Secretariat of the Commission for Environmental Cooperation of North America

Secretariat Determination under Article 15(1) that Development of a Factual Record is Not Warranted

Submission I.D.: SEM-98-003

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

Date Received: 27 May 1998

Date of this Notification: 5 October 2001

I. EXECUTIVE SUMMARY

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

On 27 May 1998, the Submitters filed with the Secretariat a submission alleging that the United States is failing to effectively enforce certain obligations regarding the deposition into the Great Lakes of airborne emissions of dioxin and mercury from solid and medical waste incinerators. Following the Secretariat's dismissal of that original submission, the Submitters filed an amended submission on 4 January 1999. The amended submission included allegations that the United States is failing to effectively enforce certain obligations to inspect and monitor incinerators emitting dioxin and mercury, to notify

certain states that they must reduce such dioxin and mercury emissions because of adverse impacts of the emissions in Canada and to implement measures that would lead to the virtual elimination of all such dioxin and mercury emissions.

On 8 September 1999, the Secretariat concluded that the two assertions in the 4 January 1999 amended submission regarding the United States' inspection and monitoring of incinerators and its alleged failure to notify states in light of adverse impacts in Canada merited a response from the United States. On 1 December 1999, the United States responded to the submission. On 24 July 2000, 6 November 2000 and 14 November 2000, the United States provided additional information regarding the allegations in the submission in response to a 24 March 2000 request from the Secretariat for information pursuant to Article 21 of the NAAEC.

The Secretariat has determined that the submission does not warrant preparation of a factual record, and that the submission should therefore be dismissed. The rationale for this conclusion is presented below

II. SUMMARY OF THE ORIGINAL AND AMENDED SUBMISSIONS

A. The Original Submission

On 27 May 1998, the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The submission concerned airborne emissions of dioxin and mercury into the Great Lakes and claimed that those emissions posed a significant threat to public health and the environment. The submission alleged that solid and medical waste incinerators in the United States are substantial sources of these emissions and that regulations issued by the US Environmental Protection Agency ("EPA") governing emissions from those incinerators conflict with the domestic laws of the United States and with certain provisions of ratified US-Canadian agreements because the regulations authorize greater emissions than contemplated by these statutes and agreements. The submission claimed that these purported inconsistencies constituted a failure to effectively enforce for purposes of Article 14.

On 14 December 1998, the Secretariat determined that the Article 14 process was not an appropriate forum for the issues raised in the 27 May 1998 submission because the core of the submission was the assertion that the Party has created an inconsistency in its substantive emission standards. The Secretariat explained its conclusion as follows:

> We do not believe that the adoption of regulations that contain emission standards that allegedly are less stringent than the standards established in governing legislation constitutes a "failure to effectively enforce" for purposes of Article 14. Instead, the regulations in such a case would represent an inconsistency in the governing legal standards. Addressing purported inconsistencies of this sort is, in our view, beyond the scope of Article 14.[1]

The Secretariat accordingly dismissed the Submission.

[11] See SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) (14 December 1998).

B. The "New and Amended" Submission

On 4 January 1999, the Submitters filed a "new and amended submission." This submission continued to assert that solid waste and medical incinerators in the United States are substantial sources of dioxin and mercury emissions. The submission further asserted that various domestic and international legal instruments obligated EPA to take several actions to address those emissions. These actions included (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 those emissions. The submission claimed that the United States has not fulfilled those obligations and that this asserted failure constitutes a failure to "effectively enforce" for purposes of Article 14 of the NAAEC.

In a determination dated 8 September 1999, the Secretariat concluded that two assertions in the 4 January 1999 submission met the criteria in Article 14 and that those assertions merited a response from the Party in light of the factors listed in Article 14(2). The first assertion related to the Party's alleged failure to inspect and monitor incinerator emissions adequately. The Secretariat determined that maintaining an adequate inspection/compliance monitoring scheme is an inherent part of enforcement, noting that Article 5(1)(b) specifically identifies "monitoring compliance" as a type of government enforcement action. The second assertion related to the Party's alleged failure to effectively enforce § 115 of the Clean Air Act, 42 USC. § 7415. According to the submission, EPA had failed to notify the Governor of states in which emissions originated that those emissions could reasonably be anticipated to endanger public health or welfare in a foreign country – in this case, Canada. The Secretariat found that the submission alleged that EPA was failing to effectively enforce a clear, specific legal obligation and therefore that the allegation satisfied the requirements of Article 14(1).

The Secretariat concluded in its 8 September 1999 determination that a third assertion in the 4 January 1999 submission – notably that the Clean Air Act and the Pollution Prevention Act provide a hierarchy of strategies for addressing waste that favors pollution prevention approaches, and that EPA has failed to propose pollution prevention as a mandatory component with regard to regulation of incinerators – raised an issue relating to general legislative direction that is not the proper ground for an Article 14 submission because it has little in common with the types of government actions that qualify as enforcement under the NAAEC. The Secretariat therefore did not request a response from the United States as to this third assertion.

The Secretariat dismissed the assertions relating to alleged failures to enforce 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 because it was not persuaded that these agreements are "environmental laws" for purposes of Article 14. The Secretariat noted that, "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)."[2]

III. SUMMARY OF THE RESPONSE AND INFORMATION OBTAINED UNDER ARTICLE 21

A. The United States' Response

The United States submitted a response dated 1 December 1999. In that response, the United States claimed that preparation of a factual record on the Submitters' claims would not significantly advance the goals of the NAAEC. According to the United States, the allegation concerning EPA's inspection and monitoring activities does not meet the requirements of the NAAEC because the submission failed to refer to the specific environmental laws that the United States is allegedly failing to enforce,[3] and it failed to indicate that the Submitters had ever communicated to the United States the allegation that EPA was failing to enforce United States law due to inadequate inspection and compliance monitoring, as required by Article 14(1)(e)(see also Guideline 5.5). The United States also asserted that the Submitters failed to comply with Article 14(2)(c), which relates to the pursuit of private remedies under the domestic laws of the Party.

Further, the United States asserted that even if the submission satisfies these provisions of the NAAEC and the Guidelines, the United States is not failing to effectively enforce its environmental law relating to the inspection and compliance monitoring of mercury and dioxin emissions from municipal waste combustors ("MWCs") and hospital/medical/infectious waste incinerators ("HMIWIs"). Among other things, the United States asserted that for most MWCs and HMIWIs, there were no United States legal provisions in effect which required testing of dioxin emissions during much of the period covered by the Submission. The United States claimed in its response that EPA monitoring programs for dioxins and mercury emissions from MWCs and HMIWIs satisfy the requirements of applicable United States law and enable the United States to determine whether these facilities are in compliance with applicable emission requirements.

The United States also claimed that it is not failing to effectively enforce § 115 of the Clean Air Act. The United States claimed that it is not aware that EPA has ever received any request by a duly constituted international agency that EPA take action to address the impacts of dioxin and mercury emissions in the Great Lakes region on Canada and therefore that EPA was not obligated to take any action under § 115. In addition, the United States claimed that it is not failing to enforce the provisions of § 115 because EPA retains discretion whether or not to issue an endangerment finding and EPA has not delayed unreasonably in exercising that discretion.

