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North American Environmental Law and Policy

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Commission for Environmental Cooperation of North America

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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue to be a source of life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation of North America (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES

Produced by the CEC, the North American Environmental Law and Policy series presents some of the most salient recent trends and developments in environmental law and policy in Canada, Mexico and the United States, including official documents related to the novel citizen submission procedure empowering individuals from the NAFTA countries to allege that a Party to the agreement is failing to effectively enforce its environmental laws.

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PREFACE

When Canada, Mexico and the United States (the Parties) entered into the North American Free Trade Agreement (NAFTA) in 1994, they also concluded the North American Agreement on Environmental Cooperation (NAAEC or Agreement). The NAAEC supports the environmental goals and objectives of NAFTA and recognizes the importance of public participation in the conservation, protection and enhancement of the environment. The citizen submission process under NAAEC Articles 14 and 15 is an innovative mechanism allowing the public to take part in the pursuit of NAAEC's goals. This volume of the North American Environmental Law and Policy (NAELP) series, which follows previous volumes devoted to the citizen submission process, provides an update on the CEC Secretariat's activity on submissions on enforcement matters under Articles 14 and 15 since August 2000.

The NAAEC citizen submissions process allows the public to request that the CEC investigate concerns regarding environmental enforcement in Canada, Mexico or the United States. The Secretariat administers the process in accordance with NAAEC Articles 14 and 15 and the *Guidelines for Submissions on Enforcement Matters,* adopted by the Council in October 1995 and revised in June 1999. The Secretariat may consider a submission from any person or nongovernmental organization asserting that a Party to NAAEC is failing to effectively enforce its environmental law. Subject to certain conditions, the Secretariat may request a response from the concerned Party. The Secretariat may then inform the Council that it considers that the submission, in light of the response provided by the Party, if any, warrants developing a "factual record." Preparation of factual records requires a two-thirds affirmative vote by the Council, as does publication of final factual records.

The Secretariat has received 34 citizen submissions since 1995. Twelve concern Canada, fourteen concern Mexico and eight concern the United States. Some submissions—mostly those concerning Mexico—focus on a specific project or incident, while others allege a widespread failure to effectively enforce environmental provisions against an entire

industry. Many different types of environmental protection provisions are at play in the different submissions, though habitat protection, pollution prevention and environmental assessment provisions are most frequently invoked. Twenty-two submissions are now closed, following either publication of a factual record or termination at an earlier stage.

Since 1994, three submissions have resulted in the publication of a factual record. The first, *Cozumel*, concerned environmental assessment requirements in connection with the construction of a cruise ship pier in Cozumel, Mexico. The second, *BC Hydro*, related to enforcing rules for fish habitat protection at hydroelectric installations in British Columbia, Canada. The third, *Metales y Derivados*, concerned clean-up and other obligations in connection with an abandoned lead smelter in Tijuana, Mexico.

As of 20 June 2002, twelve submissions are active. The Secretariat is currently developing seven factual records, as instructed by the Council, in connection with the following submissions: SEM-97-006 (*Oldman River II*); SEM-98-004 (*BC Mining*); SEM-98-006 (*Aquanova*); SEM-99-002 (*Migratory Birds*); SEM-00-004 (*BC Logging*); SEM-97-002 (*Río Magdalena*); and SEM-00-005 (*Molymex II*). The Secretariat is reviewing four submissions in light of the Parties' responses to determine whether they warrant the development of factual records: SEM-01-001 (*Cytrar* II); SEM-00-006 (*Tarahumara*); SEM-02-001 (*Ontario Logging*); and SEM-02-002 (*Mexico City Airport*). The Secretariat is awaiting a response from the Party for SEM-02-003 (*Pulp and Paper*).

In June 2000, the CEC Council established a process for the Joint Public Advisory Committee (JPAC) to conduct public reviews and provide advice to Council regarding issues concerning the implementation and further elaboration of Articles 14 and 15. The Council also requested that JPAC review the public history of citizen submissions and prepare a report on lessons learned. JPAC published its report on lessons learned in June 2001, with recommendations regarding timeliness, the independence of the Secretariat, follow-up to factual records and the transparency of the process. The report is available on the CEC website. Council adopted some of JPAC's recommendations in Council Resolution 01-06. In June 2002, JPAC completed a public review of the requirement in recent Council resolutions that the Secretariat provide the Parties the overall work plan for preparation of a factual record and provide the Parties an opportunity to comment on the plan. Council has also approved JPAC's request to conduct a public review regarding recent Council instructions defining the scope of factual records. The Council

authorized that the review take place after the relevant factual records are completed.

All submissions, Party responses, Secretariat determinations, factual records, and related documents are available on the CEC website at <www.cec.org> under Citizen Submissions on Enforcement Matters and can also be requested from <info@ccemtl.org>. The Secretariat's determinations and other documents released through 31 August 1997 were compiled in the Winter 1998 issue of this series. Determinations and other documents released from September 1997 through 31 August 2000 were compiled in the Fall 2000 issue (Volume 5). The *BC Hydro* and *Metales y Derivados* factual records were published in Volumes 6 and 8, respectively. For information about previous issues, please contact Les Éditions Yvon Blais Inc. at commandes@editionsyvonblais.qc.ca or <http://www.editionsyvon blais.qc.ca> or at (800) 363-3047 (Canada) or (450) 266-1086.

The following table captures the status of submissions and actions taken by the Secretariat at different stages of the process.

4 July 2002

A History of the 34 CEC Submissions on Enforcement Matters, 1997 – 30 June 2002*

History	2002 (to 30 June)	2001	2000	1999	1998	1997
Submissions received	SEM-02-001/ Ontario Logging (Can) (6 February) SEM-02-002/ Mexico City Airport (Mx) (7 February) SEM-02-003/ Pulp and Paper (Can) (8 May)	SEM-01-001/ Cytrar II (Mx) (14 February) SEM-01-002/ AAA Packaging (Can) (12 April) SEM-01-003/ Dermet (Mx) (14 June)	SEM-00-001/ Molymex I (Mx) (27 January) SEM-00-002/ Neste Canada (US) (21 January) SEM-00-003/ Jamaica Bay (US) (2 March) SEM-00-004/ B.C Logging (Can) (15 March) SEM-00-005/ Molymex II (Mx) (6 April—Resubmitted 31 July) SEM-00-006/ Tarahumara (Mx) (9 June)	SEM-99-001/ Methanex (US) (18 October) SEM-99-002/ Migratory Birds (US) (19 November)	SEM-98-001/ Guadalajara (Mx) (9 January—Resubmitted 15 October 1999) SEM-98-002/ Ortíz Martínez (Mx) (Revised—4 August) SEM-98-003/ Great Lakes (US) (27 May—Resubmitted 5 January 1999) SEM-98-004/ B.C. Mining (Can) (29 June) SEM-98-005/ Cytrar I (Mx) (23 July) SEM-98-006/ Aquanova (Mx) (20 October) SEM-98-007/Metales y Derivados (Mx) (23 October)	SEM-97-001/ BC Hydro (Can) (2 April) SEM-97-002/ Río Magdalena (Mx) (15 March) SEM-97-003/ Quebec Hog Farms (Can) (9 April) SEM-97-004/ Canadian Env. Defence Fund (Can) (26 May) SEM-97-005/ Biodiversity (Can) (21 July) SEM-97-006/ Oldman River II (Can) (4 October) SEM-97-007/ Lake Chapala (Mx) (10 October)

* Note: See *North American Environmental Law and Policy*, Volume 5 (Fall 2000) for a listing of determinations made in 1995 and 1996.

History	2002 (to 30 June)	2001	2000	1999	1998	1997
14(1), 14(2) and 14(3) Determinations continuing the process**	SEM-02-002 (22 February) SEM-02-001 (25 February) SEM-02-003 (7 June)	SEM-01-001 (24 April) SEM-01-001 (13 June) SEM-00-006 (6 November)	SEM-99-001 (30 March) SEM-00-002 (17 April, consolidated with SEM-99-001) SEM-00-004 (8 May) SEM-00-005 (19 October)	SEM-98-007 (5 March) SEM-98-006 (17 March) SEM-98-005 (9 April) SEM-98-004 (25 June) SEM-98-003 (8 September) SEM-99-002 (23 December)	SEM-97-002 (8 May) SEM-97-006 (23 January and 8 May) SEM-97-007 (2 October) SEM-98-004 (30 November)	SEM-96-004 (22 January) SEM-97-001 (1st and 15 May) SEM-97-002 (6 October) SEM-97-003 (8 May and 9 July)
14(1), 14(2) Dismissals		SEM-01-002 (24 April) SEM-01-003 (19 September)	SEM-98-001 (11 January) SEM-00-003 (12 April) SEM-00-001 (25 April) SEM-00-005 (13 July—Resubmitted 31 July 2000)	SEM-98-002 (18 March) SEM-98-001 (13 September)	SEM-97-005 (26 May) SEM-98-002 (23 June) SEM-98-003 (14 December)	SEM-97-004 (25 August)

** The Secretariat issued a single determination covering both Article 14(1) and 14(2) for several of these submissions.

History	2002 (to 30 June)	2001	2000	1999	1998	1997
Article 21(1)(b) Requests for additional information from the Party			SEM-98-003 (24 March)	SEM-97-002 (13 September)	SEM-97-003 (16 February)	
Dismissals following response		SEM-98-003 (5 October)	SEM-00-002 and SEM-99-001 (30 June) SEM-97-007 (14 July)			SEM-96-003 (2 April)
Notifications that a factual record is warranted	SEM-97-002 (5 February)	SEM-98-004 (11 May) SEM-00-004 (27 July) SEM-00-005 (20 December)	SEM-98-007 (6 March) SEM-98-006 (4 August)	SEM-97-006 (19 July) SEM-97-003 (29 October)	SEM-97-001 (27 April)	
Final factual records completed	SEM-98-007 (11 February)		SEM-97-001 (11 June)			SEM-96-001 (24 October)

Secretariat Determinations under Articles 14 and 15 of the North American Agreement on Environmental Cooperation—August 1997 Through June 2002

SEM-97-002

(Rio Magdalena)

SUBMITTER:	COMITÉ PRO LIMPIEZA DEL RÍO MAGDALENA
PARTY:	United Mexican States
DATE:	15 March 1997
SUMMARY:	The Submitters allege that waste water originating in the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican state of Sonora, is being discharged into the Magdalena River without prior treatment. According to the Submitters, the above contravenes Mexican environmental legislation governing the disposal of waste water.

SECRETARIAT DETERMINATIONS:

ART. 14(1)* (6 October 1997)	Determination that criteria under Article 14(1) have been met.
ART. 14(2)* (8 May 1998)	Determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.
ART. 15(1) (5 February 2002)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

* Published in Volume 5 (Fall 2000) of the *North American Environmental Law and Policy* Series.

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-97-002** (Rio Magdalena)
Submitter:	Comité Pro Limpieza del Río Magdalena
Concerned Party:	United Mexican States
Date of Receipt:	15 March 1997
Date of this Notification:	5 February 2002

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC"), the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). The Secretariat may notify the Council under Article 15(1) that it considers that the submission, in light of any response from the Party, warrants developing an Article 15 factual record. By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's Article 15(1) analysis with respect to the submission filed 7 April 1997, by Comité Pro Limpieza del Río Magdalena (the Submitter).

The Submitter asserts that Mexico is failing to effectively enforce its environmental law with respect to the discharge of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora, which allegedly is discharged into the Magdalena River without proper treatment.

On 7 April 1997, the Secretariat received the submission from Comité Pro Limpieza del Río Magdalena, in accordance with Article 14 of the NAAEC. On 2 June 1997, the Secretariat requested that the Submitter specify the chapters or provisions of law whose failure to enforce was alleged. In response to that request, the Secretariat received the additional filing to the submission on 18 July 1997.

On 6 October 1997, the Secretariat determined that the submission met the requirements of Article 14(1) of the NAAEC and, considering the criteria set forth in NAAEC Article 14(2), on 8 May 1998, it requested a response from the Party. The Secretariat received the Party's response on 29 July 1998, in accordance with NAAEC Article 14(3). Given the complexity of the matter, and to better understand some aspects of the legal and administrative framework referenced in Mexico's response, the Secretariat, relying on NAAEC Article 21(1)(b), requested but did not receive additional information from the Party. The requests were sent on 13 September 1999, 13 January 2000 and 23 October 2000.

In order to continue with the processing of this submission, the Secretariat proceeded with its analysis based on the available information. Having examined the submission in light of the Party's response, in accordance with NAAEC Article 15(1), the Secretariat hereby notifies Council that the submission warrants the development of a factual record with respect to some of the assertions, while others do not warrant further consideration in this process or the development of a factual record. The Secretariat sets forth the reasons for these determinations in the body of this document.

In summary, this submission warrants the development of a factual record in regard to the assertions of the Submitter relating to the alleged failure to effectively enforce provisions on the prevention and control of water pollution, with respect to the discharge of untreated wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora. Specifically, the development of a factual record is warranted on the effective enforcement, for the aforementioned municipalities, of Articles 88 paragraph IV, 89 paragraph VI, 92, 93, 117, 121, 122, 123, 124, 126 and 133 of the General Law of Ecological Balance and Environmental Protection (*Ley General del*

Equilibrio Ecológico y la Protección al Ambiente—LGEEPA), and Mexican Official Standard NOM-001.

II. SUMMARY OF THE SUBMISSION

The submission asserts that the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora discharge their wastewater into the Magdalena River without prior treatment, in contravention of Mexican environmental law. Comité Pro Limpieza del Río Magdalena asserts that it has undertaken efforts to prevent the pollution of the Magdalena River for the past 17 years, and describes the main relevant events occurring since then.

The Submitter states that:

> ...in the case of the water pollution in question, the procedures and standards that apply in this case have been in force since 1971, and basically show no major changes. All laws in this matter, issued to date, continue to impose on the Government full responsibility to demand the effective enforcement of the laws, at any social level, to minimize the problem, and the Towns or Municipalities have always been responsible for taking care of water pollution. This responsibility has been diminished repeatedly, due to the six-year transitions in government administrations (*sexenios*), the name changes of the respective enforcement agencies, and the lack of political will to provide a concrete solution. The authorities do NOT (sic) want to see reality, they do NOT (sic) want to measure the damages we are inflicting upon our environment for this and future generations, they do NOT (sic) want to have any continuity over the six-year transitions, for programs and positive laws, and as a result the regulations have been enforced irregularly and ineffectively, without force. (translation from original)[1]

The Submitter asserts that the pollution of the waters of the Magdalena River has caused harm to farmers and users of the Magdalena River's surface water, who have used such water for the irrigation of traditional crops and for regional family sustenance. The submission asserts that farmers and water users have even been fined by the National Water Commission (*Comisión Nacional del Agua*—CNA) under Mexican Official Standard NOM-CCA-033-ECOL/1993[2] (NOM-033), because those waters do not meet the specific parameters of the standard

1. Additional filing to the submission, p. 10.
2. Establishing the bacteriological conditions for the use of urban or municipal wastewater, or the mixture thereof in bodies of water, in crop irrigation and garden products. Note that the nomenclature of this Standard changed to NOM-033-ECOL-93, as of 30 November 1994.

for use in crop irrigation. The Submitter also asserts that many fruit trees have been found to have irreversible rotting in their roots.

Lastly, the submission denounces the failure of the three levels of government (federal, state and municipal) to attend to and solve the stated problem. The Submitter states:

> Who controls whom? The municipalities do NOT (sic) have the official classification of a receiving body for the Magdalena River for this purpose, nor the defined parameters that by law must be had along with the official legal authorizations in order to dispose of such duly treated wastewater. However, without regard to law or authority, the municipalities of Imuris, Magdalena de Kino, and Santa Ana in Sonora, Mexico, continue to blatantly dump into the receiving body of the Magdalena River, illegally mixing polluted waters with water that has historically been used as a source of drinking water for human consumption, for the irrigation of farmlands, and as regional family sustenance. (translation from original)[3]

As stated above, the Secretariat requested that the Submitter indicate which environmental laws in particular were considered not to be effectively enforced, with respect to the facts stated in the submission. The Submitter responded to this request in an additional filing. In that filing, the Submitter cites various laws that are no longer in force, indicating that there have been laws for the prevention and control of water pollution for some time, and that in its opinion they have been modified every six-year term but they have not been enforced.[4] As for laws currently in force, the Submitter indicated that it considers, in this case, that Mexico is failing to effectively enforce the following provisions of law:

(i) The General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA): Article 1 paragraphs I, II, III, V, VI, VIII, IX and X; 4; 5 paragraphs I, II, III, V, VII, XVI, XVII, XVIII and XIX; 6; 7 paragraphs I, II, VIII, XIX, XI, XII, XIV, XV, XVIII, XIX and XXI; 8 paragraphs I, II, VII, IX, X, XI, XIII and XV; 10; 15; 16; 23 paragraph VII; 36; 88; 89 paragraphs II, VI and VII; 90; 91; 92; 93; 96; 98 paragraph IV; 104; 108 paragraph I; 109 BIS; 117; 118 paragraphs I, II, III, V and VI; 119; 119 BIS; 120; 121; 122; 123; 124; 126; 127; 128; 129; 133; 157; 159 BIS 3; 159 BIS 4; 159 BIS 5; 189; 190; 191; 192; 199; and 200.

