

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

Submitter(s): Methanex Corporation

Concerned Party: United States

Date Received: 18 October 1999

**Date of this
Determination:** 30 March 2000

Submission I.D.: SEM-99-001

I-INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”) provides that the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law, if the Secretariat finds that the submission meets the requirements in Article 14(1). On 18 October 1999 the Submitters filed a submission with the Secretariat pursuant to Article 14 of the NAAEC. The Secretariat has determined that one of the assertions in this submission meets the criteria in Article 14(1) and that this assertion merits a response from the Party in light of the factors listed in Article 14(2). The Secretariat is dismissing a second assertion contained in the submission on the ground that it raises issues that are beyond the scope of the Article 14 process. The Secretariat sets forth its reasons in Section III below.

II-SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. The first is that the government is failing to effectively enforce various environmental laws relating to water resource protection and concerning underground storage tanks (USTs).¹ This assertion rests on a three-step analysis. The submission asserts that there is a regulatory scheme in place in California relating to releases of hazardous materials, such as gasoline, from USTs.² Next, it asserts

¹ See e.g., Submission at 3.

² See e.g., Submission at 1.

that there are substantial numbers of violations of this regulatory scheme.³ Finally, the submission claims that the government has failed to effectively enforce the regulatory scheme, and that this failure to enforce has "allow[ed] gasoline to be released into the environment from leaking USTs."⁴ In the words of the Submitter, "[t]he harm caused by this lack of enforcement is . . . clear."⁵

The submission's second assertion is that existing laws are insufficiently protective of human health and the environment because they do not regulate certain categories of USTs. The submission states that "as only a portion of USTs are regulated, California has also failed to enforce its environmental laws . . . by not regulating all sources of environmental contamination."⁶

III - ANALYSIS

A. Article 14(1)

The assertion that California and/or the United States is failing to effectively enforce various environmental laws satisfies the criteria for further consideration contained in Article 14(1), with the qualifications discussed below.⁷ First, the submission meets the requirements contained in the opening sentence of Article 14(1). This sentence authorizes the Secretariat to consider a submission "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." Article 45(1) of the NAAEC defines "non-governmental organization" to include, *inter alia*, "any . . . business . . . which is neither affiliated with, nor under the direction of, a government. . . ." Based on the information provided in the submission, the submitter qualifies as a "non-governmental organization."⁸ It is a business and there is no indication that it is affiliated with, or under the direction of, a government.

Further, the assertion in the submission that the Party has failed to effectively enforce UST-related requirements⁹ focuses, as required, on a Party's asserted failure to effectively enforce the law, not on the effectiveness of the law itself.¹⁰

³ See e.g., Submission at 1, 2, 7-9.

⁴ See e.g., Submission at 1, 3, 4, 8, 11.

⁵ Submission at 2.

⁶ Submission at 1.

⁷ The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind. See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

⁸ See NAAEC Article 45(1), Guideline 2.1, Submission at 13.

⁹ See e.g., Submission at 1.

¹⁰ See SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998).

Third, the submission's focus is on the asserted failure to effectively enforce "environmental laws." The submission challenges the enforcement of numerous laws, including the United States Clean Water Act, the United States Safe Drinking Water Act, the California Water Code, and the California Code of Regulations.¹¹ These laws qualify as "environmental law" for purposes of the NAAEC in that their primary purpose is "protection of the environment, or the prevention of a danger to human life or health. . ."¹²

Finally, the submission focuses on asserted failures to enforce that are ongoing, thereby meeting the requirement in Article 14(1) that a submission assert that a Party "is failing" to effectively enforce its environmental law.

Article 14(1) lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.¹³

The first two criteria are straightforward and may be addressed quickly. The submission is in English, a language designated by the Parties.¹⁴ The submission also clearly identifies the organization making the submission.¹⁵

Concerning the third criterion in Article 14(1), the submission provides sufficient information to allow the Secretariat to review the submission with respect

¹¹ Submission at 3-6.

