Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 15(1) of the North American Agreement for Environmental Cooperation

Submitters:

Adirondack Communities and Conservation Program
Adirondack Mountain Club, Inc.
American Lung Association of the City of New York
American Lung Association of Connecticut
American Lung Association of Maine
American Lung Association of Massachusetts
American Lung Association of New Hampshire
American Lung Association of New Jersey
American Lung Association of New York
American Lung Association of Rhode Island
Appalachian Mountain Club
Audubon New York
Breast Cancer Coalition of Rochester
Citizen´s Environmental Coalition
Connecticut Public Interest Research Group
Conservation Law Foundation
Delaware-Otsego Audubon Society, Inc.
Environmental Advocates
Environmental and Society Institute
Finger Lakes Trail Conference
Fishkill Ridge Caretakes, Inc.
Global Warming Action Network
Great Lakes United
Green Education and Legal Fund, Inc.
Greenpeace Canada
Greenpeace USA
Hudson River Sloop Clearwater, Inc.
Lake Clear Association
Massachusetts Public Interest Research Group
Natural Resources Defense Council
New Hampshire Public Interest Research Group
New Jersey Public Interest Research Group
New York Public Interest Research Group
New York State Community of Churches
Northeast Organic Farming Association of New York, Inc.
Ohio Public Interest Research Group

	Ontario Clean Air Alliance PennEnvironment Rainbow Lake Association, Inc. Resident´s Committee to Protect the Adirondacks Rhode Island Public Interest Research Group Scenic Hudson, Inc. Sierra Club, including Sierra Club of Canada Sierra Club of Canada, Eastern Canada Chapter Toronto Environmental Alliance U.S. Public Interest Research Group Vermont Public Interest Research Group Waterkeeper Alliance WNY Sustainable Energy Association
Party:	Canada
Date received:	14 August 2003
Date of receipt of the original submission:	1 May 2003
Date of this determination:	28 May 2004
Submission I.D.:	SEM-03-001 / Ontario Power Generation

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "CEC") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform Council and provide its reasons (Article 15(1)). The Secretariat dismisses the submission if it believes that development of a factual record is not warranted.

On 14 August 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a revised submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). The revised submission contains new information following the Secretariat's determination of 15 July 2003 that the original submission, filed on 1 May 2003, failed to meet fully the requirement in

Article 14(1)(c). On 19 September 2003, the Secretariat requested a response to the revised submission from Canada. Canada provided its response on 18 November 2003.

The Secretariat has determined that the revised submission does not warrant preparation of a factual record, and provides its reasons below.

II. SUMMARY OF THE REVISED SUBMISSION

Like the original submission, the revised submission, filed by 49 Canadian and United States non-governmental organizations,[1] asserts that Canada is failing to effectively enforce the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants. The revised submission focuses primarily on OPG's Nanticoke, Lambton and Lakeview generating stations, but the submission encompasses all six of OPG's fossil fuel powered facilities.

The Submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from OPG's coal-powered facilities pollute the air and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the Canadian Environmental Protection Act, 1999 (CEPA), which, they claim, obligate the Minister of the Environment to take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance or another deleterious substance may enter water frequented by fish.

The Submitters attach portions of a 2001 report indicating that OPG's six fossil fuel fired facilities generate 14.7% of the nitrogen oxides (NO_x), 23.7% of the sulfur dioxide (SO_2) and 22.6% of the mercury emitted in Ontario.[2] The revised submission describes the transport of emissions of sulfur dioxide and nitrogen oxides and their deposition as acidic precipitation and asserts that the prevailing westerly winds in North America transport OPG's emissions of these substances to Quebec, the Maritime Provinces, New York, Connecticut, Rhode Island and other New England states. The revised submission cites (and attaches portions of) studies indicating that Ontario is the source of 23% of the sulfur deposition on Whiteface Mountain in New York State's Adirondack Mountains

1 Five of the original Submitters are listed as Interested Parties in the submission: the attorneys general of New York, Connecticut and Rhode Island and the Towns of Chesterfield and Wilmington, both in New York State. The submission makes clear that these "Interested Parties" are not submitters. Submission at ii. In its 15 July 2003 determination, the Secretariat concluded that , in view of the Article 45(1) definition of "non-governmental organization," "the two towns and the three attorneys general, who joined the submission in their capacities as attorneys general, are not non-governmental organizations or persons within the meaning of Article 14." SEM-03-001, Determination under Article 14(1) (15 July 2003).

