Secretariat of the Commission for Environmental Cooperation

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

Submitter(s):	Department of the Planet Earth; Sierra Club of Canada; Friends of the Earth; Washington Toxics Coalition; National Coalition Against Misuse of Pesticides; WASHPIRG; International Institute of Concern for Public Health Dr. Joseph Cummins; and Reach for Unbleached
Concerned Party:	United States of America
Date Received:	4 January 1999
Date of this Determination:	8 September 1999
Submission I.D.:	SEM-98-003

I-INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law, if the Secretariat finds that the submission meets the requirements of Article 14(1). On 27 May 1998, the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. On 14 December 1998, the Secretariat issued a determination in which it dismissed the submission on the basis that it did not meet the requirements of Article 14(1). The essence of the determination was that the Party's conduct at issue in the May 27 submission did not qualify as "enforcement" – one of the threshold elements for triggering review under Article 14.

On 4 January 1999, the Submitters filed a "new and amended submission."[1] The Secretariat has determined that two assertions in this submission meet the criteria in Article

[1] 4 January 1999 Submission at 2, 16.

14(1) and that these assertions merit a response from the Party in light of the factors listed in Article 14(2). The Secretariat believes that otherwise, the submission does not meet the criteria for review contained in Article 14(1). The Secretariat sets forth its reasons in Section III below.[2]

II-SUMMARY OF THE SUBMISSION

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

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

III - ANALYSIS

A. Article 14(1)

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

> The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable screening devices. The Secretariat also believes that

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

> Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC. . . .[3]

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

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

We reviewed the submission with this perspective in mind.

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

1. The submission is in English, one of the official languages designated by the Parties (14(1)(a)).
2. The submission clearly identifies the persons and organizations making the submission (14(1)(b)).
3. The submission provides sufficient information to allow the Secretariat to review the submission, including several scientific reports relating to the issues covered in the submission (14(1)(c));[6]
4. The submission appears to be aimed at promoting enforcement rather than at harassing industry (e.g., the Submitters are not competitors of entities that are the subject of the government "enforcement" practices at issue. Instead, the Submitters are individuals and

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

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

[5] Guideline 3.3.

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

organizations committed to environmental and public health protection and the submission focuses on purported government failures)(14(1)(d));

5. The submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party's response, if any (e.g., the Submitters' cover letter of 28 May 1998 indicates that the Submitters petitioned EPA Administrator Browner on 5 July 1997 to "undertake a program to phase out solid waste and medical incinerators, and 106 sources of air pollution that were responsible for 86 percent of airborne dioxin discharges into the Great Lakes." In the same letter, the Submitters notified EPA of their intention to initiate a submission unless EPA responded to the petition. The Submitters reported initially that EPA did not respond to this letter but the Submitters supplemented the submission to advise that EPA did respond)[7] (14(1)(e)); and

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

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

Treatment of the latter two agreements warrants some elaboration. The Submitters' argument, as we understand it, is that the Great Lakes Water Quality Agreement[8] and the 1986 Agreement Between the Government of the United States of America and the

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

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

Government of Canada Concerning the Transboundary Movement of Hazardous Waste,[9] are "environmental law" for purposes of Article 14 because they represent the "law of the nation." [10] (Submission at 7). Respectfully, the Secretariat does not agree. Article 45(2) of the NAAEC is the key operative provision, defining environmental law to mean "any statute or regulation of a Party. . ." The Secretariat dismissed the Animal Alliance submission (SEM-97-005) on the ground that the Biodiversity Convention did not qualify as "environmental law" because it was an international obligation that had not been imported into domestic law by way of statute or regulation pursuant to a statute. The Animal Alliance determination is consistent with the plain language of Article 45(2) and the Secretariat follows it here.[11] As noted concerning that submission, by making this determination, the Secretariat is not excluding the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1).

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

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

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

[11] Because of the Secretariat's view concerning the Great Lakes Water Quality Agreement, the Secretariat also determines that the Submitters' assertion based on Clean Air Act § 118, 42 USC § 7418, does not merit further consideration under Article 14. (Submission at 11). Recourse to the plain language of the Agreement is consistent with the Vienna Convention on the Law of Treaties, Article 31(1), which provides as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See also Vienna Convention on the Law of Treaties, Article 32, which provides that under certain circumstances it may be appropriate to have recourse to supplementary means of interpretation.

[12] The Secretariat read the original submission to assert that standards contained in EPA regulations for solid waste and medical waste incinerators conflict with various statutes and international instruments and it determined that such an assertion did not provide the basis for an Article 14 submission because the assertion's primary focus was on allegedly flawed "standard-setting" activity – not on enforcement actions.

1. Asserted Inspection-Related Failures

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

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

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

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

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

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

The Secretariat believes that the assertion that the U.S.'s inspection and compliance-monitoring record is not effective satisfies the requirements of Article 14(1). Maintaining an adequate inspection/compliance-monitoring scheme is an inherent part of enforcement.

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

Indeed, Article 5(1)(b) of the NAAEC specifically identifies "monitoring compliance" as a type of government enforcement action.

