular es un recurso contemplado por la legislación de la Parte mexicana y disponible a los peticionarios para que acudan a esa Parte, previamente a la presentación de una petición.²⁵

23. Estas disposiciones de las Directrices entraron en vigor en junio de 1999, después de que se hubiera presentado la petición el 10 de octubre de 1997, si bien ello no afecta la conclusión del Secretariado en este aspecto.

24. Página 9 de la petición.

25. La Parte señala que considera que la denuncia popular prevista en la LGEEPA no es un recurso, sino un mecanismo para informar a la autoridad sobre cuestiones ambientales. (páginas 2 y 3 de la respuesta) El artículo 14(2)(c) hace alusión a "... los recursos disponibles conforme a la legislación de la Parte..." exigiendo que estén previstos en la legislación de la Parte, pero sin establecer otras limitaciones sobre las características de esos recursos. La denuncia popular está prevista en los artículos 189 y siguientes de la LGEEPA, y permite a cualquier persona recurrir a la autoridad ambiental para denunciar presuntas violaciones a las leyes o reglamentos ambientales o daños al medio ambiente. La denuncia popular es en este sentido y para efectos del proceso conforme a los artículos 14 y 15 del ACAAN, un recurso contemplado por la legislación de la Parte mexicana y disponible a los peticionarios para que acudan a esa Parte, previamente a la presentación de una petición conforme al artículo 14 del ACAAN.

Como última consideración conforme al artículo 14(2), el Secretariado observó que la petición no parece basarse en noticias de los medios de comunicación, aunque se anexan copias de diversos volúmenes de una publicación local sobre la situación de la cuenca ("El Charal") y otras publicaciones especializadas que se refieren al tema.²⁶

El 2 de octubre de 1998 el Secretariado determinó que la petición cumplía con los requisitos del artículo 14(1) y orientándose por las consideraciones del artículo 14(2), el Secretariado solicitó en esa fecha una respuesta de la Parte. La Parte mexicana presentó su respuesta al Secretariado el 14 de diciembre de 1998.

III. RESUMEN DE LA RESPUESTA DE LA PARTE

En la respuesta de México, recibida por el Secretariado el 14 de diciembre de 1998, la Parte arguye que la petición no es procedente puesto que, según la Parte, conforme al artículo 14(2)(c) del ACAAN los Peticionarios debieron haber agotado los recursos previstos en la legislación mexicana y no lo hicieron. Sobre este asunto, la Parte mexicana explica que considera además, que la denuncia popular prevista en la LGEEPA no es un recurso. En la sección anterior se hizo referencia a estos comentarios de la Parte.

Respecto del asunto planteado en la petición, la Parte sostiene que no incumplió con su obligación de aplicar de manera efectiva sus leyes y reglamentos ambientales a través de medidas adecuadas. Señala que el procedimiento de responsabilidad de servidores públicos se inició porque los propios denunciantes lo solicitaron, y que se remitió la Denuncia Popular a la CNA por ser dicho órgano el competente para ejercer las funciones en materia de prevención, control, fiscalización y sanción de asuntos relativos a contaminación del agua, y también porque era una de las autoridades denunciadas. La Parte indica que si bien es cierto que "el gobierno mexicano omitió acatar el término de 30 días al que se refería el artículo 193 de la LGEEPA, para notificar a los denunciantes el resultado de la verificación de los hechos y, en su caso, las medidas impuestas, también lo es que la autoridad ambiental si atendió la Denuncia Popular y la dilación en que incurrió para elaborar la respuesta a la misma se debió a la necesidad de atender con la profundidad que el asunto requería el fondo de la problemática ambiental planteada sobre el Lago de Chapala, y ameritaba conocer la opinión de diversas autoridades...". Finalmente, la Parte señala que no

26. Ver artículo 14(2)(d) del ACAAN y anexos 9 y 10 de la petición.

practicó el peritaje solicitado por los denunciantes para efectos de la declaratoria de emergencia solicitada porque estimó que la información proporcionada por la CNA era suficiente para determinar la improcedencia de dicha declaratoria.

La Parte afirma haberse ocupado de todos los hechos materia de la Denuncia Popular en la contestación a la Denuncia Popular notificada el 30 de octubre de 1998. No obstante lo anterior, la Parte manifiesta que a efecto de proporcionar una respuesta integral a la CCA, solicitó a la CNA información actualizada relativa a la situación ambiental del Lago de Chapala, por lo cual se elaboró un diagnóstico que se integró a la respuesta. En ese diagnóstico la Parte afirma que el agua del Lago de Chapala refleja valores que permiten su utilización como agua potable, para fines agrícolas, de pesquería y recreación, por lo que el mismo no se encuentra en una situación de emergencia.

IV. ANÁLISIS DE LA PETICIÓN A LA LUZ DE LA RESPUESTA DE LA PARTE, CONFORME AL ARTÍCULO 15(1) DEL ACCAN

En conformidad con el artículo 15(1) del ACCAN, el Secretariado procede a revisar la petición a la luz de la respuesta proporcionada por la Parte, para determinar si amerita la elaboración de un expediente de hechos.

A juicio de los Peticionarios, México está omitiendo aplicar de manera efectiva su legislación ambiental en este caso porque consideran que para que exista una aplicación efectiva de la legislación ambiental, la Profepa debía, en resumen: haber cumplido con las formalidades aplicables a la denuncia popular, respondiendo a los denunciantes en los tiempos y términos que señala la LGEEPA; haber declarado al ecosistema del Lago de Chapala en emergencia ambiental con base en la verificación de los hechos denunciados y el peritaje del IMTA; no haber convertido la Denuncia Popular en “un caso de responsabilidad de funcionarios públicos”; y no haber delegado inapropiadamente su competencia en la CNA.²⁷

La argumentación central de la petición se refiere a la necesidad de declarar en emergencia ambiental al ecosistema del Lago de Chapala, como consecuencia de una correcta tramitación de la Denuncia Popular en los tiempos y términos que señala la LGEEPA. Según los Peticionarios, la autoridad ambiental no ha exigido el cumplimiento por

27. Páginas 9 y 10 de la petición.

parte de quienes aprovechan la cuenca para la extracción de agua y la descarga de aguas residuales de las disposiciones aplicables para la protección de los recursos de la cuenca y la prevención de la contaminación del agua. La petición asevera que la Parte ha omitido aplicar de manera efectiva su legislación ambiental al no considerar el fondo de la Denuncia Popular en la que plantean estos problemas de degradación y violación a la legislación ambiental, y en al que se solicita la declaratoria de una emergencia ambiental en la zona. Los Peticionarios expresamente señalan que en la petición no se abordan los problemas sustantivos planteados en la Denuncia Popular porque la petición se aboca al hecho de que la autoridad no respondió dicha Denuncia Popular, omitiendo aplicar de manera efectiva su legislación ambiental. Para comprender el contexto de las aseveraciones de la petición, se explica a continuación el procedimiento de denuncia popular.

La denuncia popular es un procedimiento establecido en la LGEEPA (Título Sexto, capítulo VII, artículos 189 a 194), que se origina cuando una persona pone en conocimiento de la Secretaría (Semarnap) hechos, actos u omisiones contrarios a la legislación ambiental, y que obliga a la Secretaría a llevar a cabo ciertas acciones concretas, dentro de plazos determinados. Es importante señalar que en este caso son aplicables las disposiciones vigentes el 23 de septiembre de 1996, y no las actuales, que entraron en vigor en diciembre de 1996.

La LGEEPA no indica expresamente cuáles son los efectos de la denuncia popular. De la lectura armónica de los artículos 8 y del Título Sexto de la LGEEPA, se desprende que una denuncia popular obliga a la Secretaría a realizar determinados actos, y otorga el derecho a los denunciantes a que se les proporcione la información correspondiente, y a utilizar los expedientes relativos a las denuncias populares como prueba en juicio, en caso de que decidan demandar el pago de daños y perjuicios al responsable de los hechos materia de la denuncia popular.

Al conocer de una denuncia popular, la Secretaría tiene las siguientes obligaciones: recibir la denuncia, identificar al denunciante, y en su caso, notificar a la persona o personas a quienes se hayan imputado los hechos materia de la denuncia o a quienes pudiera afectar la misma (artículo 191). La Secretaría debe realizar las diligencias necesarias para comprobar la veracidad de los hechos materia de la denuncia, y en su caso "evaluarlos", o debe remitirla a la autoridad competente cuando los hechos materia de la misma fueren de competencia local, en cuyo caso deberá promover ante dicha autoridad la ejecución de las medidas que resulten procedentes (artículo 192). Dentro de los quince días hábiles

siguientes a su presentación, la Secretaría debe hacer del conocimiento del denunciante el trámite que se le haya dado (artículo 193). En caso de que los hechos, actos u omisiones denunciados resulten ser ciertos, deberá realizar las acciones que le competen a fin de preservar, proteger y restaurar el equilibrio ecológico y el ambiente (artículo 8, fracciones II y III), iniciar los procedimientos administrativos que resulten necesarios tales como los relacionados con sus facultades de investigación y vigilancia, ejecución de medidas de seguridad, imposición de multas y sanciones por infracciones administrativas; así como, en su caso, coadyuvar en la persecución de delitos ambientales (Título Sexto, capítulos I, II, III, IV y VI, así como artículo 193). En todo caso, la Secretaría deberá tramitar la denuncia conforme a derecho, e informar al denunciante el resultado de la investigación correspondiente y las medidas que en su caso ejecutó — dentro de los 30 días hábiles siguientes (artículo 193).

En su respuesta, la Parte argumenta que aplicó efectivamente su legislación ambiental, afirmando que “si bien es cierto que el gobierno mexicano omitió acatar el término de 30 días al que se refería el artículo 193 de la LGEEPA, para notificar a los denunciantes el resultado de la verificación de los hechos y, en su caso, las medidas impuestas, también lo es que la autoridad ambiental sí atendió la denuncia popular y la dilación en que incurrió para elaborar la respuesta a la misma se debió a la necesidad de atender con la profundidad que el asunto requería el fondo de la problemática ambiental planteada sobre el Lago de Chapala, y ameritaba conocer la opinión de diversas autoridades administrativas...”²⁸

Asimismo, la Parte sostiene la legalidad de sus actuaciones al señalar que el procedimiento de responsabilidad de servidores públicos se inició porque los propios denunciantes lo solicitaron, y que la Denuncia Popular se remitió a la CNA por ser dicho órgano “el competente para ejercer las funciones en materia de prevención, control, fiscalización y sanción de asuntos relativos a contaminación del agua, y también porque era una de las autoridades denunciadas...”²⁹

La Profepa dio trámite a la Denuncia Popular mediante el intercambio de numerosos oficios con las autoridades denunciadas, así como de las mismas y la Profepa con los denunciantes. Las comunicaciones que por parte de la Profepa y de las autoridades denunciadas recibieron los denunciantes, ofrecen cierta información a los denunciantes sobre

28. Página 25 de la respuesta.

29. Página 26 de la respuesta.

aspectos de la Denuncia Popular, pero no se refieren específicamente al fondo de las peticiones de los denunciantes, salvo el Acuerdo No. D-047, del 23 de junio de 1997, emitido por el Contralor Interno de la CNA, en donde resuelve que “no se acreditó la irregularidad atribuida a servidores públicos adscritos a la Comisión Nacional del Agua, en consecuencia no ha lugar a instaurar el procedimiento administrativo de determinación de responsabilidades, ni ha lugar a imponer sanción administrativa alguna”.³⁰

El 30 de octubre de 1998 fue notificada a los denunciantes la contestación a la Denuncia Popular, de fecha 25 de septiembre de 1998, dándose respuesta a la Denuncia Popular más de dos años después de que fue presentada el 23 de septiembre de 1996. En la contestación a la Denuncia Popular, que se anexa a la respuesta de la Parte a la petición, la Profepa afirma que el Lago de Chapala “de ningún modo sufre un alto grado de degradación”, y que no existen elementos para considerar a la Cuenca Lerma-Chapala en un estado de emergencia, mencionando que deberían practicarse ciertos estudios por el IMTA. También señala, en aparente contradicción a lo anterior, que es innecesario realizar los estudios indicados por los denunciantes porque “el Lago de Chapala no está tan contaminado”, ya que si eso fuera cierto, el agua “no se ocuparía para consumo humano como actualmente se usa, ya que de éste se abastece a casi todo el Estado de Jalisco, previa potabilización del agua”. La contestación a la Denuncia Popular afirma también que la CNA realiza monitoreos sobre la calidad del agua en el Lago de Chapala.³¹

De la petición y de la respuesta se desprende que la Semarnap al conocer de la Denuncia Popular: (i) recibió la denuncia; (ii) identificó a los denunciantes y notificó a las autoridades denunciadas; (iii) hizo del conocimiento de los denunciantes el trámite que se le dio a la Denuncia Popular dentro de los quince días hábiles siguientes a la presentación del escrito de Denuncia Popular;³² y (iv) realizó diligencias con el fin de comprobar la veracidad de los hechos materia de la Denuncia Popular y las evaluó.³³

La petición y la respuesta de la Parte coinciden en que la Semarnap omitió comunicar a los denunciantes dentro de los treinta días hábiles siguientes al día en que hizo del conocimiento de los denunciantes el trámite que se le dio a la Denuncia Popular, el resultado de la verificación y evaluación de los hechos denunciados, así como las

30. Anexo 24 de la petición.

31. Página 14 de la respuesta.

32. Páginas 3 a 5 y anexos 11 a 24 de la petición.

33. Página 17 de la respuesta.

medidas que en su caso se hubiesen ejecutado. Esta comunicación se notificó a los denunciantes con dos años de retraso, después de que los Peticionarios presentaron la petición y de que el Secretariado solicitara una respuesta de la Parte.

La Parte argumenta que omitió acatar el término de 30 días hábiles para notificar a los denunciantes, debido a la necesidad de atender con la profundidad que el asunto requería, el fondo del problema ambiental planteado sobre el Lago de Chapala, máxime que necesitaba conocer la opinión de diversas autoridades, incluido el análisis técnico de la CNA, sin el cual, la Profepa nunca hubiera estado en posibilidad de determinar la existencia o no de una situación de emergencia ambiental.³⁴

Al analizar la petición conforme al artículo 15(1) del ACAAN, el Secretariado confrontó los argumentos de los Peticionarios sobre la omisión por parte de México de aplicar de manera efectiva su legislación ambiental al no estudiar el fondo de la Denuncia Popular y decretar la emergencia ambiental en el Lago de Chapala, con la información que la Profepa proporcionó en la contestación a la Denuncia Popular. El Secretariado concluyó que, pese a que es incuestionable que la contestación a la Denuncia Popular aborda el fondo del problema ambiental planteado sobre el Lago de Chapala, no es claro que lo haga en los términos que los Peticionarios señalan que la Profepa debía responder para dar cumplimiento a sus atribuciones.

La respuesta de la Parte no indica que la Profepa haya verificado de manera independiente la información que le fue proporcionada por la CNA para dar respuesta a la Denuncia Popular, sino que se desprende de la respuesta que la información proporcionada por la CNA es la única fuente de información con la que la Parte sustenta la contestación a la Denuncia Popular. Asimismo, se observa que la respuesta de la Parte no indica que la Profepa o la CNA hayan aplicado sanciones a persona alguna, y afirma que no se declaró la emergencia ambiental que los denunciantes pretendían por considerarla una medida innecesaria.

Por las razones procesales que más adelante se detallan, el Secretariado no puede establecer cuál es el punto de vista actual de los Peticionarios a la luz de la Respuesta de la Parte, en particular, respecto de si estiman que de la contestación a la Denuncia Popular se desprende que Profepa atendió “con la profundidad necesaria” el fondo del problema ambiental planteado sobre el Lago de Chapala, que es el asunto

34. Páginas 25 y 32 de la respuesta.

planteado en la petición. El Secretariado tampoco puede obtener y considerar la opinión de los Peticionarios sobre si el “análisis técnico de la CNA” y demás “información recabada” por la Parte con relación a el problema ambiental del Lago de Chapala, sea a juicio de los Peticionarios, aplicación efectiva de la legislación ambiental en términos de la verificación de los hechos y su evaluación, como plantean en su petición que debe darse para que se aplique de manera efectiva la legislación ambiental.

Por otra parte, el Secretariado observó que la legislación de la Parte no establece expresamente en qué casos se debe declarar una emergencia ambiental. De conformidad con dicha legislación, la Parte tiene cierta discrecionalidad para resolver sobre la declaratoria de una emergencia ambiental. De los artículos 5, 6, 8, 13, 42 y 133 de la LGEEPA se desprende que cuando se trata de un asunto de competencia federal, corresponde a la Secretaría “declarar” una emergencia ambiental,³⁵ aunque para resolverla deban participar más dependencias del gobierno federal. Además, el artículo 63 del Reglamento Interior de la Semarnap creó la Dirección General de Emergencias Ambientales, como unidad

35. El artículo 5 de la LGEEPA establece materias de exclusiva jurisdicción federal. Entre éstas se encuentran: (i) las que afecten el equilibrio ecológico de dos o más entidades federativas (fracción VII); y (ii) “la prevención y el control de emergencias y contingencias ambientales, cuando la magnitud o gravedad de los desequilibrios a los ecosistemas o de los daños reales o potenciales lo haga necesario” (fracción IX). El artículo 6 de la LGEEPA dispone que es materia local (estatal o municipal) “la prevención y el control de emergencias ecológicas y contingencias ambientales, en forma aislada o participativa con la Federación, cuando la magnitud o gravedad de los desequilibrios ecológicos o daños al ambiente no rebasen el territorio de la entidad federativa o del municipio, no hagan necesaria la acción exclusiva de la Federación” (fracción III). Por lo tanto, cabe concluir que declarar una emergencia con relación al Lago de Chapala, por involucrar varias entidades federativas, es de exclusiva competencia federal. El artículo 8 de la LGEEPA establece que corresponde a la Secretaría: (i) “Aplicar, en la esfera de su competencia, esta Ley, sus reglamentos y las normas técnicas ecológicas que expida y vigilar su observancia” (fracción II); (ii) “realizar las distintas acciones que le competen a fin de preservar, proteger, y restaurar el equilibrio ecológico y el ambiente ...” (fracción IV); (iii) “formular y desarrollar programas para preservar y restaurar el equilibrio ecológico y propiciar el manejo integral de los recursos naturales” (fracción V); y (iv) “proponer al Ejecutivo Federal, la adopción de las medidas necesarias para la prevención y control de contingencias ambientales y aplicarlas en el ámbito de su competencia” (fracción XVI). Asimismo, la Secretaría está obligada a mantener “un sistema permanente de información y vigilancia sobre los ecosistemas y su equilibrio en territorio nacional ...” (artículo 42), así como a realizar “un sistemático y permanente monitoreo de la calidad de las aguas, para detectar la presencia de contaminantes ... y aplicar las medidas que procedan o, en su caso, promover su ejecución” (artículo 133). Según el artículo 13 de la LGEEPA, cuando se esté en presencia de emergencias, “la Secretaría de Gobernación, la Secretaría, y las demás autoridades competentes, pondrán en forma coordinada al Ejecutivo las medidas necesarias.”

administrativa dependiente de la Profepa, señalándole entre otras atribuciones, la de emitir recomendaciones para aplicar medidas preventivas, correctivas y de seguridad, para la atención de emergencias o contingencias ambientales en general. Ahora bien, declarar o no una emergencia ambiental presumiblemente sería discrecional para la Secretaría toda vez que no hay precepto alguno que le ordene hacerlo, ni indica la ley aquellos casos en que se tendría por fuerza que declarar una emergencia ambiental.

Como se ha indicado, para el Secretariado es de interés la opinión de los Peticionarios sobre la contestación a la Denuncia Popular en tanto esa contestación afecta la aseveración central de su petición: que al no resolver debidamente dicha Denuncia Popular y declarar el Lago de Chapala en emergencia ambiental, la Parte estaba incurriendo en una omisión en la aplicación efectiva de su legislación ambiental. El Secretariado estudió la posibilidad de contactar al Peticionario para aclarar esta cuestión, más no encontró fundamento para hacerlo ni en el ACAAN ni en las Directrices.

El ACAAN y las Directrices no establecen un mecanismo *ad-hoc* para aclarar en el proceso del Artículo 14 una cuestión de fondo con los peticionarios, sino que limitan al Secretariado a analizar la petición a la luz de la respuesta de la Parte. El hecho de que los Peticionarios no hayan retirado su petición al recibir la contestación a la Denuncia Popular, como lo contempla el apartado 14.2 de la *Directrices*, podría sugerir que consideran que la contestación es inadecuada y que existe aún una omisión en la aplicación efectiva de la legislación ambiental de la Parte, más no es suficiente para confirmarlo. Con base en lo establecido en el artículo 21(1)(b) del Acuerdo, el Secretariado puede solicitar información a una Parte, más no a un peticionario.³⁶ El Secretariado consideró también el apartado 3.10 de las *Directrices*, que autorizan al Secretariado a “notificar en cualquier momento al peticionario la existencia de errores menores de forma en la petición” a fin de que éstos sean rectificados. Sin embargo, es claro que la ausencia en la petición de la opinión del Peticionario respecto de la contestación de la Denuncia Popular no es un error menor de forma en la petición, ya que se trata de un hecho posterior a la petición. Por esta razón, el Secretariado consideró que tampoco tenía facultades para contactar al Peticionario con base en este apartado de las *Directrices*.

36. El artículo 21(1)(b) del ACAAN dispone:

1. A petición del Consejo o del Secretariado, cada una de las Partes, de conformidad con su legislación, proporcionará la información que requiera el Consejo o el Secretariado, inclusive:
 - b) hará lo razonable para poner a su disposición cualquier otra información que se le solicite.”

Resumiendo, la petición asevera que la Parte no aplicó de manera efectiva su legislación ambiental al no resolver la Denuncia Popular declarando una emergencia ambiental ante el presunto deterioro del ecosistema del Lago de Chapala. No obstante su retraso, la Parte afirma en la respuesta que dio cabal trámite a la Denuncia Popular y que en la misma demostró a los denunciantes que no era procedente declarar la emergencia ambiental. Como ya se mencionó, con base en la información que el Secretariado puede tomar en cuenta en su análisis conforme al artículo 15(1) del ACAAN, no le es posible determinar si una vez expedida y notificada la contestación a la Denuncia Popular, los Peticionarios coinciden con lo expresado por la Parte o si aún consideran que la Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. En particular, al Secretariado no es posible considerar en el examen de esta petición, la opinión de los Peticionarios sobre si al recabar información de la CNA, la Profepa cumplió con la verificación de los hechos correspondiente, y si consideran que al tomar esa información como base para no declarar una emergencia ambiental, y al no haber aparentemente impuesto medidas correctivas ni sanciones, la Profepa está aplicando de manera efectiva la legislación ambiental de la Parte.

Es pertinente recordar que el primer párrafo del artículo 14 del Acuerdo establece expresamente que el Secretariado “podrá examinar peticiones de cualquier persona u organización ... que *asevere* que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental ...” (énfasis añadido) y el primer párrafo del artículo 15 prevé que el Secretariado considere si una petición amerita la elaboración de un expediente de hechos “...a la luz de la respuesta dada por la Parte...”. Al no poder confirmar si ante la contestación a la Denuncia Popular, que se anexa a la respuesta de la Parte, aún fuese intención de los Peticionarios aseverar que la Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, el Secretariado considera que ha quedado impedido desde un punto de vista procesal, para llevar a cabo la consideración prevista por el artículo 15(1) en el proceso iniciado por la petición SEM-97-007. En vista de lo anterior, el Secretariado determina dar por concluido ese proceso.

V. DETERMINACIÓN DEL SECRETARIADO

El Secretariado ha revisado la petición a la luz de la respuesta proporcionada por la Parte, y determina que ha quedado impedido por razones procesales para considerar si la petición amerita la elaboración de un expediente de hechos conforme al artículo 15(1) del ACAAN, ya que la respuesta de la Parte se basa en un acto de la Parte posterior a la

presentación de la petición, pero que afecta la aseveración principal de dicha petición, y el Secretariado por razones procesales no puede considerar la opinión de los Peticionarios sobre ese acto de la Parte. Por esa razón el Secretariado da por concluido el procedimiento de la presente petición y en cumplimiento a lo dispuesto por el artículo 9.6 de la *Directrices*, explica sus razones en esta Determinación.

por: Janine Ferretti
Directora ejecutiva

c.c. Lic. José Luis Samaniego
Sra. Norine Smith, Environment Canada
Sr. William Nitze, US-EPA
Dra. Raquel Gutiérrez Nájera, Instituto de Derecho Ambiental

SEM-98-001
(GUADALAJARA)

SUBMITTER: INSTITUTO DE DERECHO AMBIENTAL

PARTY: UNITED MEXICAN STATES

DATE: 9 JANUARY 1998

SUMMARY: The Submitters allege that Mexican Federal Attorney General and the Federal Judiciary did not duly enforce the General Law on Ecological Balance and Environmental Protection (LGEEPA) in relation to the explosions in the Reforma area of the city of Guadalajara, state of Jalisco.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article
(13 SEPTEMBER 1999) 14(1) have not been met.

REV. SUB. ART. 14(1) Determination terminating the process upon
(11 JANUARY 2000) receipt of a revised submission.

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submitter(s):	Instituto de Derecho Ambiental, A.C. et al.
Concerned Party:	United Mexican States
Date received:	9 January 1998
Date of the determination:	13 September 1999
Submission I.D.:	SEM-98-001

I. PROCEDURAL HISTORY

On 9 January, 1998, the Institute for Environmental Law (*Instituto de Derecho Ambiental, A.C.*) together with some of the citizens affected by the explosions of 22 April 1992 in the Reforma sector of the City of Guadalajara, Jalisco, Mexico (the Submitters), filed a submission with the Secretariat of the Commission for Environmental Cooperation (Secretariat) under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC or Agreement). The Secretariat now reviews the submission pursuant to Article 14(1) of the NAAEC.

II. SUMMARY OF SUBMISSION

The Submitters allege that Mexico has failed to effectively enforce its environmental law with regard to the explosions of 22 April 1992 in the Reforma sector of the City of Guadalajara, Jalisco, Mexico. The Submitters indicate that the incident occurred as the result of the presence of hydrocarbons and other highly explosive substances in the underground sewer of the Reforma sector of Guadalajara. According to some official reports cited by the Submitters, the explosions killed 204 people,

injured 1,460 people and destroyed or caused major damage to 1,148 buildings, approximately.¹

The Federal Attorney General's Office (*Procuraduría General de la República*) initiated criminal proceedings against nine allegedly responsible individuals for manslaughter, injuries caused by negligence, damage to property, damage to streets and communications, inappropriate exercise of authority as a public servant and the one provided for in the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*).² The submission asserts that there have been violations of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*) with respect to Articles 14, 16, 19, 20 and 21; of Articles 182 to 188 of the LGEEPA; of Articles 6 to 11 and 18 of the Federal Criminal Code (*Código Penal Federal*); of Articles 1, 2, 4, 10, 41, 134, 135, 136, 138, 141, 144, 146, 292, 298, 299 of the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*); and of Articles 5 (1)(j)(l), 6 and 7 of the NAAEC.

While the Submitters make a number of assertions, their primary argument under Article 14 of the NAAEC, and the one we focus on in the analysis below, is that the Federal Attorney General's Office and the Federal Judiciary of Mexico (*Poder Judicial de la Federación*) failed to effectively enforce the LGEEPA by issuing a stay of proceedings with the force of *res judicata* in the criminal case arising from the aforementioned explosions, because they believe that such procedural action impeded any further investigation of the incident. The Submitters' other arguments, notably that justice has been denied because no investigation was ever conducted regarding environmental control, use of hazardous substances, release of said substances into the sewer system, and prevention measures and maintenance in those facilities, are not supported by references to particular environmental laws that presumably obligated the government to undertake such activities and for that reason we do not review them here.

III. ANALYSIS

Under Article 14(1) of the NAAEC, the Secretariat may

“ . . . consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

-
1. The Submitters question the accuracy of the official data and point out certain inconsistencies. Page 3 of the submission.
 2. Page 6 of the submission.

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party."

The threshold requirement that the submission "assert(s) that a Party is failing to effectively enforce its environmental law" is of special relevance in determining whether this submission meets the criteria for the Secretariat to review it. This document addresses this preliminary issue as the basis for the Secretariat's determination. The analysis then refers to the allegations by the Submitters with regard to Articles 5, 6 and 7 of the NAAEC.

1) Environmental law

This section is an analysis of the legal provisions that the Submitters allege Mexico has failed to enforce effectively, grouped under the following headings: allegations related to criminal procedure and allegations related to environmental crimes. For the purpose of this analysis, the starting point should be the definition provided in the Agreement itself. In Article 45(2), the NAAEC defines "environmental law" as the legal provisions of a Party the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health.³ The legal provisions cited in a submission must

3. "For purposes of Article 14(1) and Part Five:

- (a) "environmental law" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

meet this definition in order for the Secretariat to review them within the process established by Article 14 of the Agreement.

a) Allegations Related to Criminal Procedure

As mentioned above, the definition of “environmental law” in the Agreement requires that the primary purpose of the provisions regarding which a failure to effectively enforce is alleged must be the protection of the environment or the prevention of a danger to human life or health from environmental pollutants or hazardous substances. A simple reading of Articles 14, 16, 19, 20 and 21 of the Mexican Constitution; Articles 6 to 11 and 18 of the Federal Criminal Code; and Articles 1, 2, 4, 10, 41, 134, 135, 136, 138, 141, 144, 146, 292, 298, 299 of the Federal Code of Criminal Procedure, clearly shows that their primary purpose is to establish due process requirements and to regulate criminal procedure.⁴ Thus, the Secretariat is not authorized to review the allegations of the Submitters of a failure to effectively enforce such provisions. Because they are not environmental law under Article 45(2) of the Agreement, these legal provisions are beyond the scope of the submission process under Article 14 of the NAAEC.⁵

b) Allegations related to environmental crimes

Unlike the foregoing, it is clear that provisions specifying environmental crimes are, by virtue of their primary purpose, “environmental law”

(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas

in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

(b) For greater certainty, the term “environmental law” does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part”.

