**Secretariat of the Commission for Environmental Cooperation**

**Determination in accordance with Articles 14(1) and (2)
of the North American Agreement for Environmental Cooperation**

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| **Submitters:** | Friends of the Earth Canada<br>Friends of the Earth-U.S.<br>Earthroots<br>Centre for Environmentally Sustainable Development<br>Great Lakes United<br>Pollution Probe<br>Waterkeeper Alliance<br>Sierra Club (U.S. and Canada) |
| **Represented by**: | Waterkeeper Alliance and Sierra Legal Defence Fund |
| **Party:** | United States |
| **Date received:** | 20 September 2004 |
| **Date of this determination:** | 24 February 2005 |
| **Submission I.D.:** | SEM-04-005 (Coal-fired Power Plants) |

## I. INTRODUCTION

On 20 September 2004, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that the United States is failing to effectively enforce sections 303 and 402 of the federal Clean Water Act (CWA) in connection with mercury emissions from coal-fired power plants to air and water that are allegedly degrading thousands of rivers, lakes and other water bodies across the United States. In a determination of 16 December 2004, the Secretariat found that the submission as a whole did not provide sufficient information to allow the Secretariat to review it, and therefore failed to satisfy Article 14(1)(c).[1] The

[1] Article 14(1)(c), Guideline 5.2, 5.3.

Secretariat gave the Submitters 30 days to re-file the submission, and on 18 January 2005, the Submitters re-filed the submission with an additional appendix containing an explanation of the new information provided and twelve sub-appendices.

The Secretariat has determined that the submission now satisfies Article 14(1) and that, based on the considerations in Article 14(2), it warrants a response from the United States. The reasons for this determination are provided below.

## II. SUMMARY OF THE SUBMISSION

This section summarizes the original submission as well as the additional information provided on 18 January 2005.

### A. The Original Submission

The Submitters assert that throughout the United States, the number of fish consumption advisories (FCAs)[2] for mercury has risen from 899 to 2347 since 1993, and that, according to the U.S. Environmental Protection Agency (USEPA or EPA), 35% of the total lake acres and 24% of the river miles in the United States are now under FCAs.[3] They contend that the USEPA "is allowing both non-point and point source discharges of mercury from coal-fired power plants that are contributing to a steady degradation of the nation's waterways as evidenced by increasing mercury fish advisories and the effective withdrawal of existing uses (fishable) of many of these water bodies."[4] According to the Submitters, these discharges include both air emissions of mercury that fall back to the earth in the form of precipitation or as dry particles and direct discharges to water.

The Submitters assert that mercury discharges from coal-fired power plants to air and water contravene provisions of the CWA enacted to prevent degradation of national waters, in *National Pollutant Discharge Elimination System* (NPDES) provisions under section 402 of the CWA and Water Quality Standards (WQS) provisions under section 303 of the CWA. According to the submission, the CWA, through the NPDES provisions, "requires the [USEPA] Administrator to establish and enforce technology and water quality-based limitations for point source discharges into the country's navigable waters."[5] The submission also describes the system for delegating permitting of point sources to states under USEPA's oversight authority.[6]

The submission then presents an explanation of state WQS. The Submitters assert that states designate uses, including both existing and desired uses, for all water bodies within their borders and that they are required to protect and maintain the level of water quality necessary

[2] The Submitters describe FCAs as "warning the general public and sensitive subpopulations, such as pregnant women, of the dangers of consuming this otherwise healthy food." Submission at 1.
[3] Submission at 1.
[4] Submission at 12.
[5] Submission at 6.
[6] *Id*.

