14 December 1998

BY FAX AND REGISTERED MAIL

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Re: Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submission I.D.: SEM-98-003

Submitter(s): Department of the Planet Earth;
Sierra Club of Canada;
Friends of the Earth;
Washington Toxics Coalition;
National Coalition Against Misuse of Pesticides;
WASHPIRG;
International Institute of Concern for Public Health
Dr. Joseph Cummins; and
Reach for Unbleached

Concerned Party: United States of America

Date Received: May 27, 1998

I-INTRODUCTION

On May 27, 1998, the Submitters 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 non-governmental organization or person asserting that a Party to the *Agreement* is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of

Article 14(1). 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)).

This is the Secretariat's determination as to whether the submission meets the requirements of Article 14(1) so that it may be considered by the Secretariat.

II-SUMMARY OF THE SUBMISSION

The submission concerns airborne emissions of dioxin and mercury into the Great Lakes. It alleges that solid waste and medical incinerators in the United States are substantial sources of such emissions, and that a significant percentage of these emissions could be eliminated without economic sacrifice and, indeed, steps to eliminate these emissions could produce substantial economic benefits.[1] The submission further alleges that U.S. Environmental Protection Agency (EPA) regulations governing emissions from such incinerators conflict with the domestic laws (statutes) of the United States and with certain provisions of ratified U.S.-Canadian agreements because the regulations authorize greater emissions than contemplated by the statutes and agreements. The submission claims that these purported inconsistencies constitute a failure of "enforcement," thereby bringing the inconsistencies within the scope of Article 14.

III-ANALYSIS

A. Overview

Article 14 of the *NAAEC* directs the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the *NAAEC* is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the requirements of Article 14(1). When the Secretariat determines that the Article 14(1) requirements are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission.

As the Secretariat has noted in previous Article 14(1) determinations,[2] Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.[3]

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1 Submission at 2.

2 See e.g., Submission No. SEM-97-005 (May 26, 1998).

3 See e.g., Submission No. SEM-97-005 (May 26, 1998).

The Secretariat nevertheless has determined that the Article 14 process is not an appropriate forum for the issues raised in Submission 98-003. Article 14(1) reserves the Article 14 process for claims that a Party is "failing to effectively enforce its environmental law. . . ." We conclude that the Party's conduct at issue here does not qualify as "enforcement" and therefore such conduct is not subject to review under Article 14.[4]

B. The Governing Legal Framework

Based on our review of the *Agreement*, we conclude that whatever the outer bounds of "enforcement" under Article 14(1) may be, enforcement does not include government standard-setting. As two distinguished commentators have noted, the *NAAEC's* purpose is not to set environmental standards for the Parties. Instead, the Parties intended to reserve to themselves the right to establish their own standards.[5]

Article 3 of the *Agreement* supports the interpretation that government standard-setting is outside the purview of Article 14. It provides that the *Agreement* "[r]ecogniz[es] the right of each Party to establish its own levels of domestic environmental protection."[6] Thus, Article 3 is strong evidence that the Parties did not contemplate that the Article 14 citizen submissions process would be available for challenges to a Party's exercise of its standard-setting authority. [7]

Article 5 of the *Agreement*, entitled "Government Enforcement Action," supports the conclusion that Article 14 in particular was not intended to encompass Party standard-setting activity. Article 5 provides an illustrative list of governmental actions that qualify as "enforcement" activity. Viewed as a whole, the activities listed are geared more toward promoting compliance with governing legal standards than to establishing such standards.[8]

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4 We do not reach the issue of whether the international agreements at issue here qualify as "environmental law" for purposes of Article 14 because of our interpretation of the term "enforcement." Further, the Secretariat, by its determination, is not in any way questioning the importance of the environmental and public health issues the submission raises. See e.g., 33 U.S.C. § 1218 (a)(1)(A) (describing the Great Lakes as a "valuable natural resource"); U.S. EPA, Deposition of Air Pollutants to the Great Waters: Second Report to Congress (June 1997); International Joint Commission, Ninth Biennial Report on Great Lakes Water Quality, 1, 35-40 (1997). Instead, again, the determination only reflects the Secretariat's judgment that Article 14 is not the appropriate forum in which to raise these issues, at least not in the context in which the submission raises them.