4. For example, Article 14 of the Mexican Constitution provides that “No law shall be applied retroactively against any person. No-one may be deprived of life, liberty or property, goods or rights except through due process before previously established courts of law. . . .” (free translation)
5. The Submitters also allege that there is a correlation between the procedural provisions they cite and Articles 5, 6 and 7 of the NAAEC. Notwithstanding the clear intention of the NAAEC to promote strengthening of government measures for enforcement, procedural guarantees and access to legal remedies, the Secretariat considers that the definition of “environmental law” for the purposes of Article 14 of the NAAEC only includes procedural provisions, when their primary purpose is environmental in nature. That is not the case here.

under the definition in Article 45(2) of the NAAEC. These provisions sanction violations of mandatory prevention and control measures that may harm human life or health and the environment.⁶

We point out at the outset that there is some uncertainty concerning whether any environmental law applies to the 1992 incident and the enforcement of that incident. There is also some uncertainty as to which environmental law applies, if one does. The reason for this uncertainty is that Articles 183 to 187 of the LGEEPA that covered environmental crimes at the time of the explosions, and that are cited by the Submitters, were revoked on 13 December 1996.⁷ Based on Article 117 of the Federal Criminal Code, which provides that the law suppressing a type of offense extinguishes the right of action, it could be alleged that prosecution for these offenses is no longer possible. From the opposite view, it could be argued that the type of offense has not been suppressed because the environmental crimes were incorporated into the Federal Criminal Code in Articles 414 to 423 simultaneously to their being suppressed from the LGEEPA. However, the constitutional principle that prohibits the retroactive application of a law against any person would seem to prevent the application of criminal provisions established in 1996 to events that took place in 1992. As a final point, it could be argued that there is no legislative intention to cease penalizing such conducts as crimes, but rather it is clear that society maintains its interest in sanctioning them, so what would be unconstitutional is to prevent prosecution of the crimes previously covered by the LGEEPA, by retroactively applying the revocation Decree against the interest of society.

In short, as regards the scope of the Article 14 process, the Secretariat considers that the provisions cited by the Submitters related to criminal procedure are not environmental law for the purpose of Article 14 of the NAAEC. As for the environmental crimes cited by the Submitters, their content meets the definition of environmental law. However, because

6. For example, Article 415 of the Federal Criminal Code states that "A prison term of three months to six years and a fine of the equivalent of one thousand to twenty thousand days of the current general minimum daily wage in the Federal District shall be imposed upon whoever: I Without authorization of the competent federal authorities or in violation of the terms under which it was granted, undertakes any activity with hazardous materials or wastes that causes or may cause harm to public health, natural resources, fauna, flora or ecosystems. . . ." (free translation)

7. The second transitory Article of the Reform Decree published on December 13, 1996 in the Official Gazette of the Federation (*Diario Oficial de la Federación*) states that "Articles 183 to 187 of the General Law on Ecological Equilibrium and Environmental Protection, Article 58 of the Forestry Law, and Articles 30 and 31 of the Federal Hunting Law are hereby revoked." (free translation)

we believe that the submission should be dismissed on other grounds, we do not discuss further the issue of the applicability of the revoked Articles 183 to 187 of the LGEEPA, but simply note that there is an unresolved question concerning the identity of the environmental law that covers the incident that is the subject of the submission.

We now turn to the key substantive assertion of the submission and explain why we are not persuaded that this assertion merits continued consideration under Article 14 of the NAAEC. The submission argues that a failure to effectively enforce environmental law took place in early 1994, when a stay of proceedings was issued and confirmed with regard to the prosecutions related to the 1992 explosions. The Submitters argue that staying the criminal proceedings with the force of *res judicata*, barred any further investigation of the incident, as well as the identification and punishment of whoever was responsible for the incident; in other words, that the effective enforcement of environmental law with regard to the incident of 1992 was thereby impeded.

The fact that the explosion itself occurred in 1992 raises a temporal issue. Pursuant to both Article 14 of the NAAEC, and the *Vienna Convention on the Law of Treaties*, the process of reviewing submissions on effective enforcement of environmental law shall not be applied retroactively. Article 28 of the 1969 Vienna Convention on the Law of Treaties stipulates that “unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party.”

The Secretariat interprets Article 14 of the NAAEC as requiring that the failure to effectively enforce environmental law argued in a submission take place while the Agreement is in force. It is not required that the events referred to by the Submitters in their allegations occurred after 1st January 1994, when the NAAEC entered into force. However, if they took place before, there needs to have been a failure to effectively enforce environmental law after 1st January 1994 in order to be considered in the review of a submission. The Submitters claim that this is the case here—that when the Agreement entered into force, the authorities had the power and the responsibility to prosecute environmental crimes related to the explosions of 22 April 1992. Although the Secretariat is not governed by the principle of *stare decisis* in making its determinations, it should be mentioned that in previous determinations it has stated “. . . the possibility that a present duty to enforce may originate from,

in the language of the Vienna Convention, a situation which has *not* ceased to exist. . . .”⁸

It is important to highlight the precise nature of the Submitters’ assertion here. The Submitters’ assertion, at least as we understand it, is that the dismissal of the case against the nine charged individuals operated as *res judicata* legally to prevent the Party from further investigating the incident or from bringing charges against other culpable parties. Based on our understanding of Mexican law, this assertion is incorrect. It is our understanding that the only legal effect of *res judicata* in this case was to terminate that particular criminal proceeding and to prevent a new trial of the same individuals for the same offenses. The termination of the proceeding did not have the legal effect of barring further investigation of the facts, nor did it impede initiating new proceedings against others presumably responsible. Thus, following dismissal of the case the Party retained the ability to investigate the incident and pursue legal action against other allegedly culpable parties. As a result, the assertion that the dismissal of this criminal proceeding in itself constitutes a failure to enforce does not merit further consideration under Article 14 of NAAEC because it did not prevent enforcement action in the way the Submitters apparently believe it did.

We note that we do not address in this Determination two apparently related questions. First, there is the issue of whether the dismissal is potentially a failure to enforce with respect to the nine individuals initially charged. The Submitters do not raise this issue as far as can tell and we do not address it. Similarly, the Submitters do not raise and we do not address the issue of whether failing to prosecute other individuals constitutes a failure to enforce.

2) Allegations related to the NAAEC

The Submitters also cite Articles 5 (1)(j)(l), 6 and 7 of the NAAEC, related respectively to government action for the enforcement of environmental laws and regulations, private access to remedies and procedural guaran-

8. From SEM-96-001, Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 7 June 1997. See also SEM-97-001, Notification of the Secretariat to Council of the reasons why it considers the development of a factual record is merited in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 27 April 1998.

tees. The Secretariat's view is that, as a general matter, to the extent that these articles create obligations on the part of the Parties (Canada, Mexico and the United States)⁹ the remedy provided under the Agreement for a Party's purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for nongovernmental organizations and individuals relating to allegations that a Party is not effectively enforcing its environmental laws. Only if an individual or nongovernmental organization could seek enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of a Party would these provisions be potentially susceptible to a submission under Article 14 of the Agreement. Because the Submitters do not indicate that they have sought enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of the Party or communicated that matter to the Party, we cannot conclude that the allegations that those provisions are not being enforced effectively satisfy the criteria under Article 14(1) of the Agreement.

In short, the Secretariat considers that the allegations that Articles 5(1)(j)(l), 6 and 7 of the NAAEC have not been enforced effectively, do not satisfy the criteria under Article 14(1) of the Agreement.

IV. SECRETARIAT DETERMINATION

The Secretariat has reviewed the Submission in accordance with Article 14(1) of the NAAEC, and considers that it does not meet the criteria established therein because, among other considerations, the submission fails to connect the incident with a violation of applicable environmental law. For the reasons set out above, the Secretariat cannot conclude with certainty that the failures indicated by the Submitters in this submission are failures to effectively enforce applicable Mexican environmental law incurred by the Party during the legal force of the Agreement.

Pursuant to Section 6.1 of the Guidelines, the Secretariat notifies the Submitters that it will not further review the submission. However,

9. For example, the first paragraph of Article 5 of the NAAEC states that "With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate government action, subject to Article 37. . . ."

in accordance with Section 6.2 of the Guidelines, the Submitters have 30 days from the receipt of this determination to provide the Secretariat with a submission that meets the criteria of Article 14(1) of the NAAEC.

Secretariat of the Commission for Environmental Cooperation

per: David L. Markell
Head, Submissions on Enforcement Matters Unit

c.c. Ms. Janine Ferretti, CEC Executive Director

Montreal, a 11 de enero de 2000

POR CORREO CERTIFICADO Y ELECTRÓNICO

Instituto de Derecho Ambiental
Att. Dra. Raquel Gutiérrez Nájera
Isla Filipinas No. 1935
Fraccionamiento Jardines de la Cruz
C.P. 44950
Guadalajara, Jalisco
México

Asunto: **Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los Artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte**

Peticionario: Instituto de Derecho Ambiental

Parte: Estados Unidos Mexicanos

Fecha: 15 de octubre de 1999

No. de petición: SEM-98-001

Estimados peticionarios:

Hacemos referencia a la petición revisada presentada al Secretariado de la Comisión para la Cooperación Ambiental ("Secretariado") el día 20 de octubre de 1999, en conformidad con el apartado 6.2 de las Directrices para la Presentación de Peticiones Relativas a la Aplicación Efectiva de la Legislación Ambiental ("Directrices"). El 13 de septiembre de 1999 el Secretariado determinó que la petición original no cumple con los requisitos establecidos en el artículo 14(1) del ACAAN, entre otras consideraciones, porque no logra relacionar el incidente con una violación de la legislación ambiental aplicable.

El Secretariado ha analizado la petición revisada y sus anexos, que repite la mayoría de los argumentos esbozados en la petición original e invoca algunas disposiciones de la Ley General del Equilibrio Ecológico y la Protección al Ambiente vigente antes de la reforma de 1996, respecto de

las cuales, los Peticionarios consideran que México está incurriendo en omisiones en su aplicación efectiva. De nueva cuenta, el Secretariado no puede concluir que las omisiones señaladas por los Peticionarios se refieran a la aplicación efectiva de la legislación ambiental mexicana aplicable estando en vigor el Acuerdo. Las aseveraciones que se hacen en la petición revisada o no se basan en legislación ambiental aplicable a las propias aseveraciones, o no señalan omisiones en la aplicación efectiva de la legislación ambiental a partir del 1 de enero de 1994, cuando el ACAAN entró en vigor¹. En su mayoría, las aseveraciones se basan en disposiciones que establecen definiciones y atribuciones genéricas. Al hacer esas aseveraciones, sin embargo, no se indica la correlación con disposiciones sustantivas aplicables en el ámbito temporal del ACAAN, que supuestamente no estuvieran siendo aplicadas de manera efectiva en el marco de esas definiciones y atribuciones. Por lo anterior, la petición revisada no modifica las conclusiones del Secretariado –expresadas en su Determinación del 13 de septiembre de 1999– en el sentido de que la petición no cumple con los criterios establecidos en el Artículo 14(1) del ACAAN.

En cumplimiento de lo dispuesto por los apartados 6.1 y 6.3 de las Directrices, este Secretariado notifica al Peticionario que el procedimiento respecto de la petición SEM-98-001 ha terminado.

Atentamente,

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Jefe de la Unidad sobre Peticiones Ciudadanas
c.c. José Luis Samaniego, Semarnap
William Nitze, US-EPA
Norine Smith, Environment Canada
Janine Ferretti, Directora Ejecutiva del Secretariado

1. Es preciso repetir aquí la siguiente aclaración sobre este asunto vertida en la Determinación del Secretariado del 13 de septiembre de 1999: "El Secretariado interpreta el artículo 14 del ACAAN en el sentido de requerir que la omisión en la aplicación efectiva de la legislación ambiental que se argumente en una petición, sea una omisión que esté ocurriendo o cuyos efectos persistan durante la vigencia del Acuerdo. Ahora bien, no es condición necesaria que los hechos a los que se refieran los alegatos de los Peticionarios hayan ocurrido después del 1º de enero de 1994 cuando entró en vigor el ACAAN. Pero si ocurrieron antes, debe haber habido una omisión en la aplicación efectiva de la legislación ambiental después del 1º de enero de 1994 para considerarlos en la revisión de una petición."

SEM-98-002
(ORTIZ MARTÍNEZ)

SUBMITTER: C. HÉCTOR GREGORIO ORTIZ MARTÍNEZ

PARTY: UNITED MEXICAN STATES

DATE: 14 OCTOBER 1997

SUMMARY: The submission alleged “improper administrative processing, omission and persistent failure to effectively enforce” environmental law in connection to a citizen complaint filed by the Submitter.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(23 JUNE 1998) have not been met.

REV. SUB. ART. 14(1) Determination terminating the process upon
(18 MARCH 1999) receipt of a revised submission.

Secretariat of the Commission for Environmental Cooperation

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

Submission No.: SEM-98-002
Submitter(s): C. Héctor Gregorio Ortiz Martínez
Party: United States of Mexico
Date: 14 October 1997

I. BACKGROUND

On 14 October 1997, the Submitter forwarded to the Secretariat of the North American Commission for Environmental Cooperation (“the Secretariat”) a submission under of articles 14 and 15 of the North American Agreement for Environmental Cooperation (“the NAAEC” or “the Agreement”). Article 3.3 of the Guidelines for Submissions on Enforcement Matters (“the Guidelines”) establishes that submissions should not exceed 15 pages of typed, letter-sized paper, excluding supporting information. Since the submission exceeded this limit, the Secretariat requested that the Submitter provide a revised version in accordance with the above-mentioned provision.

On 10 February 1998, the Secretariat acknowledged receipt of the revised submission delivered to the Secretariat’s liaison office in Mexico City. The Secretariat also informed the Submitter that, under Article 3.1 of the Guidelines, submissions must be delivered to the Secretariat’s offices located in Montreal, Quebec, Canada.

In accordance with Article 14(1) of the NAAEC, the Secretariat hereby records its determination, in relation to the above-mentioned submission.

II. SUMMARY OF THE SUBMISSION

The submission alleges “that there has been a lack of due process, omissions and persistent non-compliance in the effective enforcement of current environmental legislation” on the part of the Ministry of the Environment, Natural Resources and Fisheries (“Semarnap”) and the Federal Attorney for Environmental Protection (“Profepa”) of the United States of Mexico (“Mexico”), in relation to a citizen denunciation (“denuncia popular”) made by the Submitter. The Submitter alleges procedural violations during various processes described in the submission, which are related to forestry operations in “El Taray,” in the state of Jalisco.

The submission indicates that an Inspection Visit was carried out on the above-mentioned site, after a Technical Audit order had been issued. As a result, sanctions were imposed on the person against whom the “denuncia popular” had been filed, and under the specific circumstances, sanctions were also imposed upon the Submitter himself. The Submitter alleges that neither the Technical Audit nor the Inspection Visit constitutes an adequate response to the “denuncia popular.” The Submitter also claims that the authorities have not issued “a technical opinion regarding harm, [which would be] deemed as [admissible] evidence if adduced in a trial, under the provisions of Article 194 of the [Mexican] Ecological Balance and Environmental Protection Law (LGEEPA), which was in effect at the beginning of said proceedings.” The Submitter also states that he has challenged the imposed sanctions and that the proceeding is under appeal, although he claims that this does not preclude the Secretariat’s consideration of the submission.

III. ANALYSIS

Under Article 14(1), the Secretariat may:

Consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

Noteworthy amongst the evaluation criteria established in Article 14(1) is the threshold requirement that the submission be related to "environmental law." The Secretariat will now address this preliminary matter to determine whether the submission meets the necessary requirements to be considered by the Secretariat. Article 45(2) defines the term "environmental law" as follows:

For purposes of Article 14(l) and Part Five:

- (a) "**environmental law**" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areasin the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "**environmental law**" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

Although the Secretariat has concluded that the Submission makes many allegations that could not be construed as relating to “environmental law,” the Secretariat has also concluded that there are some claims that could potentially meet the threshold requirement of being assertions of a failure to effectively enforce “environmental law.” The Secretariat now turns to the latter claims.

1) Failure to effectively enforce the LGEEPA in relation to the “denuncia popular” procedures

The Submitter argues that Mexico has failed to effectively enforce environmental legislation with relation to the “denuncia popular” pursued by the Submitter through writs delivered on 14 January 1994 and 6 October 1995 to the [Mexican] Department of Agriculture and Water Resources and to the Semarnap (pages 1 and 5 of the submission).

Firstly, the Secretariat observes that the submission and its annexes do not sufficiently support the claim that the documents filed by the Submitter on 14 January 1994 and 6 October 1995, constitute a “denuncia popular.” The term “denuncia popular” is not used in such submissions, nor is it indicated that the complaint was made under the provisions of the LGEEPA. Furthermore, the documents do not relate to a “fact, act or omission that resulted or may result in ecological imbalance or harm to the environment or natural resources, or that contravened the provisions of the LGEEPA and other legal codes regulating environmental protection and ecological balance preservation and restoration,” as provided in Article 204 of the LGEEPA in relation to the “denuncia popular” procedure.

Notwithstanding the above, the Secretariat has examined the alleged “denuncia popular” presented by the Submitter, to determine whether it is related to “environmental law” for the purposes of its Article 14(1) review. In the opinion of the Secretariat, it is evident that the provisions of the LGEEPA establishing the “denuncia popular” procedures qualify as “environmental law” as defined in the above-mentioned Article 45(2). Nevertheless, it is equally clear for purposes of the NAAEC, that the facts addressed in the “denuncia popular” shall in each specific case comply with the provisions of Article 45(2). A “denuncia popular” may refer to violations of Mexican environmental laws as well as to other threats to the environment. It is the opinion of the Secretariat that the definition of “environmental law” in Article 45(2) implies that if procedural provisions such as those establishing the “denuncia popular”

procedure, relate to substantive provisions that are clearly environmental in nature, they must also qualify as “environmental law” under Article 45(2).

In the present case, the Secretariat notes that the facts reported by the Submitter as a “denuncia popular” in the above-mentioned documents are not relevant to “i) prevention, control or abatement of a spill, discharge or emission of environmental pollutants, ii) control of hazardous or toxic chemicals, substances or waste and the dissemination of relevant information, or iii) protection of wildlife, including endangered species and their habitat, and natural protected areas.” Therefore, the Secretariat cannot conclude that those complaints of the Submitter relate to environmental protection. On the contrary, the complaints are related to the management of commercial forestry resources, a subject which, under paragraph (b) of the above-mentioned the NAAEC article, is expressly excluded from the definition of “environmental law.” The Submitter refers to this definition and argues that the complaint “is also related to wildlife species or forestry resources, the exploitation of which has been restricted by the authorities” (page 14 of the submission). In this regard, the Secretariat has examined the submission, the documents attached, and particularly the alleged “denuncia popular” and the Technical Audit Certificate in question. The Secretariat again notes that the above are related to the management of commercial forestry resources and do not relate to environmental protection. Therefore, this complaint cannot constitute a matter of “environmental law” as defined in Article 45(2).

2) *Failure to effectively enforce the LGEEPA, in relation to the issuance of a technical opinion on harm caused as a result of violations of LGEEPA provisions*

The Submitter claims that environmental authorities did not issue a technical opinion on harm in accordance with Article 194 of the LGEEPA, as that provision existed at the time of the “denuncia popular” (page 6 of the submission). Article 204 of the current LGEEPA, which contains the same text as the former Article 194, stipulates that parties concerned may request that Semarnap issue a technical opinion concerning harm caused as a result of violations of the LGEEPA. As regards these allegations, the Secretariat has found no evidence in the submission or in the attached documents that the Submitter requested a technical opinion under said provisions.

3) *Failure to effectively enforce the [Mexican] Forestry Law, its Regulations and the Federal Administrative Procedures Law*

The Submitter has made various allegations involving “procedural violations” (see pp. 2, 3, 7, etc. of the submission). In this regard, it should be noted that the process established in articles 14 and 15 of the NAAEC does not constitute a forum in which to revisit a Party’s internal administrative proceeding; rather it is strictly framed within the obligations undertaken by the Parties signatory to the Agreement to effectively enforce their “environmental laws.” In the context of the current submission, the provisions of the Forestry Law, its Regulations and the Federal Administrative Procedures Law cited by the Submitter do not constitute “environmental law” for the purposes of Article 14(1) of the NAAEC. In light of the above, the assertions regarding omissions in the effective enforcement of said provisions cannot be the subject of analysis on the part of the Secretariat, within the framework of the process established in articles 14 and 15 of the NAAEC.

4) *Additional considerations by the Secretariat*

The Secretariat is not required to examine all the questions raised by the Submitter until it has determined that the submission meets the requirements of Article 14(1) of the NAAEC, including the threshold requirement that submissions relate to “environmental law.” However, we believe it is important to refer to a type of allegation which in the opinion of the Secretariat is not within its jurisdiction nor contemplated by the objectives listed in Article 1 of the NAAEC. The submission in question contains accusations against various government officials in different agencies and at different levels of government, which in the opinion of the Secretariat are inappropriate for this forum. The process established by the NAAEC in articles 14 and 15 aims at promoting cooperation amongst the Parties for environmental protection in North America. It should be stressed that this process, designed to examine submissions related to the failure to effectively enforce “environmental law,” is not intended as a mechanism to review allegations respecting the performance of individual public officials. This process solely addresses the actions of the authorities as institutions, and the specific facts and actions that are related to the effective enforcement of “environmental law,” as defined in the Agreement.

IV. DETERMINATION BY THE SECRETARIAT

The Secretariat has examined the submission in accordance with Article 14(1) of the NAAEC and has determined that it does not meet the requirements established therein, because it does not refer to a “failure to effectively enforce environmental law,” for the reasons set out above. Under Article 6.1 of the Guidelines, the Secretariat hereby notifies the Submitter that it will not proceed to examine the submission. In accordance with Article 6.3 of the Guidelines, the Submitter has 30 days to file a submission that meets the criteria established in Article 14(1).

per: Janine Ferretti
Interim Executive Director

(23 June 1998)

18 de marzo de 1999

POR CORREO CERTIFICADO

C. Héctor Gregorio Ortiz Martínez
Javier Mina No. 1081
C.P. 44800
Sector Libertad
Guadalajara, Jalisco
México

Asunto: **Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte**

Peticionarios: C. Héctor Gregorio Ortiz Martínez
Parte: Estados Unidos Mexicanos
Fecha: 14 de octubre de 1997
No. de petición: SEM-98-002

La presente hace referencia a la petición revisada que el Peticionario presentó al Secretariado de la Comisión para la Cooperación Ambiental ("Secretariado") el día 4 de agosto de 1998, en conformidad con el apartado 6.2 de las Directrices para la Presentación de Peticiones Relativas a la Aplicación Efectiva de la Legislación Ambiental ("Directrices"). El 23 de junio de 1998 el Secretariado determinó que la petición original no cumple con los requisitos establecidos en el artículo 14(1) del ACAAN, ya que no se refiere a "omisiones en la aplicación efectiva de la legislación ambiental".

El Secretariado ha analizado la petición revisada, que difiere de la petición original en cuanto a que contiene denuncias adicionales respecto del desempeño de algunos funcionarios públicos relacionado con el aprovechamiento maderable materia de la petición. Sin embargo, ninguno de los nuevos argumentos en la petición revisada modifica las conclusiones del Secretariado en su Determinación del 23 de junio de 1998. Asimismo, el Secretariado ha analizado los argumentos

planteados en el escrito que acompaña a la petición revisada, sin perjuicio de que formalmente éstos no son parte de la petición revisada, y ha determinado que dichos argumentos tampoco modifican las conclusiones del Secretariado. Por las razones vertidas en la Determinación del Secretariado del 23 de junio de 1998, la petición revisada no cumple con los criterios establecidos en el artículo 14(1) del ACAAN.

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica al Peticionario que el procedimiento respecto de la petición SEM-98-002 ha terminado.

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Jefe de la Unidad de Peticiones Ciudadanas

c.c. Lic. José Luis Samaniego, Semarnap
Ms. Norine Smith, Environment Canada
Mr. William Nitze, US-EPA

SEM-98-003
(GREAT LAKES)

SUBMITTER: DEPARTMENT OF THE PLANET EARTH,
ET AL.

PARTY: UNITED STATES OF AMERICA

DATE: 27 MAY 1998

SUMMARY: The Submitters assert that the US Environmental Protection Agency's regulations drafted and programs adopted to control airborne emissions of dioxins and furans, mercury and other persistent toxic substances from solid waste and medical waste incinerators violate and fail to enforce both: 1) US domestic laws, and; 2) the ratified US-Canadian treaties designed to protect the Great Lakes that are partly referenced in the US Clean Air Act.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(14 DECEMBER 1998) have not been met.

REV. SUB. ART. Determination that criteria under Article 14(1)
14(1) AND 14(2) have been met and determination pursuant
(8 SEPTEMBER 1999) to Article 14(2) that the submission merits
requesting a response from the Party.

14 December 1998

BY FAX AND REGISTERED MAIL

Mr. Erik Jansson, Exec. Dir.
Department of the Planet Earth
701 E Street, S.E., Suite 200
Washington, D.C. 20003
Phone: (202) 543-5450
Fax: (202) 543-4791

Re: Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submission I.D.: SEM-98-003

Submitter(s): Department of the Planet Earth;
Sierra Club of Canada;
Friends of the Earth;
Washington Toxics Coalition;
National Coalition Against Misuse of Pesticides;
WASHPIRG;
International Institute of Concern for Public Health
Dr. Joseph Cummins; and
Reach for Unbleached

Concerned Party: United States of America

Date Received: May 27, 1998

I- INTRODUCTION

On May 27, 1998, the Submitters 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 non-governmental 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)).

This is the Secretariat's determination as to whether the submission meets the requirements of Article 14(1) so that it may be considered by the Secretariat.

II- SUMMARY OF THE SUBMISSION

The submission concerns airborne emissions of dioxin and mercury into the Great Lakes. It alleges that solid waste and medical incinerators in the United States are substantial sources of such emissions, and that a significant percentage of these emissions could be eliminated without economic sacrifice and, indeed, steps to eliminate these emissions could produce substantial economic benefits.¹ The submission further alleges that U.S. Environmental Protection Agency (EPA) regulations governing emissions from such incinerators conflict with the domestic laws (statutes) of the United States and with certain provisions of ratified U.S.-Canadian agreements because the regulations authorize greater emissions than contemplated by the statutes and agreements. The submission claims that these purported inconsistencies constitute a failure of "enforcement," thereby bringing the inconsistencies within the scope of Article 14.

III- ANALYSIS

A. Overview

Article 14 of the NAAEC directs the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the requirements of Article 14(1). When the Secretariat determines that the Article 14(1) requirements are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission.

1. Submission at 2.

As the Secretariat has noted in previous Article 14(1) determinations,² Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.³

The Secretariat nevertheless has determined that the Article 14 process is not an appropriate forum for the issues raised in Submission 98-003. Article 14(1) reserves the Article 14 process for claims that a Party is “failing to effectively enforce its environmental law. . . .” We conclude that the Party’s conduct at issue here does not qualify as “enforcement” and therefore such conduct is not subject to review under Article 14.⁴

B. The Governing Legal Framework

Based on our review of the *Agreement*, we conclude that whatever the outer bounds of “enforcement” under Article 14(1) may be, enforcement does not include government standard-setting. As two distinguished commentators have noted, the NAAEC’s purpose is not to set environmental standards for the Parties. Instead, the Parties intended to reserve to themselves the right to establish their own standards.⁵

Article 3 of the *Agreement* supports the interpretation that government standard-setting is outside the purview of Article 14. It provides that the *Agreement* “[r]ecogniz[es] the right of each Party to establish its own levels of domestic environmental protection.”⁶ Thus, Article 3 is

2. See e.g., Submission No. SEM-97-005 (May 26, 1998).

3. See e.g., Submission No. SEM-97-005 (May 26, 1998).

4. We do not reach the issue of whether the international agreements at issue here qualify as “environmental law” for purposes of Article 14 because of our interpretation of the term “enforcement.” Further, the Secretariat, by its determination, is not in any way questioning the importance of the environmental and public health issues the submission raises. See e.g., 33 U.S.C. § 1218 (a)(1)(A) (describing the Great Lakes as a “valuable natural resource”); U.S. EPA, Deposition of Air Pollutants to the Great Waters: Second Report to Congress (June 1997); International Joint Commission, Ninth Biennial Report on Great Lakes Water Quality, 1, 35-40 (1997). Instead, again, the determination only reflects the Secretariat’s judgment that Article 14 is not the appropriate forum in which to raise these issues, at least not in the context in which the submission raises them.

5. Pierre Marc Johnson and André Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law* 153, 171 (Island Press 1996) (noting the distinction between claims that regulations are not enforced and the claim that regulations are inadequate because they are insufficiently stringent). Under some circumstances, a Party concerned about issues related to standard-setting may initiate consultations under NAFTA Article 1114. See Article 10(6).

6. Article 3 also provides that “each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve these laws and regulations.”

strong evidence that the Parties did not contemplate that the Article 14 citizen submissions process would be available for challenges to a Party's exercise of its standard-setting authority.⁷

Article 5 of the Agreement, entitled "Government Enforcement Action," supports the conclusion that Article 14 in particular was not intended to encompass Party standard-setting activity. Article 5 provides an illustrative list of governmental actions that qualify as "enforcement" activity. Viewed as a whole, the activities listed are geared more toward promoting compliance with governing legal standards than to establishing such standards.⁸

Our view, in sum, is that the better interpretation of the Agreement is that the Article 14(1) requirement that a submission assert a failure to "effectively enforce" bars the Secretariat from considering disputes concerning "standard-setting" under Article 14.⁹ Article 14 focuses, instead, on whether, once established, such standards are effectively enforced.

We recognize that, as others have noted, drawing the line between "standard-setting" and "enforcement" of the law may be blurred on occasion and difficult to discern at the margins.¹⁰ Perhaps the paradigmatic case for the sort of standard-setting that is beyond the purview of Article 14 involves a Party's enacting legislation that establishes specific environmental standards. It seems indisputable that Article 14 is not available as a vehicle to challenge the standards adopted in such legislation.

7. See also Submission SEM-95-001 (Sept. 21, 1995).

8. There is some ambiguity in the list in the sense that some of the items included, such as "using licenses, permits, or authorizations," may have dual compliance and standard-setting dimensions. See Article 5(1)(I). This is the case for regulations as well. The list is also not intended to be exclusive in nature.

9. See Submission #95-001 (Sept. 21, 1995) (noting that "[w]hile the Submitters may contend that . . . legislative action amounts to a breach of the obligation to maintain high levels of protection, Articles 14 and 15 do not repose in the Secretariat the power to explore aspects of the *Agreement* not arising from a failure to enforce environmental law.") We do not believe that Article 45(1), which defines effective enforcement, at least in part, by discussing what it is not, is helpful to the interpretation of enforcement in the context of this submission.