Finally, the United States asserted that it is taking significant action to reduce atmospheric deposition of dioxins and mercury from MWCs and HMIWIs, including

[2] See SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and (2) (8 September 1999).
[3] See Guideline 5.2 of the Guidelines for Submissions on Enforcement Matters Under Article 14 and 15 of the North American Agreement on Environmental Cooperation.

deposition to the Great Lakes ecosystem. As a result, the United States believes that preparation of a factual record would be of limited utility and would not significantly advance the goals of the NAAEC. In particular, the United States pointed to the implementation of binational frameworks that include the Great Lakes Binational Toxics Strategy of April 1997, the US-Canada Great Lakes Water Quality Agreement, and other cooperation among the governments of the two countries and the International Joint Commission ("IJC") on persistent toxic pollution, including dioxins and mercury air pollution. The response indicated that the April 1997 Strategy sets target reduction levels for persistent toxic substances and has received broad-based support from Great Lakes stakeholders.

B. The Secretariat's Article 21 Request

On 24 March 2000, the Secretariat issued to the United States a request for information under Article 21 of the NAAEC. Article 21 directs a Party, upon request of the Secretariat, to provide such information as the Secretariat may require, including (a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data; and (b) taking all reasonable steps to make available any other such information requested.

Commentators and courts alike have highlighted the complexity of the Clean Air Act.[4] The Article 21 request was designed to assist the Secretariat in determining the obligations the statute imposes on the types of air emission sources identified in the submission, the compliance status of those sources, and the status and scope of monitoring and enforcement efforts under the Act. The request related in particular to various aspects of the implementation of § 129 of the Clean Air Act, 42 USC. § 7429. That provision requires that EPA establish standards of performance for new solid waste incineration units (MWCs and HMIWIs) and guidelines for existing MWCs and HMIWIs and that EPA require the owners or operators of these facilities to comply with monitoring requirements and report to EPA on monitoring results.

The Article 21 request was intended to clarify the Secretariat's understanding, based on the United States response, that the majority of incineration units were not subject to emission standards or monitoring requirements under the Clean Air Act at the time the submission was filed or even as of the time of the Article 21 request. The Article 21 request also was intended to produce detailed information on the monitoring requirements currently in effect under the Clean Air Act for MWCs and HMIWIs, the number of sources currently subject to these requirements, and the compliance status of those sources, among other things. The Secretariat separated the information requested into several categories of MWCs and HMIWIs, based on its understanding that EPA's regulatory scheme was categorized in this way.

[4] See, e.g., *Chevron USA., Inc. v. NRDC*, 467 US 837, 848 (1984) (the Clean Air Act is "lengthy, detailed, technical, [and] complex"); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994) (describing the Act as "one of the most comprehensive pieces of legislation in our nation's history" and as "an extremely complex law"); Frederick R. Anderson, et al., Environmental Protection: Law and Policy 378 (3d ed. 1999) (the 1990 amendments to the Act "greatly increased the length, specificity, and scope of the Act").

EPA provided an interim response to the Article 21 request for information in a letter dated 28 July 2000, which was accompanied by a memorandum dated 24 July 2000. The 24 July 2000 memorandum provided information about the new MWCs and new HMIWIs, while EPA provided additional information on 6 November 2000 and 14 November 2000 relating to existing MWCs and existing HMIWIs.

IV. ANALYSIS

The Secretariat has concluded, after reviewing the information provided by the Submitters and by the Party, that, as further explained below, a factual record is not warranted for the submission.

A. Introduction

This submission has reached the stage at which, under Article 15(1), the Secretariat must consider whether the submission, in light of the Party's response, warrants developing a factual record. Prior to reaching this stage, as noted above, on 8 September 1999 the Secretariat determined that the amended submission filed on 4 January 1999 meets the criteria in Article 14(1) and that it merited a response from the United States based upon a review of the factors in Article 14(2).[5]

The Secretariat first determined that the submission meets the six criteria set out in Article 14(1)(a) through (f). The submission is in English, satisfying the criteria in Article 14(1)(a). It clearly identifies the persons and organizations making the submission (Article 14(1)(b)). It provides scientific reports and other information sufficient to allow the Secretariat to review the submission (Article 14(1)(c)). It appears to be aimed at promoting enforcement rather than at harassing industry (Article 14(1)(d)). It indicates that the matter has been communicated in writing to the relevant authorities and indicates the Party's response (Article 14(1)(e)). And, the Submitters reside in or were established in the United States or Canada (Article 14(1)(f)).

The Secretariat also concluded that two of the assertions in the 4 January 1999 amended submission meet the criteria inherent in the opening sentence of Article 14(1). The assertions that the United States is failing adequately to inspect and monitor incinerator emissions and to fulfill specific obligations set out in Clean Air Act § 115, 42 USC. § 7415(a), (b), meet the requirements that a submission involve "environmental laws," assert a failure to "effectively enforce," and satisfy the temporal condition inherent in the phrase "is failing." The Secretariat concluded that the Submitters' other assertions do not meet the criteria in the first sentence of Article 14(1).

The Secretariat further concluded that the two assertions satisfying the criteria in Article 14(1) also warranted a response from the United States based on the guiding factors in Article 14(2). The amended submission alleges harm to the Submitters (Article 14(2)(a)), raises matters whose further study would advance the goals of the NAAEC (Article 14(2)(b)), indicates that a private remedy was being pursued with respect to some of the

[5] For a more detailed analysis of the Secretariat's determination under Articles 14(1) and (2), see SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and (2) (8 September 1999).

issues raised in the submission (Article 14(2)(c)), and is not drawn exclusively from mass media reports (Article 14(2)(d)).

B. A Factual Record is Not Warranted Regarding the Inspection and Monitoring Allegations

As noted above, the submitters' assertion that the United States' monitoring and inspection strategy constituted a failure to effectively enforce the Clean Air Act was one of the two reasons the Secretariat requested a response from the United States. The essence of the assertion, as also mentioned above, was that the inspection/monitoring scheme allegedly constitutes a failure to effectively enforce for purposes of Articles 14 and 15 because: 1) many MWCs and HMIWIs have never had their emissions actually measured for mercury/dioxin; 2) of those incinerators that have had their emissions measured, in many instances this has only occurred once; and 3) the measurements that have been taken often are taken under near-ideal conditions that do not reflect actual emission levels.[6]

The United States' response to these three assertions has five major elements. The first four elements are as follows: 1) regarding the submitters' first assertion -- that many incinerators have never had their emissions actually measured for mercury/dioxin -- most incinerators were not subject to regulatory or monitoring requirements at the time the submission was filed,[7] and therefore the assertion goes to the adequacy of the regulatory requirements themselves, not to whether there is (or has been) a failure to effectively enforce; 2) this first assertion also is outdated – many facilities have conducted emissions monitoring even though they legally were not required to have done so at the time of the submission or even at the time of the United States response, in order to ensure that they will be in compliance when the requirements become effective;[8] 3) EPA, consistent with its regulations, uses a variety of strategies to monitor compliance with emissions standards -- such monitoring is not done on a "one-time-only" basis; and 4) EPA requires representative sampling, not testing under "near-ideal" conditions. A fifth major point is that a factual record is not warranted here because EPA regulatory efforts already have achieved significant reductions in emissions, with additional substantial reductions to follow in the near future as regulatory requirements become effective. As an example of this last point, the United States advises that its 1995 regulations concerning MWCs have "already reduced dioxins emissions from MWCs by slightly over 90% from 1990 levels and, when fully implemented in December 2000, will reduce dioxins emissions from MWCs by 99% from 1990 levels."[9]