¹² Article 45(2)(a). The relevant provisions of the California Code have this purpose.

¹³ Article 14(1)(a)-(f).

¹⁴ Article 14(1)(a), Guideline 3.2.

¹⁵ Article 14(1)(b), Submission, cover page and inside cover page, and page 2.

to the assertions of a failure to effectively enforce the California laws cited.¹⁶ Among other things, the submission contains a fairly extensive discussion of asserted failures to effectively enforce the State's UST requirements.¹⁷ It also provides as Appendices various government documents relating to the subject matter at issue, including reports issued by the California State Auditor concerning the regulation of USTs and enforcement of regulatory requirements pertaining to USTs.¹⁸

The submission, however, does not provide sufficient information concerning the federal Safe Drinking Water Act and federal Clean Water Act. As has been noted in other Determinations, while the requirements of Article 14(1) are not intended to place an undue burden on submitters, a certain amount of support is required for assertions at this initial stage.¹⁹ The vast majority of this submission focuses on asserted failures to effectively enforce various California environmental laws. Indeed, the "Summary" portion of the submission refers exclusively to California and California laws. While the submission makes brief references to the referenced federal laws, it does not provide the Secretariat with the information necessary to review the submission adequately with respect to these laws.²⁰

The fourth criterion in Article 14(1), relating to whether a submission is "aimed at promoting enforcement," also warrants elaboration. Guideline 5.4 indicates that in determining whether a submission appears to be aimed at promoting enforcement rather than at harassing industry, the Secretariat is to consider factors such as whether or not:

- (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;
- (b) the submission appears frivolous.

An unusual feature of this submission is that the Submitter is a producer of methanol, which is used in the production of Methyl Tertiary-Butyl Ether (MTBE).²¹ MTBE, in turn, is a constituent of gasoline that is stored in, and sometimes leaks from, USTs. The Submitter's status may raise a question for some concerning its motivation in filing the submission. The Submitter expresses the hope that more stringent enforcement of UST requirements will reduce leakage from such tanks and thereby enhance environmental protection and promote

¹⁶ Article 14(1)(c), Guideline 5.2, 5.3.

¹⁷ See e.g., Submission at 6-11.

¹⁸ Annexes G and H.

¹⁹ See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

²⁰ See e.g., Guideline 5.2 and 5.3.

²¹ Annex K, March 9, 1999 letter from Fred T. Williams, Vice President Marketing, Methanex Corporation to Governor Gray Davis, stating that "Methanex is the world's largest producer and marketer of natural gas derived methanol, one of the two components used to produce MTBE."

protection of public health.²² In addition to its expressed concerns relating to the harm that such leaks cause to the environment and public health, the Submitter has an economic interest. In March 1999, California's Governor issued an Executive Order in which he announced a phase-out of the use of MTBE in gasoline.²³ The submission notes that the Executive Order cites the environmental threat that MTBE poses to groundwater and drinking water because of leaking underground fuel storage tanks.²⁴ The submission suggests that the approach of phasing out MTBE is a flawed strategy for addressing this environmental problem, and that heightened enforcement of UST requirements to prevent leakage would be a better approach, stating as follows:

This [the Governor's] Order acknowledges the UST issue, but focuses attention on one gasoline component, namely MTBE. It thus treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State's failure to enforce its environmental laws.²⁵

The Submitter expresses the view that, in short, the government's responsibility is to improve enforcement of existing regulations in order to prevent leakage and promote clean-up.²⁶ The submission states that the risk to the environment is not from MTBE, but from leaking USTs.²⁷

The Submitter's status as a producer of methanol does not take away from the focus of the submission, which is on the asserted need for tighter enforcement. It also, importantly, does not suggest that the purpose of the submission is to challenge a particular company or business's compliance with UST requirements. The submission states on its face that it is focused on the acts or omissions of the government in enforcing the law and for purposes of Article 14(1)(d) this appears to be the case.²⁸ The submission summarizes its position on this issue as follows:

[T]he submission is aimed at enforcement, and not at harassing any particular company or industry in the United States. Methanex notes that California authorities have failed to enforce their environmental laws with the result that gasoline released from USTs has and continues to contaminate the environment, including soil, air and water. . . . Methanex submits that active enforcement of California's existing environmental laws will ensure that gasoline is not unnecessarily released into the

²² Submission at 1-2, 13.