(ii) The Law of Ecological Balance and Environmental Protection for the State of Sonora: Article 3 paragraphs I, IV, and V; 6 paragraphs

3. Additional filing to the submission, p. 11.
4. Additional filing to the submission, p. 1, 10 and 11.

II, III, VIII, X and XII; 7 paragraphs III and VII; 8 paragraphs II, VI and IX; 52, 95 paragraph IV; 96 paragraphs I and III; 97 paragraphs I and II; 98 paragraphs I, II and IV; 99, 101, 102, 104, 105, 163, 164, 165, 166, 167 and 168.

(iii) The Waters Law for the State of Sonora, Article 73 paragraph I.

(iv) The Health Law for the State of Sonora: Article 3 paragraph XI; 4 paragraph VI; 5 paragraph I; 6 paragraphs I and II; 8 paragraph V; 18 paragraph V; 86 paragraph III; 90, 91 paragraphs I and II; 94; 95; 194; 195; 196; 200 and 201.

III. SUMMARY OF THE RESPONSE OF MEXICO

The Party, in its response filed 29 July 1998, first claims that most of the facts set forth by the Submitter arose prior to the entry into force of the NAAEC, that is, before 1 January 1994, and thus it considers the application thereof in this particular case would be retroactive, to the Party's detriment. The response indicates that this would be contrary to the general principle of law that requires disputes to be evaluated according to previously established bodies and rules.

Secondly, the Party argues that the submission is inappropriate pursuant to NAAEC Article 14(2)(c). According to the Party, this article establishes that "the submitters must exhaust the remedies set forth in domestic law" before filing any submission.[5] In this respect, the Party alleges that while the Submitter sent several communications to various federal, state and municipal authorities, these did not constitute the filing of legal actions as provided in the environmental laws. The Party asserts that the Submitter had several legal remedies available to it, such as appellate review, a nullification suit before the Federal Tax Court (now called the Federal Court for Tax and Administrative Justice (*Tribunal Federal de Justicia Fiscal y Administrativa*)) and a suit for an injunction.

Mexico's response describes the problems of the Magdalena River and the situation of the three municipalities in question. The response includes as exhibits copies of the construction or extension projects of the treatment systems of each municipality with which the treatment deficiencies of the three municipalities supposedly will be handled, among other documents.

5. Response of Mexico, p. 11.

Lastly, the Party dedicates a section of its response to refute the supposed failure by Mexico to effectively enforce Mexican environmental law, making reference to each of the provisions invoked by the Submitter. The Party argues that some of the provisions cited by the Submitter do not apply to the subject matter of the submission, and that those that do apply have been complied with.

The Party disputes the applicability of the environmental laws of the State of Sonora with regard to the submission, holding that the matter of wastewater discharge in nationally owned waters falls under federal jurisdiction.[6] The Party asserts that the Magdalena River is national property in accordance with Declaration 207, dated 25 June 1924, published in the Official Gazette of the Federation (*Diario Oficial de la Federación*) on 22 August 1924.[7] The Party concludes that only federal laws apply to the case at hand.[8]

IV. ANALYSIS

IV.1 Introduction

The process in regard to this submission is currently at the NAAEC Article 15(1) stage. To reach this stage, the Secretariat must first determine that a submission meets the requirements of Article 14(1) and that it merits a response from the Party, in consideration of the criteria of Article 14(2). At the time the Secretariat made its determination under these NAAEC articles, the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines") in force did not require the Secretariat to state the reasons of its determinations. Given that the Guidelines were revised in June 1999 and now do so require, the Secretariat states its reasons herein.

Second, the Secretariat addresses the Party's argument that the application of the NAAEC is retroactive to its detriment since, according to the Party, most of the facts addressed by the submission arose prior to the entry into force of the NAAEC.

Third, the Secretariat sets forth the reasons why some environmental provisions invoked in the submission do not warrant consideration in the processing of this submission nor in the development of a factual record.

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6. Response of Mexico, p. 30 *et seq.*
7. Response of Mexico, p. 31.
8. Response of Mexico, p. 33, third paragraph.

Lastly, the Secretariat explains the reasons why it considers that, in light of the Party's response, the submission warrants the development of a factual record on the alleged failure to effectively enforce some of the provisions relating to water, due to the alleged discharge of untreated wastewater into the Magdalena River from the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora.

IV.2 NAAEC Article 14(1) and (2) Analysis of the Submission

In its 6 October 1997 determination,[9] the Secretariat concluded that the submission met the requirements of NAAEC Article 14(1). The Submitter clearly identified itself in the submission as a nongovernmental organization located in Terrenate, Imuris Municipality, Sonora, Mexico.[10] The submission was filed with the Secretariat in Spanish, the language designated by Mexico.

The Submitter asserts that Mexico is failing to effectively enforce various articles of the LGEEPA, as well as three laws of the state of Sonora: the Law of Ecological Balance and Environmental Protection, the Waters Law and the Health Law. The Secretariat considered that the submission referred to "environmental laws" pursuant to the definition contained in NAAEC Article 45(2), because the main purpose of the aforesaid laws is environmental protection or the prevention of a hazard to human health, principally through the prevention and control of pollutant releases.

The Secretariat determined that the information and documents provided by the Submitters are sufficient to allow the Secretariat to analyze the submission. The submission describes the pollution problems of the Magdalena River and the lack of adequate treatment of the discharged wastewater, in alleged violation of the laws prohibiting the release of pollutants into bodies of water and the obligations to prevent and control water pollution. The submission describes the efforts undertaken by Comité Pro Limpieza del Río Magdalena to protect the river over 17 years. Copies of the various communications sent to several authorities since 1989 and the answers thereto, relating to the situation of the river and the lack of adequate treatment of municipal wastewater, are attached to the submission, along with some samples of the propaganda used by Comité Pro Limpieza del Río Magdalena to promote the protection of the river. In its additional filing of 18 July 1997, the Submitter identified the provisions of law that it considers have not been

9. SEM-97-002 (Río Magdalena), Article 14(2) determination (6 October 1997).
10. Submission, p. 1.

effectively enforced. The Secretariat concluded that the submission is not aimed at harassing industry because it does not single out any particular industry, but rather seeks the enforcement of the environmental laws to prevent water pollution in Mexico. It also considered that the matter has been notified in writing to the pertinent authorities in Mexico, given that three citizen complaints have been filed in this regard, among other filings.[11]

Having complied with all Article 14(1) requirements, the Secretariat proceeded to evaluate the submission taking account of the criteria of NAAEC Article 14(2). The Submitter asserts that there are damages and harmful effects to the environment and health. It states that fruit trees, such as plum, quince and pomegranate trees, show irreversible levels of rotting,[12] that in 1991 "the results of bacteriological analyses performed on waters of the Magdalena de Kino Irrigation District showed a high number of fecal coliforms in several agricultural samples,"[13] and that these results appear again in bacteriological analyses reported in 1996.[14]

The submission addresses the remedies available under the laws of the Party that were pursued, and the Secretariat considers that a reasonable effort has been made to use them. As stated above, the Submitter filed a citizen complaint three times under the LGEEPA to make the authorities aware of the alleged violations of environmental law, with respect to the pollution of the Magdalena River.[15] The last one was made

11. Additional filing to the submission, p. 2, 3 and 8.
12. Submission, p. 1, and additional filing to the submission, p. 8 and 9.
13. Additional filing to the submission, p. 2.
14. Additional filing to the submission, p. 3.
15. Mexico's objection to this point, set forth in its response, should be noted. The Party considers that the submission is inappropriate and that NAAEC Article 14(2)(c) has been contravened because, according to the Party, that article "states that submitters must exhaust the remedies provided in domestic law before preparing any submission" (p. 11 of the Party's response). The Party alleges that while the Submitter sent various communications to several federal, state and municipal environmental authorities, these do not constitute the legal remedies set forth in law. According to the Party, the Submitter had several legal remedies available to it under Mexican law, such as the appellate review, the nullification suit before the Federal Tax Court, and the injunction suit. The Party also argues that the Submitter should have waited for a ruling on the citizen complaint filed in 1996 (p. 11 of Mexico's response). As stated elsewhere, the Article 14(2) criteria are *considerations that guide the Secretariat* in deciding whether a submission warrants a response from the Party, in contrast to Article 14(1), which establishes the requirements to be met by the submissions in order for the Secretariat to proceed with its review. Among these considerations, Article 14(2)(c) includes the question of "whether private remedies available under the Party's law have been pursued." Furthermore, sections 5.6(c) and 7.5(b) of the Guidelines state, respectively, that "the submission should address [...] the actions, including private remedies, available under the

by means of a statement filed 10 October 1996.[16] As indicated in other determinations, in the Secretariat's opinion, for purposes of NAAEC Article 14, the citizen complaint is a remedy contemplated by the Party's laws and available to the Submitter to be used before filing a submission.[17] The submission further states:

> For now, we are pages away from recording all our activities in these years of struggle, in visits, work meetings, different types of actions, awareness campaigns, chats and exchanges with school students, etc., at all levels of government and with society in general, and in the end doing everything within our reach to let us give rise to positive actions to save our River from pollution, but to date there is no indication of a concrete solution from the persons and authorities responsible for effectively enforcing the law in Mexico. (translation from original)[18]

The Secretariat considers that further study in this process of the alleged failure to effectively enforce the laws on water pollution control and prevention to which this submission refers would contribute to furthering the objectives of the NAAEC, particularly the promotion of environmental protection and the improved observance and enforcement of laws and regulations to attain higher levels of environmental protection, as established in Articles 1 and 2 of the Agreement. The submission does not appear to be based exclusively on media reports, but rather the Submitter seems to have broad, direct knowledge of the matter. The submission states that the members of the submitting organization have been fighting 17 years for the clean-up of the Magdalena River, without success.[19] On the basis of all of this, in the Determination of 8 May 1998,[20] the Secretariat requested a response to the submission from the Party, which Mexico presented to the Secretariat 29 July 1998.

Party's law that have been pursued," and that in evaluating the matter, "the Secretariat will be guided by whether ... reasonable actions have been taken to pursue such remedies prior to initiating a submission ..."

16. Additional filing to the submission, p. 9 and exhibits to the submission.
17. The citizen complaint provided in LGEEPA Articles 189 through 204 allows any person to approach the environmental authority to denounce presumed violations of the environmental laws or regulations, or environmental damages. The authority must consider the complaint and, as applicable, take the pertinent measures and inform the complainant of any ruling made in regard thereof. Thus, the citizen complaint appears to be a remedy contemplated by the Party and available to the Submitter before that Party, prior to filing an Article 14 submission. See the following determinations: SEM-98-006 (Grupo Ecológico Manglar) NAAEC Article 15(1) determination (4 August 2000), and SEM-97-007 (Instituto de Derecho Ambiental) NAAEC Article 15(1) determination (14 July 2000).
18. Additional filing to the submission, p. 11.
19. Submission, p. 1.
20. SEM-97-002 (Río Magdalena), Article 14(2) determination (8 May 1998).

IV.3 Claims by the Party relating to the alleged retroactive application of the NAAEC

The Party states that most of the facts set forth by the Submitter arose before 1 January 1994, when the NAAEC entered into force, and thus the application of the NAAEC would be retroactive to the Party's detriment. It indicates that this would be contrary to the general principle of law that requires disputes to be evaluated according to previously established bodies and rules.[21]

Based on the *Vienna Convention on the Law of Treaties*,[22] the Secretariat considers that NAAEC Article 14 allows the review of an alleged failure to effectively enforce environmental laws that occurs, or the effects of which persist, during the effective period of the NAAEC, even if the facts to which this alleged failure refers arose before the entry into force thereof. The facts to which NAAEC Article 14 applies are not those underlying the violation for which there was an alleged failure to effectively enforce, but rather those underlying the alleged failure to effectively enforce the environmental laws.[23] In other words, the fact that must be after the entry into force of the NAAEC is the alleged failure to effectively enforce the environmental laws.

The Submitter describes the pollution problems of the Magdalena River that have arisen from 1988, six years prior to the entry into force of the NAAEC, to the April 1997 filing date of the submission. However, the submission clearly indicates that the failures to effectively enforce the environmental laws regarding the alleged discharges of untreated wastewater into the Magdalena River, by the municipalities of Imuris, Magdalena de Kino and Santa Ana, continued as of the time the submission was filed. Because the alleged violations were continuing at the time the submission was filed, the application of NAAEC Article 14 is not retroactive with respect to the alleged failure to effectively enforce the environmental laws. It does not matter that the alleged discharges of untreated municipal wastewater into the Magdalena River and other facts mentioned in the submission began to occur prior to I January 1994.

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21. Response of Mexico, p. 8 and 9.
22. Article 28 of the Vienna Convention on the Law of Treaties provides that "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."
23. See SEM-96-01 (Cozumel) Article 14 and 15 recommendation (7 June 1996) and SEM-98-001 (Guadalajara) Article 14(1) determination (11 January 2000).

IV.4 Are the provisions invoked by the Submitter applicable to the facts stated in the submission?

As stated above, the Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the discharge of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana into the Magdalena River, and it invokes 82 legal provisions, although it does not relate them individually to those facts. In its response to the submission, Mexico argues that the Submitters should have specified "... which norms actually apply and what aspects thereof were not enforced; in this perspective it is impossible to establish any relationship between the environmental problems claimed in the submission and the law that actually applies to the case at hand."[24] Notwithstanding this objection, Mexico's response addresses these provisions one by one, indicating how they have been enforced in the case in question and further indicating which provisions the Party deems inapplicable to the facts set forth in the submission.[25] Following is a summary of the analysis of applicability of the provisions cited to the facts set forth in the submission, in light of Mexico's response. This analysis took into account the fact that while the submitters' arguments on the specific provisions facilitate an analysis of the submission, neither the NAAEC nor the Guidelines require the submitters to specify the actual provisions of law whose failure to effectively enforce is alleged. In the case of the LGEEPA, it suffices to indicate the applicable chapter.[26]

IV.4.1 Provisions not applicable by reason of jurisdiction

The submission asserts that Mexico is failing to effectively enforce several provisions of three state laws: the Law of Ecological Balance and Environmental Protection for the State of Sonora, the Waters Law for the State of Sonora, and the Health Law for the State of Sonora. Mexico's response denies that these state laws are applicable to the facts under the submission.[27] The Party states that pollution prevention and control for national waters, and specifically the control of wastewater discharges into national rivers, corresponds to the federal authority through the CNA, in accordance with the Political Constitution of the United Mexican States, the National Waters Law (*Ley de Aguas Nacionales*—LAN) and the LGEEPA. The response indicates that the Magdalena River is a national property, pursuant to Declaration 207 dated 25 June 1924, pub-

24. Response of Mexico, p. 30.
25. Response of Mexico, p. 29 *et seq.*
26. See Section 5.2 of the Guidelines.
27. Response of Mexico, p. 31 through 33.

lished in the Official Gazette of the Federation on 22 August of that year, and thus the discharge of wastewater into that river falls under federal jurisdiction.

LGEEPA Article 5 paragraph XI and Article 86 paragraph III of the National Waters Law clearly establish such an allocation of jurisdictions.[28] Therefore, the Secretariat determines that further review of the submission's claims, with respect to the state provisions invoked, is unwarranted.

IV.4.2 Provisions not applicable by reason of the subject matter

The submission asserts that Mexico is failing to effectively enforce its environmental laws by allowing the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora to discharge wastewater into the Magdalena River without prior treatment.