to protect "existing uses."[7] They claim that "if a water in the U.S. was being used as a source for fish consumption on or after November 28, 1975, the CWA makes it clear that both point and nonpoint sources of pollutants must be controlled to allow this existing use to continue."[8] The submission describes the requirement to develop numeric or narrative water quality criteria to achieve and protect existing and designated uses of waterways under a three-tiered system for classifying water bodies, and also outlines the antidegradation provision, which the Submitters describe as "[t]he most critical component of the state WQS scheme."[9] According to the Submitters, "[t]he purpose of the antidegradation policy is to ensure that existing water uses and the level of water quality to protect those uses are maintained and protected."[10] They assert that the antidegradation provisions "require that both point and nonpoint sources of pollution be maintained to protect designated and existing uses of all U.S. waterways."[11] The Submitters assert that the USEPA retains oversight authority for all aspects of state WQS, including authority to approve state WQS or to promulgate its own standards if a state does not make changes USEPA says are needed to meet requirements of the CWA.[12]

The submission also outlines the CWA's provisions regarding Total Maximum Daily Loads (TMDLs), which the Submitters describe as essential for implementing the antidegradation provisions. The Submitters assert that "where waterways have become contaminated beyond levels set in the WQS, the state must establish TMDLs to bring a water body back into compliance . . . by establishing the maximum amount of pollution that can be added to [the] water body."[13] According to the Submitters, "[t]he CWA requires that TMDLs incorporate (1) a waste load allocation for point sources (those with NPDES permits), (2) a load allocation for natural background pollution, and (3) a load allocation for nonpoint sources."[14] The Submitters assert that "TMDLs apply to water bodies that exceed their WQS even where there is no point source of pollution, that is, where the only sources of pollution are nonpoint, for example from atmospheric deposition."[15] They contend that USEPA retains considerable oversight of a state's TMDL program, including authority to approve state TMDLs (or state "continuing planning processes" containing TMDLs) or to reject them and promulgate acceptable ones.[16]

Focusing on the years 1993 to 2003, the Submitters assert that the United States, through the USEPA, is failing on an ongoing basis to effectively enforce the NPDES provisions under section 402 of the CWA and the WQS provisions under section 303 of the CWA in three different ways. First, they contend USEPA issues NPDES permits or delegates to states the issuance of state permits meeting federal requirements that allow for ongoing point source discharges of mercury into U.S. waterways, without consideration for the cumulative impact of point and nonpoint discharges of mercury on degraded waters. They assert that a "factual

[7] Submission at 6-7.
[8] Submission at 7.
[9] *Id.*
[10] *Id.*
[11] Submission at 7-8.
[12] Submission at 8.
[13] Submission at 9.
[14] *Id.*
[15] *Id.*
[16] *Id.*

record would establish whether the [USEPA] is allowing direct discharges of mercury to waterways that are currently under FCAs for mercury and thus no longer suitable for fishing."[17] Second, they assert the USEPA approves inadequate state antidegradation policies and implementation procedures that fail to safeguard water bodies. Third, they claim the USEPA fails to use its authority to require states to adopt TMDLs for mercury where WQS are not being met, and to issue its own TMDLs where state action is inadequate.

### B. The Additional Information in Appendix 12

On 18 January 2005, the Submitters provided additional information in the form of Appendix 12 to the original submission. Appendix 12 contains an initial section containing a response to the Secretariat's determination of 16 December 2004, plus twelve sub-sections containing additional supporting information. The Submitters ask that the period covered by the submission be expanded to 1993 through 31 December 2004.

The Submitters state that "[t]he very nature of the allegations – that the U.S. government is failing to enforce its environmental laws with respect to mercury emissions from coal-fired plants across all of the country's almost 1,100 utility units and impacting virtually every waterway in North America - makes it highly impracticable to cite and provide documentary evidence of every alleged violation of the CWA with respect to every facility."[18] They explain that, nonetheless, they are providing "detailed information relating to the coal-fired plants in ten specific states, which [they] submit as exemplary of the widespread and systemic problem that is being asserted."[19] They assert that these states – Alabama, Illinois, Indian, Kentucky, Michigan, North Carolina, Ohio, Pennsylvania, Texas and West Virginia – "represent almost 60% of the mercury emissions from coal-fired power plants."[20] They provide data indicating that coal-fired power plants in these states emitted 73,624 pounds of mercury and mercury compounds to air in 2001 and 72,145 pounds to air in 2002.[21] They also provide data on the amount of mercury and mercury compounds those plants discharged to water in 2001 and 2002.[22]