2 Revised submission at 5, Appendix C.

and 22% of the sulfur deposition in the western Adirondacks.[3] The revised submission also provides information regarding the adverse environmental and human health impacts that they claim result from the downwind deposition of OPG's mercury, sulfur dioxide and nitrogen oxides emissions in eastern Canada and northeastern United States. The Submitters claim that they or their members are directly and personally affected by the harm described in the revised submission and that natural resources that they use have been degraded in recreational and other value.[4]

The revised submission describes the efforts of some of the Submitters to communicate to the Canadian Minister of the Environment and others their concerns regarding the alleged downwind impacts of OPG's air emissions. The Submitters claim that "Canada has responded to these communications by promising attention to the matter but by doing little about it."[5] They contend that "[t]he only concrete changes at the OPG plants discussed by Canada have been the installation of pollution control equipment on certain units to reduce NO_x emissions in an effort to meet obligations under the 2000 Ozone Annex to the Canada-United States Air Quality Agreement."[6]

The only new information in the revised submission concerns the pursuit of private remedies available under Canadian law in regard to the matters addressed in the submission. The Submitters claim that "[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success."[7]

III. SUMMARY OF CANADA'S RESPONSE

In its response, Canada affirms that it is concerned about the harmful effects of NO_X, SO_2 and mercury emissions from OPG's Nanticoke, Lambton and Lakeview Generating Stations on human health and the environment, including on fish and fish habitat.[8] Canada asserts that it has been working cooperatively with the Government of Ontario for many years to ensure that these atmospheric emissions are reduced in a timely fashion, taking into account economic and competitive considerations vis-à-vis the United States.[9]

Canada explains that under a 1998 Canada-Wide Accord on Environmental Harmonization (Harmonization Accord), the federal government and the provinces work together to develop strategies to address environmental issues, and they agree on the

3 Revised submission at 7, Appendix C.
4 Revised submission at 14-15.
5 Revised submission at 13.
6 *Id.*
7 Revised submission at 12.
8 Response at 6, 15.
9 Response at 15.

development of Canada-Wide Standards (CWS) for emissions of specific pollutants.[10] Canada explains that the Harmonization Accord is used to determine the order of government "best situated" to effectively address the environmental concern in question.[11] However, if that government is unable to fulfill its obligations, the concerned governments will develop an alternative plan. The response indicates that federal, provincial and territorial jurisdictions are all accountable for achieving CWS targets and reporting publicly on their progress.[12] Canada states that in the case of stationary sources of emissions, such as OPG's facilities, Canada's practice is to pursue a multilevel and consensus-based approach when setting expectations, such as a CWS.[13]

Canada states that s. 176 of CEPA 1999, which addresses international water pollution, does not apply to a situation where airborne pollutants blow over international borders and ultimately descend into water.[14] In regard to s. 166 of CEPA 1999, which addresses international air pollution, Canada outlines federal and provincial actions designed to limit emissions of the pollutants identified by the Submitters at OPG's facilities.[15]

Canada explains that NO_x emissions from OPG facilities are being addressed under the *Ozone Annex to the Canada-U.S. Air Quality Agreement* (December 2000) and the *Canada-wide Acid Rain Strategy for Post-2000*. Under the Ozone Annex, Canada has agreed to a 39-kilotonne cap, by 2007, on NO_x emissions from fossil-fuel electric power generation facilities located within a specific area of Ontario.[16] Canada describes steps that Ontario has taken, including a commitment to phase out coal use at the Lakeview Generating Station by 2005 and adoption of Regulation 397/01, which establishes a series of decreasing caps for NO_x for the electricity sector using a hybrid cap-and-trade system.[17] Canada states that under the regulation, emissions trading could prevent attainment of the 39-kilotonne cap and expresses its belief that "the province-wide application of the cap and the flexibility provisions that allow allowances to be purchased from uncapped sources and/or from the U.S. would be inappropriate."[18] Canada is working with the new Ontario provincial government under subparagraph 166(1)(b) of CEPA 1999 to determine whether the province can use its laws to meet the 39-kilotonne cap.[19] If not, Canada will consider appropriate action under federal law.[20] Under the *Acid Rain Strategy*, Canada is funding nitrogen research which will provide a science basis for determining whether further action on NO_x may be required.[21]

