

Secretariat of the Commission for Environmental Cooperation

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

Submitter: Louisiana Bucket Brigade
Concerned Party: United States
Date of submission: 03 July 2013
Date of this determination: 12 August 2013
Submission I.D.: SEM-13-002 (*Louisiana Refinery Releases*)

I. INTRODUCTION

1. On 03 July 2013, the Louisiana Bucket Brigade, represented by Anna Hrybyk, Program Manager, (the “Submitter”) filed SEM 13-002 (*Louisiana Refinery Releases*) (the “Submission”), a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or the “Agreement”),¹ with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”). Articles 14 and 15 of the NAAEC provide for a process allowing any person or non-governmental organization to file a submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the [NAAEC]* (the “Guidelines”).² When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council of the CEC that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with its consideration of the submission.³

¹ *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, 32 ILM 1480 (entered into force 1 January 1994) [NAAEC], online: CEC < <http://bit.ly/eLLoyc> >.

² Commission for Environmental Cooperation, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Montreal: CEC, 2012) [the Guidelines], online: CEC < <http://goo.gl/bRFBa> >.

³ Previous Secretariat Determinations and Factual Records can be found on the CEC’s website at: < www.cec.org/SEMregistry >. In this Determination, unless otherwise stated, reference to an “Article” refers to an article of the NAAEC.

2. The Secretariat has determined that the Submission does not meet the admissibility requirements of Article 14(1) and that, in accordance with Guideline 6.2, for the reasons set out below, the Submitters are being notified that they have sixty working days from the date of this Determination to provide a Submission that conforms to all of the requirements of Article 14(1), failing which the Secretariat will terminate the process with respect to the Submission. The Secretariat's reasons are set out in Section III.

II. SUMMARY OF THE SUBMISSION

3. The Submitter states that it is “an environmental health and justice organization that has been supporting grassroots communities all over [Louisiana] in their fight to be free of industrial pollution since 2000”.⁴
4. The Submitter asserts that the United States Environmental Protection Agency (“EPA”) has failed to “use the Clean Air Act to enforce environmental hazards discovered in the Agency’s July 2012 Risk Management Plan inspection of ExxonMobil Refinery in Baton Rouge, Louisiana (EMBRRF)”.⁵ The Submitter notes that United States Clean Air Act (“CAA”) 40 CFR Part 68, Accidental Release Prevention, contains a Risk Management Plan (“RMP”) rule [set out in Subpart G] that is “designed to prevent catastrophic accidents from extremely hazardous substances”.⁶ The Submitter further asserts that the “RMP, as written, does not comply with CAA(r) 40 CFR Part 68, Accidental Release Prevention”.⁷ The Submitter notes that the refinery's own upset reports show "36 accidents totaling 926,286 pounds [420,156 kg] of pollution from units that are covered by the RMP," despite the facility's RMP allegedly stating that there are no accidents subject to the RMP to report.⁸
5. The Submitter maintains that there is a community of 59,600 people located within two miles of the EMBRRF and chemical plant,⁹ and that this constitutes “one of the most egregious cases of environmental injustice in the region”.¹⁰
6. The Submitter states that it communicated the foregoing to the EPA in a letter dated 12 January 2012, which also requested that the EPA “add the EM BRRF to its list of facilities for inspection and enforcement action in 2012”.¹¹
7. The Submission then sets out a summary of the events concerning a release of benzene and other chemicals from the EMBRRF on 14 June 2012, citing a report from Exxon to the National Response Center and correspondence with the Louisiana

⁴ Submission, at 1.

⁵ *Ibid.* United States Clean Air Act (CAA) 42 U.S.C. §§ 7401-7671q.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Submission, Appendix B.

¹⁰ *Ibid.*, at 1.

¹¹ *Ibid.*, at 2, and Appendix C.

Department of Environmental Quality (“LDEQ”), and regarding alleged statements that the EMBRRF released 10 pounds of benzene.¹²