For each of the ten states, the Submitters explain that Appendix 12 provides details and analysis of private remedies available to address the matters raised in the submission; statistical data of direct discharges to water from coal-fired power plants; charts that correlate designated uses of state waterways with mercury fish consumption advisories (FCA's); a list of the largest mercury emitting power plants in the state; a complete list of mercury-based FCA's for the state; an updated list of state-wide FCAs; a copy of the state's water quality standards, including its antidegradation policy and, where available, a list of designated uses of each waterway in the state and tier protection designations; a detailed review and analysis of state TMDL actions, including CWA § 303(d) mercury-impaired waterways and preparation of TMDLs for mercury impaired waters; and press reports critiquing EPA's

[17] Submission at 10.
[18] Submission, Appendix 12 at 4.
[19] *Id.*
[20] *Id.*
[21] Submission, Appendix 12 at 5-6.
[22] Submission, Appendix 12 at 6-7.

actions in dealing with mercury emissions under the CAA to provide a context for the Submitters' allegations.[23]

The Submitters append two Clean Air Act Title V permits for coal-fired power plants, which they claim are typical in that the permits neither place any restrictions on mercury emissions nor mention water quality standards or antidegradation. The Submitters claim that the failure of the permits to control mercury emissions is consistent with statements on USEPA's website that "EPA is committed to regulating and reducing power plant mercury plant emissions for the first time ever" and that "[o]n December 15, 2003, EPA signed its first ever proposal to substantially curb mercury emissions from coal-fired power plants."[24] The Submitters state that the conduct of the USEPA towards the coal-fired power industry as demonstrated by its handling of an ongoing mercury rule-making process under the Clean Air, while not a primary piece of evidence of non-enforcement, can properly be considered to give a factual context to the allegation of the USEPA's failure to effectively enforce the CWA.[25]

The Submitters also provide additional information regarding FCAs in the ten states. According to the Submitters, as of July 2004, four of the ten states (Ohio, Pennsylvania, Illinois and Kentucky) had state-wide mercury FCAs for both lakes and rivers, two (Indiana and Michigan) had state-wide mercury FCAs for either lakes or rivers, and four (Texas, Alabama, North Carolina and West Virginia) had no state-wide mercury FCAs but nonetheless had at least one, and as many as 17, mercury FCAs in the state.[26] The Submitters assert that West Virginia has declared a state-wide mercury advisory on its waters since the filing of their original submission.[27] They also assert that Texas, Alabama and North Carolina have state-wide mercury FCAs for coastal areas.[28] Appendix 12B provides detailed information regarding the specific water bodies under mercury FCAs for each state.

Regarding private remedies, the Submitters assert that one option would be to bring several hundred lawsuits against Clean Air Act Title V permitting authorities to challenge permits that fail to address antidegradation of waterways.[29] Another option would be to sue individual state governments in multiple lawsuits alleging failure to implement adequate water quality standards and antidegradation provisions.[30] They contend bringing multiple lawsuits would require considerable expense of time and money.[31] The Submitters provide information regarding lawsuits private citizens have brought to try, with mixed results, to force states and USEPA "to effectively control nonpoint sources of pollution and atmospheric deposition of toxics and to better implement current requirements under WQS and TMDL processes."[32] The Submitters assert that the TMDL litigation they reference "tends to strengthen [their]

[23] Submission, Appendix 12 at 7-8.
[24] Submission, Appendix 12 at 8.
[25] Submission, Appendix 12 at 10.
[26] Submission, Appendix 12 at 9.
[27] Submission, Appendix 12 at 13.
[28] Submission, Appendix 12 at 9.
[29] Submission, Appendix 12 at 11.
[30] *Id.*
[31] *Id.*
[32] *Id*.

assertion that the EPA fails to effectively enforce the relevant CWA provisions."[33] They conclude that "any attempts to address mercury emissions through TMDL litigation would itself be a great burden without necessarily dealing with the full extent of the problem."[34] They claim that pursuing litigation regarding individual NPDES permits would also be extremely cumbersome. In sum, noting that the failure to effectively enforce asserted in the submission is evidenced by the sum of the evidence regarding alleged failures based on the NPDES, antidegradation, WQS or TMDL processes, they claim it would be "highly burdensome to attempt to remedy the issue through available private means."[35]