10 Response at 5.
11 *Id.*
12 Response at 6.
13 *Id.*
14 Response at 7.
15 *Id.*
16 Response at 8.
17 Response at 8-9.
18 Resposne at 9.
19 *Id*
20 *Id.*
21 Response at 10.

As regards SO_2, Canada asserts that it has cut emissions by more than 45% since 1980.[22] Under the *Acid Rain Strategy*, Ontario announced in January 2000 a provincial SO_2 reduction target of 50% by 2015.[23] To reach this target, Ontario is phasing out the use of coal at the Lakeview Generating Station by 2005, eliminating SO_2 emissions there, and is implementing emission caps intended to reduce SO_2 emissions from fossil fuel burning power plants by 25% by 2007.[24] In light of Ontario's actions, Canada asserts that there is no indication that action by the federal government is warranted.[25]

As regards mercury, Canada asserts that a CWS on mercury emissions originating from the electric power generation sector will be developed by 2005 and is expected to be implemented by 2010.[26] Canada affirms that the federal and provincial governments have also committed to explore the national capture of mercury from coal burned in the range of 60-90%, based on current and emerging technology.[27] The phase-out of coal-burning at the Lakeview Generating Station by 2005 will eliminate one source of mercury emissions.28 Concerning section 36(3) of the *Fisheries Act*, which prohibits the deposit of deleterious substances into waters frequented by fish, Canada asserts that there is insufficient evidence of a causal link between mercury emissions originating from OPG's facilities and the mercury found in fish-bearing waters.[29] Consequently, Environment Canada is working on an inspection program in Ontario that will include the "complex and difficult task" of sampling and tracking the fate of mercury emissions from OPG's facilities.[30] Canada notes that OPG's Nanticoke facility reported a discharge of one kilogram of mercury into water in 2001, and states that at this time, the Government of Canada is focusing its efforts on Nanticoke's atmospheric releases of mercury, which in 2001 were 226 times greater than its reported mercury discharge into water.[31]

IV. ANALYSIS

The revised submission focuses on the impacts of long-range deposition of air pollutants from coal-fired power plants, issues that have long challenged governments in North America, both domestically and, in regard to transboundary movement of those pollutants, in the international domain. For example, Canada's response mentions programs that have been in place, and the progress made, since 1985 in both Canada and the United States to address acid rain caused in part by emissions from coal-fired power plants.[32] The revised submission suggests that emissions from OPG's coal-fired power

22 *Id.*
23 Response at 12.
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 Response at 13.
29 Response at 13-14.
30 Response at 14.
31 *Id.*
32 Response at 10-11.

plants are an obstacle to Canada meeting its commitments under an international agreement with the United States, and it presents substantial information on the potential effects of OPG's coal-fired power plant emissions on human health and the environment.

The revised submission approaches these issues through the lens of specific provisions of law that the Submitters claim Canada is failing to effectively enforce in regard to OPG's coal-fired power plants. In regard to the transboundary movement of power plant emissions and Canada's commitments under an international agreement with the United States, the Submitters assert that the federal government is not fulfilling its obligations under Sections 166 and 176 of CEPA 1999. In regard to potential effects in Eastern Canada of emissions from OPG's coal-fired power plants, the Submitters assert that Canada is failing to enforce section 36(3) of the Fisheries Act to address air emissions from OPG's facilities that eventually are deposited into fish-bearing waters downwind. As explained below, the Secretariat has determined that neither set of assertions warrants the development of a factual record.