A statement from the United States' 1 December 1999 response captures clearly the Party's position that the submission inappropriately focuses on the adequacy of the Party's law, rather than on an asserted failure to effectively enforce that law, because the substantial majority of incinerators covered by the submission were not subject to legal requirements at the time of the submission:

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[6] See, e.g., January 4, 1999 submission at 12.
[7] See, e.g., 1 December 1999 response at 29; 6 November 2000 US memorandum at 2.
[8] See, e.g., 1 December 1999 response at 29.
[9] 1 December 1999 response at 30; see also 6 November 2000 US memorandum at 5.

> The Submitters have presented no information . . . supporting their assertion that EPA is not enforcing the requirements it has adopted for incinerators under section 129, or even that MWC or MWI facilities are not complying with those requirements. Indeed, it would be extremely difficult for the Submitters to present information demonstrating that MWCs or MWIs are not in compliance with the regulations governing mercury and dioxins emissions from those facilities because, aside from the 1991 NSPS that apply to a small number of MWCs, the regulations do not require that MWC and MWI facilities be in compliance until December, 2000 and September, 2002, respectively.[10]

In response to the Secretariat's Article 21 request, the Party elaborated upon this general statement by providing detailed information concerning when regulatory requirements became (or will become) effective as to different types of incinerators, the types of monitoring that have occurred to date and that will be required in the future, and the level of compliance with regulatory requirements. In the remainder of this section, the Secretariat reviews the information provided concerning each of the different types of incinerators whose emissions are of concern in the submission.

1. The 1991 Standards for New MWCs

EPA reports in its 24 July 2000 response to the Secretariat's Article 21 request for information that sixteen new MWC units at seven plants are subject to the 1991 standards for new MWCs contained in its "NSPS Subpart Ea" regulations.[11] The Subpart Ea regulations establish emission standards for dioxin/furans. The regulation does not establish mercury standards for new MWC units, but states may require more stringent regulations for their new MWC units. The Secretariat is assuming for purposes of its analysis that all sixteen were subject to these regulations at the time the new and amended submission was filed in January 1999.

EPA indicates that it uses several strategies to monitor compliance of these sixteen facilities with emission standards. First, there is a required initial performance test conducted at the time of start-up. Next, each MWC unit must conduct an annual performance test for dioxin emissions. Third, continuous emissions monitors ("CEMs") operated by each unit produce results for emissions of sulfur dioxide and nitrogen oxide, which act as operating parameters that are surrogates for dioxin emissions, and those results are reported to EPA every six months. Finally, EPA and the states conduct inspections of the units. EPA reports that during the past five years, "a total of 129 inspections have been conducted by EPA and/or the states at the seven MWC plants."

[10] See, e.g., 1 December 1999 response at 34.

[11] 40 C.F.R. Part 60, Subpart Ea. EPA's 24 July 2000 memorandum indicates that there is another category of new MWC units regulated under the Standards of Performance for Large Municipal Waste Combustors for which Construction is Commenced after 20 September 1994, or for which Modification or Reconstruction is Commenced after 19 June 1996. 40 C.F.R. Part 60, Subpart Eb. These standards were promulgated on 19 December 1995. EPA's response appears to indicate that there are currently no facilities in this category. See 24 July 2000 US memorandum at 1.

EPA provides in tabular form the number of inspections conducted at each of the plants and the date of the last inspection.[12]

In addition, Table 1 of EPA's 24 July 2000 response lists the compliance status of each of the seven plants as "[i]n compliance with mercury and dioxin" for the period January-March 2000. EPA further indicates concerning compliance status that the five-year compliance history from EPA's database does not indicate any violations relating to dioxin or mercury emissions, apparently based on the 129 government inspections.

Thus, the United States' 24 July 2000 memorandum indicates that, with regard to the 16 facilities covered by the NSPS Subpart Ea regulations, little or no evidence likely exists to support the Submitters' general assertions that many facilities either have not had their emissions tested at all, or have had them tested once. The Secretariat's understanding, from the United States' 1 December 1999 response, is that EPA requires that testing be done in a way that will produce samples that are representative of the gases in the stack – i.e., EPA's response indicates that testing is done under other than "near-ideal" conditions, the other assertion of the Submitters.[13]

The Secretariat has determined that development of a factual record is not warranted concerning the 16 facilities that were subject to the Subpart Ea regulatory requirements at the time the submission was filed. EPA has provided information that appears to controvert the assertions contained in the submission that many of these facilities either have never had their emissions tested or such tests have only been conducted on a one-time basis. The regulations do not appear to contemplate testing under near-ideal conditions. In short, the extensive information that the United States provided lays to rest any serious question regarding whether its monitoring and inspection approach amounts to a failure to effectively enforce the emissions regulations applicable to these 16 facilities. Accordingly, development of a factual record is not warranted in connection with those facilities.

2. The 1995 Guidelines for Large Existing MWCs

The United States reports that only two of the 163 large existing MWCs subject to the 1995 Guidelines had final compliance dates for meeting dioxins and mercury emission limitations as of the date the new and amended submission was filed (January 1999).[14] It notes that even as of approximately 1 September 2000, only a small minority (roughly 11

[12] All from the Attachment to 24 July 2000 US memorandum, at 1.

[13] See, e.g., 1 December 1999 response at 30-31. The discussion at pages 30-32 of the December 1999 response relates to the Eb regulated facilities (i.e., NSPS for large new MWCs for which construction is commenced after 20/09/94), not the Ea facilities discussed in this section, although the United States asserts generally that EPA regulations regarding MWC and MWI testing and monitoring meet applicable CAA requirements. The discussion of the Eb regulations appears to be by way of example, but there is nothing in the response that refers specifically to the way facilities subject to the Ea regulations are tested. Nonetheless, the Ea regulations appear to impose requirements that are essentially the same as those imposed by the Eb regulations.