10. See e.g., *American Automobile Manufacturers Association et al. v. John P. Cahill, et al.*, 152 F.3d 196 (2nd Cir. 1998) (noting that the distinction between "standards" and "enforcement mechanism" "can be less than a bright line in some cases . . ."). See also Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 Va. J. Int'l L. 721, 758 (1996) (discussing issues relating to the definition of "enforcement" under the NAAEC and noting that "[i]n the complex regulatory system, enforcement cannot be readily separated from lawmaking in practice.")

On the other hand, a submission with three key elements perhaps would be the paradigmatic submission involving “enforcement:” 1) a Party’s law establishes specific environmental standards; 2) regulated entities (i.e., parties subject to such standards) are allegedly operating in violation of such standards; and 3) the Party has allegedly failed to effectively enforce this law (e.g., by allegedly allowing violations to occur without using available enforcement authorities to curtail them). Many variations on this paradigm undoubtedly would fall within the ambit of Article 14 as well.¹¹

In this Determination, we consider the question as to where the line should be drawn between standard-setting and enforcement in the context of a Party’s promulgation of regulations that establish substantive emission or discharge standards.

C. Article 14(1) Analysis of the Party’s Activities Involved in this Submission

The Submitters’ claim, as we understand it, contains three elements: 1) several provisions in the Clean Air Act, Pollution Prevention Act, and Great Lakes Agreement,¹² among other statutes and agreements, obligate the U.S. EPA to promulgate regulations that will result in the “virtual elimination” and “zero discharge” of certain pollutants, including mercury and dioxin; 2) EPA regulations are inconsistent with these provisions because the regulations will allow for certain waste incinerators to continue to emit at “excessive” levels; and 3) these regulations, by failing to comply with the governing law, constitute a “failure to effectively enforce.”

In our judgment, the submission before us falls on the “standard-setting” side of the line. The critical analytical point, in our view, is that even if the Submitters’ claim is accurate, the Party has created an

11. See e.g., Article 5.

12. With respect to U.S. domestic law, the submission claims that Clean Air Act sections 7401(c), 7415(a)(b), and 7429(a)(2) and the entire *Pollution Prevention Act* have not been effectively enforced. Submission at 8, 9. In Appendix 2, the Submitters cite to a variety of other Clean Air Act provisions as well. The submission alleges that the U.S. EPA regulatory program also is inconsistent with the “virtual elimination of persistent toxic substances” and “zero emission” components of the *Great Lakes Water Quality Agreement (1972 and 1978)*, the *Protocol of 1987* and the *Strategy of 1997*. Finally, the Submission asserts that the regulatory program violates the *1986 Agreement Between the Government of Canada and the Government of the United States Concerning Transboundary Movement of Hazardous Waste*. The submission claims that these international agreements are part of U.S. domestic law because they have been ratified. Submission at 8, 9.

inconsistency in its substantive emission standards.¹³ We do not believe that adoption of regulations that contain emission standards that allegedly are less stringent than the standards established in governing legislation constitutes a “failure to effectively enforce” for purposes of Article 14.¹⁴ Instead, the regulations in such a case would represent an inconsistency in the governing legal standards. Addressing purported inconsistencies of this sort is, in our view, beyond the scope of Article 14.

In closing, we note that a variety of strategies may have the ultimate effect of undermining a Party’s environmental standards; yet, even though the environmental and health consequences of different strategies may be comparable, one strategy may subject a Party to Article 14 while another may not. Here, for example, the Party’s purportedly allowing excessive emissions through promulgation of regulations is a form of “standard-setting” activity (albeit in the Submitters’ view a flawed one) and therefore it is not within the reach of Article 14. In contrast, a Party’s failure to effectively enforce against regulated parties that are violating and thereby exceeding legally enforceable standards would be subject to Article 14. For the reasons provided above, we are of the view that the limited scope of Article 14 jurisdiction requires the Secretariat to draw such a line.

13. We do not reach the issue of whether the Submitters’ claim is accurate. The Secretariat reviewed the Petition and the Appendices carefully and had difficulty, *inter alia*, determining the precise level of emissions mandated by the statutes cited by the Submitters. Thus, the Secretariat found it difficult to evaluate the Submitters’ claim that the domestic legislation and EPA regulations are inconsistent. For example, the Submitters cite section 7401(c) of the Clean Air Act as one section EPA has violated with its regulations. This section does not appear to establish emission standards, providing simply that: “A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.”

14. A Party’s adoption of regulations that are inconsistent with the governing statute may be addressable in a different forum. Under U.S. environmental law, for example, adoption of regulations that are inconsistent with the governing statute would likely be subject to judicial review. Indeed, while the courts in the United States grant agencies such as EPA considerable deference in the application of statutory responsibilities, see e.g., *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), “*Chevron* does not seem to have insulated agency interpretations of statutes from effective judicial review.” Percival, Miller, Schroeder, and Leape, *Environmental Regulation: Law, Science, and Policy* 760 (Little Brown, 2nd ed. 1996). We simply are stating that such issues are not subject to Article 14.

We emphasize the narrowness of our determination in drawing a distinction between standard-setting and enforcement in the context of regulations. We are not concluding that all regulations are necessarily beyond the scope of Article 14. For example, we voice no opinion here as to whether a submission alleging that a Party’s regulations inappropriately narrow the scope of EPA inspection or monitoring authority might qualify for review under Article 14(1). See Article 5(b). Cf. Submission SEM-95-002 (December 8, 1995).

Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, 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) within 30 days after receipt of this Notification.

Yours truly,

Secretariat of the Commission for Environmental Cooperation

per: Janine Ferretti
Interim Executive Director

c.c. Mr. William Nitze, US-EPA
Mr. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitter(s): Department of the Planet Earth;
Sierra Club of Canada;
Friends of the Earth;
Washington Toxics Coalition;
National Coalition Against Misuse of Pesticides;
WASHPIRG;
International Institute of Concern for
Public Health
Dr. Joseph Cummins; and
Reach for Unbleached

Concerned Party: United States of America

Date Received: 4 January 1999

**Date of this
Determination:** 8 September 1999

Submission I.D.: SEM-98-003

I- INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider a submission from any non-governmental 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). On 27 May 1998, the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. On 14 December 1998, the Secretariat issued a determination in which it dismissed the submission on the

basis that it did not meet the requirements of Article 14(1). The essence of the determination was that the Party's conduct at issue in the May 27 submission did not qualify as "enforcement"—one of the threshold elements for triggering review under Article 14.

On 4 January 1999, the Submitters filed a "new and amended submission."¹ The Secretariat has determined that two assertions in this submission meet the criteria in Article 14(1) and that these assertions merit a response from the Party in light of the factors listed in Article 14(2). The Secretariat believes that otherwise, the submission does not meet the criteria for review contained in Article 14(1). The Secretariat sets forth its reasons in Section III below.²

II- SUMMARY OF THE SUBMISSION

The submission concerns airborne emissions of dioxin and mercury into the Great Lakes. The submission claims that such emissions pose a significant threat to public health and the environment. It asserts that solid waste and medical incinerators in the United States are substantial sources of such emissions.

The submission further asserts that various domestic laws and international legal instruments obligate the US Environmental Protection Agency (EPA) to take several actions to address these emissions. These actions include, among others: 1) inspecting and otherwise monitoring emissions from such incinerators; 2) advising "host states" that incinerators within their jurisdictions are contributing air pollution that may be endangering public health or welfare in a foreign country, thereby triggering such states' obligation to reduce such pollution; and 3) requiring such incinerators to implement pollution prevention approaches and the like to achieve the goal of virtually eliminating these emissions. The submission claims that the United States has not fulfilled these obligations and that this asserted failure constitutes a failure to "effectively enforce" for purposes of Article 14 of the NAAEC.

1. 4 January 1999 Submission at 2, 16.

2. The Council adopted revised Guidelines for the Article 14 process in June 1999. Pursuant to Guideline 7.2, the Determination provides an explanation of how the submission meets or fails to meet the Article 14(1) criteria as well as an explanation of the factors that guided the Secretariat in making its determination under Article 14(2). The revised Guidelines are available on the CEC web page, www.cec.org, under Citizen Submissions.

III- ANALYSIS

A. Article 14(1)

As the Secretariat has noted in previous Article 14(1) determinations, the requirements contained in Article 14 are not intended to place an undue burden on submitters. In the determination concerning the Animal Alliance submission (SEM-97-005), for example, the Secretariat states as follows:

The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC. . . .³

In its discussion in the Animal Alliance determination of the burden under Article 14, the Secretariat noted that use of the word “assertion” in the opening sentence of Article 14(1) “supports a relatively low threshold under Article 14(1),”⁴ although it also indicated that “a certain amount of substantive analysis is nonetheless required at this initial stage” because “[o]therwise, the Secretariat would be forced to consider all submissions that merely ‘assert’ a failure to effectively enforce environmental law.”

The recent revisions to the Guidelines provide further support for the notion that the Article 14(1) and (2) stages of the citizen submission process are intended as a screening mechanism. The Guidelines limit submissions to 15 pages in length.⁵ The revised Guidelines require a submitter to address a minimum of 13 criteria or factors in this limited space, indicating that a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) and (2) for more in-depth consideration.

We reviewed the submission with this perspective in mind.

Article 14(1) provides that the Secretariat may consider a submission if the submission meets six criteria. We believe that the submission meets each of these criteria, as indicated below.

3. Submission No. SEM-97-005 (26 May 1998).

4. The relevant part of Article 14(1) reads as follows: “The Secretariat may consider a submission from any non governmental organization or person *asserting that . . .*”

5. Guideline 3.3.

1. The submission is in English, one of the official languages designated by the Parties (14(1)(a)).
2. The submission clearly identifies the persons and organizations making the submission (14(1)(b)).
3. The submission provides sufficient information to allow the Secretariat to review the submission, including several scientific reports relating to the issues covered in the submission (14(1)(c));⁶
4. The submission appears to be aimed at promoting enforcement rather than at harassing industry (e.g., the Submitters are not competitors of entities that are the subject of the government “enforcement” practices at issue. Instead, the Submitters are individuals and organizations committed to environmental and public health protection and the submission focuses on purported government failures)(14(1)(d));
5. The submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party’s response, if any (e.g., the Submitters’ cover letter of 28 May 1998 indicates that the Submitters petitioned EPA Administrator Browner on 5 July 1997 to “undertake a program to phase out solid waste and medical incinerators, and 106 sources of air pollution that were responsible for 86 percent of airborne dioxin discharges into the Great Lakes.” In the same letter, the Submitters notified EPA of their intention to initiate a submission unless EPA responded to the petition. The Submitters reported initially that EPA did not respond to this letter but the Submitters supplemented the submission to advise that EPA did respond)⁷ (14(1)(e)); and

6. See e.g., Thomas Webster and Paul Connett. 1998. Dioxin emission inventories and trends: The importance of large point sources, 37 *Chemosphere*, 2105.

7. In its May 28 cover letter, the Submitters reported that EPA did not respond. The Submitters notified the Secretariat by letter, dated 14 July 1998, that the Submitters had received a copy of a letter from EPA, dated 18 June 1998 responding to the letter. The Submitters provided a copy of the EPA response. The Department of the Planet Earth also has provided a copy of its 11 December 1998 letter to the US EPA’s Office of Pollution Prevention and Toxics relating to the draft Multimedia Strategy for Priority PBT Pollutants and the draft EPA Action Plan for Mercury. In this letter, the Submitters cover several issues raised by the submission, among others, including whether EPA proposals for dioxin and furan are “in harmony” with the Clean Air Act, Clean Water Act, Pollution Prevention Act and the “virtual elimination” requirements of the Great Lakes Water Quality Agreement.

6. The Submitters reside in or were established in the United States or Canada (14(1)(f)).

Article 14(1)'s opening sentence establishes three other parameters for the Article 14 process. Submissions must: 1) involve one or more "environmental laws;" 2) involve asserted failures to "effectively enforce" such laws; and 3) meet a temporal requirement in that they must assert that the Party "is failing" to effectively enforce. This submission involves a variety of different laws that qualify as "environmental law" for purposes of Article 14, such as the US Clean Air Act and Pollution Prevention Act. The Secretariat is not persuaded by the submission that the Great Lakes Water Quality Agreement or the 1986 Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste should be considered "environmental laws" for purposes of Article 14.

Treatment of the latter two agreements warrants some elaboration. The Submitters' argument, as we understand it, is that the Great Lakes Water Quality Agreement⁸ and the 1986 Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste,⁹ are "environmental law" for purposes of Article 14 because they represent the "law of the nation."¹⁰ (Submission at 7). Respectfully, the Secretariat does not agree. Article 45(2) of the NAAEC is the key operative provision, defining environmental law to mean "any statute or regulation of a Party. . . ." The Secretariat dismissed the Animal Alliance submission (SEM-97-005) on the ground that the Biodiversity Convention did not qualify as "environmental law" because it was an international obligation that had not been imported into domestic law by way of statute or regulation pursuant to a statute. The Animal Alliance determination is consistent with the plain language of Article 45(2) and the Secretariat

8. Canada-United States: Great Lakes Water Quality Agreement, 1978, as amended by the 1983 and 1987 Protocols, done at Ottawa on 22 November 1978, United States-Canada, 30 UST 1303, TIAS 9257 as amended 16 October 1983, TIAS 10798 and November 1987, Consolidated in International Joint Commission, revised Great Lakes Water Quality Agreement of 1978 (1994).

9. Agreement Concerning the Transboundary Movement of Hazardous Waste, 28 Oct. 1986, US-Can., T.I.A.S. No. 11,099.

10. The Supremacy Clause of the United States Constitution provides that «This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.» US Constitution, Article VI.

follows it here.¹¹ As noted concerning that submission, by making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).

The second significant issue under Article 14(1) is whether the submission involves the required assertion that a Party is currently failing to "effectively enforce" the environmental laws at issue in this proceeding. The Secretariat understands that the Submitters' submission of 4 January 1999 asserts that the Party is failing to effectively enforce for purposes of Article 14 with respect to air emissions of dioxins and mercury into the Great Lakes on three grounds.¹² We will discuss each of these assertions below. The first two seem to the Secretariat to qualify as assertions relating to possible failures to "enforce" and therefore are subject to consideration under Article 14(1). The third, however, does not in our view qualify as "enforcement" for purposes of Article 14.

1. Asserted Inspection-Related Failures

One basis for the Submitters' assertion of a failure to effectively enforce involves the government's asserted failure to adequately inspect and monitor incinerator emissions. The Submitters assert that the US EPA has an "incredibly poor" incinerator monitoring program. (Submission at 11-12). The Submitters assert that, among other things, inspections are rarely performed:

Astonishingly MSW plants accounting for 26 percent of total combusted solid waste in the United States have never been tested for their dioxin emissions. Most US facilities have only been tested once, which means that a lot of guesswork is needed about emissions. (5 November 1998 letter from Department of the Planet Earth at 1-2).

11. Because of the Secretariat's view concerning the Great Lakes Water Quality Agreement, the Secretariat also determines that the Submitters' assertion based on Clean Air Act § 118, 42 USC § 7418, does not merit further consideration under Article 14. (Submission at 11). Recourse to the plain language of the Agreement is consistent with the Vienna Convention on the Law of Treaties, Article 31(1), which provides as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See also Vienna Convention on the Law of Treaties, Article 32, which provides that under certain circumstances it may be appropriate to have recourse to supplementary means of interpretation.
12. The Secretariat read the original submission to assert that standards contained in EPA regulations for solid waste and medical waste incinerators conflict with various statutes and international instruments and it determined that such an assertion did not provide the basis for an Article 14 submission because the assertion's primary focus was on allegedly flawed "standard-setting" activity—not on enforcement actions.

The submitters also assert that there are concerns with the testing that is done because in some cases it is performed under ideal circumstances rather than under normal operating conditions:

[T]here has been a documented concerted effort to test plants under the most ideal circumstances rather than normal operating conditions. . . . (Submission at 12).

The 1998 Webster and Connett article attached to the submission offers additional detail concerning these assertions:

A major limitation of our estimates is the paucity of measurement data. An astonishing number of US MSW incinerators have either been tested for PCDD/PCDF [dioxins/furans] only once or never tested at all. Although the current lack of emission data is improving, operators and regulators have in the past seemed quite happy to deem a plant's emissions acceptable based on one set of measurements. An important related deficiency is the reliance on many stack tests taken under near-ideal circumstances. Actual emissions can be larger for a number of reasons including seasonal variations, upset conditions, start-up, shut-down and periods of soot blow off. We believe that increasing scientific attention must be paid to emissions during non-optimal conditions; such conditions may tend to drive inventories in the future.¹³

The Secretariat believes that the assertion that the U.S.'s inspection and compliance-monitoring record is not effective satisfies the requirements of Article 14(1). Maintaining an adequate inspection/compliance-monitoring scheme is an inherent part of enforcement. Indeed, Article 5(1)(b) of the NAAEC specifically identifies "monitoring compliance" as a type of government enforcement action.

2. *Clean Air Act § 115, 42 USC § 7415(a), (b)*

A second basis for Submitters' assertion of a failure to effectively enforce is Clean Air Act § 115, 42 USC § 7415(a), (b). The Submitters assert that these provisions require the EPA Administrator to "notify the Governor of the State in which such emission originates" whenever the Administrator receives reports from any duly constituted international agency such as the IJC or CEC, that air pollution or pollutants emitted in the United States can "be reasonably anticipated to endanger public

13. See Webster and Connett. 1998; pp. 2105, 2115, 2116.

health or welfare in a foreign country.”¹⁴ The Submitters assert that “[u]nfortunately, the Administrator has not carried out this program.”¹⁵

The thrust of this assertion, in short, is that EPA is failing to effectively enforce or fulfill a clear, quite specific legal obligation. This is similar to the assertion we have seen in previous submissions, in which the Secretariat has determined that an assertion that a Party is failing to comply with a NEPA-type law satisfies the requirements of Article 14.¹⁶ The Secretariat believes that this assertion satisfies the requirements of Article 14(1).

3. Failure Adequately to Pursue Legislative Policy Directions

The Submitters’ third assertion is that US legislation and international “treaties” obligate EPA to pursue pollution prevention-oriented approaches to air pollution that do not involve standard-setting but EPA has failed to follow the legislatively-charted path and this failure qualifies as a lack of “effective enforcement.” The submission alleges that Clean Air Act § 101(c), 42 USC § 7401(c), and the Pollution Prevention Act provide a hierarchy of strategies for addressing waste that favors pollution prevention approaches, yet EPA has failed to propose pollution prevention as a mandatory component with regard to regulation of incineration. (Submission at 10). EPA’s failure to do so, in the Submitters’ view, is not in harmony with the legislative direction that the first priority is to reduce emissions through process changes, substitution of materials, and the like, and therefore is a failure to enforce for purposes of Article 14.

The Submitters assert that the Pollution Prevention Act establishes a “clear hierarchy of pollution prevention programs for all of the management programs of the Environmental Protection Agency” (Submis-

14. The Submitters state that the notification is considered a “finding” that requires the State to revise its air pollution plan to prevent or eliminate the endangerment. (Submission at 10, 11).

15. 4 January 1999 Submission at 11. See also 25 March 1999 letter from Department of the Planet Earth at 2.

16. Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, SEM-96-001 (7 June 1996, reported in CEC, North American Environmental Law and Policy, Winter 1998, at p. 96); The Southwest Center for Biological Diversity, et al. (Fort Huachuca; SEM-96-004); requesting a response under Article 14(2) based on the assertion that the Party failed to effectively enforce the National Environmental Policy Act (NEPA) with respect to the United States Army’s operation of Fort Huachuca by, inter alia, failing to provide a cumulative environmental analysis. After the Party issued its response, the Submitters withdrew their submission, thereby terminating the process.

sion at 10). Section 13101(b) of the Pollution Prevention Act of 1990 establishes the policy of Congress to be as follows:

The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

Clean Air Act § 101(c), 42 USC § 7401(c), sounds much the same theme, providing that “[a] primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.”

The Submitters’ assertion appears to be that EPA is not effectively enforcing these laws because the agency has “failed to propose source reduction and pollution prevention as a mandatory component with regard to regulation of incineration. . . .” (Submission at 10). With respect, the Secretariat does not believe that this is a matter of “enforcement” for purposes of Article 14.

The broad question this assertion raises is whether legislative encouragement that EPA pursue various goals may serve as the basis for an assertion under Article 14 that EPA is failing to effectively enforce these goals. As we noted in our 14 December 1998 Determination concerning this submission, arriving at a precise definition of “enforcement” is not a simple task. The term is not defined in the NAAEC.

The meaning of the term “enforcement” is illuminated to some extent by Article 5, entitled “Government Enforcement Action.” Article 5 seems to signal at least two points regarding the appropriate definition of enforcement. The first is that the concept of enforcement should be defined broadly. It should not be limited to traditional deterrence-based enforcement—i.e., it should not be confined to the level of government prosecution activity and the like. The Secretariat and the Council have embraced this interpretation in previous submissions. (See e.g., BC Hydro, Council Resolution 98-07).

Article 5 is also helpful through the list of enforcement actions it provides. This list is merely illustrative but it nevertheless offers some

insights into the drafters' intentions. As we noted in the December 14 Great Lakes determination, for example, the list provides support for the notion that Article 14 is not intended for challenges to a Party's standard-setting activities because "[v]iewed as a whole, the activities listed [in Article 5] are geared more toward promoting compliance with governing legal standards than to establishing such standards." (Determination at 4).

The list of illustrative enforcement actions provided in Article 5 provides a strong indication that the type of general legislative direction involved here is not a ground for an Article 14 submission. The legislative directive to promote pollution prevention (including creation of a hierarchy of approaches for managing waste) has little in common with the types of government actions labeled as enforcement in Article 5 and leaves EPA considerable discretion as to how best to fulfill this responsibility. As a result, the Secretariat here reaches the limited conclusion that a directive to EPA of the sort referenced here to promote pollution prevention does not provide the basis for an assertion that EPA's purported failure adequately to promote pollution prevention is a failure to enforce under Article 14.

In an effort to explain its reasoning on this point further, the Secretariat notes that the outcome might be different if the legislative direction were clearly enforcement-oriented. For example, if a statute established a hierarchy, or priorities, for enforcement action—e.g., it directed the government to give top priority to inspecting the largest facilities in a particular industry and lowest priority to inspecting the small facilities—government failure to adhere to this priority scheme potentially would constitute a failure to effectively enforce in the Secretariat's view because the government allegedly would be failing to perform its enforcement responsibilities in the manner directed by the legislature. That is not the situation here.

B. Article 14(2)

In deciding whether to request a response from a Party, the Secretariat is to be guided by the four factors listed in Article 14(2). Thus, during this phase of the process the Secretariat may assign weight to each factor as it deems appropriate in the context of a particular submission. The Secretariat has determined based on its consideration of the factors contained in Article 14(2) that the submission merits requesting a response from the Party.

The Submitters' assertion that there are significant health and environmental issues associated with airborne emissions of persistent toxic chemicals dioxins and mercury, and that solid waste and medical incinerators are prominent sources of such emissions, qualifies this submission as one that raises matters "whose further study in this process would advance the goals of this Agreement" [Article 14(2)(b); 28 May 1998 Submission at 8, 9]. The Submitters cite government and other sources in support of these assertions. The 18 June 1998 letter from EPA, provided by the Submitters, states that EPA is "very concerned about air pollution from incinerators, particularly with regard to mercury and dioxin. The USEPA is committed to reducing these air pollutants and is undertaking several high priority policy and regulatory initiatives targeted at reducing these and other persistent, toxic substances." This Article 14(2) factor is perhaps of greatest significance in the context of this submission.

The submission's focus on such impacts also is relevant to Article 14(2)(a), involving allegations of harm to the Submitters.¹⁷ With respect to Article 14(2)(c), the Submitters assert that a private remedy available under the Party's law is being pursued by Earthjustice to address some of the issues raised in the submission. The widespread failure to monitor asserted to exist here is relevant to the weight to be given to this factor. Finally, the submission includes several scientific studies and other documents and is not drawn exclusively from mass media reports. [Article 14(2)(d)].

CONCLUSION

For the foregoing reasons, the Secretariat has determined that two of the assertions contained in the submission meet the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that the submission merits requesting a response from the Government of the United States as to these two assertions. Accordingly, the Secretariat requests a response from the Government of the

17. In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC." The same is true here.

United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

David L. Markell
Head, Submissions on Enforcement Matters Unit

- c.o. Mr. William Nitze, US-EPA
- c.c. Ms. Norinne Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Mr. Erik Jansson, Exec. Dir.
Department of the Planet Earth
Ms. Janine Ferretti, CEC Executive Director

SEM-98-004
(BC MINING)

SUBMITTER: SIERRA CLUB OF BRITISH COLUMBIA,
ET AL.

PARTY: CANADA

DATE: 29 JUNE 1998

SUMMARY: The submission alleges a systemic failure of Canada to enforce section 36(3) of the Fisheries Act to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(30 NOVEMBER 1998) have been met.

ART. 14(2) Determination pursuant to Article 14(2) that
(25 JUNE 1999) the submission merits requesting a response
from the Party.

November 30, 1998

ELECTRONICALLY AND BY REGISTERED MAIL

Mr. David R. Boyd
Sierra Legal Defence Fund
214-131 Water Street
Vancouver, B.C. V6B 4M3
Phone: (604) 685-5618
Fax: (604) 685-7813
E-mail: sldf@sierralegal.com

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s): Sierra Club of British Columbia
Environmental Mining Council of
British Columbia
Taku Wilderness Association

Represented by: Sierra Legal Defence Fund

Party: Canada

Date: 29 June 1998

Submission No.: SEM-98-004

Dear Mr. Boyd:

The Secretariat of the Commission for Environmental Cooperation has concluded that your submission satisfies the initial screening criteria under Article 14(1) of the North American Agreement on Environmental Cooperation (NAAEC). We noted in our determination in SEM 97-005 that Article 14 is not intended to be an insurmountable procedural screening device but instead it should be given a large and liberal

interpretation, consistent with the objectives of the NAAEC and the provisions of the Vienna Convention on the Law of Treaties.¹ The Submission meets this burden. Further, the Submission appears to be aimed at promoting enforcement rather than at harassing industry.² The Submission meets the other criteria in Article 14(1) as well.

Accordingly, the submission will now be reviewed under Article 14(2) to determine whether the submission merits requesting a response from the Government of Canada.

We will keep you informed of the status of your submission in accordance with Articles 14 and 15 and the Guidelines for Submissions on Enforcement Matters.

Yours truly,

Commission for Environmental Cooperation – Secretariat

per: Janine Ferretti
Interim Executive Director

c.c. Ms. Norine Smith, Environment Canada
Mr. William Nitze, U.S. EPA
Mr. José Luis Samaniego, SEMARNAP

1. SEM 97-005 (May 26, 1998).
2. See Article 14(1)(d).

June 25, 1999

BY FAX AND REGISTERED MAIL

The Honourable Christine Stewart
Minister of the Environment
Government of Canada
Les Terrasses de la Chaudière
28th Floor
10 Wellington Street
Hull (Québec)
Canada K1A 0H3

Attention: Ms. Norine Smith

**Re: Submission on enforcement matters under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

Submitter(s): Sierra Club of British Columbia
Environmental Mining Council of
British Columbia
Taku Wilderness Association

Represented by: Sierra Legal Defence Fund

Party: Canada

Date: 29 June 1998

Submission No.: SEM-98-004

Dear Minister:

On 29 June 1998, the Secretariat of the Commission for Environmental Cooperation received a submission pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("Agreement") filed by Sierra Legal Defence Fund on behalf of Sierra Club of British Columbia, Environmental Mining Council of British Columbia and

Taku Wilderness Association. The submission alleges “the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.”

The Secretariat reviewed the submission under Article 14(1) of the Agreement and determined on 30 November 1998 that the submission met the requirements of Article 14(1).

Pursuant to Article 14(2) of the Agreement, the Secretariat has determined that the submissions merits requesting a response from the Government of Canada. Accordingly, the Secretariat requests a response from the Government of Canada to the above-mentioned submission, within the 30 day time frame provided in Article 14(3) of the Agreement, or in exceptional circumstances, within 60 days of delivery of this request. A copy of the submission and of the supporting information is annexed to this letter.

Sincerely,

Commission for Environmental Cooperation—Secretariat

per: David L. Markell
Head, Submissions on Enforcement Matters Unit

c.c. Mr. William Nitze, U.S. EPA
Mr. José Luis Samaniego, SEMARNAP
Mr. David R. Boyd, Sierra Legal Defence Fund
Ms. Janine Ferretti, Interim Executive Director

Enclosures (2)

SEM-98-005

(CYTRAR)

SUBMITTER: ACADEMIA SONORENSE DE DERECHOS
HUMANOS

PARTY: UNITED MEXICAN STATES

DATE: 11 AUGUST 1998

SUMMARY: The Submitters allege that Mexico has failed to effectively enforce environmental law by having authorized the operation of a hazardous waste landfill (Cytrar) less than six kilometers away from Hermosillo, Sonora.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) Determination that criteria under Article 14(1)
(9 APRIL 1999) have been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

9 de abril de 1999

POR FAX Y MENSAJERO

Mtra. Julia Carabias Lillo
Semarnap
Periférico Sur # 4209, 6º Piso
Fracc. Jardines en la Montaña
14210 México, D.F.
México

Atención: Lic. José Luis Samaniego

Ref.: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los Artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Academia Sonorense de Derechos Humanos, A.C.
Lic. Domingo Gutiérrez Mendivil

Parte: Estados Unidos Mexicanos

Fecha: 11 de agosto de 1998

Petición: SEM-98-005

Como es de su conocimiento, el Secretariado de la CCA recibió el día 11 de agosto de 1998 una petición presentada por la Academia Sonorense de Derechos Humanos, A.C. y el licenciado Domingo Gutiérrez Mendivil. Los Peticionarios aseveran que México ha incurrido en una omisión en la aplicación efectiva de su legislación ambiental al autorizar la operación de un confinamiento de residuos peligrosos, conocido como Cytrar, a menos de seis kilómetros de la ciudad de Hermosillo, Sonora, México.

La petición señala que conforme a la Norma Oficial Mexicana NOM-055-ECOL/1993, la distancia entre el confinamiento y la ciudad

de Hermosillo debería ser de por lo menos veinticinco kilómetros. Los Peticionarios aseveran que las autoridades han anunciado que el confinamiento será reubicado y que no se ha informado a la sociedad sobre la nueva ubicación ni sobre las medidas previstas para la limpieza del sitio, que ha sido contaminado y que representa un grave riesgo para la salud y el medio ambiente.

El Secretariado ha revisado la petición y ha determinado que cumple con los requisitos establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte. Asimismo, considerando los criterios previstos en el artículo 14(2) del ACAAN, el Secretariado ha determinado que la petición amerita solicitar una respuesta de la Parte. Al efecto, solicitamos del Gobierno de México una respuesta a la petición de referencia. Anexamos una copia de la petición y de la información de apoyo que la acompaña.