A. Assertions regarding CEPA 1999

CEPA ss. 166 and 176 both provide that the Environment Minister shall take certain prescribed action if the Environment Minister and the Health Minister have reason to believe that a substance released from a Canadian source into the air or water creates, or may reasonably be anticipated to create, air or water pollution either (1) in a foreign country that provides substantially the same rights to Canada as Canada provides in ss. 166 and 176 or (2) that violates or is likely to violate an international agreement on prevention, control or correction of pollution.[33] In regard to alleged non-federal sources of pollution such as OPG, the ministerial action that ss. 166 and 176 contemplate is, first, consultation with the relevant non-federal government to determine whether that government can address the transboundary pollution and, second, if the non-federal government cannot or does not take action, either the publication of a notice requiring preparation and implementation of a pollution prevention plan under CEPA s. 56(1) or recommendation of regulations to the Governor in Council regarding the pollution. The Act does not establish time limits within which Environment Canada must initiate or conclude consultations with the relevant non-federal government or take action where the non-federal government cannot or does not take action.

Canada takes the position that s. 176 does not apply to airborne pollutants that blow over international borders and ultimately descend into water. In view of this position,[34] and

33 *See* CEPA ss. 166 and 176.

34 Section 176 applies where the Minsters of Environment and of Health have reason to believe that a substance released from a source in Canada into water creates, or may reasonably ne anticipated to create, water pollution in another country or water pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution. CEPA 1999, s. 176(1). The Secretariat found no judicial opinions discussing the scope of s. 176. Because the revised submission deals only with air emissions and neither it nor the response presents an issue regarding interpretation of s. 166, the Secretariat sees no reason to discuss in detail legal interpretations that might differ from Canada's interpretation of s. 176.

because the revised submission focuses on OPG's air emissions, the Secretariat focuses its analysis solely on the Submitters' assertions regarding s. 166. Section 166 states in full:

> **Determination of international air pollution**
>
> (1) Subject to subsection (4), the Minister shall act under subsections (2) and (3) only if the Ministers [of Environment and of Health] have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to
>
> (*a*) air pollution in a country other than Canada; or
>
> (*b*) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.
>
> **Consultation with other governments**
>
> (2) If the source referred to in subsection (1) is not a federal source, the Minister shall
>
> (*a*) consult with the government responsible for the area in which the source is situated to determine whether that government can prevent, control or correct the air pollution under its laws; and
>
> (*b*) if the government referred to in paragraph (*a*) can prevent, control or correct the air pollution, offer it an opportunity to do so.
>
> **Ministerial action**
>
> (3) If the source referred to in subsection (1) is a federal source or if the government referred to in paragraph (2)(*a*) cannot prevent, control or correct the air pollution under its laws or does not do so, the Minister shall take at least one of the following courses of action:
>
> (*a*) on approval by the Governor in Council, publish a notice under subsection 56(1); or,
>
> (*b*) recommend regulations to the Governor in Council for the purpose of preventing, controlling or correcting the air pollution.
>
> **Reciprocity with other country**
>
> (4) If the air pollution referred to in paragraph (1)(*a*) is in a country where Canada does not have substantially the same rights with respect to the prevention, control or correction of air pollution as that country has under this Division, the Minister shall decide whether to act under subsections (2) and (3) or to take no action at all.
>
> **Other factors**
>
> (5) When recommending regulations under paragraph (3)(*b*), the Minister shall take into account comments made under subsection 168(2), notices of objection filed under subjection 332(2) and any report of a board of review submitted under subsection 340(1).

The Submitters' assertions regarding s. 166 are similar to those found in the Great Lakes submission (SEM-98-003), for which the Secretariat concluded a factual record was not warranted for claims that the United States was failing to effectively enforce section 115 of the federal Clean Air Act.[35] Section 115 of the Clean Air Act provides Canada with substantially the same rights as s. 166 of CEPA affords the United States, in that it requires the U.S. Environmental Protection Agency to take action where it has reason to believe that air pollution from a United States source harms the environment or human health in a foreign country. In Great Lakes, the Secretariat reasoned as follows in deciding against recommending a factual record:

