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January 4, 1999

Amended NGO Petition to the North American Commission For
Environmental Cooperation for an Investigation and
Creation of a Factual Record Under Articles 14 and 15

Via: Federal Express and Mail

Submission ID: SEM-98-003

Submitted To:

Ms. Janine Ferretti
Interim Executive Director
North American Commission
for Environmental Cooperation
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CANDADA H2Y 1N9

Copies To:

c. Hon Carol Browner, US EPA
c. Hon. Christine Stewart, MP
c. Hon. Julia Carabias, Minister
c. Mr. Gary V. Gulezian, EPA
c. Joint Public Advisory Comm.
c. David Markell, CEC
c. Earthlaw, Denver
copies

Executive Summary

A December 14, 1998, determination by the CEC concerning our previous citizen petition of May 28, 1998, concludes that consideration of our requests under Article 14 is not possible.

It was suggested that the NAFTA agreement prohibits CEC from investigating any persistent failure of the US Environmental Protection Agency to enforce two domestic laws and two treaties with regard to "persistent toxic" air pollution emissions from solid waste and medical waste incinerators, because regulation of air pollution is always a "standard-setting" program.

In this amended submission, we assert that this is not true - indeed quoting the International Joint Commission to the contrary. There is an alternative approach to air pollution elimination that does not involve "standard-setting". This includes programs like source reduction, product redesign, separation of waste prior to incineration, recycling, or simply closing the incinerator - front end control rather than end of pipe control.

None of these alternative programs involve "standard setting", and therefore, consideration of our original petition as well as this amended petition, should not precluded from consideration by CEC under Article 14 and Article 15. These alternatives contrast sharply with the end of the smokestack or waterway pipe emission control programs, where emission standards are in fact set and emission control equipment is often prescribed.

Since emission "standard setting" and prescription of emission control equipment are not involved in the implementation and enforcement of any of these alternatives, the Secretariat of CEC should be able to recommend that the Council consider our petition under Article 15.

Great Lakes Water Quality Agreement - Strong Opposition of International Joint Commission to Standard Setting for Persistent Toxic Substances

Twenty six years ago, the United States and Canada signed the treaty, which has been ratified by both nations, and carries the force of law. The treaty, and all of its later amendments, establishes a standard of "virtual elimination of persistent toxic substances" and "zero discharge".

The International Joint Commission has expressed strong opposition to "standard-setting" approaches, because the goal of virtual elimination and zero discharge cannot be achieved in this manner. Alternative programs such as source reduction, product redesign and recycling are essential.

To summarize, for all of those facilities whose air plumes contaminate the Great Lakes with persistent toxic substances - a large airshed, how can the CEC maintain that the "zero discharge" and "virtual elimination of persistent toxic substances" program established 26 years ago by a ratified treaty, allows the US Environmental Protection Agency the option of a "standard setting" program?

The International Joint Commission has pointed out that both the United States and Canada have persistently failed to develop and enforce programs capable of achieving the goals of the treaty. For the United States, some of the provisions of the Clean Air Act and the Pollution Prevention Act echo the treaty requirements, and have not been enforced.

Our original petition, as does this amended one, focused particularly on the mercury and dioxin/furan emissions from solid waste and medical waste incinerators. We are happy to say that the US Environmental Protection Agency has initiated programs that move in the right direction for elimination of mercury emissions. This is not the case for dioxins/furans.

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NGO Petition

Re: New and Amended Citizen Petition: Request for Additional Determination and Clarification of SEM-98-003

Dear Ms. Ferretti,

We want to thank CEC for its speedy determination of our May 28, 1998 submission with eight other groups and experts on enforcement matters concerning solid waste and medical waste incinerators, pursuant to Article 14 and Article 15 of the North American Agreement on Environmental Cooperation.