Conforme al artículo 14(3), estaremos en espera de recibir la respuesta del Gobierno de México el día 26 de mayo de 1999, esto es, en un plazo de 30 días hábiles posteriores a la entrega de la presente, salvo que por circunstancias excepcionales se requiera ampliar el plazo a 60 días.

Sometido respetuosamente a su consideración,

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Jefe de la Unidad de Peticiones Ciudadanas

c.c. Ms. Norine Smith, Environment Canada
Mr. William Nitze, US-EPA
Lic. Gutiérrez Mendívil, Academia Sonorense de
Derechos Humanos, A.C.
Ms. Janine Ferretti, Directora Ejecutiva Interina

SEM-98-006
(AQUANOVA)

SUBMITTER: GRUPO ECOLÓGICO MANGLAR

PARTY: UNITED MEXICAN STATES

DATE: 20 OCTOBER 1998

SUMMARY: The submission alleges that Mexico is failing to effectively enforce its environmental laws with respect to the establishment and operation of Granjas Aquanova S.A. de C.V., a shrimp farm in Isla del Conde, San Blas, Nayarit, Mexico.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2)
(17 MARCH 1999) Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

ART. 15(1)
(4 AUGUST 2000) Notification to council to be disclosed upon Council's decision on whether the Secretariat will prepare a factual record.

17 de marzo de 1999

POR FAX Y MENSAJERO

Mtra. Julia Carabias Lillo
Atn.: Lic. José Luis Samaniego,
Semarnap
Periférico Sur # 4209 6º Piso
Fracc. Jardines en la Montaña
14210 México, D.F.
México

Ref.: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Grupo Ecológico Manglar, A.C.
Parte: Estados Unidos Mexicanos
Fecha: 20 de octubre de 1998
Petición: SEM-98-006

Como es de su conocimiento, el Secretariado de la CCA recibió el día 20 de octubre de 1998 una petición del Grupo Ecológico Manglar, A.C. La petición se refiere a diversas omisiones en la aplicación efectiva de la legislación ambiental por parte de México respecto al establecimiento y operación de las instalaciones camaronícolas de Granjas Aquanova, S.A., de C.V., en la Isla del Conde, Municipio de San Blas, Nayarit, México.

Los Peticionarios aseveran la falta de aplicación efectiva de disposiciones legales para la protección de los recursos naturales (incluyendo protección de selvas y bosques tropicales, algunas especies de mangle sujetas a protección especial y aves migratorias), de los requerimientos en materia de impacto ambiental, de diversas

disposiciones en materia de agua (incluyendo las aplicables a descargas de aguas residuales, prevención y control de la contaminación de las aguas y aprovechamiento de aguas), así como de las disposiciones para la protección de los recursos pesqueros en caso de introducción de especies. La petición señala que han habido omisiones en la aplicación efectiva de la legislación ambiental durante los procedimientos de verificación que la autoridad ambiental ha realizado. Dichos procedimientos concluyeron mediante la firma de un convenio con la empresa para evaluar los daños ocasionados a dos áreas de manglar y las opciones de remediación. Los Peticionarios argumentan que la legislación ambiental no se ha aplicado de manera efectiva y que "...la autoridad no puede transigir el cumplimiento y aplicación de las leyes de orden público e interés social, como son la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley Forestal." Finalmente, la petición asevera que se han cometido delitos ambientales que no han sido perseguidos y que se ha incumplido tres convenios internacionales para la protección de especies migratorias y humedales.

El Secretariado ha revisado la petición y ha determinado que cumple con los requisitos establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte. Asimismo, considerando los criterios previstos en el artículo 14(2) del ACAAN, el Secretariado ha determinado que la petición amerita solicitar una respuesta de la Parte. Al efecto, solicitamos del Gobierno de México una respuesta a la petición de referencia. Anexamos una copia de la petición y de la información de apoyo que la acompaña.

Conforme al artículo 14(3), estaremos en espera de recibir la respuesta del Gobierno de México el día 3 de mayo de 1999, esto es, en un plazo de 30 días hábiles posteriores a la entrega de la presente, salvo que por circunstancias excepcionales se requiera ampliar el plazo a 60 días.

Sometido respetuosamente a su consideración,

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Jefe de la Unidad de Peticiones Ciudadanas

c.c. Ms. Norine Smith, Environment Canada
Mr. William Nitze, US-EPA
Grupo Ecológico Manglar, A.C.

SEM-98-007
(METALES Y DERIVADOS)

SUBMITTER: ENVIRONMENTAL HEALTH COALITION
ET AL.

PARTY: UNITED MEXICAN STATES

DATE: 23 OCTOBER 1998

SUMMARY: The Submitters allege that Mexico has failed to effectively enforce its environmental law in connection with an abandoned lead smelter in Tijuana, Baja California, Mexico, that poses serious threats to the health of the neighboring community and to the environment.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) Determination that criteria under Article 14(1)
(5 MARCH 1999) have been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

ART. 15(1) Notification to Council that a factual record is
(6 MARCH 2000) warranted in accordance with Article 15(1).

5 de marzo de 1999

POR FAX Y MENSAJERO

Mtra. Julia Carabias Lillo
Atn.: Lic. José Luis Samaniego,
Semarnap
Periférico Sur # 4209 6º Piso
Fracc. Jardines en la Montaña
14210 México, D.F.
México

Ref.: Petición relativa a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios: Environmental Health Coalition
Comité Ciudadano Pro Restauración
del Cañón del Padre, A.C.

Parte: Estados Unidos Mexicanos

Fecha: 23 de octubre de 1998

Petición: SEM-98-007

Como es de su conocimiento, el Secretariado de la CCA recibió el día 23 de octubre de 1998 una petición del Environmental Health Coalition y el Comité Ciudadano Pro Restauración del Cañón del Padre, A.C. Los Peticionarios aseveran que ha habido una omisión en la aplicación efectiva de la legislación ambiental mexicana en el caso de una fundidora de plomo abandonada en Tijuana, Baja California, México, que presenta un alto riesgo para la salud de las comunidades vecinas y el medio ambiente.

En la petición se afirma que México “no ha aplicado con efectividad sus leyes ambientales por su incapacidad o falta de voluntad para proseguir con los procesos penales [iniciados] contra [el propietario] mediante su extradición formal”. Asimismo, señalan los Peticionarios que México “no ha aplicado efectivamente el artículo 170 de la Ley General [del Equilibrio Ecológico y la Protección al Ambiente] al no tomar las medidas necesarias para contener o neutralizar los residuos peligrosos generados por Metales y Derivados a fin de evitar un riesgo eminente de perjudicar el medio ambiente y la salud pública”, y que tampoco ha aplicado “el artículo 134 de la Ley General porque no ha tomado las acciones adecuadas para controlar o impedir la contaminación del suelo en el sitio de Metales y Derivados y lugares cercanos.”

El Secretariado ha revisado la petición y ha determinado que cumple con los requisitos establecidos en el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte. Asimismo, considerando los criterios previstos en el artículo 14(2) del ACAAN, el Secretariado ha determinado que la petición amerita solicitar una respuesta de la Parte. Al efecto, solicitamos del Gobierno de México una respuesta a la petición de referencia. Anexamos una copia de la petición y de la información de apoyo que la acompaña, presentadas originalmente en inglés, así como la traducción de la petición al español.

Conforme al artículo 14(3), estaremos en espera de recibir la respuesta del Gobierno de México el día 16 de abril de 1999, esto es, en un plazo de 30 días hábiles posteriores a la entrega de la presente, salvo que por circunstancias excepcionales se requiera ampliar el plazo a 60 días.

Sometido respetuosamente a su consideración,

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Jefe de la Unidad de Peticiones Ciudadanas

c.c. Ms. Norine Smith, Environment Canada
Mr. William Nitze, US-EPA
César Luna, Esq., Environmental Health Coalition
Janine Ferretti, Directora Ejecutiva Interina

Secretariat of the Commission for Environmental Cooperation

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

Submission no.: SEM-98-007

Submitter(s): Environmental Health Coalition
Comité Ciudadano Pro Restauración
del Cañón del Padre y Servicios
Comunitarios, A.C.

Party: United Mexican States

Date of the Submission: 23 October 1998

Date of this notification: 6 March 2000

I- EXECUTIVE SUMMARY

In accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), the Environmental Health Coalition and the Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C., presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a Submission asserting that there has been a failure to effectively enforce Mexican environmental law in the case of an abandoned lead smelter in Tijuana, Baja California, Mexico (Metales y Derivados). The Submitters allege that the site represents a major risk for the health of the neighboring communities and the environment, that Mexico has failed to extradite the persons responsible for the contamination, and that the measures that have been taken at the site are not sufficient to protect the neighboring population and avoid ecological imbalance. The Submitters believe that there has been a failure to effectively enforce the Federal Criminal Code (*Código Penal Federal*), the Law on International Extradition (*Ley de Extradición Internacional*), and the Extradition Treaty between the United

Mexican States and the United States of America. They also assert that Mexico has failed to effectively enforce the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA).

In light of the Party's Response, the contents of which have been designated as confidential, the Secretariat hereby notifies the Council that certain allegations in the Submission warrant the development of a factual record and others do not warrant further review under the submissions on enforcement matters process. With regard to the assertions that Mexico is failing to effectively enforce its environmental law by failing to pursue extradition of the owners of Metales y Derivados, the Secretariat has determined that no further review is warranted. With respect to the allegations of a failure to effectively enforce LGEEPA Articles 170 and 134, the Secretariat considers that the development of a factual record is warranted to understand Mexico's enforcement efforts to prevent an imminent risk to the environment and dangerous repercussions to public health, and to prevent and control soil contamination, including by restoration, at the Metales y Derivados site, in accordance with those provisions. The Secretariat hereby, and in accordance with Article 15(1) of the NAAEC, provides the reasons for its determinations, within the limitations arising from the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

II- PROCEDURAL BACKGROUND

On 23 October 1998, the Secretariat of the CEC received a Submission from the Environmental Health Coalition and the Comité Ciudadano Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C. The Submitters assert that there has been a failure to effectively enforce Mexican environmental law in the case of an abandoned lead smelter in Tijuana, Baja California, Mexico, that they claim poses a high risk to the health of the surrounding communities and to the environment. The Submitters request that the Submission be studied for the development of a factual record in accordance with Articles 14 and 15 of the NAAEC; they also request that the Secretariat make a report to Council in accordance with Article 13 of the Agreement. On 30 October 1998, the Secretariat acknowledged receipt of the Submission, informing the Submitters that it would be reviewed in accordance with Article 14 of the NAAEC, and also informing them that in accordance with Article 13 of NAAEC, the possibility of making a Secretariat report would be considered after the conclusion of the Article 14 process.

On 5 March 1999, the Secretariat notified Mexico that it had reviewed the Submission and determined that it met the criteria set forth in Article 14(1) of the NAAEC. The Secretariat considered the factors set forth in Article 14(2) of the NAAEC, and decided that the Submission merited a response from the Party. In that same Determination of 5 March 1999, the Secretariat requested a Response from Mexico.

Mexico submitted a Response to the Secretariat on 1 June 1999 and designated that Response as confidential. On 14 June 1999, the Secretariat acknowledged receipt of the Response and requested an explanation from Mexico for the designation of confidentiality, as well as a summary of the confidential information for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters. Mexico informed the Secretariat on 20 July 1999 that in accordance with Article 39(1) of the NAAEC and Article 16 of the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*), the designation of confidentiality encompassed the totality of the information contained in the Response. On 13 September 1999, the Secretariat requested certain clarifications from the Government of Mexico regarding its request for confidentiality. On 13 October 1999, the Secretariat referred the matter to Council for its consideration. Pending a decision by Council on this matter, this Notification does not provide information from the Response because of the assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

III- SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico has failed to effectively enforce its environmental laws in the case of the abandoned lead smelter Metales y Derivados in Tijuana, Baja California. The Submitters assert that the site poses a major risk to the health of the neighboring communities and the environment. They state that the company New Frontier Trading Corporation, through its subsidiary, Metales y Derivados, has not returned the hazardous wastes it generated to the United States, as required by Mexican law and the La Paz Agreement. According to the Submitters, the owner and operators abandoned the facility when it was shut down and they returned to the United States, leaving behind some 6,000 metric tons of lead slag, waste piles of by-products, sulfuric acid and heavy metals such as antimony, arsenic, cadmium and copper from the battery recycling operations.¹

1. P. 3 of the Submission.

The Submission states that there is a community of approximately 1,000 inhabitants (Colonia Chilpancingo) located within approximately 150 yards of Metales y Derivados and asserts that the conditions at this site represent a constant health risk for the inhabitants of that community. The Submission describes the various health problems reported by its members, which the Submitters consider to be attributable to exposure to the toxic substances abandoned at the site.

The Submitters also state that in May of 1993, the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente -Profepa*) recommended that the Attorney General (*Procuraduría General de la República*) initiate a prosecution against the owners and operators of the company. According to the Submission, a federal judge issued arrest warrants for José Kahn and other persons involved in the operations of Metales y Derivados in August 1995, but those people fled to the United States to evade prosecution. The Submission claims that Mexico has been unable or unwilling to resume the prosecution of Mr. Kahn or other parties responsible for the contamination caused by Metales y Derivados, while New Frontier Corporation continues to operate as an active company with its head office in San Diego, California, and with annual business estimated at between US \$700,000 and \$1,000,000.² The Submission cites Article 415 of the Federal Criminal Code which establishes environmental crimes related to hazardous wastes and other contaminants. The Submitters argue that Article 3 of the Law on International Extradition and Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States obligate Mexico to request the extradition of the persons responsible for Metales y Derivados. The Submitters assert that the failure to pursue the criminal proceeding instituted against the owner of Metales y Derivados by requesting his formal extradition from the United States is a failure to effectively enforce environmental law on Mexico's part.

In addition, the Submitters assert a failure by Mexico to effectively enforce the LGEEPA. The Submission alleges a failure to effectively enforce Article 170 of the LGEEPA by failing to order adequate measures to properly confine or secure the hazardous materials and wastes from Metales y Derivados to prevent an imminent risk to the ecological balance and dangerous repercussions to public health, and Article 134 of the LGEEPA by failing to take the actions necessary to control or prevent soil contamination at the site and its environs, or to restore the site. The Submitters allege that the measures Mexico has taken (i.e. the shutdown of the plant, the repair of a wall and the installation of a plastic cover over

2. P. 7 and Appendix 6-a of the Submission.

the slag) are not sufficient to protect the community and prevent ecological imbalance, and that this situation represents a failure to effectively enforce the LGEEPA.

IV- SUMMARY OF THE RESPONSE

As mentioned above, Mexico designated its Response as confidential and informed the Secretariat on 20 July 1999 that the designation of confidentiality encompassed the totality of the information contained in the Response. Pending a decision by Council on this matter, the Secretariat does not include in this Notification information from the Response, because of the assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

V- ANALYSIS OF THE SUBMISSION IN ACCORDANCE WITH ARTICLES 14(1) AND 14(2) OF THE NAAEC

On 5 March 1999 the Secretariat notified Mexico that it had reviewed the Submission and determined that it met the criteria set forth in Article 14(1) of the NAAEC.

Article 14(1) of the Agreement states that:

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:
 - (a) is in writing in a language designated by that Party in a notification to the Secretariat;
 - (b) clearly identifies the person or organization making the submission;
 - (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
 - (d) appears to be aimed at promoting enforcement rather than at harassing industry;
 - (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

- (f) is filed by a person or organization residing or established in the territory of a Party.

Article 14(1) is not intended to place a heavy burden on submitters, although some initial screening is required at this stage.³ The Secretariat reviewed this Submission with that perspective in mind.

The first issue is whether the Submission involves the required assertion of a failure to effectively enforce environmental law. The Secretariat determined that the Submission met these requirements for the following reasons.

The Submission “asserts” that Mexico is failing to effectively enforce Article 3 of the Law on International Extradition, Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States, Article 415 of the Federal Criminal Code, and Articles 170 and 134 of the LGEEPA. To meet the Article 14(1) threshold, the legal provisions cited in a submission must satisfy the definition of “environmental law” contained in Article 45(2) of the NAAEC,⁴ which refers to the principal purpose of such provisions.⁵

3. See SEM-97-005/ Animal Alliance of Canada, et al, Article 14(1) Determination; and SEM-98-003/Department of the Planet Earth, et al, Article 14(1)&(2) Determination concerning the revised submission.
4. Article 45(2) of the NAAEC states:
For purposes of Article 14(1) and Part Five:
(a) “**environmental law**” means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas
in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
(b) For greater certainty, the term “**environmental law**” does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.
5. Although the Secretariat is not governed by the principle of *stare decisis*, it has previously, in other determinations, noted that provisions cited in a submission must meet the definition of environmental law. See the determinations of the Secretariat pursuant to Article 14(1) of the NAAEC for the following submissions: SEM-98-001/Instituto de Derecho Ambiental et al. (13 September 1999), SEM-98-002/Hector

The Secretariat found that it was appropriate to review these allegations under Articles 14 and 15 of the NAAEC, with a focus on Articles 415 of the Federal Criminal Code and 170 and 134 of LGEEPA. The Secretariat considered that the allegation that Mexico is failing to enforce its environmental law effectively by the failure to extradite met this threshold. The Submission argues that the failure to enforce these provisions is a failure to enforce Article 415 of the Federal Criminal Code, which establishes criminal penalties for environmental offenses, directed to protecting human health and the environment.⁶ Although the provisions from the extradition law and treaty cited in the Submission are not in and of themselves “environmental law,” the Submission connects these to Article 415 of the Federal Criminal Code, which clearly meets the definition of environmental law.

Articles 170 and 134 of the LGEEPA also clearly qualify as environmental law. These Articles set out criteria and measures for the protection of the environment and the prevention of risks to human life or health associated with hazardous substances and with soil contamination, satisfying Article 14(1) of the NAAEC and the definition of environmental law the effective enforcement of which is the subject of this process.

The Secretariat also determined in March 1999, that the Submission satisfied the six listed criteria in Article 14(1). The Submission was filed in writing in English,⁷ and the Secretariat translated it to Spanish, because this is the official language of the Party concerned.⁸ The Submitters identified themselves as the Comité Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C., established in Tijuana, Baja California,

Gregorio Ortiz Martínez (18 March 1999) and SEM-97-005/Animal Alliance of Canada, et al. (26 May 1998)].

6. Article 415 of the Federal Criminal code provides:

“There will be a penalty of between three months and six years in prison, as well as a fine equivalent to between 1,000 and 20,000 days of minimum wage as established in the Federal District at the moment the crime was committed, for those who:

I. Without authorization from the appropriate federal authority or in violation of the terms in which it were granted, carry out any activity involving hazardous wastes or materials that cause or can cause harm to public health, natural resources, fauna, flora, or ecosystems;

II. In violation of established legal guidelines or relevant official Mexican standards, emits, releases, or discharges into the atmosphere—or authorizes or orders such activities—gases, smoke, or dust that cause harm to public health, natural resources, flora, fauna, or ecosystems; or

III. In violation of established legal guidelines or relevant official Mexican standards, generates noise, vibrations, or thermal or luminous energy that cause harm to public health, natural resources, flora, fauna, or ecosystems.” (Free translation)

7. See Article 14(1)(a) of the NAAEC and section 3.2 of the Guidelines.

8. However, where the Submission is cited in this document, the reference is to the original version filed by the Submitters in English.

Mexico and the Environmental Health Coalition, established in San Diego, California, United States. Both are non-governmental organizations, representing the community allegedly affected by the site.⁹ The Submission contains sufficient information to allow the Secretariat to review it. For example, it includes information about the American company New Frontier Trading Corporation and its subsidiary Metales y Derivados, S.A. de C.V., it describes the activities carried out at the site while it was in operation, and includes photographs of the site taken in 1998. The Submission contains information about the toxic characteristics of the wastes abandoned at the site, descriptions of the ailments potentially caused by exposure to the toxic substances allegedly at the site (from skin irritations to babies born with hydrocephaly), information about the human health risks associated with lead and technical information about options for remediation of lead-contaminated sites.¹⁰ The Submission does not appear to be aimed at harassing industry, but rather, at promoting enforcement for the protection of the health of the community living near the site and of the environment.¹¹ The Submission includes copies of various letters sent to the authorities before the plant was closed down,¹² as well as a letter of 13 February 1998 to Profepa requesting information about the status of the criminal proceeding against the plant owners and other information about the conditions at the site.¹³ No reference is made in the submission to any response from the government to the letters sent prior to plant closure, but the Submitters refer to and attach a letter from Profepa, Baja California, dated 12 March 1998, by which the information requested on 13 February 1998 was denied.¹⁴

Having reviewed the Submission in accordance with Article 14(1) and found that it meets the requirements established therein, the Secretariat decided that the Submission merited a response from Mexico. The Secretariat's decision was guided by Article 14(2) of the NAAEC, which provides that:

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

9. See Article (14)(1)(b) and (f) of the NAAEC.

10. See Article (14)(1)(c) of the NAAEC.

11. See Article 14(1)(d) of the NAAEC.

12. See Appendices 1-b through 1-e of the Submission.

13. See Appendix 1-a of the Submission.

14. See Article 14(1)(e) of the NAAEC and Appendix 2-a of the Submission.

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

The Secretariat reviewed the Submission with these factors in mind. The Submitters claim that the community of Colonia Chilpancingo, which the Submitters represent, is exposed to grave risks from the toxic substances at the abandoned and allegedly inadequately secured site.¹⁵ In the opinion of the Secretariat, the types of grave risks to human health and the environment allegedly ensuing from the Party's asserted failure to effectively enforce its environmental law are a matter whose further study in this process will contribute to achieving the goals of the NAAEC, especially Articles 1 and 5 thereof.¹⁶

The Secretariat also considered whether private remedies have been pursued. The Submission states that members of the allegedly affected communities appealed to the environmental authorities while the plant was operating to demand control of the toxic emissions and the illegal disposal of hazardous waste. It states that those communications resulted in certain actions by Profepa regarding the plant, including filing a formal criminal complaint and ordering the shutdown of the smelter. As mentioned above, on 13 February 1998, the Submitters requested information about the status of the criminal proceeding initiated in 1993 against the owners of the plant, and on the conditions at the site and the measures for its remediation. This information was denied

15. Pp. 3-7 and Appendices 1-b, 1-c, 1-d, 3 and 4-b of the Submission.

16. See Article 14(2)(a) and (b) of the NAAEC. The Submitters claim that between 1990 and 1994, when the plant was still operating, 35 children and at least 4 adults died of illnesses allegedly caused by the exposure to the toxic releases of the Metales y Derivados plant, and that the community has also suffered other allegedly related illnesses (see Appendix 4-c to the Submission). The submission includes 4 letters sent to the government between 1990 and 1992 concerning these health problems and requesting that the situation be resolved. The Submitters also argue that the risks to health in Colonia Chilpancingo and other nearby communities continue to grow each year because the hazardous wastes at the site continue to be exposed to the environment and the toxic substances in them do not break down. (See page 7 of the Submission).

to them on the grounds that a judicial proceeding was in course. The Submitters do not indicate whether they have pursued other remedies contemplated in the law, for example, a citizen complaint. The Submitters made concerted efforts to obtain information on the situation at the site and to have the government take action. The government refused to provide this information on the basis that it was taking an enforcement action, so it is not reasonable to expect the Submitters to have done much more.¹⁷

Based on the 12 March 1998 response from Profepa to the Submitters mentioning a prosecution concerning the site, the Secretariat took note of the possibility that in its response to the Submission under Article 14(3), the Party might indicate that review of the allegations should not proceed because of a pending judicial proceeding initiated by a Party. However, the Party did not make that claim in its Response.¹⁸ As a final matter in the Article 14(2) stage, the Secretariat was satisfied that the Submission was not based exclusively on media reports, although copies of certain reports were appended to it.¹⁹ Considering all these factors, the Secretariat determined that it was appropriate to request a response from the Party to this Submission under Article 14(2) of the NAAEC, and requested such a response on 5 March 1999. Mexico's Response, which the Party designated as confidential, was received on 1 June 1999.

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17. See Article 14(2)(c) of the NAAEC. Section 7.5 of the Guidelines, adopted after the Submission was made, provides that the Secretariat "[i]n considering whether private remedies available under the Party's law have been pursued . . . will be guided by whether . . . (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases." The Secretariat made the following considerations, based on this guiding factor of Article 14(2). In repeated occasions the Submitters communicated the matter to the government and requested that it take the appropriate action. The Submission includes 4 letters sent to the government between 1990 and 1992. In addition, prior to making its submission, the Submitters requested information from Profepa on the criminal prosecution against the owners of the abandoned site, requesting also that any other responsible parties be identified (See Appendix 1-a to the Submission). Given the terms of Profepa's response of 12 March 1998, it seems reasonable for the Submitters to assume that there was no further remedy they could pursue (See Appendix 2-a to the Submission). Bearing in mind these circumstances, the Secretariat believed that it was appropriate to request a response, considering this and the other Article 14(2) factors.
18. Further explanation of this point may not be provided without disclosing the content of the Party's Response. As noted before, because of the asserted confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, and pending a decision by Council on that matter, this Notification does not provide information from the Response.
19. See Article 14(2)(d) of the NAAEC and Appendix 4 of the Submission.

**VI- ANALYSIS OF THE SUBMISSION IN LIGHT OF THE
RESPONSE FROM THE PARTY, IN ACCORDANCE
WITH ARTICLE 15(1) OF THE NAAEC**

Article 15(1) of the NAAEC provides that:

If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

As explained in section V above, in its Determination dated 5 March 1999 the Secretariat determined that the Submission merited requesting a response from Mexico and requested such response. The Secretariat has received the Response of the Party and reviewed the Submission in light of the Response. With respect to the allegations that Mexico has failed to effectively enforce the Federal Criminal Code and the law and treaty on extradition, the Secretariat has determined in light of the Party's Response, that those specific allegations do not warrant further review under the Articles 14 and 15 process. On the allegations of a failure to effectively enforce Articles 170 and 134 of the LGEEPA, the Secretariat considers the development of a factual record to be warranted. The Secretariat's reasons for both determinations are set out below. Because of the assertion of confidentiality on Mexico's Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's reasons are explained only to the extent that doing so is possible without disclosing information from the Response.

***1. Allegations of a failure to effectively enforce Article 415
of the Federal Criminal Code by failure to extradite***

The Submission asserts that Mexico is failing to enforce Article 415 of the Federal Criminal Code by failing to extradite the owners of Metales y Derivados under Article 3 of the Law on International Extradition and Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States. In March 1999, the Secretariat determined that it was appropriate to review this allegation, among other reasons, because Article 415 of the Criminal Code meets the definition of environmental law, although the other provisions involved in this allegation do not in and of themselves meet that definition. However, in light of the Response provided by the Party, the Secretariat does not consider further in this Notification the allegations that Mexico is failing to effectively enforce its environmental law by failing to pursue extradition. Because of the asserted confidentiality of the Response and

absent a summary by the Party for the purposes of Section 17.3 of the Guidelines, the Secretariat does not explain its reasons for this determination, since it is unable to do so without providing information from the Party's Response.

2. Allegations of a failure to effectively enforce Articles 170 and 134 of the LGEEPA

The Submission also asserts that Mexico is failing to effectively enforce LGEEPA Articles 170 and 134. The Secretariat determined in March 1999 that it was appropriate to review these allegations and to request a response from the Party, under Articles 14(1) and (2) of the NAAEC. In light of the Party's Response, the Secretariat reviewed whether Articles 170 and 134 are applicable to the matters raised in the Submission and confirmed that these provisions are indeed applicable for the following reasons.

The fact that Metales y Derivados operated until March 1994 and the enforcement measures in regard to the site were taken mainly between 1993 and 1995 raises the question of whether the version of Articles 170 and 134 of the LGEEPA cited in the Submission is applicable to the facts on which the Submitters base their assertions, because that version of Articles 170 and 134 entered into force on 14 December 1996.

Article 170 of the LGEEPA, as cited in the Submission, states:

When an imminent risk to the ecological balance exists, or a harm or serious deterioration of natural resources, cases of contamination posing dangerous repercussions to the ecosystems, [their] components or to public health, the Secretary, with probable cause, could order one or more of the following safety measures:

- I. The temporary, partial or total closure of the sources of contamination, as well as the facilities that handle or store wild flora or fauna species, forestry resources, or activities that create what is described in the first paragraph of this Article,
- II. The precautionary securement of hazardous materials and wastes, as well as wild flora or fauna specimens, products or byproducts or their genetic material, forestry resources, as well as the assets, vehicles, equipment and instruments that are directly associated with the activity that gives rise to the imposition of the safety measure, or

III. The process of neutralizing or other analogous action that prevents the materials or hazardous wastes from creating the effects named in the first paragraph of this Article.

Likewise, the Secretary may promote before the competent authority, the implementation of one or some of the safety measures found in other regulations.

From Article 134 of the LGEEPA, the Submission cites the following:

For the prevention and control of soil contamination, the following criteria will be considered:

- I. It is the responsibility of the State and society to prevent soil contamination;
- II. Wastes must be controlled since they constitute the principal source of soil pollution. . . .
- V. Proper actions shall be taken to restore or reestablish the quality of soil that is contaminated by the presence of hazardous materials or waste, in such a manner that it can be used or restored in whatever type of activity contemplated in the appropriate urban development program or ecological regulation.

In terms of content, the current text increases and specifies the government's authority to prevent and control soil contamination and an imminent risk to public health, although both this and the previous text provide that authority.²⁰ Both versions of Articles 170 and 134 empower

20. Articles 170 and 134 of the LGEEPA, prior to the amendment of 1996, stated (free translation):

Article 170.— Where there exists an imminent risk of ecological imbalance or cases of contamination with hazardous consequences for ecosystems, their components or public health, the Ministry, as a safety measure, may order the seizure of contaminant materials or substances, the temporary, partial or total shutdown of the corresponding sources of contamination, and initiate, before the competent authority under the terms of the relevant laws, any of the safety measures established by said provisions.

Article 134.—For the prevention and control of soil contamination, the following criteria shall be considered:

- I. It is the responsibility of the state and society to prevent soil contamination;
- II. Wastes must be controlled, as they constitute the principal source of soil contamination;
- III. It is necessary to rationalize the generation of solid municipal and industrial wastes and to incorporate techniques and procedures for their reuse and recycling, and
- IV. The use of pesticides, fertilizers and toxic substances must be compatible with the stability of ecosystems.

environmental authorities to take safety measures to respond to cases of imminent risk to the environment or contamination with dangerous repercussions to the environment or public health, and provide that certain criteria must be considered for the prevention and control of soil contamination. Articles 170 and 134 focus on the existence of risk and on prevention and control of soil contamination, not on risky or contaminating activities or facility operations themselves.