With regard to their NPDES-related assertions, the Submitters provide additional information that identifies all of the facilities that discharge mercury to water in the ten states on which Appendix 12 focuses.[36] They note that in states without state-wide mercury FCAs, they were not able in each case to determine the name of the receiving water body to which NPDES-permitted facilities discharge mercury.[37]

With regard to their antidegradation-related assertions, the Submitters provide examples wherein they claim water quality standards have been exceeded across all tiers of water within each of the ten states.[38] According to the Submitters, "every time a 'fishable' waterway becomes subject to a mercury FCA and is no longer fishable it is, by definition, in exceedance of water quality standards for the pollutant for which the FCA was issued."[39] In addition, they assert that "these ten states exceed their WQS's narrative criteria regarding the addition of toxic mercury from power plants into local waterways, resulting in a significant human health threat and a continuing diminution in water quality."[40] The Submitters assert that USEPA routinely approves state WQS, including antidegradation provisions and implementation procedures, that illegally fail to control nonpoint source mercury pollution from power plants.[41] With respect to Tier II waterways, the Submitters clarify that, having found no information to the contrary, they assert in the submission that the USEPA has taken no action to implement BMPs for mercury from utility units in order to protect Tier II water bodies.[42]

With regard to their TMDL-related assertions, the Submitters state that for each of the ten states, they have cross-referenced the listing of impaired waters with the water bodies subject to a mercury FCA, reviewed the EPA approval and determined what, if any, TMDLs are planned or have been prepared for mercury-impaired water bodies.[43] They assert that state lists of impaired water bodies prepared under CWA section 303(d), while often incomplete, to a large extent list water bodies with mercury FCAs, but "there is little if any follow through

[33] *Id.*
[34] Submission, Appendix at 12.
[35] *Id.*
[36] Submission, Appendix 12 at 13, Appendix 12D.
[37] Submission, Appendix 12 at 13.
[38] Submission, Appendix 12 at 14; Appendix 12B; Appendix 12E.
[39] Submission, Appendix 12 at 14.
[40] Submission, Appendix 12 at 15.
[41] *Id.*
[42] Submission, Appendix 12 at 16.
[43] Submission, Appendix 12 at 17.

by states or EPA in terms of moving even to the stage of listing such waters for TMDL preparation."[44] They state they "could not find an example – among the hundreds of mercury-impaired waters – of a control program for non-point mercury sources and therefore no evidence of any action against coal-fired power plants."[45]

The Submitters include a detailed description of the progress toward TMDLs addressing mercury-impaired waters in the ten states. They contend that of these states, only North Carolina has a TMDL for a mercury-impaired water body that acknowledges contributions from coal-fired power plant air emissions, but they note further that this TMDL does not include a specific waste load allocation for power plants.[46] The Submitters state:

> [w]hile . . . the reasons for [the failure to adopt TMDLs addressing mercury emissions from power plants] are diverse – in the case of Pennsylvania no explanation is given and in the case of Michigan the EPA has offered to assist in preparing plans in 2011 – the systemic nature of the failure of effective enforcement is shown by the almost total absence of action on TMDLs and, more importantly, the concomitant failure by the EPA to take action.[47]

The Submitters note that in Georgia, pursuant to a lawsuit settlement, a state TMDL did address mercury deposition. The Georgia TMDL indicates that 99% of mercury deposition was from airborne sources, and according to the Submitters, it does not outline any non-point source control program against coal-fired power plants.[48] The Submitters state that the Georgia TMDL illustrates the predicament of state-prepared TMDLs addressing out-of-state non-point sources such as power plants, noting that this "presents a plausible explanation for the EPA's failure to effectively enforce the CWA provisions against states."[49] According to the Submitters, the absence of a national program highlights the failure of USEPA to act in regard to non-point sources of mercury from coal-fired power plants.