²³ Submission at 2.

²⁴ Submission at 2.

²⁵ Submission at 2. The Secretariat's Determination is not intended to address this assertion of the Submitter and should not be viewed as doing so. As noted above, the Secretariat's focus is on the assertions that various environmental laws relating to releases of hazardous materials from USTs are being violated and that the government is failing to effectively enforce these laws.

²⁶ Submission at 11.

²⁷ Submission at 12.

²⁸ Article 14(1)(d), Submission at 13.

environment from USTs and that such diligent enforcement of environmental laws will result in increased protection for the environment.²⁹

In sum, the submission's assertion satisfies the criterion in Article 14(1)(d).

With respect to the fifth criterion in Article 14(1), the submission indicates that the Submitter has communicated its concerns to government officials, and it indicates that to date it has not received a response.³⁰ The submission also includes copies of relevant correspondence.³¹

Concerning the sixth criterion, contained in Article 14(1)(f), the submission is filed by an organization residing or established in the territory of a Party, notably Canada.³² The Submitter's status as a for-profit entity raises the issue of whether Article 14/15 is reserved for environmental NGOs/individuals. There is nothing in the Agreement itself that limits the pool of submitters in this way. Article 14(1)(f) simply requires that the submission be filed by an organization residing or established in the territory of a Party. As noted above, Article 45(1) of the NAAEC supports allowing businesses to file submissions through its definition of an NGO to include any business organization that is neither affiliated with, nor under the direction of, a government. As a result, a business may be a submitter so long as it is not affiliated with, nor under the direction of, a government, and so long as it resides or is established in the territory of a Party. Methanex does not seem to be disqualified under any of these exclusions and therefore it qualifies under Article 14(1)(f) as a potential submitter.

For the foregoing reasons, the submission's assertion of a failure to effectively enforce the above-referenced California environmental laws satisfies the criteria in Article 14(1).

We now turn to the submission's second assertion -- that existing laws are insufficiently protective of human health and the environment because they do not regulate certain categories of USTs. Article 14 focuses on asserted failures to effectively enforce. It does not provide jurisdiction to consider assertions that a Party's environmental laws are ineffective.³³ The Secretariat's understanding is that this assertion involves a challenge to the effectiveness or adequacy of the regulatory scheme itself.³⁴ Because this claim is beyond the scope of the Article 14 process, we do not consider it further.

²⁹ Submission at 13.

³⁰ Article 14(1)(e), Guideline 5.5, Submission at 13, 14, Annex K.

³¹ Guideline 5.5., Submission at 13, 14, Annex K.

³² Article 14(1)(f), Submission at 3, 13.

³³ The Secretariat discussed the distinction between challenges to the effectiveness of a Party's enforcement practices (within the scope of Article 14) and challenges to the adequacy of environmental laws themselves (beyond the scope of Article 14) in the Great Lakes determination. SEM-98-003 (14 December 1998).

³⁴ The Secretariat found the submission somewhat unclear concerning this assertion. Methanex alleges that "many of the State's USTs are unregulated, and thus they are not subject to any controls." (Submission at 4). The asserted failure targeted by this aspect of Methanex's submission appears to

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if the Secretariat finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the relevant Party prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.³⁵

