

**Secretariat of the Commission for Environmental Cooperation**

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

**Submitter:** Residents for Air Neutralization  
**Concerned Party:** United States  
**Date of submission:** 09 July 2013  
**Date of this determination:** 19 August 2013  
**Submission I.D.:** SEM-13-003 (*Refinery Releases in Shreveport, Louisiana*)

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**I. INTRODUCTION**

1. On 09 July 2013, the non-governmental organization Residents for Air Neutralization (“RAN”), represented by Velma White, President, (the “Submitter”) filed SEM 13-003 (*Refinery Releases in Shreveport, Louisiana*) (the “Submission”), a submission on enforcement matters (“SEM”) pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or the “Agreement”),<sup>1</sup> 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 considers how the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the [NAAEC]* (the “Guidelines”) may apply.<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> *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> >.

<sup>2</sup> 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> >.

<sup>3</sup> Previous Secretariat Determinations mentioned in this Determination, as well as Factual Records, can be found on the CEC’s website at: < [www.cec.org/SEMregistry](http://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 provides its contact information and entitles its submission “NGO petition to the North American Commission for Environmental Cooperation for an Investigation and a Creation of a Factual Record”.<sup>4</sup>
4. The Submitter asserts that the United States Environmental Protection Agency (“EPA”) “is failing to enforce the Clean Air Act and the amendments to this Act” (“CAA”).<sup>5</sup> The Submitter further asserts that “the US Environmental Protection Agency’s regulations drafted and programs adopted to control airborne perpetual emissions of harmful toxins and chemicals violate and fail to enforce US domestic laws.”<sup>6</sup> The Submitter specifies in that connection that the US EPA’s current regulations and programs “violate and fail to enforce key provisions of [...] CAA 42 Section 7401 ©: [sic] Pollution Prevention”.<sup>7</sup>
5. The Submitter then discusses an EPA inspection from 15-18 August 2011 at Calumet Lubricants, LLC, in Shreveport, Louisiana. The Submission notes that several violations were found, but does not specify what these violations were.<sup>8</sup>
6. The Submitter notes that it requested the EPA to issue an Administrative Order “mandating that corrective actions to [sic] be taken by Calumet Lubricants, LLC.”<sup>9</sup> The Submitter maintains that the EPA has not produced said Administrative Order, and that the EPA has “failed to produce any kind of results in pursuance to the environmental laws and regulations that were violated.”<sup>10</sup>
7. The Submitter claims to have been in “steady communication” with EPA officials, and that it has submitted air samples to the EPA allegedly demonstrating “the considerable harmful chemicals being released even after the results of the poor inspection.”<sup>11</sup>
8. The Submitter concludes by requesting that the US EPA “enforce the laws and regulations which were put in place by the US Government and for which they were

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<sup>4</sup> Submission at 1.

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

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, at 1-2.

created”, and requests the Secretariat to prepare a “Factual Report” regarding their assertions, which would be made public.<sup>12</sup>

### III. ANALYSIS

9. The Secretariat now examines whether Submission SEM-13-003 (*Refinery Releases in Shreveport, Louisiana*) 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,<sup>13</sup> 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)

10. 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).
11. The Submitter is Residents for Air Neutralization, a “non-governmental organization” in accordance with Article 14(1) and as defined in Article 45(1).
12. The Secretariat continues with its analysis by considering whether the Submission contains assertions that a Party is failing to effectively enforce environmental law in accordance with the opening paragraph of NAAEC Article 14(1).
13. An assertion should include a positive statement that a Party is failing to effectively enforce its environmental law, and the submitter does make several such assertions. According to Guideline 5.1 a submission should also focus on any acts or omissions of the Party asserted to demonstrate such failure, and according to Guideline 5.2, a submitter must “identify the applicable statute or regulation, or provision” of the environmental law in question. “Environmental law” is defined in Article 45(2) of the Agreement. The Submission fails to fully address the matters in Guidelines 5.1 and 5.2, as noted below.
14. The Submitter first asserts that the United States is failing to enforce the “1990 Clean Air Act and the amendments to this Act”.<sup>14</sup> The Submission continues with its assertion that “the US Environmental Protection Agency’s regulations drafted and programs adopted to control airborne perpetual emissions of harmful toxins and chemicals violate and fail to enforce US domestic laws.”<sup>15</sup>

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<sup>12</sup> *Ibid.*, at 2.

<sup>13</sup> 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).

<sup>14</sup> Submission at 1.