But, it's a disappointment that your determination has not addressed each category of our original submission. With all courtesy, we specifically assert that the portions of the Clean Air Act as well as two binational treaties, listed on page 2 of this letter, do not constitute "standard setting" programs as suggested in your determination letter of December 14, 1998.

The old fashioned end of pipe emission control and best available technologies for emission control are "standard setting" methods. Alternative approaches such as pollution prevention, product redesign, procedure, and "virtual elimination" and "zero discharge" are not standard setting programs and require a very different implementation approach.

The International Joint Commission and many experts in the field have taken the point of view that "standard-setting" approaches for persistent toxic substances are inappropriate and unworkable, and should be avoided in favor of "virtual elimination" and "zero discharge".

Therefore, your determination does not apply to them. Each category of our submission presented on the next page needs to be addressed separately by the CEC, and you have still failed to do so. We are looking forward to this. Thank you.

Consider This Letter a New and Amended Submission

For that reason, please consider this letter - combined with our previous submission of May 28, 1998 and supporting materials, - to be a new and amended submission. We are asking you for an investigation under Article 14 and the creation of a factual record under Article 15.

The issue is the same. Has the US Environmental Protection Agency failed to enforce the key provisions of the following portions of the law and treaties which are not standard setting approaches and therefore, are not precluded from

being recommended for consideration by the Secretariat to the Council of CEC? We assert that while there are some bright spots, on the whole there has been a persistent failure by the US Environmental Protection Agency to enforce these laws and treaties with regard to solid waste and medical waste incinerators. And this is also true of some other US federal agencies.

Non-Standard Setting Programs Addressed By This Citizen Submission

1) The Clean Air Act as amended in 1990.
42 Section 7401(c): Pollution prevention. (This is not a standard setting emissions program, but rather seeks to reduce an eliminate pollution via alternative approaches such as source reduction, product redesign, recycling, etc.)
42 Section 7415(a)(b): Endangerment of public health or welfare in foreign countries from pollution emitted in the United States. (This is also not a standard setting program, but rather one of procedure.)
42 Section 7418(a): Control of pollution from Federal facilities, to comply with all Federal, State, interstate and local requirements. (For facilities that discharge by air to the Great Lakes, this is not a standard setting program.)

2) Pollution Prevention Act of 1990, 42 Section 13101 et seq: All provisions. (This is not a standard setting program, but rather seeks to reduce and eliminate pollution via alternative approaches other than standard setting such as product redesign and source reduction, and recycling.)

3) The Great Lakes Water Quality Agreements of 1972, 1978 and the Protocol of 1987, and the 1997 Great Lakes Binational Strategy. (This is not a standard setting program, and the International Joint Commissions has made it very clear that they are opposed to standard setting programs for persistent toxic substances. Rather the goal is "zero discharge" and "virtual elimination" for persistent toxic substances which can only be achieved by pollution prevention approaches such as product redesign.

There also looms the legal question whether the US EPA has even the right to override this treaty and set standards for persistent toxic substances.)

4) The Agreement Between the Government of Canada and the Government of the United States Concerning Transboundary Movement of Hazardous Waste of 1986. (Again, this is not a standard setting program but rather a procedure.)

Request For Additional Determination Under SEM-98-003

We are asking the CEC to make additional determinations on our original submission for five reasons:

1) Failure to Address All Requests in the Determination: You have not answered most of the requests of the original submission in your determination. We list some of the major missing categories beginning on page 7.

2) Failure to Address Procedural and General Requirements: There are some procedural requirements of the US Clean Air Act that do not involve standard setting, yet have not been complied with by the US Environmental Protection Agency with regard to incinerators pollution. You have not addressed these.

Furthermore, the Pollution Prevention Act lays out a general approach rather than a standard for emissions in a numerical sense or control of emissions with prescribed emission control equipment. We assert that in the case of incinerators, a persistent failure to effectively enforce this law is involved by the US Environmental Protection Agency.