[14] See, e.g., Table 4 of EPA's 6 November 2000 memorandum.

percent, or 18 out of 163 large existing MWCs subject to the 1995 Guidelines),[15] had final compliance dates for meeting dioxins and mercury emission limits.[16] In the Secretariat's view, a factual record is not warranted concerning the 161 facilities not subject to regulatory requirements prior to the filing of the submission because the assertions concerning these facilities go to the adequacy of the legal requirements themselves, not to whether there is a failure to effectively enforce such requirements. There was no legal requirement for most of these facilities to meet emission limitations at the time the submission was filed, or to monitor emissions from such facilities.[17]

The two existing large MWCs subject to the 1995 Guidelines that were subject to emission standards and monitoring requirements as of the date the submission was filed are the Montgomery County Resource facility in Dickerson, Maryland (final compliance date 22 April 1991), and the Robbins RRF facility in Robbins, Illinois (final compliance date 2 June 1997).[18] The United States advises that facilities must take at least four steps to monitor compliance: (1) conduct an annual performance test; (2) submit an annual report, which "must include[ ] a list of dioxins and mercury emissions levels achieved during the most recent performance tests"; (3) conduct continuous monitoring for a number of parameters or surrogates to "ensure that dioxins and mercury emissions remain below the emission limitations . . . "; and (4) maintain records ("*e.g.*, performance test results, concerning compliance information with applicable dioxins and mercury emission limits") for review during periodic government inspections.[19] The Party further advises that EPA and the relevant state undertake the following actions to monitor compliance with emission limits once they become effective: (1) validate the initial performance test and confirm compliance based on that test; and (2) monitor for continued compliance through periodic performance tests, inspections, review of submitted reports, and/or compliance certifications by facilities. The United States indicates that it and the states use a variety of factors in determining the frequency of inspections for particular facilities, including: (a) compliance history; (b) density of other pollution sources; (c) facility location; and (d) monitoring equipment.[20] The United States indicates that there have been 15 inspections of the Montgomery facility and 43

[15] The United States advises that EPA initially established emission guidelines for existing small MWCs on 19 December 1995, but these guidelines were invalidated by court decree. EPA did not reissue these guidelines until 6 December 2000 and they did not become effective until 5 February 2001. 65 Fed. Reg. 76377 (2000). See 6 November 2000 memorandum at 3. Because there were no federal emission limitations in place for these MWCs at the time EPA formulated its response to the Article 21 request, its response generally does not address small MWCs, other than the six discussed below that are subject to State Implementation Plans ("SIPs").

[16] See, e.g., 6 November 2000 US memorandum at 3 and 4, indicating that there are 163 large existing large MWC units subject to the 1995 Guidelines at 65 MWC plants, and that as of 1 September 2000, final compliance dates were in effect for 18 facilities located at 17 MWC plants.

[17] Section 60.39b(c)(1)(i) refers to certain circumstances in which state plans "shall include measurable and enforceable incremental steps of progress toward compliance." However, the submission does not raise any concerns regarding whether state plans contain such requirements, or regarding whether sources are meeting any such incremental steps, and nothing in either the submission or the Party's response indicates that this is a potential area of ineffective enforcement.

[18] See, e.g., 6 November 2000 US memorandum Table 4.

[19] See, e.g., 6 November 2000 US memorandum at 4.

[20] See, e.g., 6 November 2000 US memorandum at 2.

inspections of the Robbins facility.[21] Finally, the United States also identifies a series of efforts EPA has made to promote compliance by large MWCs. The United States reports that since promulgating the regulations for large existing MWCs, EPA headquarters and regional offices have held monthly conference calls to address concerns with regulatory implementation and to track the progress of the states and the affected MWC facilities. In addition, EPA and the states have worked with MWCs to deal with how to meet the requirements outlined in the state or federal plans.[22]

In sum, for the two facilities that were subject to the Guidelines at the time the submission was filed, it appears that, with respect to the concerns the Submitters raised about a lack of emissions testing and a lack of representative testing, each facility has conducted extensive self-monitoring, and that there have been numerous government inspections of the facilities. While the information provided to the Secretariat regarding compliance of these facilities with emissions standards is limited, such information indicates that each of the two facilities was in compliance with dioxins and mercury as of April-June 2000.[23] Moreover, nothing in the submission or the response indicates that the United States' enforcement approach regarding these two facilities has resulted in ongoing compliance problems or other circumstances that might warrant a more in-depth development of factual information. Accordingly, a factual record regarding these assertions is not warranted.

In addition to the two large existing MWCs subject to the 1995 guidelines as of the time the submission was filed, the United States gives separate treatment in its 6 November 2000 memorandum to six existing MWCs, five located in Pennsylvania and one in Utah, that are subject to regulation under a State Implementation Plan ("SIP"). The United States explains that the five facilities in Pennsylvania are required to meet "Best Available Technology" ("BAT") emission limitations, which include annual ambient concentration limits for dioxins and mercury. It reports that over the past five years 48 inspections have been conducted at these five MWCs. It indicates that all five were in compliance for the period April-June 2000. It does not indicate their compliance status for other than that period or provide information concerning the types of monitoring undertaken for these facilities.[24] The United States indicates that violations have been identified for dioxin emissions from the Utah facility, that Utah has reached a settlement agreement with the facility for these past violations, but that EPA suspects that the facility is not in continuous compliance and EPA recently ordered the facility to perform more frequent stack testing.[25]

The final point the United States offers in connection with these facilities involves anticipated reductions in emission levels. The United States indicates as follows:

> EPA estimates that the New Source Performance Standard (NSPS) and EG Subpart Cb applicable to large MWCs, in combination with various EPA dioxins

[21] See, e.g., 6 November 2000 US memorandum Table 4.
[22] See, e.g., 6 November 2000 US memorandum at 3.
[23] See, e.g., 6 November 2000 US memorandum Table 4.
[24] See, e.g., 6 November 2000 US memorandum Table 5.
[25] See, e.g., 6 November 2000 US memorandum Table 5.

> initiatives and MWC plant closures, will significantly reduce dioxins emissions from MWCs. The estimated reduction is ninety-nine percent from 1990 levels when the NSPS and EG Subpart Cb are fully implemented in December 2000. The 1990 emissions from MWCs are calculated as 4,173 grams per year toxic equivalent quantity and the dioxins emissions levels after December 2000 are estimated as 41 grams per year. EPA estimates the NSPS and EG will bring about an eighty-eight percent reduction in mercury emissions from 1990 levels. This represents a decrease to 6.1 tons per year after December, 2000 from 51.2 tons per year in 1990.[26]

Based on a series of factors, including the limited number of facilities subject to regulation and monitoring at the time the submission was filed, the monitoring apparently required of those facilities, the significant reductions to be achieved in emissions, and the lack of any evidence of serious ongoing or unaddressed compliance problems, the Secretariat does not believe a factual record is warranted concerning this category of incinerators.

3. New Source Standards for Solid Waste Incineration Units with Capacity Equal to or Less than 250 Tons Per Day

Section 129(a)(1)(C) of the Clean Air Act requires that EPA promulgate by 15 November 1992 new source standards of performance applicable to solid waste incineration units with capacity equal to or less than 250 tons per day combusting municipal waste and to units combusting hospital waste, medical waste, and infectious waste.[27] In its 24 March 2000 request for information, the Secretariat inquired of the United States whether EPA has issued such standards and, if so, what efforts the agency has made to determine the compliance status of regulated units and what information those efforts revealed.

