

**Secretariat of the Commission for Environmental Cooperation**

**Secretariat determination in accordance with Article 14(1) and (2)  
of the North American Agreement on Environmental Cooperation**

**Submitters:** Robert Schreiber  
**Party:** United States  
**Submission:** 3 November 2015  
**Date of the determination:** 21 January 2016  
**Submission no.:** SEM-15-003 (*Municipal Wastewater Drop Shafts*)

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**I. INTRODUCTION**

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide for a process allowing any person residing in or nongovernmental organization established in North America to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” or the “CEC”)<sup>1</sup> initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC, the Secretariat may notify the Council 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 certain circumstances exist, it then proceeds no further with the submission. The Secretariat prepares a factual record only when the Council decides, by a two-thirds vote, to instruct the Secretariat to do so.<sup>2</sup>
2. On 3 November 2015, Robert Schreiber, an individual (the “Submitter”), filed a NAAEC Article 14(1) submission with the Secretariat. The Submitter asserts that the United States is failing to effectively enforce its environmental law because it does not issue permits for municipal wastewater drop shafts under the Safe Drinking Water Act’s (SDWA) underground injection control (UIC) program.<sup>3</sup>
3. The Secretariat has determined that the submission meets all of the requirements of Article 14(1), and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons for this determination are set forth below in Section II.

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<sup>1</sup> The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC or Agreement) signed by Canada, Mexico, and the United States (the “Parties”). The bodies which comprise the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

<sup>2</sup> Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <[www.cec.org/submissions](http://www.cec.org/submissions)>.

<sup>3</sup> SEM-15-003 (*Municipal Wastewater Drop Shafts*), Submission under Article 14(1) (3 November 2015) [Submission], at 1-2.

## II. ANALYSIS

4. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions “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 admissibility criteria in Article 14(1)(a) to (f).
5. In determining whether a submission meets the requirements of Article 14(1) of the NAAEC, the Secretariat does not view the admissibility criteria to be an insurmountable procedural screening device.<sup>4</sup> The Secretariat reviewed the submission with that perspective in mind.

### A. Opening paragraph of Article 14(1)

6. The Secretariat finds that the Submitter is a person under the NAAEC because he is a resident of North America and the submission clearly identifies the Submitter.<sup>5</sup> There is no information in the submission to suggest that the Submitter belongs to the government or is under its direction.
7. The next criteria to determine are whether the Submitter has identified an “environmental law”<sup>6</sup> and whether the Submitter has alleged that a Party is “effectively failing to enforce” that law.

### 1. Environmental law in question

8. The Submitter contends that the United States, specifically the U.S. Environmental Protection Agency (EPA)<sup>7</sup>, has “established a nationwide and persistent pattern of failing to enforce Part C of the SDWA when it fails to require UIC permits for dropshafts.”<sup>8</sup>

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<sup>4</sup> See SEM-97-005 (*Biodiversity*), Determination under Article 14(1) (26 May 1998); SEM-98-003 (*Great Lakes*), Determination under Article 14(1)(2) (8 September 1999).

<sup>5</sup> See Guideline 2.1. Mr. Schreiber has requested that his personal contact information, including his home address, email address, and telephone number, be treated confidentially. In accordance with Article 11(8)(a) of the Agreement and Guideline 7.1, the Secretariat will safeguard this information.

<sup>6</sup> NAAEC Article 45(2) defines “environmental law” as follows:

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.

<sup>7</sup> The submission also recognizes that EPA has not withdrawn any state UIC program authorized by it to carry out the SDWA for failure of a state to issue UIC permits for wastewater drop shafts. Submission, p. 4. The Secretariat includes this aspect of the Submitter’s assertion within the scope of this determination.

<sup>8</sup> Submission, p. 2. The Submitter uses the one-word term “dropshafts,” but it appears that the more common usage is the two-word “drop shafts.” This determination, as well as any other SEM related document produced by the Secretariat, will use the two word term unless we are quoting from the submission.