The provisions cited by the Submitter refer to various aspects of the regulatory framework regarding water: they establish jurisdictions, general principles, criteria, obligations and prohibitions for the sustainable use of water, and the prevention and control of water pollution. However, not all are directly applicable to the facts in the submission, even though they are all generally related thereto. Considering the arguments set forth in Mexico's response, and given the lack of concrete arguments from the Submitter as to the reason the Party is deemed to have failed to effectively enforce each of the cited provisions, the Secretariat considers that the following provisions of the LGEEPA are not directly applicable to the subject matter of the submission:

- Article 1 paragraphs I, II, III, V, VI, VIII, IX and X, regarding the regulatory nature of the LGEEPA;
- Articles 4; 5 paragraphs I, II, III, V, VII, XVI, XVII, XVIII and XIX; 6; 7 paragraphs I, II, VIII, XIX, XI, XII, XIV, XV, XVIII, XIX

28. LGEEPA Article 5.- The following are powers of the Federation:
...XI. The regulation of sustainable use, the protection and preservation of forestry resources, the soil, national waters, biodiversity, flora, fauna and all other natural resources under its jurisdiction; ...
LAN Article 86.- "The Commission" (the CNA) shall be responsible for:
...III. Establishing and ensuring compliance with the particular discharge conditions to be met by wastewater generated in properties and zones under federal jurisdiction; of wastewater run off directly into national waters and properties, or onto any land when such discharges may pollute the subsoil or aquifers; and in all other cases set forth in the LGEEPA.

and XXI; 8 paragraphs I, II, VII, IX, X, XI, XIII and XV; and 10, regarding the allocation of jurisdictions and coordination among authorities;

– Articles 15 and 16, regarding environmental policy;

– Article 23 paragraph VII, regarding the regulation of human settlements;

– Articles 36, 90 and 119, regarding the issuance of Mexican official standards;

– Article 88 paragraphs I through III, containing criteria for the use of aquatic ecosystems and the hydrological cycle;

– Article 89 paragraphs II and VII, regarding the consideration of sustainable water use criteria in the granting of permits, concessions and authorizations that may affect the hydrological cycle, and in the governing program for the urban development of the Federal District;

– Article 91, regarding the granting of authorizations to affect the course or currents of waterways;

– Article 96, referring to aquatic ecosystems;

– Articles 98 paragraph IV and 104, regarding the preservation and sustainable use of the soil;

– Article 108 paragraph I, regarding the exploration and exploitation of nonrenewable resources;

– Article 109 BIS, regarding the inventory of releases and discharges to be kept by the Ministry;

– Article 118 paragraphs I, II, III, V and VI, indicating the governmental activities in which the prevention and control of water pollution should be considered;

– Article 119 BIS, regarding the powers and obligations of the state and municipal governments, relating to the prevention and control of water pollution;

– Article 120, establishing that certain activities are subject to federal or local regulation, in order to prevent water pollution;

– Article 126, providing that urban wastewater treatment systems must comply with the requirements established in the Mexican official standards;

- Article 127, regarding industrial wastewater purification facilities;
- Article 128, providing that wastewater from urban drainage and sewer systems may be used in industry and farming if it is treated as provided in the Mexican official standards;
- Article 129, requiring the treatment of waters used in economic activities likely to pollute them;
- Article 134, establishing criteria for the prevention of soil contamination;
- Article 157, referring to citizen participation in environmental policy;
- Articles 159 BIS 3, 159 BIS 4 and 159 BIS 5, regarding the right to environmental information; and
- Article 200, providing that state laws must allow for citizen complaints.

These articles of the LGEEPA and the cited provisions of the state laws on environmental protection, water and health will not be further analyzed in this process, and it is not deemed necessary to analyze them in respect of the factual record warranted for this submission.

IV.4.3 Provisions relevant to the facts under the submission

Contrarily, also having considered the arguments set forth in Mexico's response, the Secretariat finds that LGEEPA Articles 88 paragraph IV, 89 paragraph VI, 93, 117, 121, 122, 123, 124, 133, 189, 190, 191, 192 and 199 are directly applicable to the subject matter of the submission.

Article 88 paragraph IV establishes that water users are responsible for preserving it and using it in a sustainable manner.[29] Article 89 paragraph VI establishes that the criteria for the preservation and sustainable use of water (as mentioned in Article 88 paragraph IV, among others) must be considered in the operation and administration of drinking water and sewer systems serving population centers and indus-

29. Article 88.- The following criteria shall be considered for the sustainable use of water and aquatic ecosystems:
...IV.- The preservation and sustainable use of water, as well as of aquatic ecosystems, is the responsibility of the users thereof and of anyone undertaking works or activities affecting such resources.

tries.[30] The municipalities of Imuris, Magdalena de Kino and Santa Ana, all users of the Magdalena River as receiving bodies for their wastewater discharges, are responsible for considering these criteria for the sustainable use of the water.

Article 92 refers to the treatment of wastewater, among the actions that the authorities must promote in order to ensure the availability of water and to reduce levels of waste.[31] LGEEPA Articles 93, 117, 121, 122, 123, 124 and 133 establish obligations, prohibitions, criteria and measures for the prevention and control of water pollution, all of which are applicable to the discharge of wastewater and to the assertions of the submission.[32] Likewise, LGEEPA Articles 189, 190, 191, 192 and 199 are relevant to the subject matter of the submission, as they regulate

30. Article 89.- The criteria for the sustainable use of water and aquatic ecosystems shall be considered in:
...VI.- The operation and administration of drinking water and sewer systems serving population centers and industries;

31. Article 92.- In order to ensure the availability of water and to reduce the levels of waste, the competent authorities shall promote the saving and efficient use of water and the treatment and reuse of wastewater.

32. Article 93.- The Secretariat shall undertake the necessary actions to avoid, and as applicable control, the eutrophication, salinization and any other pollution process in national waters.
Article 117.- The following criteria shall be considered for the prevention and control of water pollution:
I. The prevention and control of water pollution is fundamental to avoid the reduced availability thereof and to protect the country's ecosystems;
II. The State and society have shared responsibility for preventing the pollution of rivers, basins, vessels, sea waters and other water deposits and currents, including subsoil waters;
III. The use of water in production activities susceptible to producing the pollution thereof implies the responsibility for treating discharges, returning it to appropriate conditions for use in other activities, and maintaining the balance of ecosystems;
IV. Urban wastewater must receive treatment before being discharged into rivers, basins, vessels, sea waters and other water deposits and currents, including subsoil waters; and
V. The participation and responsibility of society is an indispensable condition to prevent water pollution.
Article 121.- Wastewater containing pollutants may not be discharged or leaked into any body or current of water or into the soil or subsoil, without prior treatment or without the permit or authorization from the federal authority, or from the local authority in cases of discharges into waters under local jurisdiction or into the drainage and sewer systems of population centers.
Article 122.- Wastewater arising from urban public uses and from industrial or agricultural uses, discharged into the drainage and sewer systems of population centers or into basins, rivers, waterways, vessels and other water deposits or currents, as well as waters leaked into the subsoil by any means, and in general waters spilled into the soil, must meet the necessary conditions in order to prevent:
I. Pollution of the receiving bodies;
II. Interference in water filtering processes; and

the citizen complaint procedure.[33] The Submitter used this remedy to denounce the pollution of the Magdalena River from discharges of wastewater by the municipalities in question.

IV.5 Does the submission warrant the development of a factual record?

The submission asserts that Mexico is failing to effectively enforce its environmental laws by not preventing the pollution of the Magdalena River with the discharge of untreated wastewater by the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora. Taking account of the applicable provisions, the assertions of the submission that should be examined are:

1. the alleged failure to effectively enforce Articles 93, 117 and 122 of the LGEEPA, with respect to the general obligation to prevent and control water pollution in the case of the Magdalena River;

III. Disorders, impediments or alterations in the correct uses or in the appropriate functioning of the systems, and in the hydraulic capacity of the basins, waterways, vessels, water tables and other deposits in the national domain, as well as of the sewer systems.

Article 123.- All discharges into the collection networks, rivers, aquifers, basins, waterways, vessels, sea waters and other water deposits and currents, and spills of wastewater into soils or the leakage thereof onto lands, must meet the Mexican official standards issued for such purpose and, as applicable, the particular discharge conditions thereof determined by the Secretariat or the local authorities. The person generating said discharges shall be responsible for the required prior treatment.

Article 124.- When wastewater affects or may affect water supply sources, the Secretariat shall notify the Secretariat of Health and deny or revoke the corresponding permit or authorization, as the case may be, and as applicable order the suspension of the supply.

Article 133.- With the corresponding participation of the Secretariat of Health, applicable pursuant to other provisions of law, the Secretariat shall perform a systematic and ongoing monitoring of water quality, in order to detect the presence of pollutants or excesses of organic wastes, and apply the appropriate measures. In the case of waters under local jurisdiction, such actions shall be coordinated with the authorities of the states, the Federal District and the municipalities.

33. Article 189.- Any person, social group, nongovernmental organization, association and society may denounce, before the Office of the Federal Attorney General for Environmental Protection or other authorities, any fact, act or omission that leads to or may lead to ecological imbalance or damages to the environment or to natural resources, or which contravene the provisions of this Law and all other provisions regulating matters related to environmental protection and the preservation of ecological balance...

Articles 190, 191, 192 and 199 establish the requirements and procedures applicable to citizen complaints.

Article 200.- The state laws shall establish the procedure for attending to citizen complaints in the case of acts, facts or omissions that lead to or may lead to ecological imbalance or environmental damages, due to violations of the local environmental laws.

2. the alleged failure to effectively enforce Article 88 paragraph IV and Article 89 paragraph VI of the LGEEPA, with respect to the responsibility of the municipalities of Imuris, Magdalena de Kino and Santa Ana, as users of the (national) waters of the Magdalena River, to use them sustainably;

3. the alleged failure to effectively enforce Articles 92, 117 paragraph IV, 121 and 123 of the LGEEPA, with respect to the discharges of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana into the Magdalena River, regarding the obligation of any person discharging wastewater to give prior treatment to the discharges in order to prevent the pollution of the receiving bodies;

4. the alleged failure to effectively enforce Articles 121 and 124 of the LGEEPA, with respect to the granting and cancellation of the wastewater permits for the municipalities of Imuris, Magdalena de Kino and Santa Ana;

5. the alleged failure to effectively enforce Article 123 of the LGEEPA, with respect to the wastewater discharges into the Magdalena River, regarding compliance with the applicable Mexican official standards;

6. the alleged failure to effectively enforce Article 133 of the LGEEPA, by not performing an ongoing and systematic monitoring of the water quality of the Magdalena River; and

7. the alleged failure to effectively enforce Articles 189 through 192 and 199 of the LGEEPA, with respect to the citizen complaints filed on the pollution of the Magdalena River.

Following is an examination of these assertions in light of Mexico's response, and an explanation of the reasons why the Secretariat considers that the submission warrants the development of a factual record.

IV.5.1 Alleged failure to effectively enforce the general obligation to prevent and control water pollution (LGEEPA Articles 93, 117 and 122)

Article 93 provides that the federal authority shall undertake the necessary actions to prevent or control the pollution of national waters. Article 117 provides that for preventing and controlling water pollution,

criteria must be considered that, in essence, establish the principles of prevention and control of water pollution, of the prior treatment of wastewater discharges, and of the State's and society's shared responsibility to prevent water pollution. Article 122 of the LGEEPA requires that wastewater arising from urban public uses meet the necessary conditions to prevent the pollution of the receiving bodies.

In Chapter IV of Mexico's response, the Party describes the environmental problems of the Magdalena River at that time. Mexico's response asserts: "According to the water quality monitoring performed by the CNA for the classification thereof, it can be seen that the waterway has the capacity to assimilate or attenuate the impact of the wastewater discharges it receives."[34] However, the party did not provide more information on the classification of the waters of the Magdalena River, nor did its response specify the parameters used to characterize the wastewater referenced therein.[35] The Party confirms that the municipalities of Imuris, Magdalena de Kino and Santa Ana discharge their wastewater into the aforesaid river, but it clarifies that in the case of Imuris and Magdalena de Kino the discharges are treated in oxidation lagoons,[36] and further recognizes that these systems show deficiencies.[37] Mexico's response indicates:

> It should be mentioned that the treatment of wastewater from the country's various population centers is a goal that the Mexican government has not been able to fully attain, and that the progress in this area is subject to the availability of budgetary resources. Given the foregoing, it should be noted that, despite the existence of a general obligation to treat wastewater from the population centers under both federal and state laws, the economic limitations faced by the country still make it impossible to fully enforce this provision, while the corresponding government plans now set a clear strategy for the gradual solution of the nationwide problem of wastewater treatment.[38]

Specifically with respect to Article 93, Mexico's response asserts that due compliance has been given to this article through the creation of a regulatory framework to control the pollution processes of national waters, and through the oversight of compliance with the corresponding Mexican official standards.[39] The issuance of Mexican official standards and the oversight of compliance therewith constitute measures

34. Response of Mexico, p. 13.
35. Response of Mexico, Exhibit 23, p. 40 of the Magdalena, Sonora project.
36. Response of Mexico, p. 13.
37. Response of Mexico, p. 34 and 35.
38. *Ibid.*
39. Response of Mexico, p. 47.

that may contribute to the prevention of pollution processes in national waters. However, those measures do not in and of themselves constitute effective enforcement of Article 93, the purpose of which is not the issuance of standards but the prevention and control of water pollution. The submission states precisely that in spite of the issuance of various laws to prevent water pollution and the fact that these laws and the institutional oversight frameworks have undergone numerous modifications, according to the Submitters, measures for the effective enforcement of these provisions have not been taken.[40] Mexico's response asserts that the CNA oversees compliance with the applicable Mexican official standards, but does not provide information to support the statement that such oversight is effectively carried out, and thus the central questions raised in the submission on this matter remain open.

With respect to the effective enforcement of LGEEPA Article 117, the Party's response refers only to Paragraph IV, establishing the need to give treatment to urban wastewater discharges and stating that this has been done because treatment infrastructure exists in two of the municipalities and there is a project to build one in the third.[41] With respect to the latter, the municipality of Santa Ana, the Party asserts that it does not have a water wastewater treatment system, and such waters are discharged near the Magdalena River, although a project exists to build an oxidation lagoon.[42] In the other two municipalities, there are projects to extend or build the treatment infrastructure to correct the deficiencies. The Party accompanied its response with copies of documents describing those projects.[43] The prior treatment of discharges is one of the criteria provided in Article 117, but it is not independent of the purpose of that provision, namely the prevention and control of water pollution. The response asserts that the infrastructure exists for wastewater treatment, as do projects to improve such infrastructure, but the information provided does not indicate that such infrastructure is meeting the objective of preventing and controlling water pollution of the Magdalena River, in the case of the municipalities of Imuris, Magdalena de Kino and Santa Ana, and thus the issue raised in the submission as to the lack of effective enforcement of the Article 117 criteria remains unresolved.

With regard to LGEEPA Article 122, which sets forth the concrete obligation that wastewater from urban public uses must meet the neces-

40. Submission, p. 10 and 11.
41. Response of Mexico, p. 49.
42. Response of Mexico, p. 17.
43. Response of Mexico, p. 13 through 16, 28, 29 and Exhibit 23 "Project for Adaptation and/or Extension of the Sanitary Sewer Systems and Wastewater Treatment Plants for the Cities of Imuris, Magdalena, and Santa Ana."

sary conditions to prevent the pollution of receiving bodies, again the Party responds by indicating that the infrastructure exists for the treatment of wastewater discharges.[44] As in the case of Articles 93 and 117, the purpose of this provision is to prevent the pollution of the receiving bodies, and thus the existence of treatment plants (which the Party itself deems deficient) does not seem to be sufficient to resolve the issue raised in the submission of a failure to effectively enforce this provision.

The measures mentioned by the Party do not seem to have ensured that the wastewater from urban public uses (specifically, the discharges from the municipalities of Imuris, Magdalena de Kino and Santa Ana) meet the necessary conditions to prevent the pollution of the Magdalena River, in effective enforcement of the corresponding criteria and of the general obligation to prevent or control water pollution, pursuant to Articles 93, 117 and 122 of the LGEEPA. Therefore, the Secretariat considers that the alleged failure to effectively enforce these provisions, as set forth in this submission, warrants the development of a factual record with respect to the discharge of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora.

IV.5.2 Alleged failure to effectively enforce the responsibility of users of water for its preservation and sustainable use (LGEEPA Articles 88 paragraph IV and 89 paragraph VI)

Articles 88 paragraph IV and 89 paragraph VI of the LGEEPA establish the responsibility of users of water for its preservation and sustainable use. Under these articles, the municipalities of Imuris, Magdalena de Kino and Santa Ana, as users of the Magdalena River as a receiving body of their wastewater discharges, are responsible for the preservation and sustainable use of the water and must consider the sustainable water use criteria with respect to the wastewater discharges from their sewer systems. Mexico's response does not refer to the enforcement of Article 88. As for Article 89, it asserts that it does not fall under the subject matter of the submission and that since the concepts of sustainable use and aquatic ecosystems are so broad, the Party cannot refute any violation that may be denounced.[45]

It is clear that these provisions, by establishing the responsibility of the municipalities as users of water, do fall under the subject matter of

44. Response of Mexico, p. 51.
45. Response of Mexico, p. 44 and 45.

the submission. Although the provisions are broad, the responsibility they provide for is part of the context that frames the other enforceable obligations of prevention and control of water pollution that are the subject of the submission. These provisions are relevant in this contextual sense and should be considered in the factual record the development of which is warranted with respect to this submission.

IV.5.3 Alleged failure to effectively enforce the obligation to give prior treatment to wastewater discharges (LGEEPA Articles 92, 117 paragraph IV, 121 and 123)

The main allegation of the submission is that Mexico is failing to effectively enforce its environmental laws because it allows the municipalities of Imuris, Magdalena de Kino and Santa Ana to discharge their wastewater into the Magdalena River without giving it the treatment necessary to prevent pollution of the river. Article 92 provides that treatment and reuse of wastewater shall be promoted to ensure the availability and reduce its waste, while Articles 117 paragraph IV, 121 and 123 of the LGEEPA set forth the obligation to give prior treatment to wastewater discharges to prevent the pollution of the receiving bodies.