The Submission asserts that wastes and soil contamination at the abandoned site continue to represent a public health risk, even though the plant is no longer operating. The allegations in the Submission focus on the contamination and risk allegedly caused by the operations at Metales y Derivados, but that allegedly continued to exist at the time the Submission was made in October 1998. The causes of this contamination according to the Submitters, include the alleged inadequacy of the enforcement measures taken in regard to the site until 1995, and the lack of any further steps to remediate the site to the date of the Submission.²¹ The Submitters' allegations focus on the second alleged cause. The provisions cited in the Submission are applicable because the assertions concern allegedly existing soil contamination and risks to public health, as do Articles 170 and 134, not the plant operations that allegedly caused the soil contamination.

In this Notification, the Secretariat focuses mainly on the current text of Articles 170 and 134, which governs the alleged failures by Mexico to effectively enforce its environmental law that are the focus of this Submission. However, with respect to enforcement action taken before the amendment of 1996, the applicable text is the text prior to the amendment. Finally, it should also be noted that the Secretariat focused mainly on events that occurred after the entry into force of the NAAEC in January of 1994, although events that occurred before may potentially be relevant.²²

21. Pp. 10 and 11 of the Submission.

22. On this subject, the Secretariat observed in regard to submission SEM-96-001: "Article 47 of the NAAEC indicates the Parties intended the agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law. The Vienna Convention on the Law of Treaties provides in Article 28 that *unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party.*" (cited in SEM-96-001, Recommendation of the Secretariat to

The Secretariat now explains its reasons for considering that a factual record is warranted with respect to the assertions that Articles 170 and 134 of LGGEPA have not been effectively enforced.

The Submission asserts that Mexico is failing to effectively enforce Article 170 of the LGEEPA, which empowers the Mexican environmental authorities to order safety measures where there exists an imminent risk to the ecological balance, or cases of contamination posing dangerous repercussions to the ecosystems, their components or to public health. As mentioned before, the focus of the allegations is on the current version of Article 170, which provides in paragraphs II and III that Profepa has the ability to order the precautionary securement of hazardous materials and wastes, and "the neutralization or other analogous action that prevents the materials or hazardous wastes from creating the effects named in the first paragraph of this Article," that is, that prevents an imminent risk to the environment or dangerous repercussions to the ecosystems, their components or to public health.

The Submission argues that the site is a case of contamination by hazardous materials and wastes that poses a risk to the environment and dangerous consequences for public health, and that Mexico has not taken measures to prevent the hazardous materials and wastes from creating those effects. The Submission describes the types of hazardous materials and wastes allegedly found at the site, including lead, sulfuric acid, cadmium and arsenic, and the potentially hazardous consequences for public health from the exposure to those substances.²³ The Submission asserts that the inhabitants of Colonia Chilpancingo, located approximately 150 yards downhill from the Metales y Derivados site, have suffered health problems which may have been caused and/or exacerbated by the exposure to the toxic site. The health problems described range from nausea to infants affected with asthma, chronic skin irritations and fatal birth defects such as hydrocephaly.²⁴ The Submitters also argue that the risks to health in Colonia Chilpancingo and other nearby communities continue to grow each year because the hazardous wastes at the site continue to be exposed to the environment and the toxic substances in them do not break down.²⁵ The Submitters indicate that part of the wall that was repaired in 1995 by Profepa has corroded or is cracked,

Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 7 June 1997. See also SEM-97-001, Notification of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 27 April 1998).

23. Pp. 4-6 of the Submission.

24. P. 4 and Appendix 4-d of the Submission.

25. P. 7 of the Submission.

and that the plastic cover Profepa installed over the piles of lead slag has deteriorated and the lead slag is again exposed. The Submission also claims that the authorities have failed to post warnings about the potential risks to human health represented by the waste site, and that people have made openings in the wall to enter the premises and remove debris, and others regularly take a path adjacent to the site to get to and from work, potentially exposing themselves to particles and runoff from the Metales y Derivados site.²⁶ According to the Submitters, Mexico has failed to effectively enforce Article 170 of the LGEEPA in that, although the facility was shut down in 1995, Mexico has not taken the appropriate actions to contain and secure the hazardous wastes at the site, nor to neutralize them and prevent them from causing contamination with hazardous consequences for public health, despite numerous requests from the Submitters.²⁷

The Secretariat has reviewed these allegations in light of the Party's Response. Because of the Party's assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's discussion of Mexico's Response in this Notification is limited to the following. The Response does not contest the Submitters' assertion that the site is "an imminent risk to the ecological balance or a case of contamination posing dangerous repercussions to the ecosystems, their components or to public health," as contemplated by Article 170 of the LGEEPA. The Party's Response is also consistent with the Submitters' allegations that measures were taken with regard to the Metales y Derivados site up to 1995, and that no other measures have been taken under the current text of Article 170, which entered into force in December of 1996. From both the Submission and the Response it is evident that despite the actions taken by Profepa, the site remains in a state of contamination posing dangerous repercussions to public health. It is clear that Mexico took some actions that are contemplated in the version of Article 170 in force until December 1996, mainly the temporary closure of the plant before 1995 and the repair of the wall and covering of the lead slag in 1995. However, as it reads since the 1996 reform, Article 170 provides for neutralization or other analogous action that prevents risk or dangerous consequences to public health from hazardous contamination. The Response does not claim that the government is not obligated under paragraphs II and III of Article 170 to take action where there is an imminent risk to the environment or dangerous repercussions to public health created by hazardous materials or wastes. Although Mexico's Response does not concede that

26. P. 6 and 10 of the Submission and Appendix 3.

27. P. 10 of the Submission.

the Party is failing to effectively enforce Article 170, the information in the Response does not support a claim that the Party has effectively enforced paragraphs II and III of Article 170, or that safety measures have been taken to effectively prevent “an imminent risk to the environment or dangerous repercussions to the ecosystems, their components or to public health” from the allegedly toxic contamination at the site. For these reasons, the Secretariat considers that the development of a factual record is warranted in order to better understand Mexico’s enforcement of Article 170 of the LGEEPA and the effectiveness of such enforcement in preventing risks to the environment and public health from the Metales y Derivados site, pursuant to that provision.

As part of the above, the information collected in a factual record about Mexico’s efforts to enforce Article 170 effectively, should include more information about the contamination at the site and the health problems allegedly connected with it. As mentioned above, the Party’s Response does not contest that the site is contaminated and that it poses a risk to the environment and to public health. However, there is little information from both the Submission and the Response on the specific conditions at the site. The Response does not indicate whether the government has specific data on the degree of contamination and the level of risk. For example, it does not indicate whether a characterization of the wastes now present at the site exists, or that there is any specific assessment of the current concentration of the contaminants in the soil within and outside the site, and on the exposure levels, etc. This information is relevant to the effective enforcement of Article 170 because it is essential to an understanding of the specific contamination problem, that could be addressed with the authority provided under Paragraph III of Article 170, to prevent such contamination from causing dangerous repercussions to public health and the environment.

Information is also lacking with regard to the reported health problems in the Colonia Chilpancingo, allegedly caused by the hazardous contamination at the Metales y Derivados site. For example, there is no mention in the Response of whether the risks of exposure have been assessed and whether the alleged dangerous repercussions to public health have been investigated. Also lacking is information on whether specific measures necessary to protect the health of the allegedly exposed community from any dangerous repercussions have been considered or identified. This kind of factual information is relevant to the effective enforcement of Article 170 because it provides a basis to identify specific measures that allegedly could be taken under the authority provided by Paragraph III of Article 170, to prevent hazardous contamination or wastes from causing dangerous repercussions to public health.

The Secretariat believes that, in light of the degree of the potential harm in question, a factual record on the effective enforcement of LGEEPA Article 170 with respect to the Metales y Derivados site, would advance the goals of the Agreement²⁸ by shedding light on the effective enforcement of measures for the prevention of risk to public health and the environment in connection with hazardous waste. A factual record prepared in regard to this Submission should obtain the information described in the two preceding paragraphs and other factual information that is relevant to the effective enforcement of Article 170 of LGEEPA, to better understand Mexico's enforcement efforts under that provision. Such information would also be relevant in connection with resource constraints or other obstacles that the Party may have been facing for the effective enforcement of its environmental law with respect to the Metales y Derivados site.

The Submission also asserts that Mexico is failing to effectively enforce Article 134 of LGEEPA, which enumerates the criteria that must be taken into account in the prevention and control of soil contamination, including restoration. In its opening sentence, LGEEPA Article 134 provides that the criteria it enumerates shall be taken into consideration in achieving prevention and control of soil contamination. Preventing soil contamination is an obligation imposed on both the state and society under Paragraph I; controlling wastes because they are the principal source of soil contamination is prescribed by Paragraph II; and Paragraph V provides that where soil contamination from hazardous substances or wastes exists, actions should be taken to restore contaminated soil, based on land use plans or ecological zoning programs. In light of the Party's Response, the Secretariat considered the definitions of "control" and "prevention" in Article 3 of the LGEEPA for a better understanding of the scope of Article 134. "Control" is defined as "inspection, monitoring and enforcement of the measures necessary for compliance with the provisions hereof" and "prevention" is defined as "the set of provisions and measures taken with foresight to prevent the deterioration of the environment." It is clear in light of these definitions that enforcement of Article 134 where toxic wastes and substances are concerned, should be aimed at preventing soil contamination from occurring by securing compliance, as well as at the remediation of contaminated soil.

The Submitters argue that Mexico has not taken adequate actions to control the hazardous materials found at and near the site of Metales y Derivados nor to prevent soil contamination or have the site restored, as provided by Article 134. They assert that the measures taken do not

28. Articles 1 and 5 of the NAAEC.

constitute effective enforcement of Article 134 of the LGEEPA since soil contamination was not in fact prevented and the site has not been restored. As mentioned above, the Submission contains information to support the assertion that the site is contaminated,²⁹ and the Party's Response does not contest that a grave situation of contamination exists at the Metales y Derivados site. The Submission mentions a number of measures, including inspections and the final shutdown of the plant, that were taken by the government of Mexico. Arguably, Article 134 contemplates these measures because Article 134 provides for "prevention and control" of soil contamination and those measures fall within the definition of "control" established in the LGEEPA. However, especially in light of the definitions of "control" and "prevention," it is evident that inspections and shutdowns are measures available to the environmental authority (the means) in order to prevent and control soil contamination (the end). It is also clear under that definition of control, that Paragraph II of Article 134 requires that any measures necessary to achieve compliance with other requirements (i.e. hazardous waste management requirements) be taken to prevent soil contamination.

Again, because of the Party's assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's discussion of Mexico's Response to these allegations is limited to the following. The Party does not concede that it is failing to effectively enforce Article 134. As regards the actions taken by Profepa with respect to the site, the Party's Response is basically consistent with the information provided in the Submission. The Party's Response does not claim or show that the actions taken by Profepa brought the Metales y Derivados plant into compliance regarding hazardous wastes and the prevention of soil contamination, nor that those actions otherwise prevented soil contamination at the site or produced its remediation, in accordance with Article 134. The Response does not provide information on the way in which the actions taken by Profepa applied Article 134, or whether Profepa monitored the effectiveness of its actions in preventing soil contamination. This kind of information would provide a better understanding of Mexico's enforcement efforts to prevent or control contamination at the Metales y Derivados site and to have the site restored, and of the effectiveness of those efforts. The Secretariat's understanding, in light of both the Submission and the Party's Response, is that Mexican environmental authorities have been aware of the contamination at the Metales y Derivados site and have recorded violations that were serious enough to shut down the plant. The fact that measures were taken at the site is

29. Pp. 3, 6, 7, 10 and 11, and Appendices 3 and 4-b of the Submission.

supported by the Response, but no basis was provided therein to understand how those measures amount to the effective enforcement of LGEEPA Article 134, by preventing and controlling soil contamination. Obstacles that the Party may have been facing in its enforcement efforts related to the site are not specified in the Response either. Given the current situation of soil contamination at the Metales y Derivados site, that allegedly could have been prevented or could be remediated under the authority provided by Article 134, and in light of the limited information on the Party's enforcement efforts, the Secretariat considers that development of a factual record is warranted in regard to the Submitter's assertions of a failure to effectively enforce Article 134 of the LGEEPA. Here again, the Secretariat believes that in light of the degree of the potential soil contamination in question, a factual record on the effective enforcement of LGEEPA Article 134 with respect to the Metales y Derivados site would advance the goals of the Agreement,³⁰ by shedding light on the effective enforcement of provisions for the prevention and control of soil contamination from hazardous waste.

In summary, the Secretariat considers that, in light of the Response from the Party, development of a factual record is warranted concerning the alleged failure to effectively enforce LGEEPA Articles 170 and 134 in this Submission. The factual record should provide information on the contamination at the Metales y Derivados site, on the alleged dangerous repercussions to public health and the environment from such contamination, and on the Party's enforcement efforts to prevent an imminent risk to the environment and dangerous repercussions to public health, and to prevent and control soil contamination, including by restoration, with respect to that site, in effective enforcement of LGEEPA Articles 170 and 134.

VII- NOTIFICATION TO COUNCIL IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

This Notification concerns the Submission by Environmental Health Coalition and Comité Ciudadano Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C. As noted in this document, the Secretariat has determined in light of the Party's Response that the assertions concerning the alleged failure to extradite the owners of Metales y Derivados, under Article 415 of the Federal Criminal Code and provisions of the Law on International Extradition and the Extradition Treaty between the United Mexican States and the United States of America, do not warrant further review under this process. Because of the asserted

30. Articles 1 and 5 of the NAAEC.

confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines, this notification does not explain the reasons for such determination, since the Secretariat was unable to do so without providing information from the Party's Response.

Also in light of the Party's Response, the Secretariat considers that the development of a factual record is warranted on the Submitters' assertions that Mexico is failing to effectively enforce LGEEPA Articles 170 and 134, by failing to protect public health and the environment from the risks posed by the allegedly contaminated site in Tijuana, Baja California, Mexico, abandoned by Metales y Derivados, S.A. de C.V., and by failing to prevent and control soil contamination at the site or restore the site. In accordance with Article 15(1) of the NAAEC, the Secretariat so informs the Council and in this document provides its reasons, within the limitations arising from the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

Respectfully submitted on this 6th day of March 2000.

Janine Ferretti
Executive Director

SEM-99-001
(METHANEX)

SUBMITTER: METHANEX CORPORATION

PARTY: UNITED STATES OF AMERICA

DATE: 18 OCTOBER 1999

SUMMARY: The Submitters allege that the United States of America has failed to enforce California's environmental laws and regulations related to water resource protection and to the regulation of underground storage tanks (USTs).

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) Determination that criteria under Article 14(1) have
(30 MARCH 2000) been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

ART. 14(3) Dismissal in conjunction with submission
(30 JUNE 2000) SEM-00-002 following Party's response.

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitter(s): Methanex Corporation

Concerned Party: United States

Date Received: 18 October 1999

**Date of this
Determination:** 30 March 2000

Submission I.D.: SEM-99-001

I- INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental 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 in Article 14(1). On 18 October 1999 the Submitters filed a submission with the Secretariat pursuant to Article 14 of the NAAEC. The Secretariat has determined that one of the assertions in this submission meets the criteria in Article 14(1) and that this assertion merits a response from the Party in light of the factors listed in Article 14(2). The Secretariat is dismissing a second assertion contained in the submission on the ground that it raises issues that are beyond the scope of the Article 14 process. The Secretariat sets forth its reasons in Section III below.

II- SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. The first is that the government is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs).¹ This assertion rests on a three-step analysis. The submission asserts that there is a regulatory scheme in place in California relating to releases of hazardous materials, such as gasoline, from USTs.² Next, it asserts that there are substantial numbers of violations of this regulatory scheme.³ Finally, the submission claims that the government has failed to effectively enforce the regulatory scheme, and that this failure to enforce has "allow[ed] gasoline to be released into the environment from leaking USTs."⁴ In the words of the Submitter, "[t]he harm caused by this lack of enforcement is . . . clear."⁵

The submission's second assertion is that existing laws are insufficiently protective of human health and the environment because they do not regulate certain categories of USTs. The submission states that "as only a portion of USTs are regulated, California has also failed to enforce its environmental laws . . . by not regulating all sources of environmental contamination."⁶

III- ANALYSIS

A. Article 14(1)

The assertion that California and/or the United States is failing to effectively enforce various environmental laws satisfies the criteria for further consideration contained in Article 14(1), with the qualifications discussed below.⁷ First, the submission meets the requirements contained in the opening sentence of Article 14(1). This sentence authorizes the Secretariat to consider a submission "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." Article 45(1) of the NAAEC defines "non-governmental organization" to include, *inter alia*, "any . . . business

1. See e.g., Submission at 3.

2. See e.g., Submission at 1.

3. See e.g., Submission at 1, 2, 7-9.

4. See e.g., Submission at 1, 3, 4, 8, 11.

5. Submission at 2.

6. Submission at 1.

7. The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

. . . which is neither affiliated with, nor under the direction of, a government. . . .” Based on the information provided in the submission, the submitter qualifies as a “non-governmental organization.”⁸ It is a business and there is no indication that it is affiliated with, or under the direction of, a government.

Further, the assertion in the submission that the Party has failed to effectively enforce UST-related requirements⁹ focuses, as required, on a Party’s asserted failure to effectively enforce the law, not on the effectiveness of the law itself.¹⁰

Third, the submission’s focus is on the asserted failure to effectively enforce “environmental laws.” The submission challenges the enforcement of numerous laws, including the United States Clean Water Act, the United States Safe Drinking Water Act, the California Water Code, and the California Code of Regulations.¹¹ These laws qualify as “environmental law” for purposes of the NAAEC in that their primary purpose is “protection of the environment, or the prevention of a danger to human life or health. . . .”¹²

Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party “is failing” to effectively enforce its environmental law.

Article 14(1) lists six specific criteria relevant to the Secretariat’s consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

8. See NAAEC Article 45(1), Guideline 2.1, Submission at 13.

9. See e.g., Submission at 1.

10. See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

11. Submission at 3-6.

12. Article 45(2)(a). The relevant provisions of the California Code have this purpose.

(d) appears to be aimed at promoting enforcement rather than at harassing industry;

(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

(f) is filed by a person or organization residing or established in the territory of a Party.¹³

The first two criteria are straightforward and may be addressed quickly. The submission is in English, a language designated by the Parties.¹⁴ The submission also clearly identifies the organization making the submission.¹⁵

Concerning the third criterion in Article 14(1), the submission provides sufficient information to allow the Secretariat to review the submission with respect to the assertions of a failure to effectively enforce the California laws cited.¹⁶ Among other things, the submission contains a fairly extensive discussion of asserted failures to effectively enforce the State's UST requirements.¹⁷ It also provides as Appendices various government documents relating to the subject matter at issue, including reports issued by the California State Auditor concerning the regulation of USTs and enforcement of regulatory requirements pertaining to USTs.¹⁸

The submission, however, does not provide sufficient information concerning the federal Safe Drinking Water Act and federal Clean Water Act. As has been noted in other Determinations, while the requirements of Article 14(1) are not intended to place an undue burden on submitters, a certain amount of support is required for assertions at this initial stage.¹⁹ The vast majority of this submission focuses on asserted failures to effectively enforce various California environmental laws. Indeed, the "Summary" portion of the submission refers exclusively to California and California laws. While the submission makes brief references to the referenced federal laws, it does not provide the Secretariat with the

13. Article 14(1)(a)-(f).

14. Article 14(1)(a), Guideline 3.2.

15. Article 14(1)(b), Submission, cover page and inside cover page, and page 2.

16. Article 14(1)(c), Guideline 5.2, 5.3.

17. See e.g., Submission at 6-11.

18. Annexes G and H.

19. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

information necessary to review the submission adequately with respect to these laws.²⁰

The fourth criterion in Article 14(1), relating to whether a submission is “aimed at promoting enforcement,” also warrants elaboration. Guideline 5.4 indicates that in determining whether a submission appears to be aimed at promoting enforcement rather than at harassing industry, the Secretariat is to consider factors such as whether or not:

- (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;
- (b) the submission appears frivolous.

An unusual feature of this submission is that the Submitter is a producer of methanol, which is used in the production of Methyl Tertiary-Butyl Ether (MTBE).²¹ MTBE, in turn, is a constituent of gasoline that is stored in, and sometimes leaks from, USTs. The Submitter’s status may raise a question for some concerning its motivation in filing the submission. The Submitter expresses the hope that more stringent enforcement of UST requirements will reduce leakage from such tanks and thereby enhance environmental protection and promote protection of public health.²² In addition to its expressed concerns relating to the harm that such leaks cause to the environment and public health, the Submitter has an economic interest. In March 1999, California’s Governor issued an Executive Order in which he announced a phase-out of the use of MTBE in gasoline.²³ The submission notes that the Executive Order cites the environmental threat that MTBE poses to groundwater and drinking water because of leaking underground fuel storage tanks.²⁴ The submission suggests that the approach of phasing out MTBE is a flawed strategy for addressing this environmental problem, and that heightened enforcement of UST requirements to prevent leakage would be a better approach, stating as follows:

20. See e.g., Guideline 5.2 and 5.3.

21. Annex K, March 9, 1999 letter from Fred T. Williams, Vice President Marketing, Methanex Corporation to Governor Gray Davis, stating that “Methanex is the world’s largest producer and marketer of natural gas derived methanol, one of the two components used to produce MTBE.”

22. Submission at 1-2, 13.

23. Submission at 2.

24. Submission at 2.

This [the Governor's] Order acknowledges the UST issue, but focuses attention on one gasoline component, namely MTBE. It thus treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State's failure to enforce its environmental laws.²⁵

The Submitter expresses the view that, in short, the government's responsibility is to improve enforcement of existing regulations in order to prevent leakage and promote clean-up.²⁶ The submission states that the risk to the environment is not from MTBE, but from leaking USTs.²⁷

The Submitter's status as a producer of methanol does not take away from the focus of the submission, which is on the asserted need for tighter enforcement. It also, importantly, does not suggest that the purpose of the submission is to challenge a particular company or business's compliance with UST requirements. The submission states on its face that it is focused on the acts or omissions of the government in enforcing the law and for purposes of Article 14(1)(d) this appears to be the case.²⁸ The submission summarizes its position on this issue as follows:

[T]he submission is aimed at enforcement, and not at harassing any particular company or industry in the United States. Methanex notes that California authorities have failed to enforce their environmental laws with the result that gasoline released from USTs has and continues to contaminate the environment, including soil, air and water. . . . Methanex submits that active enforcement of California's existing environmental laws will ensure that gasoline is not unnecessarily released into the environment from USTs and that such diligent enforcement of environmental laws will result in increased protection for the environment.²⁹

In sum, the submission's assertion satisfies the criterion in Article 14(1)(d).

With respect to the fifth criterion in Article 14(1), the submission indicates that the Submitter has communicated its concerns to govern-

25. Submission at 2. The Secretariat's Determination is not intended to address this assertion of the Submitter and should not be viewed as doing so. As noted above, the Secretariat's focus is on the assertions that various environmental laws relating to releases of hazardous materials from USTs are being violated and that the government is failing to effectively enforce these laws.

26. Submission at 11.

27. Submission at 12.

28. Article 14(1)(d), Submission at 13.

29. Submission at 13.

ment officials, and it indicates that to date it has not received a response.³⁰ The submission also includes copies of relevant correspondence.³¹

Concerning the sixth criterion, contained in Article 14(1)(f), the submission is filed by an organization residing or established in the territory of a Party, notably Canada.³² The Submitter's status as a for-profit entity raises the issue of whether Article 14/15 is reserved for environmental NGOs/individuals. There is nothing in the Agreement itself that limits the pool of submitters in this way. Article 14(1)(f) simply requires that the submission be filed by an organization residing or established in the territory of a Party. As noted above, Article 45(1) of the NAAEC supports allowing businesses to file submissions through its definition of an NGO to include any business organization that is neither affiliated with, nor under the direction of, a government. As a result, a business may be a submitter so long as it is not affiliated with, nor under the direction of, a government, and so long as it resides or is established in the territory of a Party. Methanex does not seem to be disqualified under any of these exclusions and therefore it qualifies under Article 14(1)(f) as a potential submitter.

For the foregoing reasons, the submission's assertion of a failure to effectively enforce the above-referenced California environmental laws satisfies the criteria in Article 14(1).

We now turn to the submission's second assertion—that existing laws are insufficiently protective of human health and the environment because they do not regulate certain categories of USTs. Article 14 focuses on asserted failures to effectively enforce. It does not provide jurisdiction to consider assertions that a Party's environmental laws are ineffective.³³ The Secretariat's understanding is that this assertion involves a challenge to the effectiveness or adequacy of the regulatory scheme itself.³⁴ Because this claim is beyond the scope of the Article 14 process, we do not consider it further.

30. Article 14(1)(e), Guideline 5.5, Submission at 13, 14, Annex K.

31. Guideline 5.5., Submission at 13, 14, Annex K.

32. Article 14(1)(f), Submission at 3, 13.

33. The Secretariat discussed the distinction between challenges to the effectiveness of a Party's enforcement practices (within the scope of Article 14) and challenges to the adequacy of environmental laws themselves (beyond the scope of Article 14) in the Great Lakes determination. SEM-98-003 (14 December 1998).

34. The Secretariat found the submission somewhat unclear concerning this assertion. Methanex alleges that "many of the State's USTs are unregulated, and thus they are not subject to any controls." (Submission at 4). The asserted failure targeted by this aspect of Methanex's submission appears to relate to the scope of California's UST

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if the Secretariat finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the relevant Party prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.³⁵

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. The submission asserts that the Submitter "is concerned with the harm which has been, and continues to be, caused to the environment by California's failure to enforce its environmental laws."³⁶ It alleges that "[g]asoline, which is a hazardous substance, continues to be released to

and other water quality protection regulatory programs rather than to inadequate enforcement of such programs. As the Secretariat has noted in other proceedings initiated under Article 14, the purpose of the NAAEC is not to set environmental standards for the Parties, a right they have reserved to themselves. Government standard-setting is therefore outside the purview of Article 14 and the Article 14 citizen submission process is not available for challenges to a Party's exercise of its standard-setting authority. *See, e.g.*, SEM-98-003 (14 December 1998). The submission also asserts that California's failure to regulate all USTs contravenes California and federal environmental law. If such a failure exists, and if it contravenes one or more environmental laws, the submission conceivably could constitute an assertion of a failure to enforce, rather than a challenge to the scope of the law itself. If this is the assertion of the Submitter, it has not developed the assertion sufficiently to make Secretariat review appropriate.

35. Article 14(2).

36. Submission at 2. See also Submission at 14 (asserting that "harm has resulted, and continues to result, from California's lack of enforcement. . .").

the environment and continues to contaminate the environment; soil, air and water.”³⁷ The submission cites an excerpt from a report of the California State Auditor that indicates that leaking tanks “pose a major threat to California’s groundwater. . . .”³⁸ The Summary of the State Auditor’s report states that leaking tanks are a threat to the State’s drinking-water supplies: “the State of California has ample evidence that gasoline leaking from underground storage tanks is jeopardizing the safety of our drinking-water supplies. . . .”³⁹ Assertions of substantial harm to the environment (here groundwater and drinking-water supplies) have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.⁴⁰ We note that the Submitter claims that the harm allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment.⁴¹

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.⁴² The submission asserts that the failure to enforce is widespread. Assertions of this sort—that there is a pattern of ineffectual enforcement—are strong candidates for Article 14 consideration.⁴³ This is particularly the case when, as here, it is also asserted that the failure to effectively enforce threatens substantial environmental harm.

Third, the submission indicates that private remedies to require the Party to enforce its law are not available.⁴⁴ The submitter states that it has communicated its concerns to California officials but has not

37. Submission at 14.

38. Submission at 7 (the excerpt is from page 15 of the California State Auditor’s report).

39. Annex G, at 1.

40. In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), for example, the Secretariat noted: “In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.” The same is true here. It appears that Methanex also claims at least indirect personal harm from the asserted failure to effectively enforce.

41. Guideline 7.4.

42. Article 14(2)(b).

43. Submissions that focus on asserted failures to enforce concerning individual facilities also warrant consideration under Article 14 under some circumstances, as previous Secretariat Determinations and the Council’s Resolution for SEM-96-001 reflect.

44. Article 14(2)(c), Guideline 7.5, Submission at 13-15.

received a response to its letters or to a "Five Point Plan" it provided to Governor Davis of California.⁴⁵ The Submitter advises in its submission that it has also filed a Notice of Intention to bring an investor-state dispute against the United States pursuant to Chapter 11 of NAFTA.⁴⁶ The Secretariat notes that the Agreement expressly provides that the Party may raise the availability of private remedies in its response.

Finally, the submission is not based exclusively on mass media reports. Instead, as noted above, the submission includes several government documents, among other materials, that relate to the assertion that there is a failure to effectively enforce that creates a substantial risk to public health and the environment.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that there is a failure to effectively enforce the California environmental laws referenced above merits requesting a response from the Party.

CONCLUSION

For the foregoing reasons and to the extent outlined above, the Secretariat has determined that the assertion that the Party is failing to effectively enforce its environmental laws meets the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that this assertion in the submission merits requesting a response from the Government of the United States. Accordingly, the Secretariat requests a response from the Government of the United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

David L. Markell
Director, Submissions on Enforcement Matters Unit

- c.o. Mr. William Nitze, US-EPA (with annexes)
- c.c. Ms. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Mr. Michael McDonald, Methanex Corporation
Ms. Janine Ferretti, CEC Executive Director

45. Submission at 13 -15.

46. Submission at 13.

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation

Submitter(s): Methanex Corporation
Neste Canada Inc.

Concerned Party: United States

Date Received: 18 October 1999

**Date of this
Determination:** 30 June 2000

Submission I.D.: SEM-99-001 and SEM-00-002

I- INTRODUCTION

This determination addresses two submissions, SEM-99-001 (Methanex) and SEM-00-002 (Neste). Methanex filed its submission on 14 October 1999. On 30 March 2000 the Secretariat determined that the submission met the criteria in Article 14(1) for further consideration and that the submission merited a response from the Party based on the factors contained in Article 14(2). Neste filed its submission on 21 January 2000. On 17 April 2000 the Secretariat determined that it was appropriate to consolidate this submission with the submission filed by Methanex pursuant to Guideline 10.3. That guideline authorizes the Secretariat to "consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law." The Secretariat determined that the Neste submission met the criteria in Article 14(1) for further consideration and that the submission merited a response from the Party based on the factors contained in Article 14(2). On 30 May 2000 the Secretariat received a response from the Party to the consolidated submissions.