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

A second basis for Submitters' assertion of a failure to effectively enforce is Clean Air Act § 115, 42 USC § 7415(a), (b). The Submitters assert that these provisions require the EPA Administrator to "notify the Governor of the State in which such emission originates" whenever the Administrator receives reports from any duly constituted international agency such as the IJC or CEC, that air pollution or pollutants emitted in the United States can "be reasonably anticipated to endanger public health or welfare in a foreign country."[14] The Submitters assert that "[u]nfortunately, the Administrator has not carried out this program."[15]

The thrust of this assertion, in short, is that EPA is failing to effectively enforce or fulfill a clear, quite specific legal obligation. This is similar to the assertion we have seen in previous submissions, in which the Secretariat has determined that an assertion that a Party is failing to comply with a NEPA-type law satisfies the requirements of Article 14.[16] The Secretariat believes that this assertion satisfies the requirements of Article 14(1).

3. Failure Adequately to Pursue Legislative Policy Directions

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

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

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

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

The Submitters assert that the Pollution Prevention Act establishes a "clear hierarchy of pollution prevention programs for all of the management programs of the Environmental Protection Agency" (Submission at 10). Section 13101(b) of the Pollution Prevention Act of 1990 establishes the policy of Congress to be as follows:

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

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

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

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

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

Article 5 is also helpful through the list of enforcement actions it provides. This list is merely illustrative but it nevertheless offers some insights into the drafters' intentions. As we noted in the December 14 Great Lakes determination, for example, the list provides support

for the notion that Article 14 is not intended for challenges to a Party's standard-setting activities because "[v]iewed as a whole, the activities listed [in Article 5] are geared more toward promoting compliance with governing legal standards than to establishing such standards." (Determination at 4).

The list of illustrative enforcement actions provided in Article 5 provides a strong indication that the type of general legislative direction involved here is not a ground for an Article 14 submission. The legislative directive to promote pollution prevention (including creation of a hierarchy of approaches for managing waste) has little in common with the types of government actions labeled as enforcement in Article 5 and leaves EPA considerable discretion as to how best to fulfill this responsibility. As a result, the Secretariat here reaches the limited conclusion that a directive to EPA of the sort referenced here to promote pollution prevention does not provide the basis for an assertion that EPA's purported failure adequately to promote pollution prevention is a failure to enforce under Article 14.

In an effort to explain its reasoning on this point further, the Secretariat notes that the outcome might be different if the legislative direction were clearly enforcement-oriented. For example, if a statute established a hierarchy, or priorities, for enforcement action – e.g., it directed the government to give top priority to inspecting the largest facilities in a particular industry and lowest priority to inspecting the small facilities – government failure to adhere to this priority scheme potentially would constitute a failure to effectively enforce in the Secretariat's view because the government allegedly would be failing to perform its enforcement responsibilities in the manner directed by the legislature. That is not the situation here.

B. Article 14(2)

In deciding whether to request a response from a Party, the Secretariat is to be guided by the four factors listed in Article 14(2). Thus, during this phase of the process the Secretariat may assign weight to each factor as it deems appropriate in the context of a particular submission. The Secretariat has determined based on its consideration of the factors contained in Article 14(2) that the submission merits requesting a response from the Party.

The Submitters' assertion that there are significant health and environmental issues associated with airborne emissions of persistent toxic chemicals dioxins and mercury, and that solid waste and medical incinerators are prominent sources of such emissions, qualifies this submission as one that raises matters "whose further study in this process would advance the goals of this Agreement" [Article 14(2)(b); 28 May 1998 Submission at 8, 9]. The Submitters cite government and other sources in support of these assertions. The 18 June 1998 letter from EPA, provided by the Submitters, states that EPA is “very concerned about air pollution from incinerators, particularly with regard to mercury and dioxin. The USEPA is committed to reducing these air pollutants and is undertaking several high priority policy

and regulatory initiatives targeted at reducing these and other persistent, toxic substances." This Article 14(2) factor is perhaps of greatest significance in the context of this submission.

The submission's focus on such impacts also is relevant to Article 14(2)(a), involving allegations of harm to the Submitters.[17] With respect to Article 14(2)(c), the Submitters assert that a private remedy available under the Party's law is being pursued by Earthjustice to address some of the issues raised in the submission. The widespread failure to monitor asserted to exist here is relevant to the weight to be given to this factor. Finally, the submission includes several scientific studies and other documents and is not drawn exclusively from mass media reports. [Article 14(2)(d)].

CONCLUSION

For the foregoing reasons, the Secretariat has determined that two of the assertions contained in the submission meet the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that the submission merits requesting a response from the Government of the United States as to these two assertions. Accordingly, the Secretariat requests a response from the Government of the United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

(original signed)
David L. Markell
Head, Submissions on Enforcement Matters Unit

c.o. Mr. William Nitze, US-EPA

c.c. Ms. Norinne Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP
Mr. Erik Jansson, Exec. Dir.
Department of the Planet Earth
Ms. Janine Ferretti, CEC Executive Director

[17] In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al*.), the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC." The same is true here.