## III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,[50] Article 14(1) is not intended to be an insurmountable procedural screening device.

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[44] *Id.*
[45] Submission, Appendix 12 at 18.
[46] Submission, Appendix 12 at 18, 27-31.
[47] Submission, Appendix 12 at 39.
[48] Submission, Appendix 12 at 18.
[49] *Id*.
[50] *See e.g.* SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98- 003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

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

The opening phrase of Article 14(1) authorizes the Secretariat to consider a submission "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law […]." The submission meets the requirements inherent in this phrase. First, the Submitters are nongovernmental organizations as defined in Article 45(1) of the NAAEC. Second, the submission asserts that a Party, the United States, is failing to effectively enforce provisions of the CWA. Third, the NPDES and WQS provisions of the CWA are clearly environmental law within the meaning of NAAEC Article 45(2) and the submission alleges an ongoing failure to effectively enforce these provisions of environmental law. Last, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself. The Secretariat's determination of 16 December 2004 included a detailed discussion of how the submission meets these requirements.[51]

### B. Six Specific Criteria under Article 14(1)

Article 14(1) then 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.[52]

In its 16 December 2004 determination, the Secretariat found that the submission meets the criteria in Article 14(1)(a), (b), (d), (e) and (f).[53] However, the Secretariat further determined that the submission as a whole did not provide sufficient information to allow the Secretariat to review it, and therefore failed to satisfy Article 14(1)(c). Although the original submission and its appendices provided sufficient information with respect to some of the Submitters' assertions, information necessary for the Secretariat's review was lacking for others.[54]

With the additional information that the Submitters provided on 18 January 2005, the submission now fully satisfies Article 14(1)(c).

The starting point for the Submitters is information regarding FCAs for mercury in United States water bodies. The Submitters incorporated into the original submission information

[51] SEM-04-005 (Coal-fired Power Plants), Determination pursuant to Article 14(1) (16 December 2004).
[52] Article 14(1)(a)-(f).
[53] *Id.*
[54] *Id.*

available from United States government sources regarding all FCAs currently in effect in the United States.[55] Appendix 12, along with its sub-appendices, provides more detailed information regarding the mercury FCAs in the ten states on which the Submitters focus.[56] The Submitters treat these FCAs as an indicator of water quality impairment, citing information indicating that USEPA appears to concur, at least to some extent, with this approach.[57]

With this baseline of information regarding impaired waters subject to FCAs, the Submitters point to additional information in support of the asserted failures to effectively enforce the CWA. Overall, the water bodies of concern in the original submission could be discerned by cross referencing all waters subject to mercury FCAs with Tier I water bodies that have been historically used for fishing or designated as "fishable," and all Tier II and III water bodies. The only Tier I, Tier II or Tier III water body specifically identified in the body of the original submission as failing to meet antidegradation requirements was Everglades National Park, which according to Submitters is classified as an outstanding national resource water (ONRW) and Tier III waterway.[58] The Submitters assert that a mercury FCA in the Everglades watershed indicates a violation of mandatory Tier III protections in Everglades National Park.[59] Appendix 12 provides a substantial amount of additional and more detailed information regarding the cross-referencing of mercury FCAs with specific water bodies in the ten states of particular concern.[60]

Relying on Toxic Release Inventory (TRI) data and other sources, the original submission indicated that at least one NPDES or state-permitted electric generating facility in each of the states of Pennsylvania, Kentucky, Illinois and Ohio discharged to either a lake or river under a statewide mercury FCA in 2002; and information identifying three permitted power plants in Michigan that, according to the Submitters, discharged mercury into three identified water bodies under mercury FCAs in 2002. With regard to TMDLs, the original submission identified West Virginia as a state that they contend failed to properly list impaired waters for which TMDLs for mercury should be adopted and they attach to the submission a report on a mercury TMDL pilot study for a portion of the Florida Everglades.[61] Appendix 12 and its sub-appendices supply a great deal of additional information identifying specific power plants