> As courts in the United States have noted, EPA's flexibility regarding when, whether and how to implement § 115 is very broad, and determining whether the factual circumstances warranting an endangerment finding exist is very complicated in general. Based on the submission and the response, it appears that it would be especially complicated to make such a finding regarding any endangerment in Canada due to mercury and dioxin emissions in the United States. Whether the United States is effectively enforcing § 115 is intricately tied in this case to the broad scope of the EPA's discretion under that provision, and whether a factual record is warranted must be viewed in light of the complex, dynamic and improving situation described in the United States' responses. Relevant as well is the lack of any indication in the submission or in the materials the United States has provided of any significant noncompliance with emissions regulations applicable to the incinerators at issue in this submission.
>
> In light of these considerations, the Secretariat finds that the submission and the response do not leave open a central question regarding whether the United States is ineffectively addressing an ongoing environmental violation under § 115 or exercising its discretion in a manner legally contrary to § 115.[36]

Canada states that in regard to NO_x emissions, Environment Canada currently "is working under subparagraph 166(1)(b) of CEPA 1999 with the Government of Ontario to determine whether the province can prevent, control or correct NO_x emissions under its laws, in order to meet the 39-kilotonne cap set out in the *Ozone Annex*."[37] Canada notes its concern that the cap-and-trade approach of the previous Ontario government risked non-attainment of the 39-kilotonne cap, but states that it is "looking forward to seeing a revised NO_x plan from the province" that reflects Canada's commitment to the 39-kilotonne cap.[38] In these circumstances, Canada's response indicates that Ontario may be able to takes steps that ensure the 2007 cap commitment will be met, making action under federal law unnecessary.[39] In light of Ontario's SO_2 emission reduction target of 50% by 2015, with a 25% reduction anticipated by 2007 through implementation of Ontario Regulation 397/01, Canada indicates that no federal action is warranted at this time in regard to SO_2 emissions. Regarding mercury emissions, Canada points to the

35 SEM-98-003 (Great Lakes), Article 15(1) Determination (5 October 2001).
36 Cite to Great Lakes
37 Response at 9.
38 Response at 7, 9.
39 Response at 9.

development of a CWS by "2005 to reduce mercury emissions from the coal-fired electric power generation sector by 2010."[40]

In addition to these targets, Canada points out that coal use at the Lakeview Generating Station will be phased out by 2005, resulting in elimination of all coal-related emissions from that source. The Secretariat also is aware of numerous press reports of OPG's recent announcement that, consistent with the announced policy of the Ontario government elected in October 2003, it will close five coal-fired power plants in Ontario within four years, including the three on which the submission focuses.[41] These press accounts, issued after Canada filed its response, indicate that OPG wrote off $473 million as a one-time accounting cost to reflect the loss of future revenues from those plants.

Like section 115 of the Clean Air Act, which was at issue in the Great Lakes submission, s. 166 of CEPA 1999 appears to provide a considerable degree of discretion to the Environment Minister. The Submitters essentially assert that Environment Canada is failing to exercise its discretion as required, in that it is not taking the actions that are contemplated under s. 166, namely (1) consulting with Ontario and, if the province can prevent, control or correct the air pollution, providing it an opportunity to do so; (2) publishing a notice (on approval of the Governor in Council) requiring OPG to prepare and implement a pollution prevention plan; or (3) recommending regulations to the Governor in Council. Yet, the Act prescribes neither the time nor the manner in which the Minister must take these actions. Notably, nothing in the Act indicates that Canada has a clear obligation to require a pollution prevention plan or recommend regulations notwithstanding Ontario's adoption of emissions reduction targets (for NO_x and SO_2), federal-provincial efforts to establish a relevant CWS (for mercury), and the announced elimination of the pollution sources at issue, even if the actual elimination of those sources faces a degree of uncertainty. In fact, s. 166(2)(b) states that "if the government referred to in paragraph (*a*) [in this case, the Ontario government] can prevent, control or correct the air pollution", the federal government "shall offer it an opportunity to do so." The response indicates that Canada is currently providing Ontario this opportunity.

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40 Response at 12.