In its response, Mexico admits that there are deficiencies in the treatment of wastewater discharged into the Magdalena River.[46] However, the response indicates that "the economic conditions of the municipalities, state and federation limit the execution of action plans for the construction of sanitation systems."[47] Additional information is warranted on this statement, especially in light of the submission's claim that sufficient funds do exist to attend to these matters. The Submitter asserts that the municipalities "collect 35 % on each monthly bill for drinking water consumption, drainage and sewer"[48] and that the money is spent on works that the Submitter deems unnecessary.[49]

With regard to Article 92, the question of whether this provision is effectively enforced does not stand in light of Mexico's response, because the purpose of this provision is only to promote wastewater

46. According to the response, the oxidation lagoons with which the municipality of Magdalena de Kino treats its wastewater are obsolete and insufficient. In the case of the municipality of Santa Ana there is not a wastewater treatment system. As for Imuris, the Party asserts that, according to information provided by the state and municipal governments, an anaerobic lagoon and a facultative lagoon began operation 11 June 1998 for the treatment of wastewater. Response of Mexico, p. 14.
47. Response of Mexico, p. 23.
48. Additional filing to the submission, p. 11.
49. Submission, p. 2.

treatment, and the actions described by the Party are precisely actions to promote the treatment of wastewater.[50]

Unlike Article 92, in the case of Article 117, the obligation is not to promote treatment but rather that the result of such promotion efforts be the prevention and control of water pollution. As stated above, the Party's response refers only to paragraph IV, which establishes the need to give treatment to urban wastewater discharges, and asserts that this has been fulfilled because the treatment infrastructure exists in two of the municipalities, with a construction project in the third.[51] The obligation to give prior treatment to the discharges as a measure to prevent and control water pollution is not satisfied by the mere existence of treatment plants, but rather such treatment must effectively prevent or control water pollution. The Party's argument also does not suffice to show effective enforcement of Article 117, by having programmed and budgeted the necessary investment to solve the deficiencies or lack of wastewater treatment in the municipalities of Magdalena de Kino and Santa Ana, since planning the future compliance with that provision is insufficient to consider that there has been effective enforcement.

In addition, while the response states that projects exist and have been budgeted, it does not state that such projects are being implemented nor does it show that the corresponding financing has actually been allocated in an approved budget. It also is not clear whether the budget would be covered by the CNA or the municipalities. This fact was noted and the respective documents were requested in the request for additional information sent by the Secretariat to the Party 13 September 2000. For example, the Secretariat sought information on the development of these projects by also requesting information from the Party on the filing, with the corresponding authority, of the preventive environmental impact statement for the three projects, referenced in numeral 11 of each project report, under the heading "Environmental Impact Study," and on the procedure that would have applied to such preventive statements. As indicated, no response to that request has been received.

Article 121 of the LGEEPA may be summarized as a prohibition to discharge wastewater containing pollutants, without prior treatment and without authorization from the competent authority. In light of the Party's response, the alleged failure to effectively enforce this provision cannot be dismissed. Mexico's response is limited to indicating that, as of the filing date of the response, the municipalities involved have not

50. Response of Mexico, p. 46 and 47.
51. Response of Mexico, p. 49.

received the corresponding wastewater discharge permits. Particularly in the case of the municipality of Santa Ana, the matter of the effective enforcement of Article 121 persists, insofar as this municipality has been allowed to discharge its wastewater with no prior treatment whatsoever, in contravention of the express prohibition established in that article.

In sum, the alleged failure to effectively enforce Article 92 does not warrant further consideration, while the allegation relating to Articles 117, 121 and 123 cannot be dismissed in light of Mexico's response, and thus the development of a factual record is warranted with respect to those provisions. The factual record is appropriate to develop information relating to the undertaking of the necessary works in the municipality of Santa Ana to treat the wastewater prior to discharge, the correction of deficiencies in the treatment system of the municipality of Magdalena de Kino, and the operating efficiency of the Imuris treatment system, in order to attain the objectives of these provisions with respect to the Magdalena River, namely the prevention or control of water pollution.

IV.5.4 Alleged failure to effectively enforce the requirement to have a wastewater discharge permit, and the potential cancellation thereof in the case of pollution of waters intended for human consumption (LGEEPA Articles 121 and 124)

The discharge of wastewater containing pollutants requires a permit or authorization from the competent authority pursuant to Article 121, which shall not be granted or shall be revoked when the wastewater affects or may affect water supply sources, in accordance with Article 124. The Submitter asserts that the Magdalena River is the only water supply source in the region and that it has been subjected to pollution and environmental damage due to the discharges of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana, for 17 years prior to the filing of the submission.[52] The information provided in Mexico's response confirms that the municipalities in question discharge their wastewater into the Magdalena River and that they do not have the corresponding discharge permits, although those permits were supposedly being processed at the time the response was filed.[53]

As regards the use of the Magdalena River for human consumption, in its description of the municipal water infrastructure provided in the response, the Party asserts that the drinking water supply in the

52. Submission, p. 2 last paragraph, and additional filing to the submission, p. 1 and 12.
53. Response of Mexico, p. 36.

three municipalities in question comes from deep wells: two in Imuris, four in Magdalena de Kino and four in Santa Ana. Mexico's response specifies that two of the wells in Magdalena de Kino are adjacent to the left bank of the Magdalena River.[54] While this information is useful for understanding the context of the matter raised in the submission, this information does not counter the Submitters' assertion that the wastewater discharges from these municipalities pollute waters intended for human consumption in the towns of the region.[55]

The Party's response recognizes that the waters of the Magdalena River are polluted, and that it has even sanctioned farmers who use it for irrigation. The Party nevertheless asserts that, according to a CNA study, the pollution is due to "open-air defecation practices, discharges of domestic drainage, and the disposal of trash and organic matter."[56] In the same sense, the response states that a well was closed in Imuris (without specifying the date) because it was seriously polluted, and indicates that the cause of the pollution was that most people in the town discharge their wastewater in outhouses, wastewater wells and septic tanks.[57]

These affirmations by the Party do not demonstrate that the Magdalena River is not polluted, nor that the wastewater discharges into the Magdalena River do not pollute water supply sources or that they are being done with the authorization required under law. Furthermore, they are not supported by information allowing for confirmation of the data upon which they are based. Given that the information provided by the Party in its response confirms the Submitters' assertion that the municipalities of Imuris, Magdalena de Kino and Santa Ana do not have discharge permits and does not refute the assertion that these wastewater discharges pollute water supply sources, review of the effective enforcement of Articles 121 and 124 is warranted in the factual record the development of which is warranted with respect to this submission.

IV.5.5 Alleged failure to effectively enforce the applicable Mexican official standards (LGEEPA Article 123)

The Submitter alleges a failure to effectively enforce Article 123, which establishes among other things that all discharges into rivers must satisfy the Mexican official standards issued for such purpose.

54. Response of Mexico, p. 14-16.
55. Submission, p. 1 and additional filing to the submission, p. 11.
56. Response of Mexico, p. 18-23.
57. Response of Mexico, p. 14.

On 6 January 1996, Mexican Official Standard NOM-001-ECOL-1996 (NOM-001), establishing the maximum allowable limits of pollutants in wastewater discharges into national waters and properties, was published in the Official Gazette of the Federation. NOM-001 is binding for the municipalities involved, establishing the following obligations for those responsible for wastewater discharges into receiving bodies or properties under federal jurisdiction:

- The discharges of wastewater must comply with the parameters established in the standard, before being released.
- The persons responsible for the wastewater discharges must monitor the quality of the discharges and report it periodically to the CNA.
- The persons responsible for wastewater discharges that exceed the maximum allowable limits established therein must file a works and actions plan with the CNA, for controlling the quality of its discharges.
- Once said plans are filed, the CNA must be informed semiannually on the progress in the control of discharges.

Compliance deadlines are established for some of the obligations contained in this standard. Accordingly, point 4.5 of NOM-001 establishes that the date as of which the municipalities' discharges must comply with the respective parameters is determined based on the number of inhabitants in the municipalities.[58] Considering the data provided by the Party in its response,[59] the municipalities of Imuris and Santa Ana must comply with the parameters of NOM-001 as of 1 January 2010, while the municipality of Magdalena de Kino must do so as of 1 January 2005.

The filing date of the works and actions plan also varies according to the population size of each municipality. The municipalities of Imuris and Santa Ana were to have filed by 31 December 1999, while the municipality of Magdalena de Kino was to have filed by 31 December 1998.

However, there is no basis for concluding that the deadline for the municipalities to comply with the parameters of NOM-001 implies that

58. The number of inhabitants is determined by the data found in the XI National Population and Housing Census, corresponding to 1990, published by the National Institute of Statistics, Geography and Information (*Instituto Nacional de Estadística, Geografía e Informática*–Inegi).
59. Response of Mexico, p. 24.

the municipalities are exempt from compliance with their other enforceable obligations under the LGEEPA and the NOM-001. For example, there is no deadline or exemption with respect to compliance with the municipalities' obligation to treat their wastewater. The obligation to monitor the discharges and report them periodically is not subject to deadlines either. In accordance with point 4.8 of NOM-001, and according to the data reported by the Party as to the number of inhabitants, the municipalities of Imuris and Santa Ana are required to take semiannual measurements and report them annually to the CNA, while Magdalena de Kino must take quarterly measurements and report them semiannually to the CNA. Mexico's response does not indicate that this monitoring has been performed and reported.

The Party asserts that in 1997 the CNA entered into an agreement for the development of a "Project for Adaptation and/or Extension of the Sanitary Sewer Systems and Wastewater Treatment Plants for the Cities of Imuris, Magdalena, and Santa Ana" as a measure to solve the environmental problems of the Magdalena River, copies of which were included in the response.[60] However, while the pollutant levels in wastewater discharges are not yet enforceable, it is not clear whether the Party has started the works and adaptations that it claims to have planned in order to comply with those obligations.

Mexico's response does not include information on the enforcement for the municipalities in question, with respect to the NOM-001 obligations that are not subject to deadlines, nor on the execution of the project that is intended to allow the municipalities in question to comply with the pollutant limits set forth in the standard, when applicable. Thus, the Secretariat considers that the development of a factual record, with respect to the alleged failure to effectively enforce LGEEPA Article 123 regarding NOM-001, is warranted.

IV.5.6 Alleged failure to effectively enforce the monitoring of water quality (LGEEPA Article 133)

Article 133 establishes the obligation of the Secretariat of Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*—Semarnat) to perform, with the corresponding participation of the Secretariat of Health, the systematic and ongoing monitoring of water quality in order to detect pollutants or excess organic waste, and apply appropriate measures. The Party indicates in its response that in applying this provision, the CNA has performed water quality monitor-

60. Response of Mexico, p. 28 and Exhibit 23.

ing on the Magdalena River and that inspection visits have been performed, companies closed and farmers fined (pursuant to NOM-033) based on such monitoring.[61] These actions carried out by the CNA clearly fall under the provisions of Article 133. However, the information provided by the Party is limited to describing one instance in which monitoring resulted in measures and does not refer to "systematic and ongoing" monitoring, as provided in Article 133.

In this sense, consideration of the effective enforcement of Article 133 in the factual record, the development of which is warranted with respect to this submission, is justified.

IV.5.7 Alleged failure to effectively enforce the citizen complaint procedure (LGEEPA Articles 189 through 192 and 199)

The Submitter asserts that on numerous occasions it approached various federal and local authorities to notify them of the environmental problems of the Magdalena River, requesting that solutions be adopted, without receiving any response to its demands.[62]

The Party asserts that it has handled three complaints filed by the Submitter, detailing the procedure and results thereof. Two of the complaints refer to the submission filed in 1992 and, according to the Party, they were processed in accordance with the LGEEPA.[63] Given that those two complaints were filed before the NAAEC entered into force and were concluded in 1992 and 1993, the alleged failure to effectively enforce the LGEEPA regarding them is not reviewed further. Only the citizen complaint filed in January 1997 is examined.

The Party confirms that in 1997 the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) received a filing from the Submitter, denouncing the problems of the Magdalena River, which was remitted to the Profepa delegation in the state of Sonora to be handled as a citizen complaint. Simultaneously—the Party asserts—information was requested from the CNA on the problems described, and the complainants were informed of the processing of their filing. The Party describes other CNA actions relating to this citizen complaint and asserts that, at the time its response was filed, the processing of the citizen complaint had not yet been concluded.[64]

61. Response of Mexico, p. 18 through 23 and 55.
62. Submission, p. 1.
63. Response of Mexico, p. 24 through 27.
64. Response of Mexico, p. 28.

The Secretariat considers that, since the submission does not express a specific argument as to the supposed failure to effectively enforce Articles 189, 190, 191, 192 and 199 of the LGEEPA relating to the citizen complaint procedure and, given the actions described in Mexico's response, it is not necessary to continue reviewing this assertion in the factual record warranted with respect to this submission, beyond the inclusion of the results of the processing thereof, which had not yet concluded.

IV.5.8 Summary

In sum, the Secretariat considers that the development of a factual record is warranted on the effective enforcement of some of the provisions invoked by the submission. In addition to providing relevant information on whether Mexico effectively enforces its environmental laws regarding the discharges of wastewater from the municipalities of Imuris, Magdalena de Kino and Santa Ana into the Magdalena River, the factual record could allow for a better understanding of the actions undertaken by the Party to effectively enforce its environmental laws on the prevention of water pollution, with respect to the discharge of those municipalities' wastewater. It will also allow for a clarification of the relationship between NOM-001 and the general obligations of the federation and municipalities, regarding the prevention of the pollution of national waters, and as to drainage, sewer and municipal wastewater treatment services. Likewise, it would gather information to clarify which functions, responsibilities and obligations fall upon the operating agencies, the municipal government and the federal government with respect to the "Project for Adaptation and/or Extension of the Sanitary Sewer Systems and Wastewater Treatment Plants for the Cities of Imuris, Magdalena, and Santa Ana" that accompanies Mexico's response,[65] and information on the progress made in this Project.

Furthermore, based on the reasons set forth in this determination, the Secretariat considers that the development of a factual record is not warranted with respect to the failure to effectively enforce articles 1 paragraphs I, II, III, V, VI, VIII, IX and X, 4, 5 paragraphs I, II, III, V, VII, XVI, XVII, XVIII and XIX, 6, 7 paragraphs I, II, VIII, XIX, XI, XII, XIV, XV, XVIII, XIX and XXI, 8 paragraphs I, II, VII, IX, X, XI, XIII and XV, 10, 15, 16, 23 paragraph VII, 36, 88 paragraphs I through III, 89 paragraphs II

65. The functions arising under this project do not seem to coincide with those established in the LGEEPA, the LAN or NOM-001. (LGEEPA Articles 88 paragraph IV, 89 paragraph VI, 93, 117 paragraph IV, 118 paragraph V, 119 BIS, 121, 122, 123 and 133; LAN Articles 88, 89 and 90.)

and VII, 90, 91, 96, 98 paragraph IV, 104, 108 paragraph I, 109 BIS, 118 paragraphs I, II, III, V and VI, 119, 119 BIS, 120, 126, 127, 128, 129, 134, 157, 159 BIS 3, 159 BIS 4 and 159 BIS 5, 189, 190, 191, 192, 199 and 200 of the LGEEPA; as well as with respect to all provisions invoked of the following state laws: the Law of Ecological Balance and Environmental Protection for the State of Sonora, the Waters Law for the State of Sonora, and the Health Law for the State of Sonora.

V. NOTIFICATION TO COUNCIL IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

In accordance with NAAEC Article 15(1), the Secretariat hereby notifies Council that, based on the reasons set forth in this determination, it considers that submission SEM-97-002 filed by Comité Pro Limpieza del Río Magdalena warrants the development of a factual record with respect to the assertion that Mexico is failing to effectively enforce Articles 88 paragraph IV, 89 paragraph VI, 92, 93, 117, 121, 122, 123, 124 and 133 of the LGEEPA, as of 1 January 1994, with respect to the pollution of the Magdalena River by the discharge of the wastewater of the municipalities of Imuris, Magdalena de Kino and Santa Ana in the Mexican state of Sonora.

Respectfully submitted for your consideration on this 5 of February 2002.

Janine Ferretti
Executive Director

SEM-98-003

(Great Lakes)

SUBMITTER:	DEPARTMENT OF THE PLANET EARTH, ET AL.
PARTY:	United States of America
DATE:	27 May 1998
SUMMARY:	The Submitters assert that the US Environmental Protection Agency's regulations drafted and programs adopted to control airborne emissions of dioxins and furans, mercury and other persistent toxic substances from solid waste and medical waste incinerators violate and fail to enforce both: 1) US domestic laws, and; 2) the ratified US-Canadian treaties designed to protect the Great Lakes that are partly referenced in the US Clean Air Act.

SECRETARIAT DETERMINATIONS:

ART. 14(1)* (14 December 1998)	Determination that criteria under Article 14(1) have not been met.
REV. SUBM. ART. 14(1)(2)* (8 September 1999)	Determination that criteria under Article 14(1) have been met and determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.
ART. 15(1) (5 October 2001)	Determination under Article 15(1) that development of a factual record is not warranted.