8. The Submitter states that it received reports from workers at the EMBRRF that 700 barrels of naphtha had been “released into the sewer system of the Exxon complex”, and that the naphtha leaked into a trunk line that ran into a wastewater treatment plant, and eventually into separator tanks that were open to the atmosphere.¹³
9. The Submitter states that the 14 August 2012 ExxonMobil final report on the incident reveals that the company admitted to spilling: 31,022 pounds of Benzene; 14,022 pounds of Volatile Organic Compounds; 13,081 pounds of Toluene; 2,588 pounds of Hexane; and, 1,421 pounds of Cyclohexane.¹⁴ The Submitter further notes that the amount of benzene spilled in that 14 June 2012 incident is nearly equivalent to the amount of benzene emitted over the previous two years.¹⁵
10. The Submitter states that the community was not “notified of the spill by emergency siren or from Exxon’s First Call system because according to Exxon ‘there was no action for them to take’”.¹⁶ The Submission quotes witnesses interviewed in the days and weeks after the spill.¹⁷
11. The Submitter provides details of its meeting with members of the Standard Heights Community Association, to meet with “senior EPA officials”, in order to present the community’s requests, which included: “1. A criminal investigation of ExxonMobil for the Benzene release; 2. An unannounced inspection of the ExxonMobil Refinery and Chemical Plant; 3. An investigation into the LDEQ and EPA Region VI response”.¹⁸
12. The Submitter notes that following a surprise EPA Risk Management Plan inspection on 16 July 2012 that revealed, inter alia, alleged failures in the mechanical integrity of the facility and violations of reporting requirements, LDEQ issued two Compliance Orders and Notices of Potential Penalty to EMBRRF between July and September 2012.¹⁹
13. The Submitter laments that “neither EPA nor LDEQ have brought fines or penalties against EMBRRF for this accident despite the potentially dangerous findings of their

¹² Submission, at 2. There are no documents included with the submission supporting the statements about a release of 10 pounds of benzene. Moreover, the links in footnotes 1 and 2 of the Submission appear to be incorrect and non-functioning.

¹³ *Ibid.*

¹⁴ Submission, at 3. The Secretariat notes a discrepancy between the Submission’s cited amounts of Hexane and Cyclohexane spilled, and the amounts for those chemicals listed in Appendix D, Louisiana Department of Environmental Quality, Unauthorized Discharge Notification Report (LAC I:3925), Attachment 3 “Final Material Balance”, at page EPA 1450. The latter reports the “Total Emissions to the Environment = Total Release, Minus Captured, Minus Biologically Treated” for Cyclohexane as “1,431 pounds” rather than the Submission’s listing of “1,421 pounds”, and for Hexane as “2,558” rather than the Submission’s listing of “2,588 pounds”.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Submission, at 3, 4. *See also* Submission, Appendix E.

¹⁸ Submission, at 4.

¹⁹ Submission, at 4, 5. *See also* Submission, Appendix G.

inspections”, and this despite EMBRRF allegedly “having one of the highest rates of unauthorized discharges in the state.”²⁰

14. The Submitter requests the CEC to:

1. Pressure the EPA and LDEQ [sic] enforce the Clean Air Act by issuing the maximum penalties for this accident and the violations found during the Risk Management Plan inspection [...] [and]
2. Pressure the EPA and LDEQ to use the general duty clause of the Clean Air Act to award no new permits to EMBRRF or EMBRCP until all findings in the 2012 RMP Inspection report are addressed.²¹

III. ANALYSIS

15. The Secretariat now examines whether Submission SEM-13-002 (*Louisiana Refinery Releases*) meets the admissibility criteria of Article 14(1) of the NAAEC. In the following paragraphs, the Secretariat treats each component of Article 14(1) in turn. As the Secretariat has found in previous Article 14(1) determinations,²² Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat will interpret every Submission in accordance with the NAAEC and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat has considered the Submission and its annexes, and determines that the Submission does not meet the criteria of Article 14(1) for the following reasons.

A. Opening Paragraph of Article 14(1)

16. The opening paragraph of Article 14(1) of the NAAEC provides: “[t]he 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” meets the criteria in Article 14(1)(a) to (f).
17. The Submitter is the Louisiana Bucket Brigade, a “non-governmental organization” in accordance with Article 14(1) and as defined in Article 45(1).
18. The Secretariat continues with its analysis by considering whether the Submission contains assertions that a Party is failing to effectively enforce environmental law. The Secretariat also analyzes whether any purported assertions in the Submission concern alleged failures of the effective enforcement of environmental laws, in accordance with the opening paragraph of NAAEC Article 14(1).
19. An assertion should include a positive statement that a Party is failing to effectively enforce its environmental law. According to Guideline 5.1 a submission should also focus on any acts or omissions of the Party asserted to demonstrate such failure.

²⁰ Submission, at 5.

²¹ *Ibid.*, at 6.

²² See, for example, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination (8 September 1999).