II- SUMMARY OF THE SUBMISSIONS

The Methanex submission contains two basic assertions. First, Methanex asserts that the Party is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs). According to the submission, there is a regulatory scheme in place in California relating to releases of hazardous materials, including gasoline, from USTs. Methanex claims that there is a substantial number of violations of this regulatory scheme. Finally, the submission argues that the Party has failed to effectively enforce the regulatory scheme, and that this failure to enforce has allowed gasoline from USTs to be released into the environment from leaking USTs, causing harm. The submission asserts that the California Governor's issuance of an Executive Order that phases out the use of MTBE is "wrong-headed" because it "focuses attention away from the UST issue by phasing-out the use of MTBE."¹

Second, the Methanex submission asserts that existing laws are insufficiently protective of health and the environment because they do not regulate certain categories of USTs. According to Methanex, the failure to regulate certain categories of USTs amounts to a failure to effectively enforce the Party's environmental laws. In its 30 March 2000 determination, the Secretariat declined to consider this second assertion further on the ground that Article 14 does not provide jurisdiction for the Secretariat to consider assertions that a Party's environmental laws are ineffective. Because the second assertion in the Methanex submission involved a challenge to the adequacy or effectiveness of the regulatory scheme itself, rather than to the Party's alleged failure to effectively enforce it, the Secretariat dismissed this portion of the Methanex submission.

As the Secretariat noted in its 17 April 2000 determination in SEM-00-002, the Neste submission largely tracks Methanex's submission. Neste's main assertion is that the Party is failing to effectively enforce various environmental laws relating to water resource protection and concerning USTs. Neste explicitly refers to the close link with Methanex's submission and states its belief that "the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs."²

1. Methanex Submission at 11.
2. Neste Submission at 2.

III- SUMMARY OF THE RESPONSE

The Party affirms its support for the citizen submission process and for developing factual records under appropriate circumstances. It states that, for example, “we wish to emphasize that the United States Government believes that the Articles 14 and 15 process is a critical component of the cooperative efforts for environmental protection among the Parties to the NAAEC. The United States has repeatedly been and continues to be a strong supporter of that process.”³ The Party continues, however, that “as the Secretariat has recognized, not all submissions merit development of a factual record.”⁴

The Party asserts that it is not appropriate to develop a factual record for the Methanex and Neste submissions. The Party identifies two reasons why development of a factual record is not warranted. First, the Response asserts that the Methanex and Neste submissions must be dismissed based on Article 14(3)(a) of the North American Agreement on Environmental Cooperation (NAAEC or the “Agreement”). Article 14(3)(a) provides that the Secretariat “shall proceed no further” if a submission “is the subject of a pending judicial or administrative proceeding.” The Response asserts that there is such a proceeding, notably a pending proceeding under Chapter 11 of the North American Free Trade Agreement (NAFTA). The Response states that, as a result, the Secretariat must dismiss the submissions.⁵ The Party summarizes as follows its view that Article 14(3) requires that the Secretariat dismiss the submissions:

Article 14.3(a), as elaborated by Article 45.3(b), specifically precludes the preparation of a factual record where the matter submitted is the subject of an international dispute resolution proceeding involving the same Party. In this case, Methanex is already challenging California’s enforcement of its UST regulations as part of its arbitration claim against the United States under NAFTA Chapter 11. Because the issue of California’s enforcement of its UST regulations has been raised before the international arbitral tribunal convoked to address Methanex’s Chapter 11 claim (a qualifying proceeding under Article 45.3(b)), development of a factual record is proscribed by Article 14.3(a).⁶

The Response also asserts that the Party is effectively enforcing its environmental laws. The Response describes the enforcement response of

3. Response at 1.

4. Response at 1. The Party cites to two Secretariat determinations that dismissed submissions on various grounds.

5. See Response at 5-8.

6. Response at 5.

the Party to the asserted violations and claims that this response constitutes effective enforcement for purposes of the NAAEC. The Response asserts that, as a result, the Secretariat should dismiss the submission because it would be inappropriate to develop a factual record under these circumstances.⁷

The Party summarizes these two points as follows:

This memorandum serves to advise the Secretariat, in accordance with Article 14.3(a) of the Agreement, that the matter raised in the submission is the subject of a pending judicial or administrative proceeding. In accordance with Article 14.3(a), the Secretariat should proceed no further with the consideration of the submission. This memorandum also explains that California is effectively enforcing its environmental law.⁸

IV- ANALYSIS

A. Introduction

Article 15(1) of the NAAEC directs the Secretariat to determine, based on its review of a submission and the Party's response, whether to dismiss the submission or to inform the Council that the Secretariat considers that the submission warrants developing a factual record. The text of Article 15(1), which reads as follows, provides little guidance to the Secretariat as to the factors it should consider in performing this responsibility:

If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

In contrast to the general language in Article 15(1) of the NAAEC, Article 14(3)(a) requires the Secretariat to dismiss a submission in one specific situation. Article 14(3)(a) provides that if "the matter is the subject of a pending judicial or administrative proceeding. . . , the Secretariat *shall* proceed no further" (emphasis added). Accordingly, if the Secretariat determines that the matter involved in a submission is the subject of a pending judicial or administrative proceeding, under Article 14(3)(a) the Secretariat must dismiss the submission, regardless of the result the Secretariat otherwise would have reached.

7. See e.g., Response at 8-29.

8. Response at 1.

B. Reasons for the Secretariat's Dismissal of these Submissions

Applying Article 14(3)(a) to the submissions at issue here, the Secretariat determines that dismissal of the Methanex and Neste submissions is warranted. Article 14(3)(a) provides that the Party shall advise the Secretariat "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further." This legal standard requires that the Secretariat dismiss a submission if two facts exist. First, there must be a "pending judicial or administrative proceeding." Second, the matter that is the subject of the submission must be the subject of the pending proceeding. Both facts exist here.

First, the information the Party provided in its response indicates that there is a "pending judicial or administrative proceeding." Article 45(3)(b) defines the term "judicial or administrative proceeding" for purposes of Article 14(3) to include "an international dispute resolution proceeding to which the Party is party." The mechanism created by Chapter 11 of NAFTA for settlement of investment disputes qualifies as an international dispute resolution proceeding.⁹ Based on the information provided to the Secretariat, it appears that such a proceeding is currently pending. The Party reports that on 15 June 1999 Methanex filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA), and that the Claim itself was filed on 3 December 1999.¹⁰ The Party also advises that the arbitration is currently a pending proceeding: as of 30 May 2000 the arbitral panel has been selected but has not yet met.¹¹ In addition, the Party in the Methanex and Neste submissions is also party to the pending Chapter 11 proceeding. Methanex's Statement of Claim in the Chapter 11 proceeding describes the claim as one between Methanex Corporation and the United States. As a result, Methanex's pending Chapter 11 arbitration claim qualifies as a "judicial or administrative proceeding" under Article 14(3)(a).

Second, the matter that is the subject of the Methanex and Neste submissions is also the subject of the pending NAFTA proceeding. The NAAEC

9. See e.g., section 906 of the Restatement (3d) of the Foreign Relations Law of the United States (1987), "Private Remedies for Violation of International Law." Comment a states: "A few international agreements have given private persons access to an international forum where the agreement establishing the forum allows such extension of its jurisdiction [to include claims by private persons]."

10. Response at 4. The Party has attached to its Response a copy of the Statement of Claim filed on 3 December 1999.

11. Response at 6.

does not define the term “matter” or the term “subject” for purposes of Article 14(3)(a). Nor do the Council’s Guidelines for Submissions, which essentially track the language of Article 14(3)(a).¹² Under any common sense reading, however, it is clear that the “matter” before the Secretariat in the Article 14 submissions is the “subject” of the pending Chapter 11 proceeding. That is, the “matter” before the Secretariat is encompassed within Methanex’s Chapter 11 claim. In each forum, Methanex contends that, *inter alia*, the government should address the risks associated with leakage of gasoline from USTs by improving its enforcement of legal measures designed to prevent such leaks rather than by banning the use of MTBE.¹³

As noted above, the primary focus of the Methanex and Neste Article 14 submissions is California’s asserted failure to effectively enforce its UST laws. The assertion is that this failure to enforce results in leakage of gasoline containing Methyl Tertiary-Butyl Ether (MTBE), creating a risk to human health and the environment. The Submitters assert that in order to address this threat, California should enhance its enforcement, not ban the use of MTBE.¹⁴

Methanex’s pending Chapter 11 claim involves this “matter” as well. The “Facts” section of the Statement of Claim devotes several paragraphs to UST legislation and the requirements it imposes on UST facilities to protect waters of the state from leaks.¹⁵ The section of the Claim entitled “Nature of the Claim” contains assertions by Methanex about the reasons why MTBE is present in drinking water. It states as follows:

21. The presence of MTBE in drinking water occurs primarily as a result of gasoline releases to the environment. Gasoline is released primarily due to:

12. See Guidelines for Submissions on Enforcement Matters 9.2-9.4.

13. See e.g., Notice of a Submission of a Claim to Arbitration at 5-7; Statement of Claim at paras. 21, 23, 33-35; Methanex Submission at 11-12.

14. See e.g., Methanex Submission at 2, 11-12; Neste Submission at 2. As the Secretariat stated in its 30 March 2000 Determination, the submission suggests that the approach of phasing out MTBE is a flawed strategy for addressing the environmental problem at issue here, and that heightened enforcement of UST requirements to prevent leakage would be a better approach. In particular, Methanex asserts that the Executive Order “treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State’s failure to enforce its environmental laws.” Methanex Submission at 2. See also Neste Submission at 3.

15. Statement of Claim at paras. 14-19. Annex 2 of the Statement of Claim, provided to the Secretariat as an annex to the Party’s response, is captioned, “Summary of California’s Environmental Laws Relating to Underground Storage Tanks.” It contains an extensive review of these laws and their requirements.

- i. the failure of the State of California to enforce its environmental legislation relating to underground storage tanks (“USTs”) and water resource protection; and
- ii. local municipalities permitting the operation of inefficient two stroke engines on drinking water reservoirs.¹⁶

The section on the “Nature of the Claim” describes California’s response to the discovery of MTBE contamination in ground and surface waters as follows: “The response of the government of California was to propose legislation which, rather than address the problem of environmental law enforcement and specifically leaking USTs, arbitrarily called for a ban on the use of MTBE in gasoline.”¹⁷

According to Methanex’s Statement of Claim in the Chapter 11 proceeding, the action by the State Governor in phasing out the use of MTBE

- i. was arbitrary and based on a process which lacked substantive fairness;
- ii. penalizes and bans only one component of gasoline;
- iii. failed to consider alternative measures to mitigate the effects of gasoline releases into the environment;
- iv. resulted from the failure or delay in enacting or enforcing legislation to reduce or eliminate gasoline releases into the environment;
- v. failed to take proper consideration of the legitimate interests of Methanex and Methanex US; and
- vi. goes far beyond what is necessary to protect any legitimate public interest.¹⁸

Methanex claims that, because of these purported flaws in the government’s approach to addressing MTBE, “the State of California did not accord to Methanex US treatment in accordance with international law,

16. Statement of Claim at para. 21.

17. Statement of Claim at para. 23.

18. Statement of Claim at para. 33 (emphasis added). Methanex’s Notice in the Chapter 11 proceeding contains the identical list of reasons why the Executive Order purportedly is flawed. Notice at 7.

including fair and equitable treatment.”¹⁹ Methanex also asserts that the government’s approach “is both directly and indirectly tantamount to an expropriation.”²⁰

In sum, Methanex’s Statement of Claim in the Chapter 11 NAFTA proceeding specifically alleges that, *inter alia*, the California Governor’s ban on the use of MTBE “resulted from the failure or delay in . . . enforcing legislation to reduce or eliminate gasoline releases into the environment.”²¹ Thus, one of the assertions Methanex makes in the Chapter 11 proceeding is that there has been a failure or delay in enforcing legislation intended to reduce or eliminate releases of gasoline. The issue that is at the heart of the Methanex and Neste submissions under the NAAEC is whether California is failing to enforce legislation to reduce or eliminate gasoline releases into the environment. Thus, to return to the language in Article 14(3)(a) of the NAAEC, the matter that is the subject of the submission is also the subject of a pending judicial or administrative proceeding. In both proceedings, Methanex (and Neste, in the case of its Article 14 submission) has alleged that the Party should have pursued enforcement actions against those responsible for leaks of gasoline from USTs rather than prohibit the use of MTBE in gasoline.²²

As a result, the Secretariat believes that dismissal of the submissions is required under Article 14(3)(a). The matter raised by the Methanex and Neste submissions is the subject of a pending arbitration proceeding initiated by Methanex under Chapter 11 of NAFTA.

Because of the Secretariat’s determination on this threshold issue, the Secretariat does not reach the question of whether a factual record would be warranted absent the pendency of such a proceeding. Thus the Secretariat does not address the nature and extent of the violations of the laws governing releases of MTBE from USTs, or the effectiveness of the Party’s enforcement efforts. Both the submission and response highlight the significance of the environmental problems posed by such releases.

19. Statement of Claim at para. 34.

20. Statement of Claim at para. 35.

21. Statement of Claim at para. 33.

22. Similarly, in the Notice of a Submission of a Claim to Arbitration, Methanex asserts that “[r]ather than address the primary issues causing gasoline releases into the environment, the government of California proposed legislation that arbitrarily called for a ban on the use of MTBE in gasoline.” Methanex Notice of a Submission of a Claim to Arbitration at 5, 6. See also Methanex Statement of Claim at para. 23, 33.

CONCLUSION

For the foregoing reasons, the Secretariat considers that the submissions SEM-99-001 and SEM-00-002 do not warrant developing a factual record. Instead, because the matter is the subject of a pending judicial or administrative proceeding, under Article 14(3)(a), the Secretariat is to proceed no further.

Respectfully submitted.

Janine Ferretti
Executive Director

c.c. Mr. William Nitze, US-EPA
Ms. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Mr. Michael Macdonald, Methanex Corporation
Mr. Kimmo Rahkamo, Neste Canada Inc.

SEM-99-002
(MIGRATORY BIRDS)

SUBMITTER: ALLIANCE FOR THE WILD ROCKIES,
CENTER FOR INTERNATIONAL
ENVIRONMENTAL LAW, ET AL.

PARTY: UNITED STATES OF AMERICA

DATE: 19 NOVEMBER 1999

SUMMARY: The Submitters allege that the United States is failing to effectively enforce the Migratory Bird Treaty Act (MBTA), which prohibits the killing of migratory birds without a permit.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) Determination that criteria under Article 14(1)
(23 DECEMBER 1999) have been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitters: Alliance for the Wild Rockies
Center for International Environmental Law
Centro de Derecho Ambiental del Noreste
de México
Centro Mexicano de Derecho Ambiental
Friends of the Earth
Instituto de Derecho Ambiental
Pacific Environment and Resources Center
Sierra Club of Canada
West Coast Environmental Law Association

Represented by: The Center for International Environmental
Law (CIEL)

Concerned Party: United States

Date Received: 19 November 1999

**Date of this
Determination:** 23 December 1999

Submission No.: SEM-99-002

I- INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental 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). On 17 November 1999 the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The Secretariat has determined that the submission meets the criteria in Article 14(1) and that it merits a response from the Party in light of the factors listed in Article 14(2). The Secretariat sets forth its reasons in Section III below.

II- SUMMARY OF THE SUBMISSION

The submission asserts that the United States Government is “failing to effectively enforce” section 703 of the Migratory Bird Treaty Act (MBTA or the Act), 16 U.S.C. § 703, which prohibits the killing or “taking” of migratory birds except under limited circumstances. This assertion rests on a three-step analysis. The submission first asserts that section 703 of the MBTA prohibits any person from killing or “taking” migratory birds, including the destruction of nests, the crushing of eggs, and the killing of nestlings and fledglings, “by any means or in any manner,” unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit.¹ Next, it asserts that loggers, logging companies, and logging contractors frequently engage in practices that violate the Act and that the government has conceded that such practices occur and violate the MBTA.² Finally, the submission claims that the United States is failing to effectively enforce this requirement of the Act against these parties.³

The submission characterizes the government’s position as one of “deliberately refus[ing] . . . to enforce this clear statutory prohibition as it relates to loggers, logging companies, and logging contractors.”⁴ It elaborates on this assertion as follows:

As a matter of internal policy, the United States has exempted logging operations from the MBTA’s prohibitions without any legislation or regulation that authorizes such an exception. The United States has never prosecuted a logger or logging company for a violation of the MBTA, even though it acknowledges that the MBTA has consistently been, and continues to be, violated by persons logging on federal and non-federal land. In fact, the Director of the FWS has stated that the FWS, the agency responsible for enforcement of the MBTA, “has had a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action

1. Submission at 1.

2. Submission at 1, Appendix C.

3. See e.g., Submission at 1.

4. Submission at 1.

should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened, migratory birds and/or their nests.”⁵

The submission asserts that, as a result, the United States “has completely abdicated its enforcement obligations.”⁶

III- ANALYSIS OF THE SUBMISSION

A. Article 14(1)

The submission meets the criteria in Article 14(1) for further consideration. First, the submission meets the requirements contained in the opening sentence of Article 14(1).⁷ This sentence authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” The submitters qualify as “non-governmental organizations.”⁸ Further, the law involved, the Migratory Bird Treaty Act, qualifies as an “environmental law” for purposes of the NAAEC. Article 45(2) of the NAAEC defines “environmental law” to mean, *inter alia*, any statute “the primary purpose of which is the protection of the environment . . . through . . . the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory. . . .” As the submission suggests, the MBTA, and section 703 of the MBTA in particular, involves “environmental law” because the “primary purpose of the MBTA is to protect and preserve wild fauna—wild birds.”⁹

As is also required by the opening sentence of Article 14(1), the focus of the submission is on a Party’s asserted failure to effectively

5. Submission at 1. Memorandum from Director, FWS, to Service Law Enforcement Officers, “MBTA Enforcement Policy” (March 7, 1996).

6. Submission at 1.

7. The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

8. See NAAEC Article 45(1), Guideline 2.1, Submission at 9.

9. Submission at 9. See e.g., 16 U.S.C. section 703; *Andrus v. Allard*, 444 U.S. 51, 52-53 (1979) (noting that the MBTA is a “conservation statute . . . designed to prevent the destruction of certain species of birds.”) The U.S. Fish and Wildlife Service has described the MBTA as “a landmark in wildlife conservation legislation.” See Origins of the U.S. Fish & Wildlife Service web page, www.fws.gov/who/origin (visited December 9, 1999). For these reasons the MBTA does not qualify as a statute “the primary purpose of which is managing the commercial harvest or exploitation . . . of natural resources.” Article 45(2)(b).

enforce the law. For example, as noted above, the submitters assert that the Party has “completely abdicated its enforcement obligations” through its failure to enforce against logging operations that allegedly kill or take migratory birds and/or their nests.¹⁰ The submission does not purport to challenge the effectiveness of the law itself.¹¹

Finally, the submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1) that a submission assert that a Party “is failing” to effectively enforce its environmental law.

Under Article 14(1), the Secretariat also must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.¹²

The submission meets these six listed criteria. The submission is in English, a language designated by the Party involved.¹³ It clearly identifies the organizations making the submission.¹⁴ The submission

10. See e.g., Submission at 1.

11. Cf. SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998). The Secretariat accepts the submission as styled at this stage of the process. The Party, of course, has the opportunity to discuss in its response whether in its view the submission involves a challenge to the content of the underlying law rather than a failure to enforce, among other issues.

12. Article 14(1)(a)-(f).

13. Article 14(1)(a), Guideline 3.2.

14. Article 14(1)(b), Guideline 2.2, Submission, cover page and inside cover page.

provides sufficient information to allow the Secretariat to review the submission.¹⁵ Among other things, the submission provides as Appendices various government documents relating to the subject matter at issue. Fourth, the submission appears to be aimed at promoting enforcement.¹⁶ Fifth, the submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party's response, if any.¹⁷ Among other things, the submission attaches as Appendix C an April 26, 1999 letter from the Center for International Environmental Law (CIEL) to the Fish and Wildlife Service of the Department of the Interior in which CIEL raises the issues covered in the submission. The submission indicates that the Party has not responded to this letter.¹⁸ Finally, the submission is filed by an organization residing or established in the territory of a Party.¹⁹

B. Article 14(2)

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. This provision provides in pertinent part as follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.²⁰

The submission alleges harm to the submitters and summarizes the types of harm they allegedly have sustained.²¹ Among other things,

15. Article 14(1)(c), Guideline 5.3, Submission at 10.

16. Article 14(1)(d), Guideline 5.4, Submission at 9, 10.

17. Article 14(1)(e), Guideline 5.5, Submission at 9, 10.

18. Submission at 9, 10.

19. Article 14(1)(f), Submission at 9.

20. Article 14(2). See also Guideline 7.3.

21. In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), the Secretariat discussed the issue of harm as follows: "In considering harm, the

the submitters indicate that they “have a common interest in protecting migratory bird populations shared by Canada, Mexico and the United States.”²² The submission indicates that each submitter has an organizational goal of protecting migratory birds and it claims that each submitter is harmed in achieving its organization’s goals by the alleged failure of the Party to enforce the MBTA and protect migratory birds with respect to logging operations.²³ The submission also asserts that migratory birds are of “great public importance.”²⁴ Among other benefits, migratory birds are a source of food, and they provide “direct economic benefits to local economies through recreation, hunting, and birdwatching.”²⁵ We note that the submitters claim that the harm they have allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment.²⁶

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.²⁷ The submission asserts that the failure to enforce is one that is longstanding in nature and that it is nationwide in scope. Assertions of this sort—that there is a widespread pattern of ineffectual enforcement—are particularly strong candidates for Article 14 consideration, although submissions that focus on asserted failures to enforce concerning individual facilities may warrant consideration under Article 14 under some circumstances, depending on other factors. The submission asserts that the alleged failure to enforce involved here has “significant consequences. . . .”²⁸ It asserts that “logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings” and that the failure to effectively enforce “permits the ongoing destruction within the United States of migratory bird populations shared by Canada, Mexico, and the United States” and “undermines . . . efforts to . . . maintain biodiversity. . . .”²⁹ As the submission notes, the

Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.”

22. Submission at 10.

23. Submission at 10, 11.

24. Submission at 11.

25. Submission at 11.

26. Guideline 7.4.

27. Article 14(2)(b).

28. Submission at 2.

29. Submission at 2.

CEC itself has found that that “migratory birds are a particularly important component of North American biodiversity.”³⁰

Third, the submission indicates that private remedies to require the Party to enforce its law are not available.³¹ Finally, the submission is not based exclusively on mass media reports. Instead, as noted above, the submission includes several government documents. In addition, the submitters have sought to obtain relevant information from the government through a Freedom of Information Act (FOIA) request.³²

CONCLUSION

For the foregoing reasons, the Secretariat has determined that the submission meets the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that the submission merits requesting a response from the Government of the United States. Accordingly, the Secretariat requests a response from the Government of the United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

David L. Markell
Head, Submissions on Enforcement Matters Unit

- c.o. Mr. William Nitze, US-EPA (with annexes)
- c.c. Ms. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Chris Wold and David Downes, Attorneys, Center for
International Environmental Law
Ms. Janine Ferretti, CEC Executive Director

30. Submission at 2.

31. Submission at 12, 13. Article 14(3)(b)(ii) provides that the Party may address in its response the availability of private remedies to the submitter if the Party believes additional consideration of this issue is warranted.

32. Submission at 13, Appendices D, E.

SEM-00-001
(MOLYMEX I)

SUBMITTER: ROSA MARIA ESCALANTE DE FERNANDEZ

PARTY: UNITED MEXICAN STATES

DATE: 27 JANUARY 2000

SUMMARY: The Submitter asserts that the town of Cumpas, Sonora, Mexico, has been affected by air pollution from the Molymex, S.A. de C.V. plant which produces molybdenum trioxide from molybdenum sulfide, allegedly in violation of the provisions of LGEEPA regarding air quality and Official Mexican Standards for environmental health.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(25 APRIL 2000) have not been met. Process terminated.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionaria(os):	Rosa María Escalante de Fernández
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	28 de enero de 2000
Fecha de la determinación:	25 de abril de 2000
Núm. de petición:	SEM-00-001

I. ANTECEDENTES

Con fecha 28 de enero de 2000, Rosa María Escalante de Fernández presentó al Secretariado de la Comisión para la Cooperación Ambiental (Secretariado) una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (“ACAAN” o “el Acuerdo”). La petición asevera que el poblado de Cumpas, Sonora, México se ha visto afectado por la contaminación atmosférica que produce la empresa Molymex, S.A. de C.V., en supuesta violación de las disposiciones de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (LGEEPA) sobre calidad del aire, y de las normas oficiales mexicanas de salud ambiental que establecen límites relativos a bióxido de azufre y partículas menores a 10 micras. Según el ACAAN, el Secretariado podrá examinar las peticiones que cumplan con los requisitos establecidos en el artículo 14(1). El Secretariado ha determinado que esta petición no cumple con los requisitos del artículo 14(1) para su examen en este proceso y en este documento expone las razones de esta determinación.

II. RESUMEN DE LA PETICIÓN

La Peticionaria de referencia asevera que el poblado de Cumpas, Sonora, México, se ha visto afectado por la contaminación atmosférica que produce la empresa Molymex, S.A. de C.V., que lleva a cabo un proceso de tostación de sulfuro de molibdeno para la producción de trióxido de molibdeno, en supuesta violación de las disposiciones de la LGEEPA sobre calidad del aire, y de las normas oficiales mexicanas de salud ambiental que establecen límites relativos a bióxido de azufre y partículas menores a 10 micras.

La petición señala que los habitantes de Cumpas y las organizaciones no gubernamentales de las que la Peticionaria es miembro consideran que la contaminación que emite la planta Molymex origina daños irreversibles de imposible reparación en la salud y el medio ambiente, supuestamente incrementando la mortandad y afectando los cultivos en Cumpas. Según la Peticionaria, se violan los artículos 110 al 116 de la LGEEPA, la norma oficial mexicana NOM-022-SSA1-1993- *Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto al bióxido de azufre (SO₂). Valor normado para la concentración de bióxido de azufre (SO₂) en el aire ambiente, como medida de protección a la salud de la población.*; y la norma oficial mexicana NOM-025-SSA1-1993- *Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto a las partículas menores de diez micras (PM10). Valor normado para la concentración de partículas menores de diez micras (PM10) en el aire ambiente, como medida de protección a la salud de la población.*

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:

- (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
- (b) identifica claramente a la persona u organización que presenta la petición;

- (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
- (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
- (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
- (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

En esta etapa se requiere entonces, de cierta revisión inicial para verificar que la petición cumple con estos requisitos, si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios.¹ El Secretariado examinó la petición en cuestión con tal perspectiva en mente.

La primera cuestión es si la petición “asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental”. El Secretariado determinó que la petición sí satisface este requisito umbral, por las siguientes razones.

La Peticionaria “asevera” que México está incurriendo en omisiones en la aplicación efectiva de los artículos 110 al 116 de la LGEEPA y las normas oficiales mexicanas NOM-022-SSA1-1993 y NOM-025-SSA1-1993, dado que el poblado de Cumpas, Sonora se ha visto afectado por la contaminación atmosférica que produce la empresa Molymex, en supuesta violación de esas disposiciones de la LGEEPA sobre calidad del aire, y de esas normas oficiales mexicanas de salud ambiental.

Además, en el caso de esta petición, la legislación citada satisface la definición de legislación ambiental aplicable a este proceso. A efecto de calificar para el proceso del artículo 14(1), las disposiciones citadas en una petición deben satisfacer la definición de “legislación ambiental” contenida en el artículo 45(2) del ACAAN.² Los artículos 110 al 116 de

1. En este sentido, véanse la Determinación conforme al artículo 14(1) en relación con la petición SEM-97-005/Animal Alliance of Canada, et al; y la Determinación conforme a los artículos 14(1) y (2) relativa a la petición SEM-98-003/Department of the Planet Earth, et al, en su versión revisada.

2. El artículo 45(2) del ACAAN establece:

Para los efectos del Artículo 14(1) y la Quinta Parte:

(a) “**legislación ambiental**” significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:

la LGEEPA contienen disposiciones sobre prevención y control de la contaminación de la atmósfera, y las normas oficiales mexicanas NOM-022-SSA1-1993 y NOM-025-SSA1-1993, contienen valores normados para la concentración, respectivamente, de bióxido de azufre (SO₂) y de partículas menores de diez micras (PM₁₀) en el aire ambiente, como medidas de protección a la salud de la población. De su simple lectura se desprende claramente que las disposiciones citadas califican como legislación ambiental para efectos de los artículos 45(2) y 14 del ACAAN, porque son disposiciones cuyo propósito principal coincide con "... la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de: ... la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales...".

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en los incisos a), b) y f) del artículo 14(1), por las siguientes razones. La petición se presentó por escrito en español,³ que es el idioma designado por México. La Peticionaria se identificó como Rosa María Escalante de Fernández, con residencia en Hermosillo, Sonora, México, es decir es una persona que reside en el territorio de la Parte mexicana.⁴

(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

(b) Para mayor certidumbre, el término "**legislación ambiental**" no incluye ningunaley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.

Aun cuando el Secretariado no se rige por el principio de *stare decisis*, en ocasiones anteriores, al examinar otras determinaciones, ha señalado que las disposiciones citadas deben satisfacer la definición de legislación ambiental. Véanse las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).

3. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las *Directrices para la presentación de peticiones*.