Yet the programs envisaged by the law are process oriented, procedural, and general. Your determination of December 14, has not addressed how process, procedure and general strategies could be considered "standard setting" and therefore, unworthy of Council consideration.

Moreover, the May 1994, Executive Order of President Clinton specifically mentions pollution prevention pursuant to the North American Agreement on Environmental Cooperation. This was the intent of the United States in signing the environmental side agreements. Pollution prevention is not a standard setting program but rather a process (much like integrated pest management or product cycle analysis) to implement continous reductions of pollution in an economically sound way over time.

3) Failure to Address Great Lakes Water Quality Agreement: In particular, you have not addressed the failure of the US government to enforce the requirement laid out by the ratified Great Lakes Water Quality Agreement of 26 years ago, which set out the standard of "virtual elimination of persistent toxic substances" into the Great Lakes and "zero discharge".

There is no standard setting involved here by the US Environmental Protection Agency because the standard was set by treaty at virtually zero 26 years ago. Such a goal requires a completely different approach than standard setting - more along the lines of pollution prevention and product redesign instead of emission control.

4) Failure to Address the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste: Similarly, your determination has not addressed our analysis concerning this bilateral agreement in our original submission.

As provided by Part 1, Article 104 and 104.1, the obligation to carry out this agreement "shall prevail to the extent of the inconsistency" between NAFTA and this bilateral agreement. And once again, standard setting is not at the heart of this agreement and it is a protected treaty under NAFTA.
This treaty takes precedence over NAFTA where there is a conflict of provisions.

5) Need to Reaffirm The Value of Negotiation: It is not enough to say that we can go to court in the United States on these issues. The purpose and intent of the environmental side agreements was to provide a way for non-governmental groups and citizens to bring an issue to the attention of the three

nations in a Council format, where a negotiated settlement would be feasible or at least where the matter could be considered in a group format.

Your narrow legalistic determination that it is not possible to move an issue from the Secretariat to the Council, because virtually all pollution issues involve "standard setting" seems to conflict drastically with the intent of the treaty signers.

Each of our requests for further determination listed starting on page 7 is supported by facts submitted with our original submission of May 28, 1998, as well as additional materials submitted to yourself on July 14, 1998, and to Mr. David Markell on November 4, 1998.

But before we go to the specific requests for additional determination, we want to summarize our understanding of the primary points of the CEC determination about our May 28, 1998 submission concerning persistent toxic substances emitted in air pollution from solid waste and medical waste incinerators.

Summary of Your Analysis of the Standard Setting Versus Enforcement Issue - Contrasted View of the IJC on Same Matter

It appears that the footnote on page 6 of your letter summarizes the present position of the CEC Secretariat on our submission:

> "We emphasize the narrowness of our determination in drawing a distinction between standard-setting and enforcement in the context of regulations. We are not concluding that all regulations are necessarily beyond the scope of Article 14. For example, we voice no opinion here as to whether a submission alleging that a Party's regulations inappropriate narrow the scope of EPA inspection or monitoring authority might qualify for review under Article 14(1)..."

On page 5, the analysis lays out the issue further:

> "...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 the 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, byond the scope of Article 14".

Secondly, your position on the failure of the United States to enforce the "virtual elimination" and "zero discharge" standard established 26 years ago by the Great Lakes Water Quality Agreement is that it too falls on the "standard-setting" side of the line rather than on the implementation and enforcement side of the line.

<u>Substantial Divergence With International Joint Commission Position</u>

Your position here contrasts dramatically with the International Joint Commission, the two nation advisory group assigned to advise on and

coordinate actions with regard to that treaty. The IJC argues against "standards setting" and in favor of the virtual elimination goal and intent of the treaty. Their position is concurred in by many practicing experts.

> "...(T)he Commission concludes that attempts to regulate persistent toxic substances have not resulted in an efficient or successful set of programs....Surely it is time to ask whether we really want to manage persistent toxic substances after they have been produced, or whether we want to eliminate and prevent their existence in the ecosystem in the first place".