<sup>15</sup> *Ibid.*

15. 42 U.S.C. § 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.
16. 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.<sup>16</sup>
17. 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 substance of its assertions, for example that the United States EPA has “yielded in its obligation to punish the offenders of”<sup>17</sup> the CAA.
18. The Submitter must therefore in any revised submission explain its assertions regarding the CAA, and indicate how any acts or omissions of the United States “serve to demonstrate” the alleged failure to effectively enforce the CAA and any of its provisions.
19. As noted above, the text of Guideline 5.2 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, and has in some cases failed to identify which provisions of the CAA are meant.
20. For example, in asserting that the EPA failed to effectively enforce the CAA by not punishing alleged offenders of the CAA, any revised submission should first explain what provision of the CAA creates an obligation on the EPA to “punish offenders”, and how the EPA allegedly has failed to do so. Moreover, the Submitter in any revised submission should explain its assertion that current EPA “regulations and programs violate and fail to enforce key provisions of [CAA 42 7401(c)]”.<sup>18</sup> In the latter connection, the Submitter in any revised submission should specify which regulations and programs are being referred to, and if applicable how the Party is failing to effectively enforce the law(s) in question.
21. The Submitter should note that the SEM process under Articles 14 and 15 cannot consider assertions that there is a defect in the law itself, rather must focus on assertions of a failure to effectively enforce environmental law, as the law stands.

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<sup>16</sup> See SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination, at 4 (8 September 1999), and SEM-13-002 (*Louisiana Refinery Releases*), Article 14(1) Determination, at 5 (12 August 2013).

<sup>17</sup> Submission at 1.

<sup>18</sup> The Submitter erroneously cites the law here, but it is clear that what is meant is actually 42 U.S.C. §7401(c), which is the United States Code citation for what is commonly known as “the Clean Air Act”.

22. Furthermore, the Submission mentions and includes information concerning a Risk Management Program (“RMP”) inspection of Calumet Lubricants under CAA Section 112(r) that occurred from 15 to 18 August 2011,<sup>19</sup> and notes that the EPA did not issue an administrative order as a result of the RMP inspection, and failed to “produce any kind of results in pursuance to the environmental laws and regulations that were violated”.<sup>20</sup>
23. In any revised submission the Submitter should explain the relationship between the law cited and how the United States allegedly failed to fulfill its obligations under that law; in other words, what “results” should the law have produced according to the Submitter, and how did the United States fail to effectively enforce the law at issue. Moreover, if the Submitter is in fact making an assertion about a failure to effectively enforce the CAA concerning the administrative order it describes (it is not clear from the Submission whether this is the case), the Submitter should also clarify whether and to what extent the United States EPA is under some legal obligation to issue that order as a result of the RMP inspection.
24. 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.
25. **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.**
26. 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 assertions lack the necessary specificity and documentation to determine whether and how they may relate to an ongoing failure to effectively enforce environmental law. Any revised submission should address how the assertion(s) may relate to an ongoing failure to effectively enforce environmental law.
27. It is clear from the Submission that the Party has taken some enforcement action, for example through the EPA’s RMP inspection of the Calumet Lubricants facility in August 2011.<sup>21</sup> 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.
28. 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 [...]”***

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<sup>19</sup> Submission at 1, and Annex 1.

<sup>20</sup> *Ibid.*, at 1.

<sup>21</sup> *See* Submission, Annex 1.

29. 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.<sup>22</sup>

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

30. 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 [...].”*

31. 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. For example, the Submitter mentions air samples submitted to the EPA, but provides no documentation regarding these. Any revised submission should include the latter information. **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 [...].”*

32. 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.<sup>23</sup> 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.<sup>24</sup>

*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 [...].”*

33. The Submission indicates that the matter has been communicated in writing to various officials at the EPA, and includes the EPA’s responses. The relevant correspondence is attached to the Submission as Annexes 2-4. The Submission does not however include the correspondence *from* the Submitter *to* the EPA officials mentioned in Annexes 2-4, and any revised Submission should include that correspondence.

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<sup>22</sup> See also Guideline 3.2.

<sup>23</sup> 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.”

<sup>24</sup> *Infra* para. 33.

34. 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.”*

35. 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).
36. 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**

37. In light of the foregoing, and having considered the Submission and its documentation, the Secretariat determines that Submission SEM 13-003 (*Refinery Releases in Shreveport, Louisiana*) does not meet the admissibility requirements of Article 14(1) of the Agreement.
38. In accordance with Guideline 6.2, the Submitters have sixty working days from the date of issuance of this Determination (19 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 14 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  
Mr. Enrique Lendo, Mexico Alternate Representative  
Dr. Irasema Coronado, CEC Executive Director  
Submitter