[55] Submission at 1, 4-5 and footnotes 2-5, 39-42, 44-46.
[56] *See, e.g.*, Submission, Appendix 12 at 9, 13-17, Appendix 12B.
[57] Submission at 10-11, footnote 19, 110. *See also* Submission, Appendix 12 at footnote 21.
[58] Submission at 11.
[59] *Id.*
[60] *See, e.g.*, Submission, Appendix 12 at 9, 13-17, Appendix 12B.
[61] Submission at 3-4, 10 and footnotes 95-100. The TMDL study for the Everglades does not specifically discuss the impact of mercury emissions from coal-fired power plants on Everglades water quality. While noting that "[b]oth long distance transport and localized deposition around certain types of sources are important," the report noted that "[t]he principal concerns [in the Everglades] focus on local effects of waste incinerators and other emissions sources in southeast Florida, increased release of mercury or other substances form the Everglades Agricultural Area promoted by drainage and soil disturbance, or hydrologic changes." Submission, Appendix 10 at 6. Acknowledging uncertainty and debate over the relative importance of local versus long range mercury sources, the TMDL study included source-receptor modeling only for local sources and concluded that "local sources account for more than 50% of mercury deposited in southern Florida." *Id.* at 58. The local sources accounted for in the TMDL study included no coal combustion sources. *Id.* at 76.

of concern to the Submitters in the ten states on which they focus, as well as detailed information regarding the status of TMDL development in those ten states.[62]

In regard to NPDES-related requirements of the CWA, the Submitters essentially assert that when a NPDES or state permit authorizes a coal-fired power plant to discharge mercury to a water body that is under a mercury FCA (and therefore, according to the Submitters, not in compliance with WQS), the CWA requires one of two responses (or both): either 1) the permit must be adjusted to allow less mercury to be discharged, or 2) measures must be taken to ensure that mercury discharges from other point or nonpoint sources (including air emissions) affecting that water body be reduced or eliminated. In either case, according to the submission, the CWA requires the permitted discharge to be considered relative to other mercury sources, a requirement the Submitters contend the United States is failing to fulfill.[63] The Secretariat concludes that the information in the submission and its attachments, including Appendix 12 and its sub-appendices, is sufficient to allow consideration of the Submitters' claims regarding the issuance of NPDES or state permits with respect to the NPDES or state-permitted electric utilities in the ten states on which the Submitters focus. The information in the original submission and Appendix 12 is sufficient to permit the United States to explain in a response whether and, if so, how it has fulfilled the CWA's requirements for NPDES or state discharge permits, including consideration of other point and nonpoint sources, in connection with the power plants identified.

The Secretariat concludes that the submission, as supplemented with the information in Appendix 12 and its sub-appendices, now includes sufficient information to allow consideration of the assertions regarding approval of state antidegradation policies and procedures and enforcement of TMDL requirements in the ten states on which the Submitters focus. The additional information in Appendix 12 and its sub-appendices allows for easier cross referencing of mercury FCAs with specific water bodies in the ten states. The Submitters' supplemental information also provides sufficient information to permit the United States to respond to the assertions regarding 1) exceedances of water quality standards for mercury in particular Tier I, Tier II and Tier III water bodies subject to FCAs; 2) the nature of the alleged failure to ensure that particular state antidegradation policies and implementation methods meet federal requirements with regard to those water bodies; and 3) the actions the Submitters believe the United States is failing to effectively take with respect to particular states in which the Submitters believe antidegradation policies and implementation methods are in violation of the CWA. With respect to antidegradation requirements for Tier II water bodies, the submission, as supplemented, now also contains sufficient information regarding the assertion that the United States has failed to require BMPs for coal-fired power plants to protect Tier II water bodies in the ten states of concern.