* Published in Volume 5 (Fall 2000) of the *North American Environmental Law and Policy* Series.

Secretariat of the Commission for Environmental Cooperation of North America

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

Submission Number:	**SEM-98-003** (Great Lakes)
Submitter(s):	Department of the Planet Earth; Sierra Club of Canada; Friends of the Earth; Washington Toxics Coalition; National Coalition Against Misuse of Pesticides; WASHPIRG; International Institute of Concern for Public Health; Dr. Joseph Cummins; and Reach for Unbleached
Concerned Party:	United States
Date Received:	27 May 1998
Date of this Notification:	5 October 2001

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "CEC") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether the submission merits requesting a response from

the Party named in the submission. If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform Council and provide its reasons (Article 15(1)). The Secretariat dismisses the submission if it believes that development of a factual record is not warranted.

On 27 May 1998, the Submitters filed with the Secretariat a submission alleging that the United States is failing to effectively enforce certain obligations regarding the deposition into the Great Lakes of airborne emissions of dioxin and mercury from solid and medical waste incinerators. Following the Secretariat's dismissal of that original submission, the Submitters filed an amended submission on 4 January 1999. The amended submission included allegations that the United States is failing to effectively enforce certain obligations to inspect and monitor incinerators emitting dioxin and mercury, to notify certain states that they must reduce such dioxin and mercury emissions because of adverse impacts of the emissions in Canada and to implement measures that would lead to the virtual elimination of all such dioxin and mercury emissions.

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

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

II. SUMMARY OF THE ORIGINAL AND AMENDED SUBMISSIONS

A. The Original Submission

On 27 May 1998, the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The submission concerned airborne emissions of dioxin and mercury into

the Great Lakes and claimed that those emissions posed a significant threat to public health and the environment. The submission alleged that solid and medical waste incinerators in the United States are substantial sources of these emissions and that regulations issued by the US Environmental Protection Agency ("EPA") governing emissions from those incinerators conflict with the domestic laws of the United States and with certain provisions of ratified US-Canadian agreements because the regulations authorize greater emissions than contemplated by these statutes and agreements. The submission claimed that these purported inconsistencies constituted a failure to effectively enforce for purposes of Article 14.

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

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

The Secretariat accordingly dismissed the Submission.

B. The "New and Amended" Submission

On 4 January 1999, the Submitters filed a "new and amended submission." This submission continued to assert that solid waste and medical incinerators in the United States are substantial sources of dioxin and mercury emissions. The submission further asserted that various domestic and international legal instruments obligated EPA to take several actions to address those emissions. These actions included (1) inspecting and otherwise monitoring emissions from such incinerators; (2) advising "host states" that incinerators within their jurisdictions are contributing air pollution that may be endangering public health or welfare in a foreign country, thereby triggering such states' obligation to reduce such pollution; and (3) requiring such incinerators to implement

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

pollution prevention approaches and the like to achieve the goal of virtually eliminating those emissions. The submission claimed that the United States has not fulfilled those obligations and that this asserted failure constitutes a failure to "effectively enforce" for purposes of Article 14 of the NAAEC.

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

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

The Secretariat dismissed the assertions relating to alleged failures to enforce the Great Lakes Water Quality Agreement or the 1986 Agreement Between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste because it was not persuaded that these agreements are "environmental laws" for purposes of Article 14. The Secretariat noted that, "by making this determination, the Secretariat is not exclud-

ing the possibility that future submissions may raise questions concerning a Party's international obligations that would meet the criteria in Article 14(1)."[2]

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

A. The United States' Response

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

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

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

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

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

B. The Secretariat's Article 21 Request

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

Commentators and courts alike have highlighted the complexity of the Clean Air Act.[4] The Article 21 request was designed to assist the

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

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

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

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

IV. ANALYSIS

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

A. Introduction

This submission has reached the stage at which, under Article 15(1), the Secretariat must consider whether the submission, in light of

Protection: Law and Policy 378 (3d ed. 1999) (the 1990 amendments to the Act "greatly increased the length, specificity, and scope of the Act").

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

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

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

The Secretariat further concluded that the two assertions satisfying the criteria in Article 14(1) also warranted a response from the United States based on the guiding factors in Article 14(2). The amended submission alleges harm to the Submitters (Article 14(2)(a)), raises matters whose further study would advance the goals of the NAAEC (Article 14(2)(b)), indicates that a private remedy was being pursued with respect to some of the issues raised in the submission (Article 14(2)(c)), and is not drawn exclusively from mass media reports (Article 14(2)(d)).

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

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

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

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

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

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

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

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

1. The 1991 Standards for New MWCs

EPA reports in its 24 July 2000 response to the Secretariat's Article 21 request for information that sixteen new MWC units at seven plants are subject to the 1991 standards for new MWCs contained in its "NSPS Subpart Ea" regulations.[11] The Subpart Ea regulations establish emission standards for dioxin/furans. The regulation does not establish mercury standards for new MWC units, but states may require more stringent regulations for their new MWC units. The Secretariat is assum-

10. *See*, *e.g.*, 1 December 1999 response at 34.
11. 40 C.F.R. Part 60, Subpart Ea. EPA's 24 July 2000 memorandum indicates that there is another category of new MWC units regulated under the Standards of Performance for Large Municipal Waste Combustors for which Construction is Commenced after 20 September 1994, or for which Modification or Reconstruction is Commenced after 19 June 1996. 40 C.F.R. Part 60, Subpart Eb. These standards were promulgated on 19 December 1995. EPA's response appears to indicate that there are currently no facilities in this category. *See* 24 July 2000 US memorandum at 1.

ing for purposes of its analysis that all sixteen were subject to these regulations at the time the new and amended submission was filed in January 1999.

EPA indicates that it uses several strategies to monitor compliance of these sixteen facilities with emission standards. First, there is a required initial performance test conducted at the time of start-up. Next, each MWC unit must conduct an annual performance test for dioxin emissions. Third, continuous emissions monitors ("CEMs") operated by each unit produce results for emissions of sulfur dioxide and nitrogen oxide, which act as operating parameters that are surrogates for dioxin emissions, and those results are reported to EPA every six months. Finally, EPA and the states conduct inspections of the units. EPA reports that during the past five years, "a total of 129 inspections have been conducted by EPA and/or the states at the seven MWC plants." EPA provides in tabular form the number of inspections conducted at each of the plants and the date of the last inspection.[12]

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

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

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12. All from the Attachment to 24 July 2000 US memorandum, at 1.
13. *See*, *e.g.*, 1 December 1999 response at 30-31**.** The discussion at pages 30-32 of the December 1999 response relates to the Eb regulated facilities (i.e., NSPS for large new MWCs for which construction is commenced after 20/09/94), not the Ea facilities discussed in this section, although the United States asserts generally that EPA regulations regarding MWC and MWI testing and monitoring meet applicable CAA requirements. The discussion of the Eb regulations appears to be by way of example, but there is nothing in the response that refers specifically to the way

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

2. The 1995 Guidelines for Large Existing MWCs

The United States reports that only two of the 163 large existing MWCs subject to the 1995 Guidelines had final compliance dates for meeting dioxins and mercury emission limitations as of the date the new and amended submission was filed (January 1999).[14] It notes that even as of approximately 1 September 2000, only a small minority (roughly 11 percent, or 18 out of 163 large existing MWCs subject to the 1995 Guidelines),[15] had final compliance dates for meeting dioxins and mercury emission limits.[16] In the Secretariat's view, a factual record is not warranted concerning the 161 facilities not subject to regulatory requirements prior to the filing of the submission because the assertions concerning these facilities go to the adequacy of the legal requirements themselves, not to whether there is a failure to effectively enforce such requirements. There was no legal requirement for most of these facilities

facilities subject to the Ea regulations are tested. Nonetheless, the Ea regulations appear to impose requirements that are essentially the same as those imposed by the Eb regulations.

14. *See*, *e.g.*, Table 4 of EPA's 6 November 2000 memorandum.
15. The United States advises that EPA initially established emission guidelines for existing small MWCs on 19 December 1995, but these guidelines were invalidated by court decree. EPA did not reissue these guidelines until 6 December 2000 and they did not become effective until 5 February 2001. 65 Fed. Reg. 76377 (2000). *See* 6 November 2000 memorandum at 3. Because there were no federal emission limitations in place for these MWCs at the time EPA formulated its response to the Article 21 request, its response generally does not address small MWCs, other than the six discussed below that are subject to State Implementation Plans ("SIPs").
16. *See*, *e.g.*, 6 November 2000 US memorandum at 3 and 4, indicating that there are 163 large existing large MWC units subject to the 1995 Guidelines at 65 MWC plants, and that as of 1 September 2000, final compliance dates were in effect for 18 facilities located at 17 MWC plants.

to meet emission limitations at the time the submission was filed, or to monitor emissions from such facilities.[17]

The two existing large MWCs subject to the 1995 Guidelines that were subject to emission standards and monitoring requirements as of the date the submission was filed are the Montgomery County Resource facility in Dickerson, Maryland (final compliance date 22 April 1991), and the Robbins RRF facility in Robbins, Illinois (final compliance date 2 June 1997).[18] The United States advises that facilities must take at least four steps to monitor compliance: (1) conduct an annual performance test; (2) submit an annual report, which "must include[ ] a list of dioxins and mercury emissions levels achieved during the most recent performance tests"; (3) conduct continuous monitoring for a number of parameters or surrogates to "ensure that dioxins and mercury emissions remain below the emission limitations . . ."; and (4) maintain records ("*e.g.*, performance test results, concerning compliance information with applicable dioxins and mercury emission limits") for review during periodic government inspections.[19] The Party further advises that EPA and the relevant state undertake the following actions to monitor compliance with emission limits once they become effective: (1) validate the initial performance test and confirm compliance based on that test; and (2) monitor for continued compliance through periodic performance tests, inspections, review of submitted reports, and/or compliance certifications by facilities. The United States indicates that it and the states use a variety of factors in determining the frequency of inspections for particular facilities, including: (a) compliance history; (b) density of other pollution sources; (c) facility location; and (d) monitoring equipment.[20] The United States indicates that there have been 15 inspections of the Montgomery facility and 43 inspections of the Robbins facility.[21] Finally, the United States also identifies a series of efforts EPA has made to promote compliance by large MWCs. The United States reports that since promulgating the regulations for large existing MWCs, EPA headquarters and regional offices have held monthly conference calls to address concerns with regulatory implementation and to track the progress of the states and the affected MWC facilities. In addition, EPA and

17. Section 60.39b(c)(1)(i) refers to certain circumstances in which state plans "shall include measurable and enforceable incremental steps of progress toward compliance." However, the submission does not raise any concerns regarding whether state plans contain such requirements, or regarding whether sources are meeting any such incremental steps, and nothing in either the submission or the Party's response indicates that this is a potential area of ineffective enforcement.
18. *See*, *e.g.*, 6 November 2000 US memorandum Table 4.
19. *See*, *e.g.*, 6 November 2000 US memorandum at 4.
20. *See*, *e.g.*, 6 November 2000 US memorandum at 2.
21. *See*, *e.g.*, 6 November 2000 US memorandum Table 4.

the states have worked with MWCs to deal with how to meet the requirements outlined in the state or federal plans.[22]

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

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

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

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

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

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

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

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

In its 24 July 2000 response, the United States divided this question into two categories of facilities. It first addressed the small MWCs. The United States reported that at the time of that response, MWCs were not subject to a new source performance standard under § 129 of the Clean Air Act. The United States advised that while EPA had promulgated such standards for small MWC units, the US Court of Appeals for the District of Columbia Circuit had vacated the rule as it applied to new small MWC units. The United States further advised that the agency

26. *See*, *e.g.*, 6 November 2000 US memorandum at 5.
27. 42 USC. § 7429(a)(1)(C).

expected to issue the final regulations for small MWC units by the end of 2000. Subsequently, EPA issued final new source performance standards for new small MWC units, which did not become effective until 5 February 2001.[28]

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

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

4. New Source Standards of Performance for HMIWIs

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

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

28. 65 Fed. Reg. 76349 (2000).
29. *See, e.g.*, 24 July 2000 US memorandum.
30. *See, e.g.*, 24 July 2000 US memorandum at 2.
31. *See, e.g.*, 24 July 2000 US memorandum Table 2.

ber of inspections conducted at each plant during the past five years, and it provides the date of the last inspection at each plant.[32]

Thus, the United States' 24 July 2000 memorandum appears to show that each of the four units covered by the 1997 regulations is subject to a regularized monitoring scheme that goes well beyond the "one-time-only" approach that the Submitters assert exists. The United States' 1 December 1999 response indicates that EPA requires that testing be done under other than "near-ideal" conditions, the other assertion of the Submitters. After describing at some length the circumstances in which testing is required of MWCs, the 1 December 1999 response indicates that "[t]he regulatory program established for [HMIWIs] closely parallels that outlined above for MWCs." In particular, the response continues, EPA's monitoring requirements for HMIWIs require "routine stack testing coupled with continuous monitoring of operating parameters for units equipped with air pollution control devices." Monitoring requirements for HMIWIs that are not equipped with add-on air pollution control devices consist of an initial stack test coupled with continuous monitoring of operating parameters and annual inspections. According to the response, "[a]fter the performance test, monitoring of operating parameters is the only way to determine, on a continuous basis, whether the source is operating in compliance." Operation outside the bounds of one or more parameter limits "constitutes a violation of a specific emission limit." In short, "[t]he initial and repeat testing requirements will ensure, on a continuous basis, that the air pollution control devices used at [HMIWIs] operate properly, that no deterioration in performance occurs, and that no changes are made to the operating system or the type of waste burned. . . . Where repeat testing is not required, annual inspections, annual opacity testing, and parameter monitoring will ensure that [HMIWI] units are functioning properly."[33]

In the Secretariat's view, the information provided does not support development of a factual record. The number of facilities involved is quite limited; the United States has provided considerable information showing that its monitoring and inspection scheme is not limited in the ways the Submitters allege it is; and the Submitters have not provided information supporting the notion that the inspection approach, in design or implementation, may constitute a failure to effectively enforce. Further, the information the United States has provided concerning compliance status reflects that compliance is generally good and

32. *See*, *e.g.*, 24 July 2000 US memorandum.
33. *See*, *e.g.*, 1 December 1999 response at 33.

the Submitters have not provided information suggesting that compliance levels may constitute a failure to effectively enforce. In particular, the compliance status information the United States has provided indicates that each of the covered facilities was in compliance with dioxin and mercury standards during the government inspections and, further, that each facility was in compliance during the period from January-March 2000. The United States reports that "EPA's database indicate[s] that each new HMIWI has continually been in compliance with the requirements . . . since commencing operation." It further notes that none of the 23 inspections revealed violations of the regulations for dioxin and/or mercury. Accordingly, the information before the Secretariat does not leave unresolved a central question as to whether there is a failure to effectively enforce the new source standards of performance applicable to HMIWIs or to justify development of a factual record to determine whether such a failure has occurred.

5. Large Existing HMIWIs

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

This conclusion is buttressed by other information that the United States provided, such as its strategy for monitoring compliance (which appears to address the concerns the Submitters have raised), the degree of compliance to date, the existence of follow-up action concerning the instances of non-compliance identified, and the significant decline in emissions to be anticipated from this set of facilities. The United States

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

reports that EPA and the relevant state undertake the following actions to monitor compliance with emission limits once they become effective: (1) validate the initial performance test and confirm compliance based on that test; and (2) monitor for continued compliance through periodic performance tests, inspections, review of submitted reports, and/or compliance certifications by facilities.[35] EPA states that it and the states use a variety of factors in determining the frequency of inspections for particular facilities, including: (a) compliance history; (b) density of other pollution sources; (c) facility location; and (d) monitoring equipment.[36] Thus, it appears that the United States' monitoring scheme addresses the concerns the Submitters raised about the adequacy of monitoring efforts.

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

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

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

seven facilities listed in Table 12 remain subject to the final compliance deadline that applies to HMIWIs subject to the federal plan.