4. Véanse los artículos (14)(1)(b) y (f) del ACAAN.

Sin embargo, el Secretariado juzga que la petición no satisface el requisito del inciso c) porque no contiene información suficiente para analizarla, ni satisface los requisitos establecidos en los incisos d) y e) de dicho artículo. La petición es muy breve, constando de cuatro páginas y 6 anexos, y no contiene suficiente información para que el Secretariado pueda revisarla en este proceso.⁵ En particular, la petición no expresa claramente la función de cada uno de sus anexos en la argumentación sobre la presunta omisión por parte de México de aplicar de manera efectiva su legislación ambiental en este asunto, lo cual es de especial importancia dado lo breve que es la petición misma. Los anexos de la petición constan de una nota de la Procuraduría Federal de Protección al Ambiente (Profepa) sobre la problemática relacionada con la planta Molymex; un dictamen de la Subdelegación de Medio Ambiente (SMA) de la Delegación de Sonora de la Secretaría de Medio Ambiente Recursos Naturales y Pesca (Semarnap); un documento sobre el proyecto de ampliación de la planta Molymex; un documento de la Secretaría de Salud Pública con gráficas comparativas de tasas de mortalidad en la zona; una querrela presentada ante el Ministerio Público Federal el 15 de noviembre de 1999; y un dictamen de dos comisiones del Congreso del Estado de Sonora, relacionado con la planta Molymex. Como se ha dicho, si bien la petición incluye anexos que contienen información sobre el problema planteado por la Peticionaria respecto de la planta Molymex, en la petición misma no se explica concretamente cómo se relaciona esa información con el asunto específico materia de la petición, es decir, con la supuesta omisión en la aplicación efectiva de los artículos 110 al 116 de la LGEEPA y de las normas oficiales mexicanas NOM-022-SSA1-1993 y NOM-025-SSA1-1993.

Además, la insuficiencia de información no permite al Secretariado determinar si la petición cumple no con los requisitos establecidos en los incisos d) y e) del artículo 14(1). Primero, aunque la petición no parece encaminada a hostigar a una industria, sino a promover la aplicación de la ley para proteger la salud de la comunidad vecina a la planta de Molymex, los alegatos de la petición no se centran en los actos u omisiones de la Parte, como lo dispone el inciso d) y el apartado 5.4(a) de las *Directrices para la presentación de peticiones*, sino en el cumplimiento de esa compañía en particular. Sobre este asunto, la información proporcionada no es suficiente para determinar si se satisface el requisito de este inciso d) del artículo 14(1). En segundo lugar, el inciso e) de ese artículo prevé que la petición señale que el asunto se haya

5. Véase el artículo (14)(1)(c) del ACAAN.

6. Página 3 de la petición, punto 5.

comunicado por escrito a las autoridades pertinentes de la Parte. La petición menciona que los habitantes de Cumpas, Sonora, y las organizaciones sin vinculación gubernamental de las que la Peticionaria es miembro activo, "...han solicitado en reiteradas ocasiones, y seguirán solicitando la clausura definitiva de la planta contaminante o su reubicación...6", pero al no acompañar copia alguna de aquéllas u otra comunicación dirigida a las autoridades pertinentes de la Parte, u otra información al respecto, no es posible determinar si se satisface el requisito de este inciso e).

Habiendo revisado la petición de conformidad con el artículo 14(1) el Secretariado determinó que la petición no satisface todos los requisitos en él establecidos, por las razones arriba descritas.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado ha revisado la petición en conformidad con el artículo 14(1) del ACAAN y considera que no cumple con todos requisitos allí establecidos porque no contiene suficiente información para determinar si cumple con algunos de esos requisitos, y porque no contiene suficiente información que permita al Secretariado revisarla.

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica a la Peticionaria que no procederá a examinar la petición. No obstante, de acuerdo con el apartado 6.2 de las Directrices, la Peticionaria cuenta con 30 días para presentar una petición que cumpla con los criterios del artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: David L. Markell
Director de la Unidad sobre Peticiones Ciudadanas

c.c. Lic. José Luis Samaniego, Semarnap
Sra. Norine Smith, Environment Canada
Sr. William Nitze, US-EPA
Sra. Janine Ferretti, Directora Ejecutiva de la CCA

SEM-00-002
(NESTE CANADA)

SUBMITTER: NESTE CANADA INC.

PARTY: UNITED STATES OF AMERICA

DATE: 21 JANUARY 2000

SUMMARY: The Submitter believes that “applicable regulatory agencies in California are not enforcing environmental laws, as defined in the NAAEC, relating to underground storage tanks (USTs) with the result that significant volumes of gasoline continue to leak into and contaminate soil, water and air in that State.”

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(17 APRIL 2000) have been met and consolidation with submission SEM-99-001.

(See Submission SEM-99-001 for copy of Determination Art. 14(3), 30 June 2000, regarding dismissal in conjunction with submission SEM-99-001, following Party’s response).

Secretariat of the Commission for Environmental Cooperation

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

Submitters:	Neste Canada Inc.
Concerned Party:	United States
Date Received:	4 January 2000
Date of this determination:	17 April 2000
Submission I.D.:	SEM-00-002

I- INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental 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). On 4 January 2000 the Submitter filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The Secretariat hereby consolidates the submission with SEM-99-001 (the “Methanex Submission”), filed on 18 October 1999. The Secretariat provides its reasons in Section III below.

II- SUMMARY OF THE SUBMISSION

The submission largely tracks Submission 99-001, recently filed by the Methanex Corporation (SEM-99-001). Neste’s main assertion, like

Methanex's, is that the government is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs).¹ Neste explicitly refers in its submission to the close link with Submission 99-001, stating that, *inter alia*, "[w]e believe that the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs."²

Additional information on the Methanex submission, including the Secretariat's 30 March 2000 Determination that one of the assertions in Methanex's submission merits a response from the United States, is available from the CEC's home page, www.cec.org.

III- ANALYSIS

The threshold question the Neste submission raises concerns the appropriate treatment of a submission when it relates to the same facts and same asserted failure to effectively enforce as an already pending submission. Guideline 10.3, quoted in full below, provides guidance concerning the appropriate treatment of related submissions. It indicates that the Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce. It also provides that the Secretariat may propose such consolidation to the Council when there is substantial overlap between submissions and the Secretariat believes it would be more efficient or cost-effective to consolidate them.

10.3 The Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law. In other situations where two or more submissions relate essentially to the same facts and enforcement matter and the Secretariat considers that it would be more efficient or cost-effective to consolidate them, it may so propose to the Council.

The Secretariat's reading of the Neste submission is that it relates to the same facts and the same asserted failure to effectively enforce an environmental law as the Methanex submission. As noted above, the operative text in Guideline 10.3 provides that the Secretariat "may" consolidate two submissions if they meet the elements for consolidation. This is the first submission that has raised the "consolidation" issue. A review of the submissions filed to date reveals that the common approach of like-minded prospective submitters has been to file jointly,

1. See e.g., Submission at 1, 2.
2. Submission at 2.

rather than file independently and then await possible consolidation. Thirteen of the 26 submissions filed to date have involved multiple submitters. For the reasons stated below, the Secretariat has determined that consolidation is appropriate in this instance.

The Secretariat has reviewed whether the Neste submission meets the criteria in Article 14(1). As is the case for the Methanex submission, the Neste submission meets the requirements contained in the opening sentence of Article 14(1). This sentence authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” Article 45(1) of the NAAEC defines “non-governmental organization” to include, *inter alia*, “any . . . business . . . which is neither affiliated with, nor under the direction of, a government. . . .” Based on the information provided in the submission, the submitter qualifies as a “non-governmental organization.”³ It is a business and there is no indication that it is affiliated with, or under the direction of, a government. Further, the assertion in the submission that the Party has failed to effectively enforce UST-related requirements⁴ focuses, as required, on a Party’s asserted failure to effectively enforce the law, not on the effectiveness of the law itself.⁵ Third, the submission’s focus is on the asserted failure to effectively enforce “environmental laws.” The submission challenges the enforcement of numerous laws, including the United States Clean Water Act, the United States Safe Drinking Water Act, the California Water Code, and the California Code of Regulations.⁶ These laws qualify as “environmental law” for purposes of the NAAEC in that their primary purpose is “protection of the environment, or the prevention of a danger to human life or health. . . .”⁷ Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party “is failing” to effectively enforce its environmental law.

Article 14(1) lists six specific criteria relevant to the Secretariat’s consideration of submissions. The Secretariat must find that a submission:

(a) is in writing in a language designated by that Party in a notification to the Secretariat;

3. See NAAEC Article 45(1), Guideline 2.1, Submission at 1.

4. See e.g., Submission at 1.

5. See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

6. Submission at 2.

7. Article 45(2)(a). The relevant provisions of the California Code have this purpose.

- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁸

The Submission meets the criteria contained in Article 14(1)(a) and (b). It is in English, a language designated by the Party.⁹ The submission identifies the organization making the submission.¹⁰ Article 14(1)(d) requires that the submission appear to be aimed at promoting enforcement rather than at harassing industry.¹¹ There is no indication that Neste is attempting to harass industry. Similarly, the final criterion, in Article 14(1)(f), is satisfied.¹² The Secretariat notes that dismissal of the submission would be required if it did not satisfy the requirements in Article 14(1)(a), (b), (d), and (f), even if it met the elements in Guideline 10.3 necessary for consolidation with an already pending submission.

The criteria contained in Article 14(1)(c) and (e) warrant more detailed discussion because of the questions they raise concerning the extent to which it is appropriate to consider SEM-99-001 in addressing this submission. With respect to Article 14(1)(c), the Submitter has endorsed and incorporated by reference the materials submitted in connection with Submission SEM-99-001:

Neste is aware of the particulars of the submission (the "Methanex Submission") made to the Secretariat by Methanex Corporation on October 18, 1999. We believe that the Methanex Submission accurately summarizes the nature and importance of the enforcement issues relating to USTs. Neste has done its own extensive research and investigations and, based on our knowledge of the facts, we submit that the documentary

8. Article 14(1)(a)-(f).

9. Article 14(1)(a), Guideline 3.2.

10. Article 14(1)(b), Submission at 1.

11. Article 14(1)(d).

12. Article 14(1)(f), Submission at 1.

evidence that Methanex has provided to you accurately reflects the current situation.¹³

The Secretariat finds that the submission meets the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based, through its incorporation of the information provided by Methanex.¹⁴ The Secretariat previously determined that Submission 99-001 met the requirement in Article 14(1)(c). Little value would be served by requiring this submitter to submit another copy of these materials.¹⁵

The Secretariat similarly finds that this submission meets the requirements contained in Article 14(1)(e), in part because of the content of Submission 99-001 on this issue. Article 14(1)(e) requires that a submitter “indicate . . . that the matter has been communicated in writing to the relevant authorities of the Party and indicate . . . the Party’s response, if any. . . .” Guideline 5.5 provides that a submission must include copies of any relevant correspondence with the relevant authorities.

The Secretariat has previously determined (in the Methanex Determination) that the matter at issue in this submission has been communicated to the Party, as required by Article 14(1)(e). The Agreement does not require that, in a multiple submitter submission, each submitter independently communicate with the Party. Given the complete identity of the matter involved in this submission and in SEM-99-001, and the practical consequence of consolidating this submission with SEM-99-001, it would promote efficiency to recognize that this submission does not arise in a vacuum by considering the Methanex submission, including the Secretariat’s Determination that the Methanex submission satisfies Article 14(1)(e), in reviewing this issue here.

In sum, if two submissions relate to precisely the same facts and the same asserted failure to effectively enforce an environmental law, and the Secretariat has determined that the already pending submission merits a response from the Party, consolidation of the two submissions may be appropriate if the “follow up” submitter could have signed on to the original submission. If the “follow up” submitter would not qualify as a submitter under Article 14(1)(a), (b), (d), or (f), the follow up submission would warrant dismissal. If, however, the “follow up” submitter meets

13. Submission at 2.

14. Article 14(1)(c), Guideline 5.2, 5.3.

15. Neste provides limited additional information concerning the asserted failure to effectively enforce as well. Submission at 2.

these criteria, and it has specifically referred to the earlier submission as is the case here, it seems contrary to a common sense application of the Agreement to require such a submitter to duplicate the showings made concerning Article 14(1)(c) and (e). Thus, as noted above, little value would be gained by having Neste submit another copy of the information already supplied by Methanex. This analysis assumes, of course, that consolidation would not prejudice the Party, or the original Submitter (here Methanex). No such prejudice would appear to be present here. As noted above, the Party has been asked to provide a response to SEM-99-001, and this submission raises no new issues or matters. It follows that even though this submission alleges a failure to effectively enforce a variety of state and federal laws, the submission will proceed, as consolidated, only with respect to the assertions for which a response has been requested in SEM-99-001.

Having determined that the submission meets the criteria in Article 14(1), the Secretariat determines that the submission warrants consolidation with SEM-99-001 and, in that respect, warrants a response from the Party in light of the factors in Article 14(2). The Secretariat's review of the Article 14(2) factors in connection with SEM-99-001 applies with equal force here, particularly given the determination that Neste could have been a co-submitter for Methanex's submission.

IV- CONCLUSION

For the foregoing reasons and to the extent outlined above, the Secretariat has determined that this submission warrants consolidation with Submission SEM-99-001 under Guideline 10.3. A response from the United States to SEM-99-001 has previously been requested. A copy of Submission SEM-00-002 and of the supporting information is annexed to this letter.

Yours truly,

David L. Markell
Director, Submissions on Enforcement Matters Unit

c.o. Mr. William Nitze, US-EPA (with annexes)

c.c. Ms. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Kimmo Rahkamo, General Manager, Neste MTBE Canada
Ms. Janine Ferretti, Executive Director
Mr. Michael McDonald, Methanex Corporation

SEM-00-003
(JAMAICA BAY)

SUBMITTER: HUDSON RIVER AUDUBON SOCIETY
OF WESTCHESTER, INC. AND
SAVE OUR SANCTUARY COMMITTEE

PARTY: UNITED STATES OF AMERICA

DATE: 2 MARCH 2000

SUMMARY: The Submitters allege that the United States is failing to enforce the Migratory Bird Treaty Act which prohibits the killing of migratory birds without a permit and the Endangered Species Act of 1973 (ESA), which prohibits the taking of endangered and threatened species, requires the protection of such species "whether by protection of habitat and food supply," and requires the designation of "critical habitat."

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(12 APRIL 2000) have not been met.

Secretariat of the Commission for Environmental Cooperation

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

Submitter(s):	Hudson River Audubon Society of Westchester, Inc. Save our Sanctuary Committee
Concerned Party:	United States
Date received:	2 March 2000
Date of this determination:	12 April 2000
Submission I.D.:	SEM-00-003

I- INTRODUCTION

On March 2, 2000, the Submitters 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 non-governmental 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 Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. The Secretariat's reasons are set forth below in Section III.

II- SUMMARY OF THE SUBMISSION

The submission concerns a proposal to construct a paved, multi-purpose bicycle path through the Jamaica Bay Wildlife Refuge. The Refuge, located in Queens, New York, is part of the Gateway National Recreation Area. The Submitters assert that through its proposed construction of the above-referenced bicycle path the United States Department of Interior—National Park Service (NPS) is “failing to enforce and proposing to violate Sections 4-10 of the Endangered Species Act [ESA]. . . .”¹ The Submitters also assert that construction of the pathway will violate the Migratory Bird Treaty Act (MBTA). The Submitters claim that construction of the pathway will constitute a failure to effectively enforce these laws because it “will destroy critical habitat for endangered and threatened species and it will result in the taking of migratory birds (including nests). . . .”²

III- ANALYSIS

A. Overview

Article 14 of the NAAEC directs the Secretariat to consider a submission from any non-governmental 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 the factors contained in Article 14(2).

As the Secretariat has noted in previous Article 14(1) determinations,³ Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.⁴

The Secretariat nevertheless has determined that the submission does not presently meet the criteria in Article 14 for further consideration.

B. The Governing Legal Framework

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any non-governmental organization or person

1. Submission at 1, 2.

2. Submission at 2.

3. See e.g., Submission No. SEM-97-005 (May 26, 1998).

4. See e.g., Submission No. SEM-97-005 (May 26, 1998).

asserting that a Party is failing to effectively enforce its environmental law. . . .” Following this first sentence, Article 14(1) lists six specific criteria relevant to the Secretariat’s consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁵

C. Application of the Governing Legal Framework

As noted above, the opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” The submission, filed by the Hudson River Audubon Society of Westchester, Inc. (Hudson River) and Save Our Sanctuary Committee, meets the requirement in the opening sentence of Article 14(1) that it be filed by a “non-governmental organization.”⁶ It also meets the requirement that it focus on an asserted failure to enforce a Party’s environmental laws, rather than on a deficiency in the law itself.⁷ Further, both the Endangered Species Act and the Migratory Bird Treaty Act qualify as environmental laws. The submission, however, does not meet the requirement in the first sentence that the assertion focus on an alleged ongoing failure to enforce.

5. Article 14(1)(a)-(f).

6. Article 45(1) defines a “non-governmental organization” to include any non-profit or public interest organization or association which is neither affiliated with, nor under the direction of, a government. There is no indication from the submission that either Submitter is affiliated with, or under the direction of, a government.

7. Cf. SEM-98-003 (14 December 1998).

Article 14(1) requires that a submission allege that a Party “is failing” to effectively enforce its environmental law. The process presupposes in a case such as this one, where the submission identifies a particular government action as the source of the alleged enforcement failure, that the Party involved actually have taken the action at issue or made some final decision. Absent such a final action or decision, any allegation of a failure to effectively enforce is based on speculation.⁸

Although the submission alleges that the National Park Service “is failing to enforce” the MBTA and the ESA, it also alleges that the NPS is “proposing to violate” these statutes.⁹ Based on the Secretariat’s understanding of the status of the potential bicycle path project that is the focus of the submission, it appears that the submission focuses on a prospective rather than on an ongoing asserted failure to effectively enforce. It therefore fails to comply with Article 14(1)’s requirement that the submission assert that a Party “is failing” to effectively enforce its environmental laws.

The failure of the submission to identify an ongoing enforcement failure is reflected in the assertions contained on page two of the submission. The submission asserts that the NPS “is violating” the ESA and the MBTA “by proposing to construct a paved, multi-purpose bicycle path” through the Refuge. According to the submission, construction of the pathway “will destroy critical habitat” for endangered and threatened species and “will result in the taking of migratory birds (including nests),” “and will therefore be in violation” of the ESA and the MBTA.¹⁰

The information supplied in the submission and the attachments to it do not reflect that the NPS has made a final decision to construct a bicycle path through the Refuge in any particular form or location. Indeed, the information provided with the submission suggests that the government is currently engaged in evaluating the appropriate location and other details of such a bicycle path. For example, a December 3, 1999 letter attached to the submission from Mr. Billy Garrett, Superintendent of the Jamaica Bay Unit of the NPS Gateway National Recreation Area, to participants in an August 1999 workshop (or “facilitated discussion”) on

8. Under Article 14(2), the Secretariat is guided in determining whether to request a response by a series of factors including, among others, whether the submission alleges harm to the person or organization making the submission. This Determination does not suggest that, for example, any harm that a submitter alleges in connection with a Party’s asserted enforcement failure must have already occurred before a submission may be filed.

9. Submission at 1, 2.

10. Submission at 1, 2.

the “multi-use pathway (RGG-IIA) that has been proposed” for the Gateway National Recreation Area, contains Mr. Garrett’s statement that “I am going to suggest that the preferred alternative identified in the 1997 Environmental Assessment (EA) be modified and updated and [the] expanded EA be finalized for public review and comment. Potential changes to the preferred alternative are described on the attached page.” Mr. Garrett’s letter then solicits comments on these potential changes.¹¹ The submission refers to this letter (along with an earlier August 27, 1999 letter from Mr. Garrett to Mr. Joseph O’Connell, the President of the Hudson River Audubon Society of Westchester) as “the most recent correspondence” from the NPS.¹² Accordingly, the documentation provided by the Submitters, along with the submission itself, suggests that there has not yet been a final decision to proceed with the bicycle path project. Similarly, the submission does not identify a final decision about the location and other details of the project. Because the submission does not identify a final government decision on the bicycle path, the assertion that the content of that decision constitutes a failure to effectively enforce is premature.

Further, while the submission meets several of the criteria contained in Article 14(1), it does not meet others. In particular, the submission satisfies Article 14(1)(a), (b), (d), and (f)—the submission is in English, a language designated by the Party, the submission clearly identifies the submitters, the submission appears to be aimed at promoting enforcement rather than at harassing industry,¹³ and the Submitters appear to reside in and be established in the territory of a Party.

The submission, however, does not meet the requirement in Article 14(1)(c) of the NAAEC that a submission provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based. The activity that allegedly constitutes a failure to enforce both the MBTA and the ESA involves construction of a bicycle path that, according to attachments to the submission, is tentatively planned to be 10 feet wide with one-foot shoulders. The submission does little to support its assertion that construction of the path “will destroy critical habitat” for endangered and threatened species and thereby violate the ESA. The

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11. An attachment to the December 3, 1999 letter, entitled «Cross Bay Boulevard Segment,» also indicates that the NPS «proposes to modify the preferred alternative and reissue the environmental assessment.» According to that attachment, the next step in the process would be to present the NPS’s modified alternative to the RGG Advisory Board.
 12. Submission at 2.
 13. See also Guideline 5.4.

submission, for example, does not indicate what endangered or threatened species are found within the Refuge. It similarly does not indicate where "critical habitat" exists within the Refuge or the portion of such habitat (if any) which purportedly will be destroyed by the proposed bicycle path.

Concerning the Migratory Bird Treaty Act, the submission alleges that construction of the path will result in the taking of migratory birds (including nests). It adds that the construction and resulting recreational use of the path will disrupt nesting and feeding of migratory birds and destroy nests and feeding areas in violation of the MBTA.¹⁴ The Submitters cite to recent CEC publications that identify the Refuge as a key conservation site and an important bird area. The submission, however, does not provide support for its assertion that the path, in light of its location and other details, will cause disruption or destruction that violates the MBTA.

Absent further information to support the existence of a connection between construction of the bicycle path and the types of impacts that would violate the ESA and/or the MBTA, the submission fails to satisfy Article 14(1)(c).

A final issue involves Article 14(1)(e), which requires that submitters indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The Submitters assert that "[w]e have recommended to the United States Department of Interior-National Park Service an alternative site for the bicycle path outside the boundary of the refuge." The submission does not indicate, however, whether, in making these recommendations, the Submitters alerted the NPS to the specific concerns that form the basis for their submission. Neither of the letters from Mr. Garrett appended to the submission (including the attachment to the December 3, 1999 letter) raises a concern on the part of the Submitters or any other participant in the facilitated workshop process that construction of the bicycle path would violate an environmental law. Indeed, other than a general statement in an August 27, 1999 letter from the NPS to one of the Submitters that "impacts to wildlife habitat and existing visitor uses" will be considered, none of the documents provided refers to any concern that construction of the path would adversely affect endangered or threatened species or migratory birds. Additional information is needed to indicate that the "matter" that is the focus of the submission has been communicated in writing to the NPS. If such concerns have been brought to the

14. Submission at 2.

attention of the Party, any correspondence that does so has not been provided. (See Guideline 5.5).

IV- CONCLUSION

Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, 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) within 30 days after receipt of this Notification.

Yours truly,

per: David L. Markell
Director, Submissions on Enforcement Matters Unit

c.c. Mr. William Nitze, US-EPA
Mr. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Ms. Janine Ferretti, Executive Director

SEM-00-004
(BC LOGGING)

SUBMITTER: DAVID SUZUKI FOUNDATION, ET AL.

PARTY: CANADA

DATE: 15 MARCH 2000

SUMMARY: The Submitters allege that the Government of Canada "is in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection."

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) Determination that criteria under Article 14(1)
(8 MAY 2000) have been met and that the submission merits requesting a response from the Party in accordance with Article 14(2).

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitter(s): David Suzuki Foundation
Greenpeace Canada
Sierra Club of British Columbia
Northwest Ecosystem Alliance
National Resources Defense Council

Represented by: Sierra Legal Defence Fund
Earthjustice Legal Defence Fund

Concerned Party: Canada

Date Received: 15 March 2000

**Date of this
Determination:** 8 May 2000

Submission I.D.: SEM-00-004

I- INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental 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 in Article 14(1). On 15 March 2000 the Submitters filed a submission with the Secretariat pursuant to Article 14 of the NAAEC. The Secretariat has determined that the assertion in the submission that the Party is failing to effectively enforce the federal *Fisheries Act* meets the criteria in Article 14(1). The Secretariat has also deter-

mined that this assertion merits a response from the Party in light of the factors listed in Article 14(2). The other assertion contained in the submission, relating to NAAEC Articles 6 and 7, does not meet the Article 14(1) criteria. The Secretariat sets forth its reasons in Section III below.

II- SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. First, the Submitters assert that the Party is failing to effectively enforce several provisions of the federal *Fisheries Act*, with a particular focus on ss. 35 and 36. Section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat in the absence of an authorization issued under s. 35(2).¹ Section 36 prohibits the deposit of deleterious substances in waters frequented by fish unless the deposit is authorized by regulation.² In addition, the Submitters assert that the Party is failing to effectively enforce specific Articles of the NAAEC, notably Articles 6 and 7.

The Submitters assert that ss. 35 and 36 of the federal *Fisheries Act* “are routinely and systematically violated by logging activities undertaken [in] British Columbia and no effective and appropriate enforcement action is being taken.”³ The Submitters assert that logging operations cause harm to fish habitat and result in the deposition of deleterious substances in waters frequented by fish. They assert that, for example, “[e]cologically, current forest practices are contributing to the decline of fisheries and the extinction of fish stocks.”⁴ The Submitters state as follows:

As more evidence is gathered from long-term studies in watersheds, a growing number of scientists note that clearcut logging and other land-use activities have profound, long-term impacts on streams, rivers and lakes and the fish populations that depend on them.⁵

The Submitters list and summarize different types of environmental damage that the Submitters claim are caused by logging, including: 1) loss of streamside vegetation; 2) altered water temperature; and 3) impacts on water quality and quantity.⁶ The Submitters assert that forestry activities such as clearcutting that occur adjacent to small

1. Submission at 8.

2. Submission at 8.

3. Executive Summary at iii.

4. Submission at 2.

5. Submission at 3. See also Submission at 5 (stating that “[l]ogging was one of the primary factors cited” in the decline in salmon numbers and in salmon health throughout coastal British Columbia).

6. Submission at 3-5.

non-fish bearing streams have a “reasonable potential” to affect downstream fish resources.⁷ With respect to this latter claim, the Submitters assert that the “cumulative effect of logging-related stream damage to non-fish bearing streams can be significant. . . . While the impact of increased sedimentation or higher temperatures may be minimal in any one stream, the cumulative effect of all tributaries flowing into fish streams can have significant negative impacts on fish habitat.”⁸ The Submitters list a number of specific areas where they assert logging operations have caused and/or are causing harm to fish and fish habitat.⁹

While the Submitters state that “[r]egulation of logging and fisheries in British Columbia is a complex jurisdictional issue,”¹⁰ the Submitters claim that Canada has jurisdiction, and the responsibility, to protect fish and fish habitat. The Submitters assert that the jurisdiction of the federal and provincial government is concurrent—“the legitimate exercise of one government’s jurisdiction does not oust the jurisdiction of the other.”¹¹ The Submitters claim that the provisions of the *Fisheries Act* addressing harm to fish habitat and deposition of deleterious substances “empower DFO to address the damage to fish and fish habitat resulting from activities permitted under provincial legislation or undertaken on private lands.”¹² They assert that “[t]he powers of DFO are . . . both preventative and remedial.”¹³ The Submitters review several provisions of the *Fisheries Act* that provide the legislative framework for protection of fish and fish habitat. As noted above, they refer to ss. 35 and 36. The Submitters also cite s. 40, which creates an offence for contraventions of ss. 35 and 36. In addition, they cite s. 37, which empowers the minister to require plans and specifications if someone proposes, or is carrying on, a work or undertaking that results, or is likely to result, in a violation of either s. 35 or s. 36 and to require modifications to the work or undertaking or restrict its operation if a violation is occurring or is likely to occur.¹⁴

In addition to discussing federal jurisdiction and responsibility, the Submitters indicate that the provincial government has jurisdiction over most aspects of logging. They state that in 1995 the Province of British Columbia introduced the Forest Practices Code.¹⁵ The Submitters

7. Submission at 5.

8. Submission at 5.

9. See e.g., Submission at 5, 6, 8-9 and Attachments 2, 6, and 8.

10. Submission at 1.

11. Submission at 1.

12. Submission at 8.

13. Submission at 8.

14. Executive Summary at iii.

15. Submission at 1.

assert that the Code is “aimed at regulating forestry practices on public lands,”¹⁶ but that the Code “has no application on private land.”¹⁷

The Submitters’ assertion that Canada is failing to effectively enforce the *Fisheries Act* with respect to the harm to fish habitat and deposition of deleterious substances allegedly caused by logging operations extends to logging on public and private lands. The Submitters assert: “In spite of the clear legislative authority to address damage to fish habitat from logging, the Government of Canada is not enforcing its laws against damage from logging on private lands and smaller streams on public lands.”¹⁸ Elaborating on this assertion, the Submitters state as follows:

After the introduction [in 1995] of the *Code*, DFO, the federal government agency responsible for the enforcement of the *Fisheries Act*, effectively withdrew from the regulation of logging activities. This occurred even though the federal government’s legislative mandate had not changed, and that logging activities are routinely permitted under the *Code* which violate the *Fisheries Act*. Furthermore, the Government of Canada is failing to enforce the *Fisheries Act* against damage occurring from logging on private lands where no effective provincial environmental protections apply.¹⁹

16. Submission at 1.

17. Submission at 1. In support of their assertion that Canada is failing to effectively enforce the *Fisheries Act* in leaving the protection of fish habitat to the provincial government, the Submitters assert that the BC government “promised that it [the Code] would eventually apply to private land” but “this promise was never kept. . . .” The Submitters state that the BC Government has proposed the “Private Land Forest Practices Regulation” in place of the Code but the Submitters assert that this Regulation “is sorely inadequate.” Submission at 9.

18. Executive Summary at iv.

19. Submission at 1. See also Attachment 12, p. 17 (containing the statement that “MacMillan Bloedel’s assertion that adherence to the Forest Practices Code will fulfill their commitment to maintain fish, fish habitat and riparian attributes is not the Department of Fisheries and Ocean’s position, particularly with regard to small streams. The best-management practices set out in the Code are not adequate to deal with the issues of falling and yarding away, and retaining non-merchantable and deciduous trees, especially in old-growth forests.”) The excerpt from the Dove-tail Consulting report provided in the Attachment attributes this point to a person named Cowan. Mr. or Ms. Cowan’s affiliation is not identified in the excerpt. The report describes itself as a “summary of a two-day workshop” “the purpose of which was to consult with scientists to obtain their input on ecological aspects of MacMillan Bloedel’s BC Coastal Forest Project.” The report indicates that 14 scientists were invited to the workshop to act as an expert panel. Scientists were nominated by environmental organizations and by MacMillan Bloedel and representatives from several environmental organizations, MacMillan Bloedel and Weyerhaeuser attended as well. The report indicates that the comments summarized do not necessarily represent a consensus of the scientific panel or the workshop participants. Attachment 12 at i. The submission indicates that Dove-tail Consulting prepared the report for DFO and the report is dated March 5, 1999.