In regard to TMDLs, the original submission stated that a "factual record would determine which state continuing planning processes fail to incorporate an existing TMDL or incorporate[] a TMDL that does not have any regulation or BMP for mercury air emissions from coal-fired plants"; that it "would also determine if EPA is failing to use its authority to

[62] *See, e.g.*, Submission, Appendix 12 at 13, 17-40, Appendix 12B, Appendix 12D, Appendix 12E, Appendix 12E.1.
[63] Submission at 10.

require states to pass TMDLs where WQS are not being met or a beneficial use has been lost"; and that it would further examine "if EPA is failing to intervene by issuing its own TMDLs where state action is inadequate."[64] Citing the example of West Virginia, the Submitters also asserted that "the CEC may need to inquire into the possible failure to use FCAs to declare waters impaired."[65] The submission, as supplemented by Appendix 12 and its sub-appendices, now contains sufficient information for the Secretariat to consider the full scope of the assertion that the United States is failing to effectively enforce TMDL requirements in the ten states on which the Submitters focus, including the listing of waters that are mercury-impaired.

### C. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of this review is to determine whether to request that the Party concerned 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:
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> (a) the submission alleges harm to the person or organization making the submission;
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> (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.[66]

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits requesting a response from the Party, in this case the United States.

The Submitters provide information regarding the adverse impacts of the mercury emissions and discharges from coal-fired power plants on human health and the environment, and they assert that mercury contamination of fish deprives individuals of an otherwise healthy food source and the full use and enjoyment of waterways.[67] Similar assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.[68]

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[64] Submission at 11-12.
[65] Submission at 12.
[66] Article 14(2) of the NAAEC.
[67] Submission at 3, 4, 15-16.
[68] In SEM-96-001 (Cozumel), Recommendation to the Council for the Development of a Factual Record (7 June 1996), 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

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[69] The Submitters state:

> [T]he preparation of a factual record would:
> a. foster the protection and improvement of the environment for present and future generations (Preamble para.1, Article 1(a));
> b. ensure that activities in the United States do not cause damage to the environment shared with Canada (Preamble, para. 2);
> c. promote sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1(b));
> d. increase cooperation between governments to better conserve, protect, and enhance the environment, particularly the shared fisheries (Articles 1(c), and 10(2)(i));
> e. strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices (Article 1(f));
> f. enhance compliance with, and enforcement of, environmental laws and regulations (Articles 1(g), and 10(2)(p)); and
> g. promote pollution prevention policies, practices, techniques and strategies (Articles 1(j) and 10(2)(b)).[70]

The Secretariat agrees that further study of the matters raised in the submission would advance these goals.

The Submitters asserted in the original submission that "[t]here are no realistic private remedies available" and that "[i]t is impractical and unrealistic for individuals and non-governmental entities with limited resources to seek redress through private remedies for a transnational problem of such scope and complexity."[71] They assert that suing the USEPA for widespread non-enforcement would constitute a hardship on them, and note that doing so would likely pose particular challenges for the Canadian Submitters.[72] In Appendix 12 and Appendix 12A, they provide additional information regarding barriers to seeking private remedies with respect to the full scope of the submission and regarding private lawsuits that related to some of the matters they raise in the submission.[73] Taking into consideration Guideline 7.5 of the CEC's *Guidelines for Submissions on Enforcement Matters*, the Secretariat concludes that reasonable actions have been taken to pursue private remedies prior to making this submission, bearing in mind the barriers to private remedies that the Submitters identify.

Finally, the submission is not based exclusively on mass media reports. As the Submitters note, "[t]he submission is based primarily upon [their] research and the reports of various American, Canadian, and international authorities, not upon mass media reports."[74]

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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."

[69] Article 14(2)(b) of the NAAEC.
[70] Submission at 16.
[71] Submission at 16-17.
[72] Submission at 17, Appendix 12 at footnote 20.
[73] Submission, Appendix 12 at 10-13, Appendix 12A.
[74] Submission at 17.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that the United States is failing to effectively enforce sections 303 and 402 of the federal Clean Water Act (CWA) in connection with mercury emissions from coal-fired power plants to air and water that are allegedly degrading thousands of rivers, lakes and other water bodies across the United States merits a response from the United States.

## IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-04-005 (Coal-fired Power Plants) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of the United States subject to the provisions of Article 14(3). A copy of the submission and Appendix 12 and its sub-appendices were previously forwarded to the Party under separate cover.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*
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