A final point that the United States makes concerning this category of incinerators is that the Party anticipates a significant decline in the number of facilities, from 1,862 to 764, that will continue to operate after the final compliance date established under the applicable state plans or federal plan.[40] Related, the United States advises that "[t]he continued closure of existing HMIWIs corresponds to a significant reduction in dioxins and mercury emissions."[41] It notes that it expects, "when the emissions guidelines are fully implemented, to achieve a reduction of HMIWI dioxins and mercury emissions by ninety-seven percent and ninety-five percent, respectively."[42]

6. Summary

The information provided to the Secretariat does not support development of a factual record concerning the assertion that there is a failure to effectively enforce because of deficiencies in monitoring compliance. For the limited universe of facilities that were subject to monitoring and other regulatory requirements at the time the submission was filed, the information provided indicates that an extensive monitoring scheme is in place and that, in particular, these facilities have had their emissions tested; the tests occur on a more than one-time-only basis; and sampling is intended to produce representative results, not results under near-ideal conditions. Among other things, the United States states that while the Submitters "assert that most 'plants' are 'tested only once during startup,' [a]ctually, the 1995 regulations, which apply to most MWCs, require that those facilities be tested annually after the facilities are required to come into full compliance with the dioxins emission limitations established by those regulations."[43] The United States indicates that the regulations require annual emissions tests for mercury from MWCs as well. The United States further indicates that additional

40. *See* 6 November 2000 US memorandum at 6 and Table 12. Emissions from the facilities that may shut down are likely to continue until the facilities shut down. It does not appear that these facilities are subject to monitoring requirements or emission limitations, and, as a result, there is no failure to effectively enforce regarding them. Even if some of the increments described at pages 5 and 6 of the United States' 6 November 2000 memorandum apply, it does not appear that any such increments would apply to monitoring or emission standards. In any event, neither the submission nor the response provides any information indicating that there is a particular compliance problem with this narrow subset of facilities.
41. *See* 6 November 2000 US memorandum at 6 and Table 12.
42. *See* 6 November 2000 US memorandum at 7 and Table 12.
43. *See* 1 December 1999 response at 31.

monitoring and inspections are also conducted.[44] Further, while the compliance-related information provided by the United States is limited in nature, there is no indication of a serious, widespread compliance problem and no unaddressed compliance problems have been presented.

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

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

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

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

42 USC. § 7415(a). Any such notification issued by the Administrator is deemed to be a finding under § 110(a)(2)(H)(ii) of the Clean Air

44. *See*, *e.g.*, 1 December 1999 response at 31-34.

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

The 4 January 1999 submission alleges that the United States is failing to effectively enforce these provisions of the Clean Air Act. The submission alleges that numerous reports from the IJC have indicated serious Great Lakes pollution problems stemming from dioxin and mercury, specifically from incinerators. According to the submission, the CEC released a report in 1997 on the long-range transport of pollutants that reached similar conclusions. The submission asserts that, despite having received these reports, EPA has failed to require SIP upgrades that could prevent or eliminate the ongoing "endangerment" of health and welfare in Canada.

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

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45. 42 USC. § 7410(a)(2)(H)(ii).
46. 42 USC. § 7415(c). EPA determined in 1985 that reciprocity existed between the United States and Canada for purposes of § 115(c). *Thomas* v. *New York*, 802 F.2d 1443, 1446 (D.C. Cir. 1986), *cert. denied*, 482 US 919 (1987). *See also* Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 Cornell Int'l L.J. 421, 436 n.141 (1993) ("Most commentators agree that Canada has satisfied the reciprocity requirement.").
47. *See* 1 December 1999 response at 38.

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

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

Regarding the first issue, a factual record would not be warranted if the United States is correct that an international agency must make a "request" to trigger EPA's obligations under § 115, and that the IJC and other reports do not contain such a request. The Secretariat has found no United States court cases addressing the issue of whether a request by an international agency is a prerequisite to EPA's other obligations under § 115.

The Clean Air Act does not on its face require that the EPA receive a "request" from a "duly constituted international agency" in order to be obliged to take action under § 115. Instead, the plain language of § 115(a)

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

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

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

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

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

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

51. 1 December 1999 response at 38. The version of § 115 in the Senate bill leading to the 1977 Clean Air Act amendments provided that EPA's obligation to call for SIP revisions would be triggered by the "receipt of requests, reports, surveys, or studies" that provide EPA with the requisite "reason to believe." S. Rep. No. 95-127, at 175 (1977). However, the Conference Report on the 1977 amendments describes the Senate bill as providing a mechanism for the Administrator to trigger a revision of an SIP "*upon the petition of an international agency* or the Secretary of State if he finds that emissions originating in a State endanger the health or welfare of persons in a

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

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

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

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foreign country." H. R. Rep. No. 95-564, at 136 (1977), *reprinted in* 1977 USC.C. & A.N. 1502, 1517 (emphasis added). The Report further states that the Conference adopted the Senate's approach by "requir[ing] a request by a duly constituted international agency as a condition for the Administrator to act." *Id.*

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

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

The United States contends that a factual record is not warranted to address these questions because the EPA has discretion in determining when to notify states under § 115. The D.C. Circuit Court of Appeals in the *Thomas* v. *New York* case cited above stated in *dicta* that "[h]ow and when the agency chooses to proceed to the stage of notification triggered by the findings is within the agency's discretion and not subject to judicial compulsion."[54] Likewise, the same court in *Her Majesty the Queen in Right of Ontario v. United States EPA* stated that "[t]he words 'whenever' the Administrator 'has reason to believe' imply a degree of discretion underlying the endangerment finding."[55] Nonetheless, the D.C. Circuit Court of Appeals has left open the possibility that, in an appropriate case, a citizen plaintiff might be able to show that EPA has unreasonably delayed taking action or otherwise abused its discretion under § 115.[56]

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

The United States, in its 1 December 1999 response, claims that the subject of this submission is similarly complex, thereby precluding any "rapid response" by the agency. The United States points out in particular that the lag between receipt of the relevant IJC reports and the failure to issue formal notification in this instance is considerably shorter than it was in the acid rain case.[59] The United States does not dispute that the IJC and CEC reports to which the Submitters refer indicate a serious concern regarding the impacts on public welfare of mercury and dioxin emissions from incinerators and other sources. However, those reports, as

54. *Thomas*, 802 F.2d at 1448.
55. *See Her Majesty the Queen*, 912 F.2d at 1533.
56. *See Her Majesty the Queen*, 912 F.2d at 1534.
57. *See Her Majesty the Queen*, 912 F.2d at 1533.
58. *See Id*. at 1534.
59. *See* Roelofs, *supra*, at 438 (scientific uncertainty concerning transboundary pollution "can be used to justify the Administrator's decision not to initiate Section 115 proceedings").

well as the United States' response, also indicate the complexity of determining source-receptor relationships and other matters inherent in identifying those sources of mercury and dioxin deposition in the Great Lakes that could be subject to stricter control through EPA-mandated SIP revisions.

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

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

60. *See* 6 November 2000 US memorandum at 6.
61. 1 December 1999 response at 41.
62. 1 December 1999 response at 43.

impose controls or pollution reduction targets for the purpose of achieving the applicable water quality standards."[63] The United States notes that it has made progress in understanding and modeling the source-receptor relationships that trace air pollutants deposited in the Great Lakes to their sources.

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

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

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

63. 1 December 1999 response at 43.

V. CONCLUSION

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

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

Janine Ferretti
Executive Director

SEM-98-004

(BC Mining)

SUBMITTER: SIERRA CLUB OF BRITISH COLUMBIA, ET AL.

PARTY: Canada

DATE: 29 June 1998

SUMMARY: The submission alleges a systemic failure of Canada to enforce section 36(3) of the Fisheries Act to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.

SECRETARIAT DETERMINATIONS:

ART. 14(1)* (30 November 1998)	Determination that criteria under Article 14(1) have been met.
ART. 14(2)* (25 June 1999)	Determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.
ART. 15(1) (11 May 2001)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

* Published in Volume 5 (Fall 2000) of the *North American Environmental Law and Policy* Series.

Commission for Environmental Cooperation — Secretariat

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-98-004** (BC Mining)
Submitter(s):	Sierra Club of British Columbia Environmental Mining Council of British Columbia Taku Wilderness Association
Concerned Party:	Canada
Date of Submission:	29 June 1998
Date of this Notification:	11 May 2001

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).[1]

1. This is the eighth Secretariat Notification to Council that the Secretariat considers development of a factual record to be warranted for a submission. Regarding the

On 29 June 1998, the Submitters filed this submission, alleging «the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia.[2]" On 30 November 1998, the Secretariat determined that the submission met the requirements of Article 14(1), and on 25 June 1999, the Secretariat requested a response from the Party under Article 14(2). The Party submitted its response on 8 September 1999. Canada contends that it is protecting fish and fish habitat by implementing a range of enforcement actions, including prosecution where appropriate, and, therefore, development of a factual record is unwarranted. In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the response, warrants developing a factual record, and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. Section 36(3), together with section 40(2), make it an offence «to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter such water.[3]"

The Submitters claim that mining frequently causes serious water pollution due to acid mine drainage and heavy metal contamination. According to the submission, acid mine drainage occurs when rocks containing sulphides are exposed to air and water, creating sulphuric acid. The sulphuric acid then dissolves the metals in the surrounding rock. In addition to acid mine drainage, the Submitters claim that processing chemicals and erosion and sedimentation resulting from mining activities also contribute to water pollution from mines.[4] The Submitters contend that the toxic substances that mining generates flow into water

previous seven, the Council has directed the Secretariat to develop a factual record for three (SEM-96-001 Cozumel, SEM-97-001 BC Hydro and SEM-98-007 Metales y Derivados), deferred its decision on one (SEM-97-006 Oldman River II), rejected the fifth (SEM-97-003 Quebec Hog Farms), and is currently considering the sixth (SEM-98-006 Aquanova) and seventh (SEM-99-002 Migratory Birds). The pertinent Council Resolutions (96-08, 98-07, 00-01, 00-02 and 00-03), are available on the CEC home page, <www.cec.org>.

2. Submission, at 5.
3. *Fisheries Act*, s. 36(3).
4. Submission, at 7-8.

systems, causing harm to fish, fish habitat, water quality and human health.[5]

In support of the submission, the Submitters include a report, prepared by the Environmental Mining Council of B.C. (Exhibit 1), which states that acid mine drainage is the mining industry's greatest environmental problem and its greatest liability, especially to waterways.[6] Relying on the 1994 B.C. State of the Environment Report, the Environmental Mining Council report notes that "there were an estimated 240 million tonnes of acid-generating waste rock and 72 million tonnes of acid-generating mine tailings in the province. Each year, the stockpile of acidic and heavy metal-generating tailings and waste rock from mining in the province grows by 25 million tonnes.[7]"

The submission focuses on three mines that the Submitters allege have been leaching toxic, deleterious substances into salmon-bearing waters for over 25 years — the Tulsequah Chief Mine, the Mt. Washington Mine and the Britannia Mine. However, the Submitters assert that there are at least 25 additional mines in British Columbia that are known to be acid-generating and at least 17 other mines identified as potentially acid-generating.[8]

The Submitters claim that violations of section 36(3) are ongoing at each of the three mines highlighted in the submission. According to the Submitters, the Tulsequah Chief Mine, an abandoned copper mine located on the Tulsequah River in northwest British Columbia, has been discharging high levels of zinc, lead and copper into the river since the mine began operating in the 1950s. These toxic substances are having a significant impact on downstream water quality and are acutely toxic to fish.[9] The Britannia Mine, located 50 km north of Vancouver, discharges high levels of minerals, especially copper and zinc, into Britannia Creek and Howe Sound and has been described as "the single worst point source of metal pollution on the North American continent.[10]" The Mt. Washington Mine on Vancouver Island, which operated for two years, from 1964 to 1966, has been leaching copper-laced acid mine drainage

5. Submission, at 5.
6. Submission, Exhibit 1, at 5.
7. Submission, Exhibit 1, at 7.
8. Submission, at 8. The Submitters attach a list of these 42 mines as Appendix 1 to the Submission.
9. Submission, at 10. The Submitters attach a copy of a letter from Environment Canada to the British Columbia Ministry of Environment, Lands and Parks describing the presence of copper, zinc and lead as acutely toxic to fish.
10. Submission, at 10, citing a mining specialist working with Environment Canada, quoted in the Vancouver Sun, June 13, 1996.

into nearby streams which flow into the Tsolum River. The Tsolum River's salmon population has been virtually destroyed.[11]

The Submitters claim no charges have ever been laid against the owners or operators of any of the three mines. They state that they were able to find only three prosecutions of mining companies in British Columbia for violations of section 36(3) of the *Fisheries Act*, one in 1983, one in 1984 and one in 1985, despite Canada's knowledge of ongoing violations of the *Fisheries Act*. The Submitters assert:

> Given the clear and compelling evidence of chronic ongoing violations of s. 36(3) of the *Fisheries Act* and the clear evidence of declining salmon populations in B.C., the facts reveal a consistent failure by the Government of Canada to effectively enforce the law against mining companies in B.C.[12]

The Submitters attribute Canada's failure to effectively enforce the *Fisheries Act* in part to a severe shortage of staff and resources. They refer to a Memorandum of Understanding between the Department of Fisheries and Oceans and Environment Canada that assigns responsibility for enforcing section 36(3) to Environment Canada. They state that, in recent years, Environment Canada's budget has shrunk by about 40 % and that Environment Canada has only 15 enforcement staff for all of British Columbia and the Yukon. They point to Environment Canada's 1996-97 enforcement statistics which indicate that only 5 prosecutions under section 36(3) were initiated in all of Canada during that time period.[13]

The Submitters cite Canada's efforts to devolve responsibility for enforcing environment laws to the provinces as another factor contributing to Canada's alleged failure to enforce the *Fisheries Act*. They claim this devolution has caused deterioration in transparency and accountability. This and the previous factor, they claim, lead to the conclusion that the examples of the three mines highlighted in the submission demonstrate a persistent, widespread pattern of ineffective enforcement of section 36(3) with respect to mining operations in British Columbia.[14]

The Submitters assert that Canada's alleged failure to enforce section 36(3) of the *Fisheries Act* effectively against the mining industry in British Columbia has contributed to the decline in salmon runs in the province. They cite studies linking the decline, in part, to pollution from

11. Submission, at 10.
12. Submission, at 15.
13. Submission, at 12-13.
14. Submission, at 11-12.

mining.[15] They describe the extinction of fish runs as "an irreversible loss" and state that the decline in fisheries has had a significant impact on communities and individuals that depend on fisheries for their livelihood and cultural identity.[16] These communities include First Nations and those involved in the recreational fishing industry.

The Submitters also assert that Canada's alleged failure to enforce the *Fisheries Act* effectively against the mining industry may be creating trade or market distortions because British Columbia "may be viewed as a 'pollution haven' where lax environmental laws and a lack of enforcement enable mining corporations to operate with lower costs than other more stringently regulated jurisdictions such as the United States.[17]" They claim that this gives mining companies in British Columbia an unfair competitive advantage over mining companies in other countries, particularly the United States.

III. SUMMARY OF THE RESPONSE

In its response, Canada submits that, both generally and in relation to the three mines described in detail in the submission, "it is protecting fish and fish habitat through the enforcement of its environmental laws, by implementing a range of enforcement actions, including prosecutions where appropriate.[18]"

A. Canada's Enforcement Activities Generally

Canada points to the high degree of cooperation and coordination in the management of fisheries and environmental issues that Canada asserts is a natural consequence of the Canadian legislative framework. Canada refers to the constitutional division of responsibilities between the federal and provincial government with respect to environmental matters. Canada states that while the mining industry in British Columbia is regulated primarily by the province under various pieces of provincial legislation, the federal government retains responsibility for the habitat and pollution prevention provisions of the *Fisheries Act*. In addition, Canada and British Columbia each has its own environmental assessment laws and they have agreed on a harmonized review mechanism.[19]

15. Submission, at 8-9.
16. Submission, at 9.
17. Submission, at 13.
18. Response, at 3.
19. All found in Response, at 9.

Canada asserts that under this legislative framework, compliance promotion and enforcement activities are carried out by both federal and provincial environmental regulatory agencies and that, in practice, the federal and provincial governments cooperate in setting goals, enacting complementary legislation, and achieving compliance in a manner that most effectively avoids gaps, overlaps or conflicts in government enforcement action.[20] Canada reviews section 36(3) of the *Fisheries Act* and refers briefly to the applicable provincial statutes, the *Waste Management Act* and the *Mines Act*.[21] Canada states that, under a 1985 Memorandum of Understanding, Environment Canada is responsible for the administration of section 36(3) on behalf of the Minister of Fisheries and Oceans.