In its 24 July 2000 response, the United States divided this question into two categories of facilities. It first addressed the small MWCs. The United States reported that at the time of that response, MWCs were not subject to a new source performance standard under § 129 of the Clean Air Act. The United States advised that while EPA had promulgated such standards for small MWC units, the US Court of Appeals for the District of Columbia Circuit had vacated the rule as it applied to new small MWC units. The United States further advised that the agency expected to issue the final regulations for small MWC units by the end of 2000. Subsequently, EPA issued final new source performance standards for new small MWC units, which did not become effective until 5 February 2001.[28]

Based on the United States response, it appears that small MWCs were not subject to regulatory requirements governing emissions of dioxins and/or mercury at the time the submission was filed, in part because of litigation involving the validity of these requirements. As a result, there does not seem to be a basis for developing a factual record involving an asserted failure to effectively enforce these requirements.

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[26] See, e.g., 6 November 2000 US memorandum at 5.
[27] 42 USC. § 7429(a)(1)(C).
[28] 65 Fed. Reg. 76349 (2000).

Because the United States addressed the second type of facilities identified in this question, namely HMIWIs, in its response to question 4 of the 24 March 2000 request for information, the compliance status of those facilities is discussed in the next section below.

4. New Source Standards of Performance for HMIWIs

In its fourth question in the Article 21 request for information, the Secretariat focused on the standards of performance that EPA issued for new HMIWIs in its Subpart Ec regulations, promulgated on 15 September 1997 (entitled Standards of Performance for Hospital/Medical/Infectious Waste Incinerators for which Construction is Commenced after 20 June 1996, 40 C.F.R. Part 60).

The United States reports that there are four new HMIWI units located at four facilities subject to these regulations.[29] The United States indicates that the compliance status of these units is monitored in several ways, including: (1) initial performance tests at the time of start-up; (2) annual performance tests, which, under the regulations, do not directly require testing of emissions of dioxin or mercury; (3) annual review of the operation of plant control technology, which includes monitoring of dioxin and mercury emissions; [30] and (4) government inspections. Regarding the inspections, the United States notes that the "appropriate state lead agencies have conducted on-site level 2 compliance monitoring inspections . . . every year since each new HMIWI commenced operation."[31] It reports that a total of 23 government inspections have been conducted at the four plants in the past five years, it indicates the number of inspections conducted at each plant during the past five years, and it provides the date of the last inspection at each plant.[32]

Thus, the United States' 24 July 2000 memorandum appears to show that each of the four units covered by the 1997 regulations is subject to a regularized monitoring scheme that goes well beyond the "one-time-only" approach that the Submitters assert exists. The United States' 1 December 1999 response indicates that EPA requires that testing be done under other than "near-ideal" conditions, the other assertion of the Submitters. After describing at some length the circumstances in which testing is required of MWCs, the 1 December 1999 response indicates that "[t]he regulatory program established for [HMIWIs] closely parallels that outlined above for MWCs." In particular, the response continues, EPA's monitoring requirements for HMIWIs require "routine stack testing coupled with continuous monitoring of operating parameters for units equipped with air pollution control devices." Monitoring requirements for HMIWIs that are not equipped with add-on air pollution control devices consist of an initial stack test coupled with continuous monitoring of operating parameters and annual inspections. According to the response, "[a]fter the performance test, monitoring of operating parameters is the only way to determine, on a continuous basis, whether the source is operating in compliance." Operation outside the bounds of one or more parameter limits "constitutes a violation of a

[29] See, e.g., 24 July 2000 US memorandum.
[30] See, e.g., 24 July 2000 US memorandum at 2.
[31] See, e.g., 24 July 2000 US memorandum Table 2.
[32] See, e.g., 24 July 2000 US memorandum.

specific emission limit." In short, "[t]he initial and repeat testing requirements will ensure, on a continuous basis, that the air pollution control devices used at [HMIWIs] operate properly, that no deterioration in performance occurs, and that no changes are made to the operating system or the type of waste burned. . . . Where repeat testing is not required, annual inspections, annual opacity testing, and parameter monitoring will ensure that [HMIWI] units are functioning properly."[33]

In the Secretariat's view, the information provided does not support development of a factual record. The number of facilities involved is quite limited; the United States has provided considerable information showing that its monitoring and inspection scheme is not limited in the ways the Submitters allege it is; and the Submitters have not provided information supporting the notion that the inspection approach, in design or implementation, may constitute a failure to effectively enforce. Further, the information the United States has provided concerning compliance status reflects that compliance is generally good and the Submitters have not provided information suggesting that compliance levels may constitute a failure to effectively enforce. In particular, the compliance status information the United States has provided indicates that each of the covered facilities was in compliance with dioxin and mercury standards during the government inspections and, further, that each facility was in compliance during the period from January-March 2000. The United States reports that "EPA's database indicate[s] that each new HMIWI has continually been in compliance with the requirements . . . since commencing operation." It further notes that none of the 23 inspections revealed violations of the regulations for dioxin and/or mercury. Accordingly, the information before the Secretariat does not leave unresolved a central question as to whether there is a failure to effectively enforce the new source standards of performance applicable to HMIWIs or to justify development of a factual record to determine whether such a failure has occurred.

5. Large Existing HMIWIs

The final set of questions in the Secretariat's Article 21 request for information relates to compliance with the emission guidelines for existing HMIWIs that EPA issued on 15 September 1997, the same date that EPA issued its new source performance standards for HMIWIs. The United States reports in response to the Article 21 information request that none of these facilities was required to be in compliance as of the date the submission was filed, and that only a small minority of existing large HMIWIs (18 out of between approximately 764 and 1,862) were required to be in compliance as of 2 November 2000, a few days before the United States response.[34] As a result, a factual record is not warranted concerning the asserted failure to effectively enforce regarding these facilities.

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[33] See, e.g., 1 December 1999 response at 33.

[34] See 6 November 2000 US memorandum at 6 and Table 11. HMIWIs subject to the federal plan must comply with increments of progress, beginning with submission of final control plans to EPA by 15 September 2000 for HMIWIs that expect to operate after 15 August 2001. These increments, all of which went into effect subsequent to the filing of the new and amended submission, are described in Table 9 of EPA's 6 November 2000 memorandum responding to the Secretariat's Article 21 request for information.

This conclusion is buttressed by other information that the United States provided, such as its strategy for monitoring compliance (which appears to address the concerns the Submitters have raised), the degree of compliance to date, the existence of follow-up action concerning the instances of non-compliance identified, and the significant decline in emissions to be anticipated from this set of facilities. The United States reports that EPA and the relevant state undertake the following actions to monitor compliance with emission limits once they become effective: (1) validate the initial performance test and confirm compliance based on that test; and (2) monitor for continued compliance through periodic performance tests, inspections, review of submitted reports, and/or compliance certifications by facilities.[35] EPA states that it and the states use a variety of factors in determining the frequency of inspections for particular facilities, including: (a) compliance history; (b) density of other pollution sources; (c) facility location; and (d) monitoring equipment.[36] Thus, it appears that the United States' monitoring scheme addresses the concerns the Submitters raised about the adequacy of monitoring efforts.

Compliance levels post-submission would not appear to provide a basis for a factual record, based on the information provided. Of the total of 18 incinerators that had final compliance dates for dioxin and mercury emission limits as of November 2000, by which time regulated HMIWIs must have the required air pollution control equipment installed and operating,[37] sixteen are listed in Table 11 as in compliance (with initial performance tests being due very soon after EPA developed its response for seven of the 16). Table 11 identifies two facilities located in Georgia as not being in compliance. From the information in Table 11, Georgia appears to be monitoring the situation and is awaiting information from the facilities about follow-up work they have conducted to come into and demonstrate compliance.