In other words, the IJC makes a clear distinction, draws a clear bright line, between the standard setting approach to pollution reduction and the virtual elimination approach to persistent toxic substances. That is same the clear line that we also stressed in our submission to CEC.

EPA Makes Some Partial Progress Towards The IJC Format for Mercury

The IJC program is not impractical, and very likely will be less expensive over the long term. And the US Environmental Protection Agency has made some partial progress towards the adoption of the IJC persistent toxic pollutant format in a practical and robust fashion for control of mercury releases into the environment from incinerators.

It is not possible to burn mercury without mercury air pollution, and so the strategy - a robust one - has been to reduce the amount of mercury in batteries and other materials that could be burned or released from discards.

The US Environmental Protection Agency program for curtailment of mercury emissions from solid waste and medical incinerators is at least headed in the direction outlined by the Clean Air Act, the Pollution Prevention Act, and the Great Lakes Water Quality Agreement.

EPA Program For Dioxin Control Fails To Move Towards IJC Format

In contrast, EPA's program for dioxin cannot achieve "virtual elimination" or avoid pollution of the Great Lakes or Canada. Just as with mercury, it is not possible to burn chlorine without producing dioxins. And many products burned in incinerators contain high levels of chlorine as well as toxic metal fillers such as PVC plastics (which are about half chlorine).

Virtual elimination or zero discharge of dioxins and furans requires that chlorine containing compounds be separated and removed from solid waste or medical waste prior to burning - as is being done for mercury, that products be redesigned so that they are not manufactured using chlorine, or that the incinerators be closed. All three options have nothing to do with standard setting.

Virtual elimination for dioxin cannot be achieved with air pollution control equipment, even with the highest level of air pollution standards. One reason is that incinerators are constantly malfunctioning. Another reason is that even the manufacture of products with chlorine will produce secondary emissions of dioxins throughout the manufacturing system. A third reason is that many consumers bypass the city collection systems and

burn chlorine containing products in their back years or suffer fires in their facilities or homes.

Request For Additional or Clarifying Determination on Following Questions:

Question #1: Great Lakes Water Quality Agreement of 1972, 1978, and the Protocol of 1987 and the 1997 Great Lakes Binational Strategy.

Legal experts are united in the position laid out by the US Constitution that treaties that are signed by the President and ratified by the US Congress are laws of the nation. Indeed, treaties can take precedence over domestic laws, as we saw when the Ethyl Corporation threatened the Canadian Parliament with a $251 million lawsuit under NAFTA for even debating whether to forbid the sale of manganese as a gasoline additive in Canada.

The Great Lakes Water Quality Agreement calls for an alternative approach to pollution- not one based on emission standards but rather one based on "zero discharge" and "virtual elimination of persistent toxic substances". The original Agreement stated, "it is the policy of the Parties that...the discharge of toxic substances in toxic amounts be prohibited and the discharge of any or all persistent toxic substances be virtually eliminated". This was not a "standard" based program for persistent toxic substances, and therefore, there should be no bar for the Secretariat to submit failure to enforce this provision to the Council for consideration of remedial action with regard to mercury and dioxin.

As already noted, this strategy requires a completely different approach such as waste reduction, product redesign, recycling, completely returnable products and so forth. A quick summary of the IJC approach as it has been developed over the years is presented in Chart 1.

The International Joint Commission and many others have repeatedly noted that the United States as well as Canada have failed to implement the virtual elimination strategy laid out by the treaty twenty six years ago. IJC has reaffirmed this many times - with the last being in their Ninth Biennial Report on Great Lakes Water Quality and has called for an evolution of thinking.

In the Sixth Biennial report, for example, IJC wrote, "We have not yet virtually eliminated, nor achieved zero discharge of any persistent toxic substance". However, recent actions on mercury by the United States and Canada are beginning to head in that direction. And we are happy to see that.