9. Part C of the SDWA protects underground sources of drinking water and requires EPA to promulgate regulations for “State underground injection control programs... [containing] minimum requirements for effective programs to prevent underground injection which endangers drinking water sources.”<sup>9</sup> The statute states that “[u]nderground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system’s not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.”<sup>10</sup>
10. The Secretariat finds that the SDWA’s UIC program qualifies as an “environmental law” under the NAAEC because its primary purpose is to protect human health and the environment.<sup>11</sup>

## **2. The alleged failure to effectively enforce the SDWA**

11. The next question to determine is whether the Submitter is asserting that the United States is effectively failing to enforce the SDWA.<sup>12</sup>
12. The Submitter defines drop shafts as structures used “to emplace municipal wastewater (mixtures of domestic sewage, industrial and commercial wastewaters, often combined with stormwater or snow melts) into subsurface tunnels,” which, the Submitter contends, are often used by a municipality as part of its wastewater treatment system designed to achieve compliance with Clean Water Act.<sup>13</sup> Because the Submitter contends that these drop shafts emplace fluids underground, he argues that they are injection wells and are required to be permitted or authorized under the SDWA’s UIC program.<sup>14</sup>
13. EPA has issued regulations implementing the SDWA’s statutory UIC requirements, and they state, in part, that “[a]ny underground injection, except into a well authorized by rule or except as authorized by permit issued under the UIC program, is prohibited. The construction of any well required to have a permit is prohibited until the permit has been issued.”<sup>15</sup> These regulations not only set forth minimum requirements for all State UIC programs but also establish requirements for UIC programs administered directly by EPA.<sup>16</sup>

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<sup>9</sup> 42 United States Code (U.S.C.) section 300(h)(a) and (b). The SDWA also recognizes that EPA may take direct enforcement action where a State does not have primary enforcement responsibility for the UIC program or where the EPA provides notice to a State with primary enforcement responsibility of such enforcement action. See 42 U.S.C. section 3000(h)-2(a).

<sup>10</sup> *Id.*, at (d)(2).

<sup>11</sup> The Secretariat has previously found that the SDWA meets the NAAEC definition of environmental law. See SEM-99-001 (*Methanex*), Determination under Article 14(1) and 14(2) (30 March 2000).

<sup>12</sup> Submission, p. 4. Although the term “drop shaft” has no statutory or regulatory definition, engineering resources consistently define it to mean a “vertical conduit” used to connect two sewers located at different elevations. See, *Advances in Water Resources and Hydraulic Engineering* (Proceedings of 16th IAHR-APD Congress and 3rd Symposium of IAHR-ISHS, 2009), p. 1515. The terms “drop structures” or “vortex drop shaft” are also used.

<sup>13</sup> *Id.*, at 1-2.

<sup>14</sup> *Id.*, at 1. The Submitter contends that the decision by the U.S. Court of Appeals for the Eleventh Circuit’s in *Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency*, (118 F. 3d 1467 (11th Cir., 1997)), mandates that all subsurface emplacement of fluids by well injection requires a permit.

<sup>15</sup> 40 Code of Federal Regulations (C.F.R.) section 144.11.

<sup>16</sup> 40 C.F.R. section 144.1(b)(2); see also footnote 9, *supra*.