5 Pierre Marc Johnson and André Beaulieu, The Environment and NAFTA: Understanding and Implementing the New Continental Law 153, 171 (Island Press 1996)(noting the distinction between claims that regulations are not enforced and the claim that regulations are inadequate because they are insufficiently stringent). Under some circumstances, a Party concerned about issues related to standard-setting may initiate consultations under NAFTA Article 1114. See Article 10(6).

6 Article 3 also provides that "each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve these laws and regulations."

7 See also Submission #SEM-95-001 (Sept. 21, 1995).

8 There is some ambiguity in the list in the sense that some of the items included, such as "using licenses, permits, or authorizations," may have dual compliance and standard-setting dimensions. See Article 5(1)(I). This is the case for regulations as well. The list is also not intended to be exclusive in nature.

Our view, in sum, is that the better interpretation of the *Agreement* is that the Article 14(1) requirement that a submission assert a failure to "effectively enforce" bars the Secretariat from considering disputes concerning "standard-setting" under Article 14.[9] Article 14 focuses, instead, on whether, once established, such standards are effectively enforced.

We recognize that, as others have noted, drawing the line between "standard-setting" and "enforcement" of the law may be blurred on occasion and difficult to discern at the margins.[10] Perhaps the paradigmatic case for the sort of standard-setting that is beyond the purview of Article 14 involves a Party's enacting legislation that establishes specific environmental standards. It seems indisputable that Article 14 is not available as a vehicle to challenge the standards adopted in such legislation.

On the other hand, a submission with three key elements perhaps would be the paradigmatic submission involving "enforcement:" 1) a Party's law establishes specific environmental standards; 2) regulated entities (i.e., parties subject to such standards) are allegedly operating in violation of such standards; and 3) the Party has allegedly failed to effectively enforce this law (e.g., by allegedly allowing violations to occur without using available enforcement authorities to curtail them). Many variations on this paradigm undoubtedly would fall within the ambit of Article 14 as well.[11]

In this Determination, we consider the question as to where the line should be drawn between standard-setting and enforcement in the context of a Party's promulgation of regulations that establish substantive emission or discharge standards.

C. Article 14(1) Analysis of the Party's Activities Involved in this Submission

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9 See Submission #95-001 (Sept. 21, 1995)(noting that "[w]hile the Submitters may contend that . . . legislative action amounts to a breach of the obligation to maintain high levels of protection, Articles 14 and 15 do not repose in the Secretariat the power to explore aspects of the *Agreement* not arising from a failure to enforce environmental law.") We do not believe that Article 45(1), which defines effective enforcement, at least in part, by discussing what it is not, is helpful to the interpretation of enforcement in the context of this submission.

10 See e.g., *American Automobile Manufacturers Association et al. v. John P. Cahill, et al*., 152 F.3d 196 (2nd Cir. 1998)(noting that the distinction between "standards" and "enforcement mechanism" "can be less than a bright line in some cases . . . ."). See also Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 Va. J. Int'l L. 721, 758 (1996)(discussing issues relating to the definition of "enforcement" under the *NAAEC* and noting that "[i]n the complex regulatory system, enforcement cannot be readily separated from lawmaking in practice.")

11 See e.g., Article 5.

The Submitters' claim, as we understand it, contains three elements: 1) several provisions in the Clean Air Act, Pollution Prevention Act, and Great Lakes Agreement,[12] among other statutes and agreements, obligate the U.S. EPA to promulgate regulations that will result in the "virtual elimination" and "zero discharge" of certain pollutants, including mercury and dioxin; 2) EPA regulations are inconsistent with these provisions because the regulations will allow for certain waste incinerators to continue to emit at "excessive" levels; and 3) these regulations, by failing to comply with the governing law, constitute a "failure to effectively enforce."