Enclosed also with this letter is our comments to the Federal Register notice concerning the US Environmental Protection's draft program for PBT, "Priority, Persistent, Bioaccumulative, and Toxic Pollutants". Again, we stressed that while the mercury control program is beginning to head in the right direction, the dioxin and furan elimination programs continue to be very poor.

In summary, we are asking you now to justify how the Great Lakes Water Quality Agreement could be called a "standard-setting" program for mercury and dioxins when the International Joint Commission as well as numerous experts

admantly maintain that that is not the case for persistent toxic substances, and indeed, that standard setting for persistent toxic chemicals like mercury or dioxin is a bad idea.

1) How can you maintain that the strategy of product redesign, the process of waste reduction, recycling, totally returnable products and pollution prevention is a "standard setting" program"?

2) How can you maintain that a "zero discharge" and "virtual elimination for persistent toxic substances" program established 26 years ago by treaty, allows the US Environmental Protection Agency the option of overriding the treaty and establishing a "standard setting" program?

3) Standard setting is an emission oriented program - aimed at reducing the pollution at the end of the smokestack or waterway pipe. Pollution prevention or elimination must be aimed at the beginning and middle of the industrial process or recycling waste back into the process. And it is distinctly different from a standard based program, but one of continuous redesign of the product and the process to provide a continuously improved reduction and elimination of pollution.

We hope that you will refer our submission to the Council, because there is ample evidence that at least for dioxins and furans, the US Environmental Protection Agency has persistently failed to enforce the provisions of the Great Lakes Water Quality Agreement. We would like to change this situation through consideration and negotiation among the parties. We ask you to make a determination.

Question #2: The Agreement Between the Government of Canada and the Government of the United States Concerning Transboundary Movement of Hazardous Waste of 1986.

Incinerators convert solid or medical waste into hazardous waste air emissions including mercury and dioxins. Instead of depositing solid or medical waste domestically into landfills, or preventing the generation of such waste or recycling it, incinerators combust it, covert some of it to hazardous waste, and then send it across the border to Canada or other nations via the air.

This binational agreement requires the country of export to notify Canada, and receive approval for export of the hazardous waste across the border. This is not a "standard-setting" program, but one of procedure.

For that reason, it is hard to see why this issue could not also be referred by the Secretariat to the Council for consideration. We ask you to make a determination.

Question #3: Clean Air Act, 42 Section 7401 (c): Pollution prevention and Pollution Prevention Act of 1990, 42 USC 13101 et seq: All provisions.

The Pollution Prevention Act of 1990, which is partially incorporated into the Clean Air Act as amended in 1990, provides a clear hierarchy of pollution

prevention programs for all of the management programs of the Environmental Protection Agency.

This is not a standard-setting program, but very much in harmony with the alternative approaches to persistent toxic pollutants favored by the Great Lakes Water Quality Agreement.

Yet, the Environmental Protection Agency has failed to propose source reduction and pollution prevention as a mandatory component with regard to regulation of incineration, in harmony with the Clean Air Act's provision that the first priority is to: "(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications.

Programs aimed at medical waste incinerators are beginning to head in the right direction, as hospitals find that steam sterilization, elimination of mercury, and landfill of other products may be less expensive.

Because these provisions of US law do not envisage "standard-setting", we see no reason why this issue cannot be referred by the Secretary to the Council. We ask you to make a determination.

Question #4: Clean Air Act, 42 Section 7415(a)(b): Endangerment of public health or welfare in foreign countries from pollution emitted in the United States.

This is another non-standard-setting program that should be eligible for referral from the Secretariat to the Council. It requires the Administrator of the Environmental Protection Agency, whenever he or she receives reports, surveys or studies from any duly constituted international agency such as the International Joint Commission 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", to notify the Governor of the State in which such emission originates.