The United States further reports in Table 12 that seven additional existing large HMIWIs subject to the federal plan are subject to emission limitations or monitoring requirements contained in a SIP that is not part of an approved state plan under §§ 111(d) and 129 of the Clean Air Act.[38] These facilities are all located in Pennsylvania. The United States lists in Table 12 the number of inspections conducted of each facility over the past five years. The United States indicates that each facility is in compliance with the requirements contained in the SIP. As the United States has explained, existing HMIWIs must comply with the emission guidelines for those facilities, at the latest, by 15 September 2002. Individual state plans may establish an earlier compliance deadline, and eleven states and one Pennsylvania county have set compliance dates earlier than that date.[39] Pending EPA approval of Pennsylvania's plan, the seven facilities listed in Table 12 remain subject to the final compliance deadline that applies to HMIWIs subject to the federal plan.

A final point that the United States makes concerning this category of incinerators is that the Party anticipates a significant decline in the number of facilities, from 1,862 to 764,

[35] See 6 November 2000 US memorandum at 7.
[36] See 6 November 2000 US memorandum at 2.
[37] See 6 November 2000 US memorandum at 6-7.
[38] See 6 November 2000 US memorandum at 6 and Table 12.
[39] See 6 November 2000 US memorandum at 5-6.

that will continue to operate after the final compliance date established under the applicable state plans or federal plan.[40] Related, the United States advises that "[t]he continued closure of existing HMIWIs corresponds to a significant reduction in dioxins and mercury emissions."[41] It notes that it expects, "when the emissions guidelines are fully implemented, to achieve a reduction of HMIWI dioxins and mercury emissions by ninety-seven percent and ninety-five percent, respectively."[42]

6. Summary

The information provided to the Secretariat does not support development of a factual record concerning the assertion that there is a failure to effectively enforce because of deficiencies in monitoring compliance. For the limited universe of facilities that were subject to monitoring and other regulatory requirements at the time the submission was filed, the information provided indicates that an extensive monitoring scheme is in place and that, in particular, these facilities have had their emissions tested; the tests occur on a more than one-time-only basis; and sampling is intended to produce representative results, not results under near-ideal conditions. Among other things, the United States states that while the Submitters "assert that most 'plants' are 'tested only once during startup,' [a]ctually, the 1995 regulations, which apply to most MWCs, require that those facilities be tested annually after the facilities are required to come into full compliance with the dioxins emission limitations established by those regulations."[43] The United States indicates that the regulations require annual emissions tests for mercury from MWCs as well. The United States further indicates that additional monitoring and inspections are also conducted.[44] Further, while the compliance-related information provided by the United States is limited in nature, there is no indication of a serious, widespread compliance problem and no unaddressed compliance problems have been presented.

The vast majority of facilities were not subject to regulatory requirements (including monitoring) at the time the new and amended submission was filed in January 1999. Thus, as to these facilities, there was no obligation, or legal authority, to enforce via monitoring at that time, and, *a fortiori***,** there could have been no failure to enforce effectively. The United States also has explained the monitoring scheme that will be used for these facilities once regulatory requirements become effective. This monitoring scheme appears to address the Submitters' concerns. Further, while only limited information concerning compliance status has been provided, no unaddressed compliance

[40] See 6 November 2000 US memorandum at 6 and Table 12. Emissions from the facilities that may shut down are likely to continue until the facilities shut down. It does not appear that these facilities are subject to monitoring requirements or emission limitations, and, as a result, there is no failure to effectively enforce regarding them. Even if some of the increments described at pages 5 and 6 of the United States' 6 November 2000 memorandum apply, it does not appear that any such increments would apply to monitoring or emission standards. In any event, neither the submission nor the response provides any information indicating that there is a particular compliance problem with this narrow subset of facilities.
[41] See 6 November 2000 US memorandum at 6 and Table 12.
[42] See 6 November 2000 US memorandum at 7 and Table 12.

[43] See 1 December 1999 response at 31.
[44] See, e.g., 1 December 1999 response at 31-34.

problems have been presented with respect to the subset of this group of facilities that became subject to monitoring and other regulatory obligations after the submission was filed.

C. A Factual Record is Not Warranted Regarding the Clean Air Act Section 115 Allegations

The second Submitter claim is that the United States is failing to effectively enforce § 115(a) of the Clean Air Act, which under certain circumstances requires that EPA notify "host" states of pollution migrating from their borders to a foreign country, thereby requiring those states to amend their SIPs to address emissions that reasonably may be anticipated to endanger public health or welfare in that foreign country. Section 115(a) provides as follows:

> Whenever the Administrator [of EPA], upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any air pollutant or pollutants emitted in the United States cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary requests him to do so with respect to such pollution which the Secretary of State alleges is of such a nature, the Administrator shall give formal notification thereof to the Governor of the State in which such emissions originate.

42 USC. § 7415(a). Any such notification issued by the Administrator is deemed to be a finding under § 110(a)(2)(H)(ii) of the Clean Air Act[45] that the SIP of the state in which the emissions originate is inadequate to prevent or eliminate the endangerment. 42 USC. § 7511(b). That finding, in turn, triggers an obligation on the part of the state whose SIP has been deemed inadequate to amend its SIP to eliminate the inadequacy. These provisions only apply to a foreign country which the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by § 115 of the Clean Air Act.[46]

The 4 January 1999 submission alleges that the United States is failing to effectively enforce these provisions of the Clean Air Act. The submission alleges that numerous reports from the IJC have indicated serious Great Lakes pollution problems stemming from dioxin and mercury, specifically from incinerators. According to the submission, the CEC released a report in 1997 on the long-range transport of pollutants that reached similar conclusions. The submission asserts that, despite having received these reports,

[45] 42 USC. § 7410(a)(2)(H)(ii)

[46] 42 USC. § 7415(c). EPA determined in 1985 that reciprocity existed between the United States and Canada for purposes of § 115(c). *Thomas v. New York*, 802 F.2d 1443, 1446 (D.C. Cir. 1986), *cert. denied*, 482 US 919 (1987). See also Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421, 436 n.141 (1993) ("Most commentators agree that Canada has satisfied the reciprocity requirement.").

EPA has failed to require SIP upgrades that could prevent or eliminate the ongoing "endangerment" of health and welfare in Canada.

In its 1 December 1999 response, the United States alleged that it is not failing to effectively enforce § 115 for two reasons. First, the United States contends that the § 115 process is not initiated until EPA receives either a request from a duly constituted international agency or a request from the Secretary of State that EPA take action under § 115. According to the response, EPA is unaware of ever having received any request from a duly constituted international agency or from the Secretary of State asking EPA to take action under § 115 to address impacts associated with atmospheric deposition of hazardous air pollutants such as dioxins and mercury in the region near the Great Lakes or in Canada.[47] Accordingly, the United States asserts that EPA has never been, and is not now, obligated to take any action under § 115 regarding such emissions.