Canada asserts that it is enforcing section 36(3) against mines in British Columbia and other industrial facilities. According to Canada, the Submitters fail to appreciate that, consistent with Article 5 of NAAEC, government enforcement action encompasses actions broader than just prosecutions. Canada claims that its general approach to enforcement and compliance is broad and comprehensive, is consistent with the approach contemplated by Article 5, and recognizes the complexity of the mining industry in British Columbia and of pollution issues related to mining.[22]

Canada describes the range of enforcement and compliance mechanisms at its disposal and states that "in dealing with pollution problems, such as those from the three abandoned mines, the mechanism determined to be the most effective in bringing about compliance is always the preferred one.[23]" In particular, Canada refers to its ongoing work on developing a compliance and enforcement policy for the habitat and pollution prevention provisions of the *Fisheries Act*,[24] and attaches to the response the July, 1999 draft of the *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (the Draft Compliance and Enforcement Policy).[25]

Compliance promotion measures addressed in the Draft Compliance and Enforcement Policy include education and information, promotion of technology development, technology transfer, the development of guidelines and codes of practice, and the promotion of envi-

20. Response, at 10.
21. Response, at 10-11.
22. All found in Response, at 11.
23. Response, at 11.
24. Response, at 13.
25. Response, Exhibit 4.

ronmental audits. Under the draft policy, actions that might be taken in response to suspected violations include site inspections and investigations, warnings, directions by inspectors, ministerial orders and prosecutions. Canada states that although this policy is still being developed, Environment Canada follows the working draft at the regional level in its enforcement of section 36(3).[26]

Canada explains that it prosecutes section 36(3) violations solely in criminal court, as civil proceedings are only available for recovering damages or cleanup costs and not for seeking penalties.[27] It asserts that because criminal prosecutions have more rigorous evidentiary requirements and require proof beyond a reasonable doubt, a prosecution may not always be feasible, particularly in relation to an abandoned mine. The likelihood of success is not as great, there may be no person available to answer to the charges, and the environmental problem may not be resolved if the alleged offender does not have the financial resources to clean up the pollution.[28] Finally, Canada asserts that, despite these limitations, it does prosecute violations of both section 35(1) (habitat protection) and 36(3) of the *Fisheries Act* and points to charges laid in April 1999 under both sections against the owners of Kemess Mine.[29]

With respect to mines specifically, Canada states that Canada and British Columbia "have legislation, regulations, policies and procedures including a range of compliance promotion and other enforcement tools in place to prevent mining operations from harming fish and fish habitat.[30]" Canada states:

> In the case of mining operations, extensive monitoring, research and other data gathering activities over the past 15 years have led to a better understanding of the acid rock generation problems associated with mining including the drainages emanating from abandoned mines in BC. A range of different activities has been directed toward solving the unique discharge problems at each of the three abandoned mines referenced in the Submission. Canada's actions with each of these three abandoned mines . . . and other mines clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious substances and thereby achieving compliance with the Act.[31]

26. Response, at 13.
27. Response, at 14.
28. Response, at 14.
29. Response, at 15. Kemess Mine is included in the list of mines attached to the Submission.
30. Response, at 15.
31. Response, at 12.

Canada also points to the federal *Fisheries Act Metal Mining Liquid Effluent Regulations* (the *MMLER*) which prescribe certain substances as deleterious under section 36(3) and set permissible levels of deposits from operating mines. Canada states that these regulations do not apply to abandoned mines.

Canada denies the allegation in the submission that there is a pattern of non-enforcement because of staff and resource shortages. It points to a comprehensive review of its enforcement program launched in May 1998, the object of which is to further strengthen the enforcement program, to counteract this allegation.[32] Canada provides no information in its response about the results of that review.

B. Canada's Enforcement Activities in Relation to Specific Mines

Canada submits that actions it has taken in relation to the Britannia, Tulsequah Chief and Mt. Washington mines constitute pending judicial or administrative proceedings within the meaning of Articles 14(3)(a) and 45(3)(a) of NAAEC. Canada states that the actions were pursued in a timely manner, are consistent with the Draft Compliance and Enforcement Policy, and are expected to resolve the many issues raised in the submission.[33]

Aside from noting the enforcement action taken against owners of the Kemess Mine, Canada does not include information about any of the mines listed in Appendix 1 of the submission because in Canada's view the Submitters did not include specific assertions about those mines.[34] Canada adds, however, that it regularly reviews and evaluates monitoring data from over 80 operating and abandoned mines in British Columbia, including those listed in Appendix 1, to ensure compliance with the *Fisheries Act*.

1. Britannia Mine

Canada acknowledges that Britannia Mine is a source of pollution to the marine environment and has been at least since the mine ceased operation in 1974. Canada describes the history of actions taken by Canada and British Columbia in response to the problems at Brittania Mine, including a series of studies conducted between 1996 and 1998 by Environment Canada and the British Columbia Ministry of the Environment, Lands and Parks (MELP) to ascertain the feasibility of a treatment plant

32. Response, at 16.
33. Response, at 5.
34. Response, at 16.

to treat the acutely lethal effluent. The two jurisdictions also carry out a joint program of effluent and stream monitoring which began in 1995.[35]

Canada reports that the studies, monitoring and other field research culminated in an application by the mine owner to MELP for a permit to construct a treatment plant to be funded by tipping fees for non-hazardous industrial wastes in a landfill which will help seal the old mine workings and decrease drainage flows.[36] Canada asserts that it reviewed and commented on the permit applications and accepted the plans in principle, subject to various conditions. According to Canada, British Columbia issued the permits on September 8, 1999, with treatment plant construction and operation expected within a year of that date.[37]

Canada claims that the treatment plant will significantly reduce the pollution caused by the mine and allow recovery of fish habitat[38] and that Canada's participation to date constitutes "administrative proceedings" within the meaning of Article 14(3)(a) and Article 45(3)(a).[39] Canada also asserts that the provincial permitting process in which Canada participated constitutes a "pending judicial or administrative proceeding" and that the Secretariat therefore should proceed no further.[40]

2. *Mt. Washington Mine*

Canada acknowledges the pollution problems at Mt. Washington Mine, commenting that the environmental damage caused by toxic levels of copper released from the mine into the drainage basin of the Tsolum River on Vancouver Island has been apparent since 1985.[41] The mine closed in 1967. Canada states that since 1985 it has been an active participant in studies and research to find a solution to the problem, including participation on a technical committee and, later, on a community-based task force that addressed environmental problems in the area.[42] The task force issued its final report in 1999.

Canada states that in June 1999 it collected and analyzed samples of the mine drainage from the mine site and found that the samples were

35. All found in Response, at 17-18.
36. Response, at 18-19.
37. Response, at 4. Canada attaches its comments and the draft permits to the Response as Exhibits 1 and 2.
38. Response, at 20.
39. Response, at 17.
40. Response, at 4.
41. Response, at 20.
42. Response, at 21.

acutely lethal to fish. Canada further states it sent a letter on July 30, 1999 to four companies that have ownership or other interests in the Mt. Washington Mine property advising them of the pollution problem and that the deposit of the acutely lethal discharge violates section 36(3) of the *Fisheries Act*.[43]

Canada submits that these latter activities, carried out after its earlier participation in the studies, research and task force, are proper and timely administrative proceedings.[44] Canada also asserts that these latter activities, which it claims are consistent with the Draft Compliance and Enforcement Policy, constitute "pending judicial or administrative proceedings" that require the Secretariat to proceed no further.[45]

3. Tulsequah Chief Mine

Canada acknowledges that water draining from the Tulsequah Chief mine contains substances that are acutely lethal to fish. Canada states that the owner of Tulsequah Chief mine, which ceased operating in 1957, applied to the province in 1994 for permission to develop the mine. This application triggered a harmonized federal provincial environmental assessment process in which Canada participated. The environmental assessment was completed in 1998 and it was determined that the most beneficial site remediation results would be accomplished by allowing the company to pursue its development plans.[46]

Canada states that at the end of the environmental assessment process, it advised British Columbia that, subject to the successful implementation of certain conditions, the project was not likely to cause significant environmental effects. British Columbia issued a project approval certificate for the mine development in March 1998, one of the conditions of which was construction of a temporary water treatment plant.[47]

Canada states that it conducted an inspection of the mine site in June 1998 to determine the status of any works undertaken by the owner and obtain drainage samples. Canada found violations of section 36(3) and wrote a warning letter to the owner referring to the letter as "the minimum enforcement response". The letter warned of further inspections and possible further enforcement action.[48]

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43. All found in Response, at 22.
44. Response, at 20.
45. Response, at 4-5.
46. All found in Response, at 23.
47. All found in Response, at 23-24.
48. Response, at 24. The letter is attached to the Response as Exhibit 5.

Canada and the mine owner subsequently held meetings to discuss the compliance issue and review the company's technical control options. The owner then produced a plan to treat the mine effluent and, as of May 1999, had taken an interim step to reduce the potential mine drainage impacts on the Tulsequah River.[49]

Canada submits that the warning letter constitutes an "administrative order" and that the warning letter, together with subsequent inspections of the mine site, constitute "pending judicial or administrative proceedings" that require the Secretariat to proceed no further.[50]

C. Other Issues Raised in the Response

Canada submits that the Secretariat should proceed no further with development of a factual record for the following additional reasons:

- Canada claims that the Submitters did not provide Canada with a reasonable opportunity to respond to the concerns raised in the submission as contemplated by Article 14(1)(e). The Submitters wrote to Canada on June 1, 1998, requesting a response within 7 days, and subsequently filed the submission with the Secretariat on June 29, 1998, claiming Canada did not respond. Canada asserts that continuing the factual record process in these circumstances would go against both the letter and spirit of NAAEC by bypassing domestic processes for handling environmental matters.[51]

- Noting that the provisions of NAAEC cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of NAAEC on January 1, 1994, Canada submits that any assertions of failure to enforce environmental laws in relation to the three mines before NAAEC came into force on January 1, 1994 should not be addressed in the factual record process.[52]

- Canada notes that the Submitters appear not to have pursued private remedies as contemplated under Article 14(2)(c) of NAAEC. Specifically, Canada states that the Submitters appear

49. Response, at 24.
50. Response, at 6.
51. Response, at 6.
52. Response, at 6-7.

not to have requested government departments and agencies to investigate the alleged violations of the *Fisheries Act*, although access to the government departments and agencies is readily available. In addition, Canada notes that the Submitters do not appear to have pursued civil suits for damages, initiated private prosecutions, sought injunctions in relation to the alleged violations or pursued administrative remedies either provincially or federally even though they have access to the courts and, generally, to administrative tribunals.[53]

- Canada asserts that the development of a factual record would not further the objectives of NAAEC given the detailed information provided in the response and that Canada is pursuing administrative proceedings in a timely fashion and in accordance with its law.[54]

IV. ANALYSIS

A. Introduction

We are now at the Article 15(1) stage of the factual record process. Previously, the Secretariat determined that the submission met the criteria in Article 14(1) and, on the basis of the factors in Article 14(2), requested a response from Canada. As the Secretariat has noted in previous Article 14(1) determinations, the requirements contained in Article 14 are not intended to place an undue burden on submitters or present an insurmountable screening device.[55]

The revised *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines")[56] require the Secretariat to provide in its notifi-

53. Response, at 7.
54. Response, at 7.
55. *See*, for example, SEM-97-005 (Biodiversity), Article 14(1) Determination (26 May 1998) and SEM-98-003 (Great Lakes), Article 14(1) and (2) Determination (8 September 1999). Although the Secretariat is not bound by the principle of *stare decisis*, references to previous determinations help to ensure consistency in the Secretariat's decisionmaking. *See*, SEM-97-001 (BC Hydro), Article 15(1) Notification (27 April 1998).
56. In June 1999, the Council adopted revised Guidelines, which are available on the CEC web page, <www.cec.org> under Citizen Submissions. The Secretariat has previously noted that the revised Guidelines provide further support for a relatively low burden on submitters with respect to Article 14, in that the revised Guidelines require submitters to address at least 13 criteria in 15 pages. *See*, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999).

cations concerning Articles 14(1) and 14(2) an explanation of how the submission meets, or fails to meet, the Article 14(1) criteria and of the factors that guided the Secretariat in determining that the submission merits a response. Because the Article 14(1) and 14(2) determinations in relation to this submission predate the revised Guidelines, these explanations are included in this notification.

1. Article 14(1)

As indicated above, the Secretariat found on November 30, 1998 that the submission met the criteria for continued review included in Article 14(1).

First, the submission satisfies the criteria in the first sentence of Article 14(1). The submission asserts that Canada, a Party, is failing to effectively enforce its environmental law. Section 36(3) of the *Fisheries Act* qualifies as environmental law for the purposes of NAAEC. The submission emphasizes the extent to which Canada has allegedly failed to effectively enforce section 36(3) rather than the effectiveness of section 36(3). The submission also meets the temporal requirements inherent in Article 14(1). The Submitters assert that, even for those mines that allegedly have been violating section 36(3) for many years, the violations are continuing and have been ongoing since January 1, 1994.

Like other submissions the Secretariat has considered, the submission alleges a failure to enforce effectively both in specific cases and more broadly. Although the submission focuses on three mines, it alleges a widespread failure by Canada to enforce section 36(3) of the *Fisheries Act* effectively against mines in British Columbia generally, resulting in ongoing and widespread harm to an important public resource. The Secretariat has previously found, after considerable analysis, that none of the criteria in Articles 14(1) and 14(2) reflects an intent, either direct or indirect, to limit the citizen submission process either to submissions alleging failures to enforce effectively in regard to particularized incidents or to submissions that focus on alleged failures to effectively enforce that are broad in scope.[57] The Secretariat concluded that

57. For a detailed discussion of the rationale for this conclusion, *see*, SEM-99-002 (Migratory Birds), Article 15(1) Notification (December 15, 2000). *See also*, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999) ("Submissions . . . which focus on the effectiveness of enforcement in the context of asserted widespread violations . . . are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it may be appropriate for the Commission to address the latter, depending on the circumstances.").

allowing either type of submission would promote the objects and purposes of the NAAEC. Further, the Council has instructed the Secretariat to prepare factual records with respect to both particularized allegations of ineffective enforcement[58] and allegations of a widespread, systemic failure to enforce effectively.[59] With respect to this submission, the Secretariat affirms that approach and concludes that both the alleged failure to enforce section 36(3) with respect to the three particular mines and the alleged failure to enforce section 36(3) against mining operations in British Columbia generally are within the scope of Article 14.

The submission also meets the criteria in Articles 14(1)(a)-(f). First, the submission is in English, one of the languages designated by Canada (Article 14(1)(a)). Second, the submission clearly identifies the organizations making the submission, on its cover page and at page 5 (Article 14(1)(b)). Third, the submission appears to be aimed at promoting enforcement rather than harassing industry (Article 14(1)(d)). The Submitters are organizations committed to environmental protection, not competitors of the entities that are the subject of the concerns raised in the submission. Fourth, the submission indicates that the matter was communicated in writing to Canada and that Canada did not respond prior to the filing of the submission (Article 14(1)(e)).[60] Fifth, the Submitters are organizations that have been established in Canada (Article 14(1)(f)).

The Submitters also provided sufficient information under Article 14(1)(c)[61] to allow the Secretariat to review the submission, as to both the alleged failure to enforce section 36(3) effectively with regard to the three specific mines discussed at length in the submission and the alleged widespread failure to enforce section 36(3) effectively. The submission explains in detail the persistent and ongoing problems with controlling acid mine drainage at the Britannia, Tulsequah Chief and Mt. Washington mines and attaches several government reports, reports of non-governmental organizations and other documents that allow the Secretariat to review the issues raised in the submission regarding the three mines.

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58. SEM-96-001 (Cozumel) and SEM-98-007 (Metales y Derivados).
59. SEM-97-001 (BC Hydro).
60. Letter of June 1, 1998 from counsel for the Submitters to the Minister of Fisheries and Oceans, attached to the Submission at Exhibit 8 requesting information about enforcement actions being taken against polluting mines in British Columbia and advising of the possibility of a submission under NAAEC if Canada did not respond by June 8, 1998.
61. Failure to meet this criterion can be a basis for terminating a submission. *See* SEM-00-003 (Jamaica Bay), Article 14(1) Determination (12 April 2000).

The submission and its attachments also include information supporting the Submitters' allegation of a widespread failure to enforce section 36(3) effectively. The Submitters include three studies that present information regarding the overall decline of and ongoing threats to fisheries in British Columbia, including the manner in which acid mine drainage and heavy metal contamination result from mining operations and cause harm to fish and fish habitat.[62] As well, the studies outline the significant technical challenges in controlling acid mine drainage effectively, including examples both in British Columbia and elsewhere of failed attempts to control acid mine drainage.[63] The Submitters also provide some information regarding the forty-two mines in British Columbia, in addition to the three highlighted in the submission, that are known to be or potentially are acid-generating.[64] Finally, the Submitters provide information regarding the overall use of prosecutions to enforce section 36(3)[65] and regarding recent reductions in the staff and resources available to Environment Canada to enforce section 36(3).[66]

Taken together, this information, along with the information regarding the three mines highlighted in the submission, is sufficient to allow the Secretariat to review the alleged widespread failure to enforce section 36(3) effectively. Many submitters are non-government environmental organizations with limited financial and human resources for monitoring compliance with environmental laws and gathering evidence of specific breaches. These constraints provide additional support for concluding that the Submitters have submitted sufficient information regarding the alleged widespread failure to enforce section 36(3) effectively to meet the threshold requirements of Article 14.

2. *Article 14(2)*

The Secretariat also determined on 25 June 1999 that the submission merited a response from Canada. In deciding whether a submission merits a response, the Secretariat considers the four factors enumerated in Article 14(2). 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;

62. Submission, Exhibits 1, 2 and 3.
63. *See, e.g.*, Submission, Exhibit 1, at 11, 15-16.
64. *See also* Submission, Exhibit 1, at 13 and generally, and Exhibit 2.
65. Submission, at 14-15, and Exhibit 7, at 7.
66. Submission, at 11 (and cited references).

(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.