With respect to logging on private lands, the Submitters identify TimberWest's logging of its private land in the Sooke watershed as "[o]ne particularly troubling example of private land logging. . . ." ²⁰ The Submitters assert that TimberWest's logging practices have been particularly troubling in several respects. They assert that Timber West left an inadequate buffer, felled trees on the banks of the Sooke River below the high water mark, harvested trees from an island within the river, harvested a buffer strip left by a previous landowner to protect fish along a known fish stream, built roads without culverts across a salmon stream, and stacked woody debris within the stream channel of this creek. ²¹ The Submitters assert that these actions threaten fish and fish habitat ²² and they claim that "[a]lthough DFO has been made aware of these activities, it has taken no action against TimberWest." ²³ The Submitters also assert that, although requested to do so by the Submitters, DFO has not used its power under s. 37(2) of the *Fisheries Act* to formally request plans and specifications from TimberWest and to order modifications to TimberWest's operations as necessary. ²⁴

With respect to logging on public lands, the Submitters provide examples of three types of activities that they assert are "routinely permitted under the Code" even though they "frequently result in damage to fish and fish habitat." ²⁵ The Submitters assert that "[e]ven though this damage is foreseeable, DFO is not enforcing the *Fisheries Act* in these instances." ²⁶ The Submitters identify "falling and yarding across fish habitat" as one such activity. ²⁷ The submitters claim that this activity "causes immediate and direct damage to fish and fish habitat."

Falling and yarding causes the erosion and de-stabilization of stream-banks, transport of sediment and wood downstream, and the disruption or destruction of critical habitat features. Thus, the practice is contrary to both section 35 of the *Fisheries Act* . . . and also contrary to section 36(3) . . .

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20. Submission at 8-9. See also Attachment 6 [referenced in the submission as Attachment 5], containing correspondence between DFO and the Sierra Legal Defence Fund relating to, *inter alia*, TimberWest logging in the Sooke watershed area.
 21. Submission at 8-9. See also Attachment 6.
 22. Correspondence between Sierra Legal Defence Fund and Department of Fisheries and Oceans, attached as Attachment 6 [referenced as Attachment 5].
 23. Submission at 9 and see e.g., Attachment 6.
 24. See note 22 above.
 25. Submission at 10.
 26. Submission at 10.
 27. The submission defines falling trees across fish habitat as "cutting down trees such that they will fall across fish bearing streams." It defines "yarding trees" as "dragging trees that have been cut down across fish bearing streams." Submission at 10 and Attachment 2 at 19.

However, despite the damaging nature of the practice, falling and yarding across streams is routinely allowed across fish habitat.²⁸

The Submitters identify “logging landslide-prone lands” as a second type of activity that occurs. The submission describes landslides and the harm they may cause to fish habitat in violation of ss. 35 and 36 of the *Fisheries Act* as follows:

Landslides can prove highly destructive to fish habitat. Those landslides that do reach fish habitat introduce silt and sediment and other woody debris while also damaging habitat features and blocking fish habitat. And even those landslides that do not reach fish streams can have detrimental impacts as sedimentation is often increased and waterflow patterns in a watershed may also be altered. Logging that causes landslides may therefore violate both sections 35 and 36(3) of the *Fisheries Act*.²⁹

The Submitters assert that logging using a clearcutting approach, the “logging method most likely to cause landslides,” occurs in a significant number of instances where the logging is planned for landslide-prone lands.³⁰

The third type of logging activity harmful to fish habitat that the Submitters identify involves “clearcutting riparian areas.” The Submitters describe the impacts of such clearcutting as follows:

The clearcutting of riparian areas has significant negative effects on fish and fish habitat. The removal of trees and vegetation in riparian areas leads to bank destabilization and increased streambank erosion, alterations in water temperature (particularly increased warming of streams which can be lethal to fish), greater fluctuations in water flows (which can cause water levels to be both dangerously high, during storm events and snowmelt periods, and dangerously low, during periods of low precipitation such as summer), decreased water quality (through introduction of sediment and logging debris) and the removal of sources of large woody debris.³¹

28. Submission at 10 and see e.g., Attachment 2 at 5, 20-21, and Attachment 14.

29. Submission at 10 and Attachment 8 at 7. For the purposes of s. 36(3) a substance is deleterious if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of the water so that the water is rendered deleterious to fish (*R. v. MacMillan Bloedel (Alberni) Ltd.* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.). Depending on the circumstances, silt and sand can be deleterious substances (*R. v. Jourdain*, [1999] B.C.J. No. 1186 (Prov. Ct.); *R. v. British Columbia Hydro and Power Authority* (1997), 25 C.E.L.R. (N.S.) 52 (B.C.S.C.); *R. v. Jack Cewe Ltd.* (1983), 13 C.E.L.R. 91 (B.C.Co. Ct.).

30. Submission at 11 and see e.g., Attachment 8 at 3-4, 8-10, 15, 17-20, and Attachment 14.

31. Submission at 10-11 and see e.g., Attachment 2 at 16 and Attachment 8.

The Submitters assert that a substantial amount of clearcutting of riparian areas occurs.³²

The Submitters' claim appears to be that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act* because, in part, "[e]ven though the functioning of the *Forest Practices Code* does not assure compliance with the *Fisheries Act*, the Government of Canada seems to have simply left the protection of fish and fish habitat to the provincial government. . . ."³³ The Submitters assert that this strategy is a failure to effectively enforce because, *inter alia*, some fish habitat (*e.g.*, private lands) are not regulated by the Code and because violations of the *Fisheries Act* continue to occur with respect to fish habitat subject to regulation under the Code. The Submitters assert that "[u]nder Canadian law, the fact that an activity is also subject to provincial regulation does not justify a reduction in the enforcement of federal legislation."³⁴

The Submitters assert that a failure to effectively enforce exists because "[n]ot only has DFO stopped active involvement in the planning process, it is failing to take remedial action after damage has occurred."³⁵ With respect to the latter claim, the Submitters state that

32. Submission at 11-12 and see *e.g.*, Attachment 2 at II, 2, 5, and Attachment 14. In addition to its coverage of this type of alleged harm in the submission and attachments, subsequent to filing the submission, the Submitters submitted to the Secretariat two letters from DFO to the BC Ministry of Forests in which DFO expresses the concern that "current logging practices in this province rarely provide riparian leave strips or setbacks that adequately protect these streams." The letter continues: "Given the current practice and the importance of such streams, we wish to confirm that the federal Fisheries Act, and specifically the requirements not to harm fish habitat or deposit deleterious substances into fish-bearing waters, continue to apply to the practice of logging adjacent to small streams in this province." See letter dated 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests. This letter states that DFO will send a letter to the province "outlining interim standards that we [DFO] deem acceptable to meet fish habitat objectives." The DFO letter also indicates that the Department believes that a review of the riparian provisions of the *Forest Practices Code* is required. The Submitters included one of these letters setting out the interim standards. The Submitters state that the interim standards include S4, S5 and S6 riparian management zone retention levels approaching 100 %. The Submitters assert that they view this new development favorably, and they intend to monitor future logging plan approvals to determine whether they actually abide by the new interim standards contained in the letter.

33. Submission at 12.

34. Submission at 13.

35. Submission at 12. It appears that the Submitters' assertion on the first point is that, at least in part, the Party is failing effectively to use its powers under s. 37 to proactively protect fish and fish habitat. Executive Summary at iii; Submission at 8; Attachment 6; Submitters' 31 March 2000 letter to the Secretariat. As noted above,

"DFO statistics for the last three years in BC show that only one prosecution . . . for the type of activities outlined in this complaint has been brought."³⁶ They continue that "[t]hat prosecution was abandoned by DFO due to delay in pursuing the charges."³⁷ The Submitters assert that DFO has brought charges "outside the logging context" for removal of trees from riparian areas. They claim that "[a] number of charges have been brought against homeowners who have removed riparian vegetation, or where riparian vegetation has been removed as part of an industrial project."³⁸ The Submitters assert that "there is no justifiable reason for DFO to distinguish between homeowners and forestry companies."³⁹

The submission's second assertion is that the Party is failing to meet its commitments under Articles 6 and 7 of the NAAEC through its "consistent intervention and staying of environmental prosecutions . . ."⁴⁰ This assertion relates to the right that Canadian law creates for initiation of private prosecutions against violators of the *Fisheries Act*. The Submitters assert that "there have been 12 private prosecutions in British Columbia in the last 19 years, at least nine of which included charges under the *Fisheries Act*. Eleven of these private prosecutions have been stayed."⁴¹ The Submitters state that "it appears that environmental private prosecutions are being stayed as a matter of course, rather than after the reasonable exercise of discretion."⁴² The Submitters claim that this government conduct constitutes a failure to meet the obligations of Articles 6 and 7 of the NAAEC.⁴³

s. 37 empowers the minister to require plans and specifications if someone proposes or is carrying on a work or undertaking that results or is likely to result in a violation of either s. 35 or s. 36 and to require modifications to the work or undertaking or restrict its operation if a violation is occurring or is likely to occur.

36. Submission at 12.

37. Submission at 12.

38. Submission at 12.

39. Submission at 13. The Submitters assert that Canada is motivated not to bring charges against BC forest companies for violations of the *Fisheries Act* because "those charges would undermine Canada's carefully cultivated message that Canadian forest products are 'sustainable and environmentally friendly'—a message Canada has spent considerable amounts of time, energy and tax dollars spreading." Submission at 15.

40. Submission at 14.

41. Submission at 13-14.

42. Submission at 14.

43. Executive Summary at iv; Submission at 14.

III- ANALYSIS

A. Article 14(1)

The assertion that Canada is failing to effectively enforce the cited sections of the *Fisheries Act* satisfies the criteria for further consideration contained in Article 14(1).⁴⁴ The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . .” The Submitters qualify as non-governmental organizations. Further, the assertion in the submission that the Party has failed to effectively enforce the federal *Fisheries Act*⁴⁵ focuses, as required, on a Party’s asserted failure to effectively enforce the law, not on the effectiveness of the law itself.⁴⁶ Third, the submission’s focus is on the asserted failure to effectively enforce “environmental laws.” The *Fisheries Act* qualifies as an “environmental law” for purposes of the NAAEC in that its primary purpose is “protection of the environment, or the prevention of a danger to human life or health. . . .”⁴⁷ Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party “is failing” to effectively enforce its environmental law.

Article 14(1) lists six specific criteria relevant to the Secretariat’s consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;

44. The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

45. See e.g., Executive Summary at iii.

46. See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

47. Article 45(2)(a).

(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

(f) is filed by a person or organization residing or established in the territory of a Party.⁴⁸

The submission meets these criteria. The submission is in English, a language designated by the Parties.⁴⁹ The submission clearly identifies the organizations making the submission.⁵⁰ Concerning the third criterion in Article 14(1), the submission provides sufficient information to allow the Secretariat to review the submission with respect to the assertions of a failure to effectively enforce the law cited.⁵¹ Among other things, the submission provides considerable information concerning the asserted violations of the *Fisheries Act* and it asserts that there has been a lack of adequate response by the government to such alleged violations.⁵²

The submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d). It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business.⁵³ The submission's statement concerning this issue is as follows:

This submission meets the threshold requirements established under Article 14(1):

...

Article 14(1)(d): The Submitting parties have a longstanding interest and involvement in the protection of the environment and, in particular, the effects of logging in British Columbia. The organizations do not have a financial interest in logging operations whether in British Columbia or elsewhere.⁵⁴

The submission meets the fifth criterion, contained in Article 14(1)(e), that it indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The submission states that it has communicated the issues raised in

48. Article 14(1)(a)-(f).

49. Article 14(1)(a), Guideline 3.2.

50. Article 14(1)(b), Executive Summary at v.

51. Article 14(1)(c), Guideline 5.2, 5.3.

52. See e.g., discussion above at pp. 2-7.

53. See Guideline 5.4(a).

54. Executive Summary at v.

the submission with the Party. The submission also provides copies of correspondence it sent to the government, and correspondence it received in response.⁵⁵

Finally, the submission meets the requirement in Article 14(1)(f) that it be filed by a “person or organization residing or established in the territory of a Party.”⁵⁶

The Submitters’ second assertion is that Canada is failing to effectively enforce the NAAEC. The Submitters assert that, *inter alia*, government actions staying private prosecutions have “denied the right to bring private prosecutions against violators of the *Fisheries Act*, even though the *Fisheries Act* encourages citizen enforcement by granting a statutory right to one-half of all fines resulting from private prosecutions.”⁵⁷ The Submitters appear to claim that these government actions violate Canada’s obligations under Articles 6 and 7 of the NAAEC.⁵⁸

The Secretariat’s view is that, as a general matter, to the extent that Articles 6 and 7 create obligations on the part of the Parties (Canada, Mexico, and the United States), the remedy for a Party’s purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for non-governmental organizations and individuals relating to allegations that a Party is failing to enforce its “environmental laws” effectively. Article 45 of the Agreement defines “environmental law” to mean “any statute or regulation of a Party, or provision thereof. . . .” The Secretariat has dismissed previous submissions on the ground that the particular international agreement involved did not qualify as “environmental law” as defined by the Parties. While Order in Council P.C. 1993-2196 authorized the Secretary

55. See Attachment 6 (containing correspondence between the Party and the Submitters); attachments to 31 March 2000 letter. See Guideline 5.5. After receiving the submission, on 30 March 2000 the Secretariat sent the Submitters a letter in which the Secretariat notified the Submitters that, pursuant to Guideline 3.10, there may be a minor error of form. In particular, the Secretariat informed the Submitters that Guideline 5.5 provides that the Submitter must include copies of any relevant correspondence with the relevant authorities. The Secretariat indicated that the submission contained certain correspondence between the Submitters and the Party, and it noted that one of these letters referenced earlier correspondence. The Secretariat requested that the Submitters supply this earlier correspondence if it is relevant. On 31 March 2000 the Submitters provided additional correspondence between DFO and the Sierra Legal Defence Fund that the Submitters indicated may be relevant to the submission.

56. Executive Summary at v.

57. Executive Summary at iv.

58. Executive Summary at iv; Submission at 14-15. The Executive Summary, at iv, refers to Article 7 of the NAAEC, while the discussion at page 14 of the submission discusses Article 6. The discussion in the text is of equal relevance to each Article.

of State for External Affairs to take the action necessary to bring the NAAEC into force for Canada under international law, as far as the Secretariat is aware Canada has not acted to make the NAAEC part of domestic law.

For the foregoing reason, the Secretariat dismisses this assertion. By making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if the Secretariat finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the relevant Party prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.⁵⁹

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. The Submitters assert that logging operations' violations of *Fisheries Act* ss. 35 and 36 cause substantial harm to the environment. Such assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.⁶⁰ We note that the Submitter claims that

59. Article 14(2).

60. In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*),

the harm allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment.⁶¹

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.⁶² The submission asserts that the failure to enforce is significant in scope. Further, as suggested above, the Submitters claim that effective enforcement would, *inter alia*, “foster the protection of an important environmental resource for the benefit of present and future generations,” . . . “promote . . . sustainable development,” and “enhance compliance with, and enforcement of, environmental laws and regulations.”⁶³

Third, the Submitters state that they “have pursued all available ‘private remedies.’⁶⁴” The Submitters indicate that various parties have “urged DFO to enforce the *Fisheries Act*. . . .”⁶⁵ Further, the Submitters state that they, and others, have brought prosecutions under the *Fisheries Act*. The Submitters assert that “in each instance, the Provincial Attorney General took over and stayed the proceedings”⁶⁶

Finally, the submission is not based exclusively on mass media reports. Instead, the Submitters include considerable documentation in support of their assertion that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act*.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that there is a failure to effectively enforce ss. 35 and 36(3) of the *Fisheries Act* merits requesting a response from the Party.

for example, the Secretariat noted: “In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.” The resources at issue in this submission are of substantial importance as well.

61. Guideline 7.4.

62. Article 14(2)(b).

63. Submission at 15, referencing NAAEC Article 1(a), (b), and (g).

64. Article 14(2)(c), Guideline 7.5, Submission at 13-15.

65. Submission at 15.

66. Submission at 15.

CONCLUSION

For the foregoing reasons, the Secretariat has determined that the assertion that Canada is failing to effectively enforce the *Fisheries Act* meets the requirements of Article 14(1) and merits requesting a response under Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada to this assertion within the time frame provided in Article 14(3) of the Agreement. The Secretariat has determined that the assertion that Canada is failing to effectively enforce the NAAEC does not satisfy the requirements of Article 14(1). A copy of the submission and of the supporting information is annexed to this letter.

David L. Markell
Director, Submissions on Enforcement Matters Unit

c.o. Ms. Norine Smith, Environment Canada (with annexes)

c.c. Mr. William Nitze, US-EPA
Mr. José Luis Samaniego, SEMARNAP
Mr. Randy Christensen,
Ms. Patti Goldman,
Ms. Janine Ferretti, Executive Director

SEM-00-005
(MOLYMEX II)

SUBMITTERS: ACADEMIA SONORENSE DE DERECHOS
HUMANOS, A.C. and
DOMINGO GUTIERREZ MENDÍVIL

PARTY: UNITED MEXICAN STATES

DATE: 6 APRIL 2000

SUMMARY: The Submitters allege that Mexico has failed to effectively enforce the General Law of Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecologico y la Proteccion al Ambiente*–LGEEPA) in relation to the operation of the company Molymex, S.A. de C.V. in the town of Cumpas, Sonora, Mexico.

SECRETARIAT DETERMINATIONS:

ART. 14(1) Determination that criteria under Article 14(1)
(13 JULY 2000) have not been met.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionaria(os):	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendivil
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	6 de abril de 2000
Fecha de la determinación:	13 de julio de 2000
Núm. de petición:	SEM-00-005

I. ANTECEDENTES

El día 6 de abril de 2000, la Academia Sonorense de Derechos Humanos, A.C. y el Lic. Domingo Gutiérrez Mendivil (los "Peticionarios"), presentaron al Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición (la "Petición") de conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (el "Acuerdo").

El Secretariado puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del Acuerdo.

El Secretariado considera que la Petición no reúne todos los requisitos establecidos en el artículo 14(1) del Acuerdo, por las razones que se

exponen en la Sección III de la presente determinación. En particular, la Petición no cumple el requisito contemplado por el inciso *e*) del artículo 14(1), porque la Petición no señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que México ha omitido aplicar de manera efectiva su legislación ambiental en relación con el funcionamiento de la planta productora de molibdeno, operada por la empresa Molymex, S.A. de C.V. ("Molymex"), ubicada en el municipio de Cumpas, en el estado de Sonora, México.¹

Según los Peticionarios, la autoridad en México ha dejado de aplicar las siguientes disposiciones de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (la "LGEEPA"): (i) los artículos 28, fracción III, 29 fracciones IV y VI, y 32,² al permitir la operación de la planta Molymex sin autorización en materia de impacto ambiental;³ (ii) el artículo 98, fracción I, al tolerar que la planta Molymex realice un uso de suelo incompatible con la vocación natural del mismo;⁴ (iii) el artículo 99, fracción III, toda vez que no se ha expedido el plan de desarrollo urbano de Cumpas, en el que se definan los usos, reservas y destinos del suelo;⁵ (iv) el artículo 112, fracción II, al omitir definir las zonas en las que se permita la instalación de industrias contaminantes;⁶ (v) el artículo 153, fracción VI, ya que se ha permitido que los residuos generados durante el proceso de tostación de molibdeno (supuestamente introducidos al país bajo el régimen de importación temporal) permanezcan en México;⁷ (vi) el artículo 153, fracción VII, al otorgar autorizaciones a Molymex para la importación de materiales supuestamente peligrosos, sin que se haya garantizado el cumplimiento de la normatividad aplicable, ni la reparación de los daños y perjuicios que pudieran causarse en el territorio nacional.⁸

1. Página 3 de la petición.

2. Aunque los Peticionarios mencionan estos tres artículos, las transcripciones que aparecen en la Petición corresponden al texto de la LGEEPA anterior a las reformas publicadas en el *Diario Oficial de la Federación* el día 13 de diciembre de 1996. Esto sin embargo, no modifica sustancialmente el sentido de los argumentos de los Peticionarios, tanto por la naturaleza de los argumentos, como debido a que el texto vigente de la LGEEPA incorpora en sus artículos 29 y 30, el contenido de los anteriores artículos 28, 29 y 32.

3. Página 5 de la petición.

4. Página 8 de la petición.

5. Página 9 de la petición.

6. Página 10 de la petición.

7. Página 11 de la petición.

8. Página 12 de la petición.

Del mismo modo los Peticionarios argumentan supuestas violaciones al cumplimiento de la norma oficial mexicana *NOM-022-SSA1-1993- Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto al bióxido de azufre (SO₂). Valor normado para la concentración de bióxido de azufre (SO₂) en el aire ambiente, como medida de protección a la salud de la población* (la “NOM-022-SSA1-1993”).⁹

Finalmente, los Peticionarios solicitan al Secretariado la elaboración de un informe en los términos del artículo 13 del Acuerdo, arguyendo que el presente caso “se inscribe en tres de los principales programas estratégicos” de la *Agenda de América del Norte para la Acción: 2000-2002, Plan Programa Trienal de la Comisión para la Cooperación Ambiental*.¹⁰ Según los Peticionarios tales programas son: (i) “las relaciones entre medio ambiente, economía y comercio”; (ii) “la obligación de las Partes de aplicar de manera efectiva sus leyes y reglamentos ambientales”; y (iii) “la importancia de trabajar en iniciativas de cooperación para prevenir o corregir los afectos adversos para la salud de los humanos y del ecosistema de América del Norte derivados de la contaminación.”¹¹

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACUERDO

El artículo 14(1) del Acuerdo establece que:

El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:

- (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
- (b) identifica claramente a la persona u organización que presenta la petición;
- (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
- (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

9. Página 5 de la petición.

10. Página 13 de la petición.

11. Páginas 13 y 14 de la petición.

- (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
- (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

La Petición fue presentada al Secretariado por una persona física y una organización sin vinculación gubernamental,¹² y asevera que México ha omitido aplicar de manera efectiva diversos artículos de la *LGEEPA*, así como la *NOM-022-SSA1-1993*. Las disposiciones citadas califican para ser consideradas como “legislación ambiental” conforme a la definición contenida en el artículo 45(2) del Acuerdo,¹³ ya que su propósito principal es la protección del medio ambiente y la prevención de un peligro contra la vida o la salud humana a través de la prevención y control de emisiones de contaminantes, el control de sustancias tóxicas y la protección de la flora y fauna silvestres.¹⁴ Por lo tanto, los tres primeros requisitos establecidos en el artículo 14(1) del Acuerdo se encuentran satisfechos.

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12. La Academia Sonorense de Derechos Humanos, A.C., uno de los Peticionarios, es una asociación civil que no es parte, ni se encuentra bajo la dirección de ningún gobierno. Por ello, califica como una organización sin vinculación gubernamental en los términos del artículo 45(1) del Acuerdo.
13. El artículo 45(2) del Acuerdo establece:
 Para los efectos del Artículo 14(1) y la Quinta Parte:
 (a) “legislación ambiental” significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
 (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
 (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
 (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas
 en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
 (b) Para mayor certidumbre, el término “legislación ambiental” no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.
 El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.
14. Véase SEM-00-005, Determinación del Secretariado de conformidad con el artículo 14(1) (25 de abril de 2000), en donde se consideró que la *NOM-022-SSA1-1993* goza del carácter de legislación ambiental conforme a la definición establecida en el artículo 45(2) del Acuerdo.

El Secretariado determinó que la Petición cumple de igual modo, con los requisitos *a)*, *b)* y *f)* del artículo 14(1) del Acuerdo, toda vez que fue presentada por escrito en español, el idioma designado por México para tales efectos;¹⁵ los Peticionarios se identifican claramente en la Petición;¹⁶ y, a partir de la información proporcionada por los Peticionarios, es posible constatar que, al menos la Academia Sonorense de Derechos Humanos, A.C., tiene su domicilio en la Ciudad de Hermosillo, Sonora, México.¹⁷

En cuanto al requisito establecido en el inciso *c)*, el Secretariado determinó que la información y documentos proporcionados por los Peticionarios son suficientes para permitir al Secretariado analizar la Petición, al menos respecto de algunas de sus aseveraciones, y en especial respecto de la supuesta omisión por parte de México en la aplicación de la *NOM-022-SSA1-1993*.

Con relación a dos de las aseveraciones de los Peticionarios, el Secretariado no considera que la Petición proporciona información suficiente para analizarlas. Primero, no hay información suficiente respecto de la aseveración de que México incurre en una omisión en la aplicación efectiva del artículo 98, fracción I, al tolerar que la planta Molymex realice un uso de suelo incompatible con la vocación natural del mismo. No se desprende claramente de la información proporcionada, que las actividades de Molymex son incompatibles con la vocación natural de los predios que ocupa. Segundo, no hay información suficiente respecto de la aseveración de que México incurrió en una omisión en la aplicación efectiva del artículo 153, fracción VII, al otorgar autorizaciones a Molymex para la importación de materiales supuestamente peligrosos, sin que se haya garantizado el cumplimiento de la normatividad aplicable, ni la reparación de los daños y perjuicios que pudieran causarse en el territorio nacional. La Petición no proporciona al Secretariado información suficiente para determinar que la materia prima utilizada por Molymex constituye un residuo peligroso conforme a la normatividad aplicable, ni para analizar la supuesta omisión en garantizar el cumplimiento de la normatividad aplicable, y la reparación de los daños y perjuicios que pudieran causarse.

15. Ver también el apartado 3.2 de las *Directrices para la Presentación de Peticiones*.

16. Página 2 de la petición.

17. El Lic. Domingo Gutiérrez Mendivil, el otro peticionario, no asevera en la petición residir dentro del territorio mexicano; sin embargo, ambos Peticionarios designan en la petición un domicilio para oír notificaciones ubicado en la ciudad de Hermosillo, Sonora, México.

No obstante las deficiencias respecto de estas dos aseveraciones, en opinión del Secretariado, la Petición satisface el requisito del inciso *c*), en particular respecto del alegato relacionado con la *NOM-022-SSA1-1993*.

Respecto al inciso *d*) del artículo 14(1) del Acuerdo, el Secretariado concluyó que la Petición no parece estar encaminada a hostigar a una industria, sino a promover la aplicación de la legislación ambiental en México. Esto en virtud de que la Petición está esencialmente referida a omisiones de la autoridad en México y no al cumplimiento de una empresa en particular. Los Peticionarios no son además, competidores de Molymex, la empresa involucrada en este caso, ni tampoco plantea la Petición una cuestión intrascendente.¹⁸

Por último, el Secretariado considera que la Petición no cumple con el requisito previsto en el inciso *e*) del artículo 14(1). No existe mención alguna en el texto de la Petición en la que se asevere que el asunto ha sido comunicado por escrito a las autoridades pertinentes de México. Tampoco en los documentos que se acompañan se señala esto con certeza. Dos de los anexos de la Petición titulados "*Problemática de la Empresa Molymex, S.A. de C.V. Localizada en Cumpas, Sonora, Perteneciente a la Corporación Radian, S.A. de C.V. y Operada por Personal Chileno*¹⁹" y "*Contaminación Atmosférica en el Poblado de Cumpas, Sonora, Caso Molymex, S.A de C.V.*"²⁰ mencionan la existencia de una denuncia ciudadana. Sin embargo, ninguno de tales documentos indica con claridad si dicha denuncia fue presentada por escrito.²¹ Por lo tanto, la Petición no señala que el asunto ha sido comunicado por escrito a las autoridades mexicanas pertinentes, como lo requiere el inciso *e*).²²

18. Ver también el apartado 5.4 de las *Directrices para la Presentación de Peticiones*, que señala que el Secretariado al determinar si la petición está encaminada a promover la aplicación efectiva de la legislación ambiental y no a hostigar a una industria, tomará en cuenta: (i) "si la petición se centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular; especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición"; y (ii) "si la petición parece intrascendente".

19. Anexo VIII de la petición.

20. Anexo IX de la petición.

21. La legislación ambiental vigente en 1994, año en el que supuestamente se realizó la denuncia ciudadana, preveía la figura de la Denuncia Popular, a través de la cual toda persona podía denunciar ante la autoridad competente, todo hecho, acto u omisión de competencia de la Federación, que produjera desequilibrio ecológico o daños al ambiente, contraviniendo las disposiciones en materia ambiental. Sin embargo, se desconoce si la denuncia ciudadana a la que se refieren los anexos mencionados, se trató en realidad de una Denuncia Popular en los términos de la legislación vigente en aquel momento.

22. Si bien en ocasiones previas el Secretariado ha interpretado que el artículo 14(1) del Acuerdo "no pretende colocar una gran carga para los peticionarios", no puede procederse al análisis de la Petición si no existe un sustento suficientemente claro

IV. DETERMINACIÓN DEL SECRETARIADO

Después de revisar la Petición conforme al artículo 14(1) del Acuerdo, el Secretariado considera que ésta no satisface todos los requisitos que dicho artículo establece, toda vez que no señala que el asunto planteado en la Petición, ha sido previamente comunicado por escrito a las autoridades pertinentes en México, como lo requiere el inciso *e*) de dicho artículo.

Por lo tanto, conforme a lo dispuesto por el apartado 6.1 de las *Directrices para la Presentación de Peticiones*, por este medio el Secretariado notifica a los Peticionarios que no procederá al análisis de la Petición. No obstante, de acuerdo con el apartado 6.2 de las *Directrices*, los Peticionarios cuentan con 30 días para presentar una petición que cumpla con los criterios del artículo 14(1) del ACAAN.

Finalmente, se informa a los Peticionarios que su solicitud para que el Secretariado lleve a cabo un informe conforme al artículo 13 del Acuerdo, sería tomada en consideración una vez concluido el proceso conforme al artículo 14 del mismo.

por: Carla Sbert
Oficial Jurídica de la
Unidad sobre Peticiones Ciudadanas

c.c. Lic. José Luis Samaniego, Semarnap
Sra. Norine Smith, Environment Canada
Sr. William Nitze, US-EPA
Sra. Janine Ferretti, Directora Ejecutiva de la CCA

para afirmar el cumplimiento de uno de los requisitos establecidos en el artículo 14(1) del Acuerdo. A este respecto, véanse SEM-00-005, Determinación del Secretariado de conformidad con el artículo 14(1) (25 de abril de 2000), SEM-97-005, Determinación del Secretariado de conformidad con el artículo 14(1) (21 de julio de 1997), SEM-98-003, Determinación del Secretariado de conformidad con el artículo 14(1) (27 de mayo de 1998).