20. The Submitter asserts that the United States has failed to “use the Clean Air Act to enforce environmental hazards discovered in the Agency’s July 2012 Risk Management Plan inspection of ExxonMobil Refinery in Baton Rouge, Louisiana (EMBRRF).” The Submission goes on to discuss alleged non-compliance of the EMBRRF’s RMP with CAA 40 CFR Part 68, namely that accident reporting requirements in the RMP have allegedly not been met by the facility.
21. 42 USC § 7401 lists the purposes of the Clean Air Act as:
to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population; (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and (4) to encourage and assist the development and operation of regional air pollution prevention and control programs.
22. The Secretariat notes that it finds and has previously found the Clean Air Act to be “environmental law” in accordance with the definition contained in Article 45(2) of the NAAEC, given its purposes of protecting the environment and preventing danger to public health through pollution prevention and control measures.²³
23. It is not clear what the Submitter means by its assertion that the United States has failed to use the Clean Air Act to “enforce environmental hazards” discovered in the July 2012 RMP inspection. The Clean Air Act does not appear to have the purpose of “enforcing environmental hazards”. Also, the Submitter’s mere allegation that the RMP does not comply with CAA 40 CFR Part 68 is not an assertion that the United States has failed to effectively enforce environmental law.
24. The Submitter cites the “General Duty Clause” of the CAA²⁴ in the context of its request that the CEC pressure the EPA and LDEQ not to award any new permits to the facility until “all findings in the 2012 inspection report are addressed”.²⁵ Such a citation is likewise not an assertion of a failure of the Party to effectively enforce environmental law.
25. The Secretariat observes that the Submission does not adequately explain how any acts or omissions of the Party alleged in the Submission serve to demonstrate a failure to effectively enforce environmental law in accordance with Guideline 5.1, nor does the Submission adequately explain the nature of its assertion that the United States is failing to “use the Clean Air Act to enforce environmental hazards” discovered in the July 2012 RMP.
26. The Submitter must therefore in any revised submission explain its assertion regarding the CAA, and indicate how any acts or omissions of the United States alleged in the Submission “serve to demonstrate” the alleged failure to effectively

²³ See SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination, at 4 (8 September 1999).

²⁴ CAA §112(r)(1). The General Duty Clause of the CAA, according to the EPA’s website < <http://goo.gl/STRNMT> > (viewed 8 August 2012), “directs owners and operators of stationary sources to identify hazards that may result from accidental releases, to design and maintain a safe facility, and to minimize the consequences of releases when they occur”.

²⁵ Submission at 6.

enforce the CAA and any of its provisions. The Secretariat also recalls the text of Guideline 5.2 which provides that the Submitter “must identify the applicable statute or regulation, or provision thereof, as defined in Article 45(2) of the Agreement.” The Submitter has identified several provisions of the CAA which are environmental law in accordance with Article 45(2), but has not indicated how the Party purportedly has failed to effectively enforce those provisions. Rather the Submission has alleged non-compliance of the RMP with the law in question, and pointed out the EMBRRF’s alleged violations of the law.

27. It is necessary to emphasize that an “environmental law” cited in a Submission must be enforceable by the government in question. Article 5 of the NAAEC, provides some examples—although not necessarily comprehensive or exhaustive—of what may constitute government enforcement actions. **Any revised submission should state as clearly as possible how it is alleged that the Party failed to effectively enforce the environmental law(s) at issue.**
28. The Secretariat next analyzes whether the Submitter meets the requirement in the opening paragraph of Article 14(1) that assertions regard ongoing failures to effectively enforce the environmental law at issue. The Submitter’s assertion, although unclear regarding the environmental law in question as detailed above, appears to be focused on the compliance of the RMP with the CAA. The Submitter acknowledges that the EPA conducted an RMP inspection of the EMBRRF in July 2012, and that the LDEQ subsequently issued Compliance Orders and Notices of Potential Penalty, but the Submitter maintains that the findings of the RMP inspection have not yet been addressed.²⁶ The Submitter notes that there are corroded lines in the facility that need replacing, and that a “solid program of Leak Detection and Repair” has to be established.²⁷ **Any revised submission should address whether, and if so, how, any assertion(s) may relate to an ongoing failure to effectively enforce environmental law.**
29. It is clear from the Submission that the Party has taken some enforcement action, first in the EPA’s RMP inspection of the EMBRRF, and second in the LDEQ’s compliance orders. The Secretariat does not adjudge whether a Party has effectively enforced the law or not, nor does it evaluate the Party’s enforcement choices. The Secretariat must however take note of enforcement action where it is evident, when considering whether to request a response from the Party concerned.
30. Having determined that the Submission does not meet the requirements of the opening paragraph of Article 14(1), the Secretariat now considers whether the subsequent criteria of Article 14(1) are met.