Second, even if the IJC and other reports triggered EPA's § 115 obligations, the United States denies that it is failing to enforce the provisions of § 115. The United States asserts that EPA retains discretion whether or not to issue a finding that an endangerment exists (a so-called "endangerment finding"). According to the United States, given the complexity of making an endangerment finding and identifying the states with emissions sources that cause or contribute to the endangerment, EPA has not been in receipt of the requisite "request" for a finding of endangerment long enough to have amounted to unreasonable delay or an abuse of the agency's discretion. The United States also contends that, in light of ongoing efforts to address mercury and dioxin deposition in the Great Lakes, a factual record regarding the § 115 issue would not advance the goals of the NAAEC.

The United States' response raises two main questions relevant to whether a factual record is warranted in regard to the alleged failure to effectively enforce § 115 of the Clean Air Act. First, must the EPA receive a request from a duly constituted international agency for a finding of endangerment – in addition to a report, survey, or study that gives EPA reason to believe that United States air pollution may reasonably be anticipated to endanger public health or welfare in a foreign country – as a prerequisite to other obligations under § 115?[48] Second, assuming that EPA can be obligated to take action under § 115 even without such a request, does the submission raise central questions that the Party's response leaves unresolved regarding whether the EPA's exercise of its discretion in responding to the IJC reports and others amounts to a failure to effectively enforce § 115?

Regarding the first issue, a factual record would not be warranted if the United States is correct that an international agency must make a "request" to trigger EPA's obligations under § 115, and that the IJC and other reports do not contain such a request. The

[47] See 1 December 1999 response at 38.

[48] The submitters have not alleged that the Secretary of State has ever requested that EPA provide formal notification to a state in which emissions originate that are endangering public health or welfare in a foreign country, and there is no evidence that the Secretary has ever issued such a request to EPA with respect to emissions of dioxins or mercury in the Great Lakes region.

Secretariat has found no United States court cases addressing the issue of whether a request by an international agency is a prerequisite to EPA's other obligations under § 115.

The Clean Air Act does not on its face require that the EPA receive a "request" from a "duly constituted international agency" in order to be obliged to take action under § 115. Instead, the plain language of § 115(a) suggests that EPA's "receipt" of "reports, surveys or studies" indicating that air pollution originating in the United States may reasonably be anticipated to cause or contribute to an endangerment in a foreign country is enough to trigger EPA's obligation to take further action. Further, whereas § 115(a) requires that EPA give formal notification if upon *receipt* of reports, surveys, or studies from a duly constituted international agency, the Administrator has reason to believe that United States emissions may be anticipated to endanger public health or welfare in a foreign country, it alternatively requires such notification "whenever the Secretary of State *requests* him to do so." Therefore, the absence of any explicit requirement that reports of international agencies include requests for EPA to notify polluting states indicates that such a request is not required.

Notably, nothing in the § 115 cases that the United States cites in its response indicates that during the time period at issue in those cases (involving an alleged failure to comply with § 115 in connection with acid rain damage in Canada) EPA viewed a request from an international agency as a prerequisite to further action.[49] In those cases, EPA relied on the IJC Seventh Annual Report of Great Lakes Water Quality to make an endangerment finding, and there is no indication that the report contained a request for notification.[50] Indeed, it would seem quite unusual for the mandate of the IJC or most other international agencies, including the CEC, to include making requests to countries to take actions such as those set out in § 115.

Despite these considerations, the United States contends that the legislative history of § 115 suggests that EPA's § 115 obligations are not triggered unless the Administrator receives a *request* from a duly constituted international agency to take formal action under § 115.[51] Under well-established principles of statutory interpretation in the United

[49] "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Lal v. INS*, 255 F. 3d 998, -- (9th Cir. 2001).

[50] See *Thomas v. New York*, 802 F.2d at 1444-46, and *Her Majesty the Queen in Right of Ontario v. United States*, 912 F.2d 1525, 1529-33 (D.C. Cir. 1990). Although it is not perfectly clear, it appears that EPA issued the endangerment and reciprocity findings at issue in those cases based solely on the IJC's Seventh Annual Report on Great Lakes Water Quality. See 912 F.2d at 1529.

[51] 1 December 1999 response at 38. The version of § 115 in the Senate bill leading to the 1977 Clean Air Act amendments provided that EPA's obligation to call for SIP revisions would be triggered by the "receipt of requests, reports, surveys, or studies" that provide EPA with the requisite "reason to believe." S. Rep. No. 95-127, at 175 (1977). However, the Conference Report on the 1977 amendments describes the Senate bill as providing a mechanism for the Administrator to trigger a revision of an SIP "*upon the petition of an international agency* or the Secretary of State if he finds that emissions originating in a State endanger the health or welfare of persons in a foreign country." H. R. Rep. No. 95-564, at 136 (1977), *reprinted in* 1977 USC.C. & A.N. 1502, 1517 (emphasis added). The Report further states that the Conference adopted the Senate's approach by "requir[ing] a request by a duly constituted international agency as a condition for the Administrator to act." *Id.*

States, a statute should be given its plain meaning, and if a statute's meaning is unambiguous on its face, the legislative history is generally immaterial and deference to an agency interpretation contrary to the plain meaning is not warranted.[52] In the Secretariat's view, it is not clear that the legislative history supporting the United States' position would overcome the plain language indicating that a "request" from an international agency is not required to trigger action under § 115.

In the absence of a dispositive court ruling or other evidence that irrefutably demonstrates the meaning of § 115, the Secretariat reaches no conclusion on the question whether a "request" from an international agency is required to trigger EPA's obligations under section 115. A factual record would do little to illuminate this legal question. Nonetheless, it is appropriate to consider other factors relevant to whether a factual record is warranted regarding the submitters' § 115 assertion.

Assuming that even absent a request,[53] the receipt from an international body of information providing EPA with the requisite "reason to believe" that United States emissions "may reasonably be anticipated to endanger public health or welfare" in Canada is enough to compel EPA to take further action, it is appropriate to consider whether a factual record is warranted to examine 1) what information EPA has received or developed, or has available to it, relevant to whether dioxin or mercury emissions from the United States cause or contribute to an endangerment of public health or welfare in Canada, including identification of sources of such emissions and 2) whether, in light of this information, EPA's actions amount to ineffective enforcement of § 115 in regard to deposition of mercury and dioxin emissions into the Great Lakes.

The United States contends that a factual record is not warranted to address these questions because the EPA has discretion in determining when to notify states under § 115. The D.C. Circuit Court of Appeals in the *Thomas v. New York* case cited above stated in *dicta* that "[h]ow and when the agency chooses to proceed to the stage of notification triggered by the findings is within the agency's discretion and not subject to judicial compulsion."[54] Likewise, the same court in *Her Majesty the Queen in Right of Ontario v. United States EPA* stated that "[t]he words 'whenever' the Administrator 'has reason to believe' imply a degree of discretion underlying the endangerment finding."[55] Nonetheless, the D.C. Circuit Court of Appeals has left open the possibility that, in an

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[52] See *Her Majesty the Queen*, 912 F.2d at 1533. See also, *Falro v. Owasso Independent School District* No. 1-011, 229 F. 3d. 956, 972 (10th Cir. 2000), *United States v. Hilario*, 218 F.3d 19, 23 (1st. Cir. 2000), *Catapalt Entertainment Inc.* 165, F,3d 747, 754 (9th Cir. 1999). Although a court need not follow the plain language of a statute if the legislative history indicates a "clear expression of contrary legislative intent", *United States v. Hilario* 218 F.3d at 23, the legislative history does not appear to be crystal clear.