Such notification is considered a "finding" that requires the State to revise its air pollution plan to prevent or eliminate the endangerment. This provision does not specify how prevention or elimination is to achieved, but it begins the process. Unfortunately, the Administrator has not carried out this program.

We see no reason why this issue cannot be referred by the Secretariat to the Council, since it does not automatically involve "standard-setting". Instead, a Governor could opt for pollution prevention alternatives, and indeed probably must in the case of the Great Lakes to comply with treaty requirements. We ask you to make a determination.

Question #5: Clean Air Act, 42 Section 7418(a).

This section requires control of pollution from Federal facilties to comply with all Federal, State, interstate and local requirements.

Yet, a primary incinerator source of dioxin and mercury to the Great Lakes is located at the Norfolk Navy Yard, Virginia. This hot sided emission control

solid waste incinerator is being allowed to retrofit with better emission control, rather than being addressed by closing, by removing materials containing persistent toxic materials prior to burning or by redesign of the products so that they do not contain persistent toxic materials.

This means that “virtual elimination” and “zero discharge” to the Great Lakes cannot be achieved by this incinerator - in violation of the treaty requirements. It is highly likely that similar situations exist on other federal facilities that discharge by air to the Great Lakes.

Since virtual elimination is not a “standard-setting” process, we see no reason why the lack of the required program for the Norfolk Navy Yard cannot be referred by the Secretariat to the Council for consideration. We ask for a determination.

Question #6: Questioning of the Inspection Program of the United States for Incinerators:

You intimated in the determination brief in the footnote on page 6 that you voice no opinion whether a submission alleging that a Party’s regulations inappropriately narrow the scope of EPA inspection or monitoring authority might qualify for review under Article 14(1)...”

In our original submission, we avoided this issue because of Article 24, 1(b) of the environmental side agreements which provide that a Party can excuse themselves from the charge that they are not enforcing its environmental laws by claiming “bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.”

However, we want to point out the incredibly poor incinerator monitoring program by the US Environmental Protection Agency as described by Thomas Webster and Paul Connett in a just published article, which is also enclosed in its entirety. Some of the same material was presented in our original submission to CEC. The authors are indeed astonished and incredulous at the EPA record:

> “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 only once or never tested at all. Although the current lack of emission data is improving, operators and regulators in the past seemed quite happy to deem a plant’s emissions 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 variation, 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. The fate of dioxin capture in ash also receives insufficient attention. An increasing number of MSW incinerators facilities are now also burning medical, pharmaceutical and industrial wastes, or running at higher than nominal capacity. We do not include emissions from RDF produced at an MSW-handling facility but burned off-site, e.G., in industrial boilers and furnaces fitted with minimal or no air pollution control.”

To summarize, the air pollution dioxin emission of 26 percent of all MSW incinerators in the United States by volume has never tested, and most of the rest of the plants have been tested only once during startup. Furthermore, there has been a documented concerted effort to test plants under the most ideal circumstances rather than normal operating conditions, as is described in material forwarded to you with the original submission.

Surely, this record of not inspecting solid waste incinerators would meet all of your criteria for referring it from the Secretariat to the Council. We ask for a determination.

Need For A Ruling From The Council As To Whether The Secretariat Is Taking Too Narrow and Legalistic An Approach

It is a matter of concern to us that the extreme "narrowness" of your determination of December 14, 1998 conflicts with the purpose of Article 14, which was to allow non-governmental groups and citizens a non-legalistic process by which matters of importance could be addressed by representatives of the three governments together in Council.

As a practical matter, if CEC continues down the path of using this type of extreme legalism in future determinations, it would likely result in the following consequences:

1) Taking All Pollution Issues Off The Table: With regard to Article 14, CEC appears to have taken all consideration of toxics, air pollution, water pollution and quite possibly most other substantive matters off the table. Virtually all subjects of concern to CEC could be considered to be "standard-setting" almost without exception, even in the case of failure to provide inspectors or any of the other actions listed in Part 2, Article 5.