14. The SDWA defines “underground injection” as “the subsurface emplacement of fluids by well injection.”<sup>17</sup> EPA’s implementing regulations further define “well” to mean “[a] bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system.”<sup>18</sup> EPA’s regulations define “injection well” to mean “a ‘well’ into which ‘fluids’ are being injected.”<sup>19</sup> EPA’s regulations define “fluid” as “any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.”<sup>20</sup>
15. EPA’s UIC regulatory scheme creates six different classes of injection wells, labeled Class I through Class VI, with Class V wells being those types of wells not included in the definitions of the other classes of wells and generally relating to non-hazardous substances.<sup>21</sup> The Secretariat is not aware of any UIC regulatory reference to municipal wastewater drop shafts or tunnels.
16. EPA’s UIC regulations set forth general program requirements, specific requirements for when the aforementioned classes of wells can be authorized by rule,<sup>22</sup> and requirements when an owner or operator must obtain an individual permit.<sup>23</sup>
17. The Submitter includes information relating to various municipal wastewater systems throughout the United States in which drop shafts are used to connect to deep water tunnel systems: Atlanta, Georgia; Gwinnett County, Georgia; Cobb County, Georgia; DeKalb County, Georgia; Milwaukee, Wisconsin; and Indianapolis, Indiana.<sup>24</sup> In all cases, the Submitter asserts that neither EPA nor authorized States have issue any UIC permits for drop shafts constructed and operated in these systems.<sup>25</sup>
18. The Submitter has included information which indicates that EPA does not, in fact, require municipal wastewater drop shafts to be authorized or regulated under the SDWA’s UIC program. On March 4, 2010, the Submitter and other concerned individuals wrote to EPA’s Assistant Administrators for Water (Pete Silva) and Enforcement and Compliance Assurance (Cynthia Giles) and raised the issue of EPA’s alleged failure to enforce UIC requirements for wastewater drop shafts.<sup>26</sup> In a response addressed to Cary Bond of the organization Newly Organized Citizens Requesting Aquifer Protection, with a copy to the Submitter, Cynthia Giles stated that “tunnels conveying sewage to publicly owned treatment works for treatment do not require a

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<sup>17</sup> SDWA section 300(h)(d)(1)(A). 40 C.F.R. section 144.3 defines the term as “well injection” and further defines “well injection” as “the subsurface emplacement of fluids through a well.”

<sup>18</sup> 40 C.F.R. section 144.3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Class I wells are generally those related to hazardous waste; Class II relate to gas storage; Class III relate to the extraction of minerals; Class IV relate to hazardous or radioactive waste, now generally banned, and Class VI relate to the geographical sequestration of carbon dioxide. See 40 C.F.R. section 144.6. The Secretariat notes that the Submitter alleges that only drop shafts, and not tunnels, require authorization under the UIC program and, more specifically, alleges that drop shafts should be regulated as Class V wells. See Submission, at 4.

<sup>22</sup> 40 C.F.R. section 144.21-.24, .28.

<sup>23</sup> *Id.*, at section 144.25.

<sup>24</sup> Submission, pp. 8-15.

<sup>25</sup> *Id.*

<sup>26</sup> Submission, p. 9; Exhibit E13.

permit under the UIC program.”<sup>27</sup> This letter references a prior EPA letter sent to the Submitter which states that “tunnels that convey sewage to a Publicly Owned Treatment Works (POTW) for treatment do not fall within ...[UIC regulations]...because such tunnels are not intended to emplace fluids below the surface of the ground through a well; rather, they are distribution systems intended to convey wastewater to POTWs from intake sites that collect both sewer flow and flow from a treatment plant during high usage times.”<sup>28</sup>

19. The Submitter also includes information related to numerous comments submitted by the Submitter and others in federal district court proceedings during 2010 to 2012 on proposed Clean Water Act consent decrees between the EPA<sup>29</sup> and a number of municipal or county wastewater agencies, such as in the City of Atlanta and Dekalb County. The comments are similar to the assertions made in this submission.<sup>30</sup> The U.S. Department of Justice, representing EPA in these matters, responded in numerous ways, arguing that the comments were outside the scope of the consent decree, that the issues had already been considered by the court, and/or that the assertions were wrong.<sup>31</sup>
20. The Secretariat finds that the assertions by the Submitter concerning alleged failures of enforcement relating to the SDWA qualify for review under the submissions on enforcement matters process and that the submission meets the opening paragraph of Article 14(1).
21. If a submission meets the opening paragraph of Article 14(1), the Secretariat then must determine if it meets the remaining admissibility criteria of Article 14(1)(a)-(f).

**B. Article 14(1) criteria**

- (a) [whether] the submission is: “in writing in a language designated by that Party in a notification to the Secretariat;*
22. The Secretariat finds that the submission to the Secretariat is in English, one of the three official languages of the NAAEC.  
*(b) [whether] the submission clearly identifies the person or organization making the submission*
23. The Secretariat finds that the submission meets this criterion.<sup>32</sup>  
*(c) [whether] the submission provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based*

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<sup>27</sup> Submission, p. 9 and Exhibit E17b. It should be noted that this EPA letter states that should EPA receive “information that a contaminant may present an imminent and substantial endangerment to a public water system or an underground source of drinking water and that appropriate state and local authorities have not acted to protect public health...[EPA] could exercise its enforcement authority under Section 1431 of the SDWA.”