[53] Although the IJC's recent biennial reports do not explicitly purport to "request" EPA to take action under section 115, they do contain recommendations for the United States to take action to further limit deposition of dioxin and mercury from incinerators into the Great Lakes. These reports are available on the IJC website at www.ijc.org. However, the Secretariat sees no reason to address here whether the IJC's recommendations might be considered "requests" for purposes of § 115, even under the United States' interpretation.

[54] *Thomas*, 802 F.2d at 1448.

[55] See *Her Majesty the Queen*, 912 F.2d at 1533.

appropriate case, a citizen plaintiff might be able to show that EPA has unreasonably delayed taking action or otherwise abused its discretion under § 115.[56]

The court in *Thomas* made note of the "complex, multi-source pollution problem" involving acid rain that confronted the agency in that case. In addition, in *Her Majesty the Queen*, the D.C. Circuit accepted the EPA's view that the agency need not make an endangerment finding triggering the obligation to notify states causing or contributing to the endangerment until the agency has identified those states, and it noted "the unusual complexity of the factors facing the agency in determining the effects of acid rain and in tracing the pollutants from the point of deposition back to their sources."[57] The court also saw "little basis for questioning [EPA's] own assessment of its current capabilities" for making the endangerment finding.[58] The court therefore concluded that EPA's failure to initiate a rulemaking leading to formal notification under § 115(a) did not amount to unreasonable delay.

The United States, in its 1 December 1999 response, claims that the subject of this submission is similarly complex, thereby precluding any "rapid response" by the agency. The United States points out in particular that the lag between receipt of the relevant IJC reports and the failure to issue formal notification in this instance is considerably shorter than it was in the acid rain case.[59] The United States does not dispute that the IJC and CEC reports to which the Submitters refer indicate a serious concern regarding the impacts on public welfare of mercury and dioxin emissions from incinerators and other sources. However, those reports, as well as the United States' response, also indicate the complexity of determining source-receptor relationships and other matters inherent in identifying those sources of mercury and dioxin deposition in the Great Lakes that could be subject to stricter control through EPA-mandated SIP revisions.

The United States further points out a recent decreasing trend in actual emissions of dioxins and mercury from the incinerators covered by the submission. EPA has estimated that new regulatory requirements and other initiatives will reduce dioxins emissions from MWCs by 99 percent from 1990 levels (from 4,173 grams per year toxic equivalent quantity in 1990 to 41 grams per year after December 2000). EPA estimates that there will be an 88 percent reduction in mercury emissions from 1990 levels after December 2000, from 51.2 tons per year in 1990 to 6.1 tons per year after December 2000. EPA similarly notes that emissions of dioxins and mercury from HMIWIs are likely to decline dramatically because a substantial percentage of such facilities intend to close.[60]

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[56] See *Her Majesty the Queen*, 912 F.2d at 1534.
[57] See *Her Majesty the Queen*, 912 F.2d at 1533.
[58] See *Id*. at 1534.
[59] See Roelofs, *supra*, at 438 (scientific uncertainty concerning transboundary pollution "can be used to justify the Administrator's decision not to initiate Section 115 proceedings").

[60] See 6 November 2000 US memorandum at 6.

Because EPA is not aware of any request to take action under § 115 in regard to mercury and dioxin emissions, it is not clear that EPA has undertaken any actions under § 115 in regard to the Submitters' concerns. However, the United States provides some details on other activities that EPA is pursuing to address deposition of mercury and dioxins into the Great Lakes. One example are binational frameworks that include "(1) implementing the Great Lakes Binational Toxics Strategy (BNS) of April 1997, (2) implementing the US-Canada Great Lakes Water Quality Agreement (GLWQA) with respect to HAPS, and (3) other cooperation among the governments and the IJC on persistent toxic pollution which also address issues of dioxins and mercury air pollution."[61] The United States also identifies unilateral efforts it is undertaking to address mercury and dioxin deposition into the Great Lakes, such as programs under the Clean Water Act that are geared toward addressing persistent toxic pollutants in the Great Lakes. In particular, the United States points to the possibility that Total Maximum Daily Loads ("TMDLs") could be developed for persistent toxic pollutants in Great Lakes waters, and that those TMDLs might be applied in a manner that sets limits or reduction targets for long-range deposition sources of those pollutants.[62] As the United States explains, "[a]lthough a TMDL itself imposes no enforceable requirements, it can serve as an assessment and planning tool that local, state, and federal authorities can use to impose controls or pollution reduction targets for the purpose of achieving the applicable water quality standards."[63] The United States notes that it has made progress in understanding and modeling the source-receptor relationships that trace air pollutants deposited in the Great Lakes to their sources.

The response therefore makes clear that the dioxin and mercury emissions scenario at issue in this submission is not static; it is changing, and it is significantly improving. The fact that efforts are still underway in the United States to reduce mercury and dioxin emissions from incinerators would likely make any attempt to make the findings necessary to implement § 115 especially complicated. For example, it would be difficult to determine whether SIP revisions that might be imposed as a result of § 115 would result in any significant improvement in public welfare in Canada beyond whatever improvement is being achieved, and will continue to be achieved, as a result of the United States' current and ongoing efforts to reduce dioxin and mercury emissions.

As courts in the United States have noted, EPA's flexibility regarding when, whether and how to implement § 115 is very broad, and determining whether the factual circumstances warranting an endangerment finding exist is very complicated in general. Based on the submission and the response, it appears that it would be especially complicated to make such a finding regarding any endangerment in Canada due to mercury and dioxin emissions in the United States. Whether the United States is effectively enforcing § 115 is intricately tied in this case to the broad scope of the EPA's discretion under that provision, and whether a factual record is warranted must be viewed in light of the complex, dynamic and improving situation described in the United States' responses. Relevant as well is the lack of any indication in the submission or in the

[61] 1 December 1999 response at 41.
[62] 1 December 1999 response at 43.
[63] 1 December 1999 response at 43.

materials the United States has provided of any significant noncompliance with emissions regulations applicable to the incinerators at issue in this submission.

In light of these considerations, the Secretariat finds that the submission and the response do not leave open a central question regarding whether the United States is ineffectively addressing an ongoing environmental violation under § 115 or exercising its discretion in a manner legally contrary to § 115. Accordingly, the Secretariat finds that a factual record is not warranted regarding the Submitters' § 115 claim, and that claim is therefore dismissed.

V. CONCLUSION

For the reasons stated above, the Secretariat considers that the submission does not warrant developing a factual record and pursuant to section 9.6 of the Guidelines hereby notifies the Submitters and the Council of its reasons and that the process is terminated with respect to the submission.

Respectfully submitted on this 5th day of October, 2001.

(Signed in the original)

Janine Ferretti

Executive Director