Article 14(1)(a) requires that a Submission be: “in writing in a language designated by that Party in a notification to the Secretariat [...]”

31. The Secretariat notes that the Submission meets the criteria of Article 14(1)(a) as it is in English, an official language designated by the Parties for filing a Submission.²⁸

²⁶ Submission at 6.

²⁷ *Ibid.*

²⁸ *See also* Guideline 3.2.

Article 14(1)(b) requires that a submission: “clearly identifies the person or organization making the submission [...].”

32. The Secretariat considers that the Submitter is clearly identified including the name of the organization and its contact information. The Submission meets the criteria of Article 14(1)(b).

Article 14(1)(c) requires 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 [...].”

33. Given that the assertion itself is unclear, it is not possible to determine whether the Submission meets the requirement of Article 14(1)(c). Although the Submission includes annexes and documentary evidence, it is not clear how the Submission is based on the documentation included, and whether the information provided is indeed sufficient to review the Submission further. **Any revised Submission should clearly explain how documentary evidence supports any assertion(s) that the Party is failing to effectively enforce its environmental law.** The Submitter should also consider Guideline 5.3 in this respect.

Article 14(1)(d) requires that a submission: “appears to be aimed at promoting enforcement rather than at harassing industry [...].”

34. The Secretariat considers that although the Submission concerns in part the actions of a particular company, the Submission appears to satisfy the criteria of NAAEC Article 14(1)(d) as it appears to be aimed at promoting enforcement of the laws at issue rather than at harassing industry.²⁹ The Submitter is not a competitor of the company concerned, nor does it stand to benefit economically from the Submission. Rather, the Submitter appears to be primarily concerned with promoting enforcement of the CAA, as evidenced by its correspondence and engagement with the Party’s relevant authorities.³⁰

Article 14(1)(e) requires that a submission indicate: “that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any [...].”

35. The Submission indicates that the matter has been communicated in writing to the relevant authorities of the Party, including the EPA and the LDEQ. Appendix C of the Submission contains a letter written by the Submitter to EPA officials and the US Coast Guard. The Submission does not however include any Party response to that letter, and any revised Submission should include any such response.
36. Moreover, the Submitter notes that it wrote to Cheryl Nolan, Assistant Secretary of LDEQ’s Office of Compliance, and to Esteban Herrera, EPA Compliance Assurance and Enforcement Division Section Chief, but the Submission does not include this correspondence, nor does it include the response from the Party referred to in the

²⁹ See Guideline 5.4(a), which provides that to determine whether the Submission is aimed at promoting effective enforcement and not at harassing industry, the Secretariat will consider whether: “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.”

³⁰ *Supra* para. 11.

Submission at page 2. Finally, the Submitter should include relevant correspondence regarding its meeting with the EPA on 12 July 2012 as well. The Submission thus does not fully meet the requirement in Article 14(1)(e), and is not in accordance with Guideline 5.5. **Any revised submission should include the above-mentioned correspondence and any other relevant correspondence with the Party and its relevant authorities, indicating any response(s) from the Party.**

Article 14(1)(f) requires that a submission: “is filed by a person or organization residing or established in the territory of a Party.”

37. The Submitter is an organization established in the territory of the United States, a Party to the NAAEC, and therefore satisfies the requirement of Article 14(1)(f).
38. Finally, it should be recalled that the public Submissions on Enforcement Matters (SEM) process is a fact-finding procedure and not a mechanism for dispute resolution. Nothing in the SEM process, nor its outcome, directly requires a Party, the CEC Council, or any other person or body to take specific remedial action.

IV. DETERMINATION

39. In light of the foregoing, and having considered the Submission and its documentation, the Secretariat determines that Submission SEM 13-002 (*Louisiana Refinery Releases*) does not meet the admissibility requirements of Article 14(1) of the Agreement.
40. In accordance with Guideline 6.2, the Submitters have sixty working days from the date of issuance of this Determination (12 August 2013) to provide a submission that conforms to the requirements of Article 14(1), failing which the Secretariat will terminate the process with respect to this submission. Any revised submission must therefore be received on or before 5 November 2013.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation



per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

cc: Ms. Michelle DePass, US Alternate Representative
Mr. Dan McDougall, Canada Alternate Representative
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