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. The submission asserts that the Submitter "is concerned with the harm which has been, and continues to be, caused to the environment by California's failure to enforce its environmental laws."³⁶ It alleges that "[g]asoline, which is a hazardous substance, continues to be released to the environment and continues to contaminate the environment; soil, air and water."³⁷ The submission cites an excerpt from a

relate to the scope of California's UST and other water quality protection regulatory programs rather than to inadequate enforcement of such programs. As the Secretariat has noted in other proceedings initiated under Article 14, the purpose of the NAAEC is not to set environmental standards for the Parties, a right they have reserved to themselves. Government standard-setting is therefore outside the purview of Article 14 and the Article 14 citizen submission process is not available for challenges to a Party's exercise of its standard-setting authority. *See, e.g.*, SEM-98-003 (14 December 1998). The submission also asserts that California's failure to regulate all USTs contravenes California and federal environmental law. If such a failure exists, and if it contravenes one or more environmental laws, the submission conceivably could constitute an assertion of a failure to enforce, rather than a challenge to the scope of the law itself. If this is the assertion of the Submitter, it has not developed the assertion sufficiently to make Secretariat review appropriate.

³⁵ Article 14(2).

³⁶ Submission at 2. See also Submission at 14 (asserting that "harm has resulted, and continues to result, from California's lack of enforcement. . . .")

³⁷ Submission at 14.

report of the California State Auditor that indicates that leaking tanks "pose a major threat to California's groundwater. . . ." ³⁸ The Summary of the State Auditor's report states that leaking tanks are a threat to the State's drinking-water supplies: "the State of California has ample evidence that gasoline leaking from underground storage tanks is jeopardizing the safety of our drinking-water supplies. . . ." ³⁹ Assertions of substantial harm to the environment (here groundwater and drinking-water supplies) have been considered under Article 14(2)(a) for other submissions and they are relevant here as well. ⁴⁰ We note that the Submitter claims that the harm allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment. ⁴¹

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement. ⁴² The submission asserts that the failure to enforce is widespread. Assertions of this sort -- that there is a pattern of ineffectual enforcement -- are strong candidates for Article 14 consideration. ⁴³ This is particularly the case when, as here, it is also asserted that the failure to effectively enforce threatens substantial environmental harm.

Third, the submission indicates that private remedies to require the Party to enforce its law are not available. ⁴⁴ The submitter states that it has communicated its concerns to California officials but has not received a response to its letters or to a "Five Point Plan" it provided to Governor Davis of California. ⁴⁵ The Submitter advises in its submission that it has also filed a Notice of Intention to bring an investor-state dispute against the United States pursuant to Chapter 11 of NAFTA. ⁴⁶ The Secretariat notes that the Agreement expressly provides that the Party may raise the availability of private remedies in its response.

³⁸ Submission at 7 (the excerpt is from page 15 of the California State Auditor's report).

³⁹ Annex G, at 1.

⁴⁰ In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), for example, the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC." The same is true here. It appears that Methanex also claims at least indirect personal harm from the asserted failure to effectively enforce.

⁴¹ Guideline 7.4.

⁴² Article 14(2)(b).

⁴³ Submissions that focus on asserted failures to enforce concerning individual facilities also warrant consideration under Article 14 under some circumstances, as previous Secretariat Determinations and the Council's Resolution for SEM-96-001 reflect.

⁴⁴ Article 14(2)(c), Guideline 7.5, Submission at 13-15.

⁴⁵ Submission at 13 -15.

⁴⁶ Submission at 13.

Finally, the submission is not based exclusively on mass media reports. Instead, as noted above, the submission includes several government documents, among other materials, that relate to the assertion that there is a failure to effectively enforce that creates a substantial risk to public health and the environment.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that there is a failure to effectively enforce the California environmental laws referenced above merits requesting a response from the Party.

CONCLUSION

For the foregoing reasons and to the extent outlined above, the Secretariat has determined that the assertion that the Party is failing to effectively enforce its environmental laws meets the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that this assertion in the submission merits requesting a response from the Government of the United States. Accordingly, the Secretariat requests a response from the Government of the United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.

(original signed)

David L. Markell

Director, Submissions on Enforcement Matters Unit

c.o. Mr. William Nitze, US-EPA (with annexes)

c.c. Ms. Norine Smith, Environment Canada

Mr. José Luis Samaniego, SEMARNAP

Mr. Michael McDonald, Methanex Corporation

Ms. Janine Ferretti, CEC Executive Director