<sup>28</sup> Submission, p. 4 and Exhibit B4, U.S. EPA letter from James D. Giattina, Director, Water Management Division, U.S. EPA Region 4 (Atlanta, GA) (October 18, 2007).

<sup>29</sup> In these enforcement cases, EPA generally partners with a state environmental agency as a co-plaintiff.

<sup>30</sup> Submission, pp. 9-11.

<sup>31</sup> *Id.* See also, Exhibits E21 and E28. Nothing in the Submission indicates that the courts in these proceedings issued any ruling which approved of or adopted the Submitter’s assertions.

<sup>32</sup> See, § 6, *supra*.

24. Regarding this criterion, Guideline 5.3 states that a submission “must contain a succinct account of the facts on which such an assertion is based and must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission is based.”
25. The submission contains sufficient information, including not only 15 pages of the actual submission, but also over 100 attachments or links to webpages with relevant information, which allows the Secretariat to review the submission, some of which is specifically referenced in this determination.
26. The Secretariat finds that the submission meets this criterion.
- (d) [whether] the submission appears to be aimed at promoting enforcement rather than at harassing industry*
27. The Secretariat finds that the submission satisfies this criterion as it appears to be aimed at promoting enforcement of the laws rather than at harassing an individual company or the industry.<sup>33</sup> Moreover, the Submitter has included copies of correspondence demonstrating that he has contacted the United States requesting enforcement and has shown no effort to target industry or a particular entity.<sup>34</sup> A review of the documents attached to the submission reveals that the Submitter has dedicated several years in pursuing enforcement of the environmental law in question. In summary, the Secretariat also finds that the submission is focused on the alleged acts and omissions of the Party.
- (e) [whether] the submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any*
28. As previously discussed,<sup>35</sup> the Secretariat finds that the Submitter has communicated with the United States on this matter and has included the Party’s responses. For this reason, the Secretariat finds that the submission meets this admissibility criterion.
- (f) [whether] the submission is filed by a person or organization residing or established in the territory of a Party*
29. The submission is filed by Robert Schreiber, an individual, who resides in the United States. The Secretariat finds that the submission satisfies the requirements of Article 14(1)(f).<sup>36</sup>
30. Having reviewed the submission with reference to the environmental law in question, the assertions in SEM-15-03 and the admissibility requirements, the Secretariat finds that the submission meets the criteria of Article 14(1) and proceeds to determine whether the submission merits requesting a response from the Party pursuant to Article 14(2) of the Agreement.<sup>37</sup> In this aspect of the determination, the Secretariat must review the following four criteria.

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<sup>33</sup> See, Guideline 5.4(a), which provides that to determine whether a 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.” No such circumstances exist here.

<sup>34</sup> See §18-19, *supra*.

<sup>35</sup> *Id.*

<sup>36</sup> See §6, *supra*.

<sup>37</sup> Guideline 7.1 provides:

**C. Article 14(2) criteria**

*a. [whether] the submission alleges harm to the person or organization making the submission*