Your narrow determination would seem to render it impossible to move any toxics or pollution issue from the Secretariat level to the Council via Article 15. Your ruling appears to construct an "insurmountable" barrier to the use of Article 14 by non-governmental groups and citizens, despite the disclaimer that this is not your objective.

Under your determination, any and all pollution issues could be considered standard setting matters, even though they are not so considered domestically in the three countries.

In the United States, for example, an administrative agency does not have the legal option of creating standards by regulation that are substantially in conflict with the legislation that has been passed by the US Congress and signed by the President (or for that matter with treaty obligations.) Regulations are aimed at the "implementation" of the legislation on the books and the intent of Congress in passing that legislation.

The basic and underlying standard setting in the United States is by legislation or in the case of the Great Lakes by treaty, and not by the regulatory agency. Where an agency strikes out to undermine the legislation (or treaty) in a manner divergent enough to be obvious and even blatant - as opposed to the more minor types of "inconsistencies" - the court system very often

reverses the agency and requires them to redraft their regulations. (Such action, of course, also requires an outside party to challenge the regulations and bring the lawsuit which is one reason that many of the so-called "inconsistencies" remain.)

2) Only Mexico Is To Be Involved: Under your determination, actions with regard to pollution in the Canada and the United States are also taken off the table - never to be considered by CEC.

Only pollution generated by Mexico qualifies for CEC consideration, and that is only because there is funding available, providing a carrot. Under your narrow determination, there would be no actual substantive basis for consideration of failure to enforce pollution laws in Mexico except where the financial inducement might persuade them to participate.

3) Negotiation Is No Longer An Encouraged Route: It is true that we the submitters have standing and can go to federal court in the United States to enforce the failure of the United States to implement key portions of the Clean Air Act, the Pollution Prevention Act, and the Great Lakes Water Quality Agreement. We have discussed this option among ourselves and planned for it in the case that is is needed.

Indeed EarthJustice has recently filed a law case concerning the failure of the US Environmental Protection Agency to draft regulations that are consistent with the requirements of the Clean Air Act with regard to medical waste incinerators.

It is also true that in cases where the regulatory programs are very divergent from enabling legislation, such as in this case what is required by the Clean Air Act and the Great Lakes Water Quality Agreement, and where the facts are well documented and established over so many years, the probability that such legal action would prevail is quite high.

Negotiation Should Be A Preferred and Favored Program

But, we contend that the object of the environmental side agreements of NAFTA was to provide an amply opportunity for negotiation rather than legal action on these same issues - specifically with regards to the issue addressed by the Preamble of NAFTA's environmental side agreements that it is the "responsibility (of the States) to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

States or of areas beyond the limits of national juridiction".

We believe from long experience that negotiated settlements produce the best and most durable results in the long run, and that is why we made a submission to the CEC. Your narrow legalistic determination seems to attempt to close out that negotiation option on any matter relating to air or water pollution.

It would never be possible to advance an enforcement issue from the Secretariat to the Council under Articles 14 and 15, if all enforcement matters could always conveniently labeled "standard-setting" matters, even where this is an inaccurate assessment.

Requesting A Ruling From The Council

For all these reasons, it would seem that a ruling from the Council of CEC on what they would like to receive from the Secretariat would be appropriate. We hope that you will ask them for that. We in turn will write each member of the Council with that suggestion.

They have much to gain. It's much more attractive for government representatives of elected officials to deal with issues in a negotiated forthright fashion than to be sued, and deal with the issues under court order with all the adverse publicity. Furthermore, negotiated programs generally produce better results with less cost.

Summary of Our Requests for Determination

In this letter, we list and describe six different Clean Air Act, Pollution Prevention Act and treaty provisions - that were presented in the original submission - that do not involve "standard-setting". Failure of the US Environmental Protection Agency to enforce each of these provisions - since they do not involved "standard-setting" - should be eligible issues for the Secretariat to refer to the Council of CEC for consideration.