41 *See* R. Mackie, "Ontario's five coal-fired plants to shut down within four years," *The Globe and Mail*, 17 March 2004 (viewed on the internet at http://www.theglobeandmail.com/servlet/ArticleNews/TPPrint/LAC/20040317/HYDRO17/TPNational (17 April 2004); Reuters, "Ontario vows to shut coal plants, critics wary," *Forbes.com*, 17 March 2004, viewed on the internet at http://www.forbes.com/business/energy/newswire/2004/03/17/rtr1302622.html (15 April 2004); "Plant closure report alarms Nanticoke," *The Toronto Star*, 17 March 2004, viewed on the internet at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1079564621228&call_pageid=968256289824 (15 April 2004); "Ontario Power Generation reports 2003 earnings," *CNW Telbec*, 16 March 2004, viewed on the internet at http://www.cnw.ca/fr/releases/archive/March2004/16/c0843.html (15 April 2004); "Ontario braces for big changes to energy market," *CTV.ca*, 18 March 2004, viewed on the internet at http://www.ctv.ca/servlet/ArticleNews/print/CTVNews/1079543973373_74953173/?hub=TopStories&subhub=PrintStory&articleURL=http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1079543973373_74953173/?hub=TopStories (15 April 2004). .

The information before the Secretariat regarding both emission reduction targets and concrete actions, together with reports of the planned closure of some or all of OPG's coal-fired power plants, indicates a dynamic and improving situation in regard to the transboundary pollution of concern to the Submitters, similar to the situation presented in the Great Lakes submission. While the passage of time without any progress on the part of Ontario or the federal Environment Minister may, in the future, raise a question regarding the application of s. 166 in this context, the Secretariat cannot, at this time, identify a central question regarding the Environment Minister's exercise of the discretion given him in s. 166 of CEPA that would warrant preparation of a factual record.

B. Assertions regarding s. 36(3) of the *Fisheries Act*

The Submitters' assertions regarding s. 36(3) appear to suggest an untested application of the provision to air emissions that eventually are deposited into water frequented by fish. Nonetheless, by conducting an inspection of OPG's mercury emissions under the *Fisheries Act*, Canada indicates that OPG's emissions might be considered "a deposit of a deleterious substance . . . under [] conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter [water frequented by fish]" within the meaning of s. 36(3). However, Canada also points out the complexity of tracking air emissions to establish the causal source-receptor link between OPG's emissions and specific fish-bearing waters downwind, as well as the need to establish the elements of an offense under s. 36(3) beyond a reasonable doubt. Canada explains as follows:

> The task of measuring mercury emissions in stack gases is difficult and the scientific techniques are quite complicated. Specialized equipment based on a unique determination of the circumstances is required. Due to these complications, and thus high costs, stack sampling programs are usually carried out once a year or once every few years. As a result data on long term monitoring of emission is very scarce.
>
> The atmospheric modelling of emissions and the attempt to determine their ultimate fate is even more difficult. First, as described above, the data is scarce; and second, there is not full scientific understanding of atmospheric pathways and chemical interactions with mercury in the atmosphere. This science is in its infancy and is the subject of much study and debate in the scientific community. There are currently no comprehensive models available that can deal with the mercury emissions from these stacks.[42]

In view of the apparently unprecedented nature of the application of s. 36(3) to air emissions that are eventually deposited into waters frequented by fish, Canada's inspection of OPG's mercury emissions with a view to considering whether action is warranted under s. 36(3) is a significant step. Because Canada is early in the process of addressing the complexities inherent in undertaking the sampling and studies involved,

42 Response at 14.

and noting as well the announced closing of some or all of OPG's coal-fired facilities, the Secretariat has concluded that a factual record at this early stage in Canada's possible pursuit of s. 36(3) charges would be of limited value.

IV. DETERMINATION

For the foregoing reasons, the Secretariat considers that the revised submission, SEM-03-001 (Ontario Power Generation), does not warrant developing a factual record and pursuant to section 9.6 of the Guidelines hereby notifies the Submitters and the Council of its reasons and that the process is terminated with respect to the submission.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

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

cc: Norine Smith, Environment Canada
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Submitters