31. In regard to whether the submission alleges harm to the person or organization making the submission pursuant to Article 14(2)(a),<sup>38</sup> the submission alleges that municipal wastewater, which contains pathogenic viruses and bacteria from many sources, as well as contaminants from stormwater runoff, could contaminate underground sources of drinking water through exfiltration from drop shafts.<sup>39</sup>
32. The submission does not include any documentation or evidence of actual contamination or exfiltration from drop shafts in a particular location to a particular aquifer or underground source of drinking water. Rather, the Submitter contends generally that without a UIC permit there is no review of potential contamination from any drop shaft before it is constructed nor after it is operational because no monitoring plan requirements are generally imposed. Specifically, the Submitter asserts that “injection into a subsurface tunnel and the elevation of any surrounding ground water is never responsibly demonstrated before construction of a drop shaft well begins. And after a drop shaft well becomes operational, monitoring wells are needed to measure any aquifer contamination. The EPA’s failure to enforce UIC permitting requirements removes the regulatory condition that all UIC permits must have enforceable monitoring well programs (40 C.F.R. section 144.54) which provide data for public scrutiny.”<sup>40</sup>
33. The submission does, however, include some specific information which suggests that such contamination has or could occur. Regarding the deep tunnel system used in Milwaukee, the Submitter includes excerpts from a 2002 Wisconsin state audit of the Milwaukee Metropolitan Sewerage District which found, in part, that sampling of groundwater monitoring wells located near the deep tunnel system shows that 17.2 percent of the samples taken at the wells exceeded the groundwater standard for total coliform bacteria, which includes both fecal coliform and other species of coliform bacteria.<sup>41</sup> Additionally, the Submitter includes similar information relating to the sewage system in Indianapolis, Indiana which includes a number of drop shafts and deep tunnels. In response to a public comment on whether the construction and operation of this

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Where the Secretariat determines that the submission meets the criteria set out in Article 14(1) of the Agreement, the Secretariat will determine whether the submission merits requesting a response from the Party concerned. The Secretariat will accordingly notify the Council and the Submitter.

<sup>38</sup> Guideline 7.4 provides:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

- (a) the alleged harm is due to the asserted failure to effectively enforce environmental law;
- (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.

<sup>39</sup> Submission, pp. 6-7.

<sup>40</sup> *Id.*, at 7.

<sup>41</sup> Submission, p. 12; Exhibit F2b. In this case, the Wisconsin Department of Natural Resources required Milwaukee to monitor 32 groundwater wells near the Deep Tunnel to address concerns “raised about the effects the Deep Tunnel may have on groundwater quality in the Milwaukee area.” It appears that such requirements were included in the NPDES discharge permit issued by the State. After a review of the results from the monitoring plan, Milwaukee and its consultant concluded that the majority of pollutants from the escaping wastewater, which traveled 150 to 400 feet, were flushed back into the tunnel within days after the tunnel had been pumped out to a treatment plant and the normal inward groundwater flow was reestablished. Exhibit F2b, p. 3.

system could impact nearby groundwater, the City stated that it “will take all necessary steps to prevent groundwater contamination during construction and operation of the deep tunnel” through its Groundwater Management Plan, which includes various components such as monitoring of groundwater both during and after tunnel construction.<sup>42</sup>

34. Further, the Submitter includes excerpts from a 2001 U.S. EPA memorandum from an EPA senior toxicologist in the Region 4 office in Atlanta who, after consulting with colleagues in EPA’s Office of Water, stated that “all pipes (and tunnels) have the potential to leak ...depend[ing] on the pressure (as results from the volume) of the sewage or water in the tunnel, ... [noting that] storm water can enhance the release of water soluble components into the water table.” The toxicologist concluded that “releases from the storage tunnel cannot be quantified but are highly likely. Potential contamination of the water table should be considered such that a system of monitoring wells should be placed immediately down gradient of the tunnel and sampled (full scan) a minimum of twice per year (during the first year of operation).”<sup>43</sup>
35. While the Secretariat recognizes that the Submitter may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in the United States, the especially public nature of this resource—underground sources of drinking water—bring the Submitter within the spirit and intent of Article 14 of the NAAEC.<sup>44</sup>
36. Based on this information, the Secretariat finds that the submission meets the allegation of harm criterion.

*(b) [whether] the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;*

37. The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement. It asserts that the failure to enforce is one that is longstanding in nature and that it is nationwide in scope. Assertions of this sort are particularly strong candidates for Article 14 consideration.<sup>45</sup>
38. The Secretariat determines that the submission meets this criterion.

*(c) [whether] private remedies available under the Party’s law have been pursued;*

39. The Submitter has raised his concerns in numerous legal contexts, mostly notably in providing comments on proposed EPA CWA consent decrees involving wastewater treatment facilities and proposed CWA permits for POTWs, as well as in correspondence directly with EPA.<sup>46</sup> Although other private remedies may be available, the Secretariat has previously found that a Submitter has met this criterion even where some or all of those other private remedies have not been pursued, particularly if it is impractical or unrealistic for submitters with limited resources to pursue such

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<sup>42</sup> Submission, p. 14; Exhibit G-9. The city’s plan is part of its wellhead protection program, which appears to be related to the state’s implementation of the SDWA’s public water system supervision (PWSS) program rather than the UIC program.