We are asking you for a determination on six questions that were amply described in the original submission, and which you did not address in your letter of December 14, 1998 - claiming inaccurately that they were "standard-setting" matters. In the last paragraph of your letter, you write:

> "Pursuant to Guideline 6.2, the Secretariat, for the foregoing reasons, will terminate the Article 14 process with respect to this submission, unless the Submitters provide the Secretariat with a submission that conforms to the criteria of Article 14(1) within 30 days after receipt of this Notification."

Please consider this letter of January 4, 1998 to be a new and amended submission to the North American Commission for Environmental Cooperation - - combined with and supported by the original submission and supporting material of May 28, 1998, and the additional materials sent to you on July 14, 1998, the additional materials sent to Mr. David Markell on November 5, 1998, and the additional materials forwarded with this letter.

We have demonstrated in this letter that this submission, as well as most of the previous one, conforms to the criteria of Article 14(1). And we have forwarded you this submission to you within the required 30 days.

Remedies Sought

We are asking you for three remedies:

1) This citizen petition asks the North American Commission for Environmental Cooperation under Article 14 to undertake:

A. an investigation of the violations of the legal requirements laid out by US domestic law and by two US-Canadian ratified treaties posed by the

regulations, the enforcement programs, and the operations of the US Environmental Protection Agency concerning control of persistent toxic pollutants emitted by US based solid waste and medical waste incinerators.

Each of these violations has been outlined and described in this citizen petition for solid waste and medical incinerators (with a special focus on mercury and dioxins), A similar problem has been described concerning the emissions of incinerators located on federal facilities, and;

B. an investigation the failure of the US Environmental Protection Agency to enforce the Clean Air Act, the Pollution Prevention Act, and two ratified treaties towards achievement of "virtual elimination of persistent toxic substance" and "zero discharge" and "prevention and elimination" of air pollution emissions from municipal solid waste and medical waste incinerators based in the United States but whose air emission plumes cross the Canadian border or contaminate the Great Lakes.

2) We are also asking CEC to create a factual report under Article 15. We are asking you to recommend that the Council consider how the US enforcement program could be brought into compliance. None of the requests above involve "standard-setting" issues and therefore, are not excluded from a referral from the Secretariat to the Council.

3) We are asking you, on behalf of the staff of the Secretariat, to seek guidance from the Council first, on what matters they would like to receive from the Secretariat; secondly, whether the extreme legalisms of your determination in our case is in harmony with the intent of the signers of the environmental side agreements; and finally, whether the Council wishes to discourage non-governmental and citizen submissions from being considered by the three government Council.

Sincerely,

Erik Jansson, Exec. Dir.

Signing Also on Behalf of The Following Original Signers of the May 28, 1998 Submission:

1) Elizabeth May, Exec. Dir. Sierra Club of Canada, Ottawa, Ontario
2) Dr. Brent Blackwelder, PhD, Pres., Friends of the Earth, Washington, D.C.
3) Carol Dansereau, Acting Dir., Washington Toxics Coalition, Seattle, Washington
4) Jay Feldman, Exec. Dir., National Coalition Against the Misuse of Pesticides, Washington, D.C.
5) Jon Stier, WASHPIRG, Seattle, Washington
6) Dr. Rosalie Bertelle, PhD, International Institute of Concern for Public Health, Toronto, Ontario
7) Dr. Joseph Cummins, PhD, Prof. Em. University of Western Ontario, London, Ontario
8) Delores Broten, Reach for Unbleached, Whaletown, British Columbia

Material Enclosed:

Webster, Thomas and Paul Connett, "Dioxin emission inventories and trends; the importance of large point sources", Chemosphere, 37/9-12 (1998) 2105-2118

Department of the Planet Earth, Comments on Multimedia Strategy for Priority PBT Pollutants and the Draft EPA Action Plan for Mercury, November 16, 1998: OPPTS - 00255