In our judgment, the submission before us falls on the "standard-setting" side of the line. The critical analytical point, in our view, is that even if the Submitters' claim is accurate, the Party has created an inconsistency in its substantive emission standards.[13] We do not believe that adoption of regulations that contain emission standards that allegedly are less stringent than the standards established in governing legislation constitutes a "failure to effectively enforce" for purposes of Article 14.[14] Instead, the regulations in such a case would represent an inconsistency in the governing legal standards. Addressing purported inconsistencies of this sort is, in our view, beyond the scope of Article 14.

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[12] With respect to U.S. domestic law, the submission claims that Clean Air Act sections 7401(c), 7415(a)(b), and 7429(a)(2) and the entire *Pollution Prevention Act* have not been effectively enforced. Submission at 8, 9. In Appendix 2, the Submitters cite to a variety of other Clean Air Act provisions as well. The submission alleges that the U.S. EPA regulatory program also is inconsistent with the "virtual elimination of persistent toxic substances" and "zero emission" components of the *Great Lakes Water Quality Agreement (1972 and 1978)*, the *Protocol of 1987* and the *Strategy of 1997*. Finally, the Submission asserts that the regulatory program violates the *1986 Agreement Between the Government of Canada and the Government of the United States Concerning Transboundary Movement of Hazardous Waste*. The submission claims that these international agreements are part of U.S. domestic law because they have been ratified. Submission at 8, 9.

[13] We do not reach the issue of whether the Submitters' claim is accurate. The Secretariat reviewed the Petition and the Appendices carefully and had difficulty, inter alia, determining the precise level of emissions mandated by the statutes cited by the Submitters. Thus, the Secretariat found it difficult to evaluate the Submitters' claim that the domestic legislation and EPA regulations are inconsistent. For example, the Submitters cite section 7401(c) of the Clean Air Act as one section EPA has violated with its regulations. This section does not appear to establish emission standards, providing simply that: "A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention."

[14] A Party's adoption of regulations that are inconsistent with the governing statute may be addressable in a different forum. Under U.S. environmental law, for example, adoption of regulations that are inconsistent with the governing statute would likely be subject to judicial review. Indeed, while the courts in the United States grant agencies such as EPA considerable deference in the application of statutory responsibilities, see e.g., *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), "*Chevron* does not seem to have insulated agency interpretations of statutes from effective judicial review." Percival , Miller, Schroeder, and Leape, *Environmental Regulation: Law, Science, and Policy* 760 (Little Brown, 2nd ed. 1996). We simply are stating that such issues are not subject to Article 14.
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 inappropriately narrow the scope of EPA inspection or monitoring authority might qualify for review under Article 14(1). See Article 5(b). Cf. Submission #SEM95-002 (December 8, 1995).

In closing, we note that a variety of strategies may have the ultimate effect of undermining a Party's environmental standards; yet, even though the environmental and health consequences of different strategies may be comparable, one strategy may subject a Party to Article 14 while another may not. Here, for example, the Party's purportedly allowing excessive emissions through promulgation of regulations is a form of "standard-setting" activity (albeit in the Submitters' view a flawed one) and therefore it is not within the reach of Article 14. In contrast, a Party's failure to effectively enforce against regulated parties that are violating and thereby exceeding legally enforceable standards would be subject to Article 14. For the reasons provided above, we are of the view that the limited scope of Article 14 jurisdiction requires the Secretariat to draw such a line.

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.

Yours truly,

Secretariat of the Commission for Environmental Cooperation

per: Janine Ferretti
Interim Executive Director

c.c: Mr. William Nitze, US-EPA
Mr. Norine Smith, Environment Canada
Mr. José Luis Samaniego, SEMARNAP