<sup>43</sup> *Id.*, at 6-7, note c-10. The Secretariat notes that the Submitter labels this memorandum as including only excerpts and, thus, the Secretariat cannot give full probative value to the memorandum without seeing the entire document or whether it concerns a drop shaft, which is the subject of this Submission, or concerns only connecting tunnels, which the Submitter states is not the subject of the Submission. See, Submission, p.4.

<sup>44</sup> See SEM 96-001 (*Cozumel*) Notification under Article 15(1) (7 June 1996); 98-004 (*BC Mining*) (11 May 2001).

<sup>45</sup> See SEM 99-002 (*Migratory Birds*) Determination under Article 14(1)(2) (23 December 1999), p. 6.

<sup>46</sup> See §19, *supra*.



remedies, which the Secretariat assumes is the situation here.<sup>47</sup> Under Guideline 7.5(b), the Secretariat finds that the Submitter has taken reasonable steps to pursue private remedies prior to making the submission.

40. The Secretariat finds that the submission meets this criterion.

*(d) [whether] the submission is drawn exclusively from mass media reports.*

41. It is clear from the submission and the documentation submitted that the Submitter has not drawn the basis of his submission exclusively from mass media reports. The submission is based on the Submitter's personal involvement in the assertions made and includes many documents and information from sources other than the mass media,<sup>48</sup> including the U.S. EPA, municipalities, and consulting engineers.

42. The Secretariat finds that the submission meets this criterion.

### **III. DETERMINATION**

43. Having conducted its NAAEC Article 14(1) review of submission SEM-15-003 (*Municipal Wastewater Drop Shafts*), the Secretariat finds that it meets the requirements of that article for the reasons set out herein.

44. In addition, taking account of the criteria of NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the Party of concern, in this case the United States, in regard to the Submitters' assertions concerning the alleged failure to effectively enforce the Underground Injection Control (UIC) Program of the Safe Drinking Water Act with respect to the construction and operation of municipal wastewater drop shafts.

45. The Party, in any response, may also choose to provide other information related to the submission, for example:

- (i) whether the United States is aware of any particular situation of potential or actual harm to underground sources of drinking water from the construction and/or operation of municipal wastewater drop shafts;
- (ii) whether the United States has ever exercised its enforcement authority under Section 1431 of the Safe Drinking Water Act with respect to a contaminant from any municipal wastewater drop shafts; and
- (iii) whether the U.S. EPA or any of the States has ever required monitoring of potential or actual exfiltration from municipal wastewater drop shafts, similar to that which was discussed in the EPA memorandum dated July 3, 2001;<sup>49</sup>

46. In addition, the Party may give notice of the existence of pending proceedings, if any, pursuant to NAAEC Article 14(3)(i).

47. As stipulated by NAAEC Article 14(3), the Party may provide a response to the submission within the 30 days following receipt of this determination; i.e., by 4 March 2016. In exceptional

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<sup>47</sup> See, Secretariat Recommendation, SEM 04-005 (*Coal-Fired Power Plants*) Notification under Article 15(1) (5 December 2005), p. 15.

<sup>48</sup> See Guideline 7.6.

<sup>49</sup> *Id.*

circumstances, the Party may give written notice of the extension of this period to 60 days; i.e., by 15 April 2016.

48. Copies of the Secretariat's determination as well as the submission are available in the SEM registry, and copies of all annexes will be forwarded to the Party upon request.

Respectfully submitted for your consideration this 21 January 2016.

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

Per: Robert Moyer  
Director, Submissions on Enforcement Matters Unit

cc: Ms. Jane Nishida, Acting Alternate Representative, United States  
Mr. Enrique Lendo, Alternate Representative, Mexico  
Ms. Louise Métivier, Alternate Representative, Canada  
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Submitter