The submission alleges harm to the Submitters within the meaning of Article 14(2)(a).[67] The Submitters refer to their common interest in protecting British Columbia's threatened wild salmon population and to the importance of salmon to the province as a whole. The Submitters state that they each have a strong concern about Canada's failure to enforce the *Fisheries Act* against mining operations and about the resulting industrial pollution and its effect on fish, fish habitat, and water generally. They allege that the failure to enforce fisheries legislation against the mining industry has contributed to the decline of anadromous fish stocks and to destruction of fish habitat and valuable fisheries and has had a significant effect on communities and individuals who depend on fisheries for livelihood and cultural identity.[68]

Second, the submission raises matters whose further study in the factual record process would advance the goals of NAAEC. At the very least, further study of the matters raised in the submission would help "foster the protection and improvement of the environment . . . for present and future generations;[69]" "enhance compliance with, and enforcement of, environmental laws and regulations;[70]" and "promote pollution prevention policies and practices.[71]" Further, as the Secretariat has noted in connection with other submissions, allegations of widespread patterns of ineffectual enforcement, such as those contained in this submission, "are particularly strong candidates for Article 14 consideration.[72]"

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67. The Secretariat considered the issue of harm in "Recommendations of the Secretariat to Council for the development of a Factual Record" in relation to Submission SEM-96-001 (Cozumel). After noting the importance and public nature of the marine resource in question, the Secretariat stated:
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 brings the submitters within the spirit and intent of Article 14.
68. Submission, at 9.
69. Article 1(a).
70. Article 1(g).
71. Article 1(j).
72. SEM-99-002 (Migratory Birds), Article 14(1) and (2) Determination (23 December 1999).

Third, the Secretariat considered the extent to which the Submitters pursued private remedies under the Party's law. The Submitters assert that they have urged Canada to enforce section 36(3) but that Canada has failed to respond.[73] They also state that environmental groups, First Nations, local communities and others have made extensive efforts to have the law enforced so as to prevent contamination of fisheries from mines in British Columbia.[74] The Submitters acknowledge the right of Canadian citizens to initiate private prosecutions under the *Fisheries Act* but claim that this is not an effective remedy. They point to several private prosecutions of alleged *Fisheries Act* violations commenced by the Sierra Legal Defence Fund which were taken over and terminated by the provincial Attorney General.[75] Given the widespread nature of the alleged failure to enforce section 36(3) effectively, the burden on the Submitters of pursuing remedies with regard to all of the mines involved and the Submitters' experience with futile private prosecutions, "reasonable actions have been taken[76]" to pursue specific private remedies with respect to the violations alleged in the submission.

Finally, the submission relies on a number of government reports and reports by non-governmental organizations.[77] Therefore, the submission is not drawn exclusively from mass media reports.

B. Whether the Matter is Subject to Pending Administrative or Judicial Proceedings

As noted above, Canada submits that the assertions in the submission concerning the enforcement of the *Fisheries Act* in relation to Britannia, Mt. Washington and Tulsequah Chief Mines are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a). Because Article 14(3)(a) provides that the Secretariat "shall proceed no further" where the matter alleged in the submission is the subject of "a pending judicial or administrative proceeding," the Secretariat considers whether any pending judicial or administrative proceedings preclude or limit development of a factual record before considering other factors relevant to whether a factual record is warranted.

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73. Submission, at 18.
74. Submission, at 15.
75. Submission, at 18.
76. Guideline 7.5(b).
77. The Submission relies on reports such as "Acid Mine Drainage: Mining and Water Pollution Issues in B.C.", by the Environmental Mining Council of B.C. (Exhibit 1) and "Water Quality Assessment and Objectives for the Tsolum River Basin," by B.C. Ministry of Environment (Exhibit 5).

A "judicial or administrative proceeding" is defined in Article 45(3) as

> (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
>
> (b) an international dispute resolution proceeding to which the Party is party.

In order to fall within the definition of "judicial or administrative proceeding" in Article 45(3)(a), a proceeding must be "specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, and in accordance with a Party's law.[78]" Further, such a proceeding must concern the same subject matter as the allegations raised in the submission. Finally, "this initial threshold consideration should be construed narrowly so as to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3).[79]"

Applying these principles in considering whether Article 14(3)(a) precludes further consideration of a submission, the Secretariat has stated previously that

> [o]nly proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time should be considered as falling within Article 14(3)(a). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, should not be sufficient to trigger the automatic termination clause. If such a proceeding were included within the definition, a Party could effectively shield non-enforcement of its environmental laws from scrutiny simply by commissioning studies or holding consultations.[80]

Bearing these parameters in mind, none of the actions Canada has taken in relation to the three mines falls within the definition of "judicial or administrative proceedings" under Articles 14(3) and 45(3). With respect to Britannia Mine, neither Canada's historic participation in

78. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
79. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
80. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

studies and other efforts intended to address the pollution problem, nor its participation in the provincial permitting process, meets the definition. Issuing certain permits clearly falls within the definition of "judicial or administrative proceeding." However, according to Canada, the provincial permits for the treatment plant and landfill operations associated with Britannia Mine were issued on September 8, 1999. Therefore, even assuming that a proceeding for issuing a provincial permit under British Columbia's *Waste Management Act* would constitute an administrative proceeding respecting the alleged failure to enforce the *Fisheries Act* effectively,[81] the provincial permits are no longer the subject of pending proceedings.

Similarly, Canada's collection of samples of mine drainage, its participation on the Tsolum River Task Force, and its letter of July 30, 1999 to the four companies believed to have an interest in the land on which Mt. Washington Mine is located[82] do not fall within the kinds of actions described in Article 45(3)(a). They are not proceedings of any kind against any person to enforce the *Fisheries Act*. Further, they are not designed to reach a compliance agreement or to culminate in a specific decision or ruling within a specified time. Last, the response makes clear that at the time of the response, the June 30, 1999 letter had been sent, the Task Force had issued its final report and its funding had been terminated and Canada had not determined what future enforcement or other action, if any, it would pursue. Canada's actions in relation to Mt. Washington Mine have not proceeded to the point where they can be seen as an integral step in any of the actions specified in Article 45(3)(a).

With respect to Tulsequah Chief Mine, Canada points to the inspections, testing and subsequent warning letter[83] to the mine owner as pending judicial or administrative proceedings within the meaning of Articles 14(3) and 45(3). Construing the Article 45(3) definition narrowly, inspections and testing do not fall within any of the actions described in Article 45(3), because by themselves they are not designed to culminate in a specific ruling, decision or agreement. Rather, they are information-gathering steps that might, but do not necessarily, lead to further enforcement action within a specified timeframe.

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81. Because the provincial permit proceedings are no longer pending, it is not necessary to address this question. Notably, however, while a violation of some of the conditions in the provincial permits might, as a factual matter, also result in a violation of section 36(3), there is no indication that the permits are *Fisheries Act* authorizations.
82. Response, Exhibit 3.
83. Response, Exhibit 5.

Nor does the warning letter to the owner of the Tulsequah Chief Mine fall within the Article 45(3) definition. Canada asserts that the warning letter is an "administrative order". However, applying the principles set out above, an "administrative order" in the context of Article 45(3) must at the very least contain a directive with immediate legal effect that compels or enjoins an activity so as to promote compliance with the law. An administrative order, unlike the warning letter, is a ruling from which legal rights and obligations flow.[84] Indeed, the Draft Compliance and Enforcement Policy provides for the issuance of ministerial orders as a distinct, and more consequential, alternative to warning letters. Warning letters as contemplated in the Draft Compliance and Enforcement Policy[85] may be a legitimate enforcement measure, and they may lay the groundwork for further action. However, given the indefinite nature of any future action that may follow, the warning letter attached to the response is not an administrative order issued under the *Fisheries Act* within the meaning of Article 45(3).

Only in relation to Kemess Mine has Canada shown that there is a pending judicial or administrative proceeding within the meaning of Article 45(3)(a). By laying charges against the mine owner, Canada is seeking sanctions in a judicial forum. If a factual record is developed as a result of the submission, the Secretariat will be precluded from considering whether Canada is failing to effectively enforce the provisions of the *Fisheries Act* in relation to Kemess Mine as long as the charges and prosecution are pending. However, Article 14(3)(a) would not preclude the Secretariat from looking at certain matters relating to Kemess Mine as they pertain to the allegation of a widespread failure to enforce section 36(3) effectively against mining operations. For example, the Secretariat may want to examine the circumstances leading to charges against the owners of Kemess Mine in order to provide information about why charges are laid in some circumstances and not others.

In sum, Article 14(3)(a) does not preclude the Secretariat from proceeding further, except with respect to whether Canada is effectively enforcing section 36(3) in regard to the Kemess Mine. Under Article

84. The following definitions support this interpretation of "administrative order." *Black's Law Dictionary*, 7th ed., defines "administrative order" as
1. An order issued by a government agency after an adjudicatory hearing. 2. An agency regulation that interprets or applies a statutory provision.
The *Dictionary of Canadian Law* (Dukelow, 1991) includes the following definition of "order" taken from the *Court of Appeal Act* (BC):
(a) A judgment and a decree, and (b) an opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made.

85. Response, Exhibit 4.

15(1), the Secretariat's next step is to consider whether the submission, in light of the Party's response, warrants developing a factual record.[86]

C. Why Preparation of a Factual Record is Warranted

The Secretariat is of the view that development of a factual record is warranted regarding the matters raised in the submission. Section 36(3), the key provision at issue, is the central pollution prevention provision in the *Fisheries Act*. As described in detail above, the Submitters allege a pattern of ineffective enforcement of section 36(3) in relation to mines operating in British Columbia.

Throughout the response, Canada disputes this allegation. First, Canada describes measures it has undertaken to promote compliance with and enforce section 36(3) of the *Fisheries Act* in relation to the three mines that the Submitters use to illustrate this alleged pattern of ineffective enforcement. Canada's response also includes numerous claims about the overall effectiveness of its enforcement activities in connection with mining operations in British Columbia, but provides few specific details to support those claims in relation to the mines listed in the Appendix. The centerpiece of Canada's assertions regarding its approach to enforcement of section 36(3) is the Draft Compliance and Enforcement Policy. As explained below, a factual record would afford an opportunity to develop additional information concerning both the effectiveness of the actions Canada has taken with respect to the three highlighted mines and the actual application of the various measures Canada claims it employs generally in the enforcement of section 36(3) in relation to mines in British Columbia.

1. The Britannia, Mt. Washington and Tulsequah Chief Mines

The Secretariat first considers whether development of a factual record is warranted in relation to the Britannia, Mt. Washington and Tulsequah Chief mines, taking into account the details that Canada has provided regarding concrete compliance and enforcement action it has taken in relation to the mines. Clearly, Canada acknowledges and has made attempts to address the longstanding issues related to acid mine drainage at these mines. Significantly, however, Canada provides no information indicating that the actions it or British Columbia has taken

86. On 18 April 2000, the Submitters filed a reply to the Party's response. There is, however, no provision in the NAAEC for consideration of such a reply from a submitter at this stage of the citizen submission process. If the Council directs preparation of a factual record for this submission, the Secretariat may consider additional information from the Submitters in its development of the factual record. *See* Article 15(4).

to address the serious and persistent water pollution problems at any of the mines have ensured, or will in the future ensure, compliance with section 36(3). In short, it appears undisputed that at least as of the date of Canada's response, acid mine drainage from each of the three mines – one of which has been described as the single worst point source of metal pollution in North America[87] – was continuing to enter and affect fish habitat and *Fisheries Act* violations were ongoing. Accordingly, the Secretariat has determined that development of a factual record is warranted to examine in greater detail the effectiveness of the enforcement approach taken in relation to each mine, whether those approaches serve as models for effective enforcement with respect to mines in British Columbia generally, and whether and how Canada's approach prevents *Fisheries Act* violations at the mines in the long term.

The Secretariat considers preparation of a factual record to be appropriate with respect to all three mines despite the effluent treatment works planned or underway at the Britannia and Tulsequah Chief mines. With respect to Britannia Mine, development of a factual record would provide an opportunity to examine the progress in implementing the treatment plant and landfill, their effectiveness as a solution to acid mine drainage from the mine and the steps Canada has taken to ensure long-term compliance with section 36(3) at the mine. As to the Tulsequah Chief mine, Canada explains that inspection and sampling it conducted in August 1999 indicated treatment works beyond those initially anticipated were likely necessary to address *Fisheries Act* violations. A factual record is warranted to examine in more detail whether those additional works have been required and implemented, whether they have been effective in controlling the violations, and what steps Canada has taken to ensure that violations of section 36(3) do not persist at the mine.

The Tulsequah Chief mine also raises questions regarding Canada's assertion that current environmental assessment and environmental protection regimes preclude problems similar to those at older mines such as the Britannia, Mt. Washington and Tulsequah Chief mines from occurring at newer mines in production or proposed for development in British Columbia.[88] In particular, Canada points to the harmonized environmental assessment process between British Columbia and Canada, as well as other licensing and permitting processes. Canada reports that between 1994 and 1998, Canada and British Columbia conducted a comprehensive environmental review of a new Tulsequah mining project and concluded that the development of the project improved the ability

87. Submission, at 9.
88. Response, at 9-10.

to properly rehabilitate the site for long-term closure. In March 1998, following Canada's determination that the project was not likely to cause significant environmental impacts if certain conditions were met, British Columbia issued a project approval certificate. One condition of approval was construction of a temporary water treatment plant, scheduled to be in place by September-October 1998, followed by full effluent treatment, scheduled to be in place by November 1999. However, in spite of the environmental assessment and the conditions placed on the project approval by the province, Canada issued a warning letter to the mine owner[89] on September 28, 1998 and concluded in August 1999 that additional works were likely necessary to control *Fisheries Act* violations. A factual record is warranted to examine the extent to which section 36(3) is enforced effectively through application of the environmental assessment process at the Tulsequah Chief mine and other mines.[90]

2. *The Alleged Widespread Failure to Enforce Section 36(3) Effectively*

The submission asserts a widespread failure by Canada to enforce section 36(3) to protect fish and fish habitat from the environmental impacts of mining operations in British Columbia. While it focuses most heavily on the Britannia, Mt. Washington and Tulsequah Chief Mines, those mines are clearly intended to illustrate a more widespread concern. The submission also lists 25 "known acid generating mines" and 17 "potentially acid generating mines" in Appendix 1. The submission provides no specific details of alleged violations in relation to these additional mines and Canada provides no specific information in this regard except as to the Kemess Mine. Canada maintains that, in the absence of specific assertions regarding the other mines in British Columbia, it is unable to respond to the Submitters' claims about those other mines. However, the allegations regarding widespread ineffective enforcement of section 36(3) against the mines listed in the Appendix must be viewed in light of all of the information presented in the submission.

89. Response, Exhibit 5.

90. The Kemess Mine provides another example. According to materials attached to the submission, the Kemess Mine project was approved in 1996 after undergoing the harmonized environmental assessment process. Submission, Exhibit 2, at 48. As of the date of Canada's response, British Columbia was pursuing charges against owners of the mine under sections 35(1), 36(3), 40(1) and 40(2) of the *Fisheries Act*. Response, Exhibit 7. Although these pending proceedings preclude a factual record regarding effectiveness of *Fisheries Act* enforcement at the mine, the mere fact that these violations occurred despite application of the harmonized environmental assessment process raises questions as to the limits on the ability of the process to prevent *Fisheries Act* violations.

The Submitters support with three studies their assertion that there are or may be a number of mines polluting fish habitat in addition to the three discussed in detail in the body of the submission.[91] Together, these studies present information regarding the overall decline of and ongoing threats to fisheries in British Columbia, including threats due to acid mine drainage. The studies also discuss the manner in which acid mine drainage and heavy metal contamination result from mining operations and cause harm to fish and fish habitat. As well, the studies outline the significant technical challenges in controlling acid mine drainage effectively, including examples both in British Columbia and elsewhere of failed attempts to control acid mine drainage.[92] These studies support the conclusion that acid mine drainage and heavy metal contamination are a predictable result of mining in the absence of – and sometimes despite – preventive and containment measures.[93]

The Submitters also provide information on several of the forty-two mines listed in the Appendix.[94] The attachments to the submission describe impacts acid mine drainage from some of these mines has had on associated fisheries historically and recount attempts, with varying degrees of success, to control acid mine drainage from some of the mines so as to prevent contamination that might threaten fisheries.[95] For at least two of the mines, the attachments note ongoing surface or ground water pollution concerns related to the mines.[96]

The Submitters also provide information indicating that Canada initiated only 5 prosecutions Canada-wide under section 36(3) in 1996-97[97] and state they were able to find only three cases (dating from the 1980's) in which mining companies have been prosecuted for violations of section 36(3).[98] They maintain that enforcement mechanisms other than prosecution have been "complete and utter failures" given that the three mines described in the submission have been allowed to continue to pollute fish habitat.[99] Finally, they provide information regarding recent reductions in the staff and resources available to Environment Canada to enforce section 36(3).[100]

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91. Submission, Exhibits 1, 2 and 3.
92. *See*, for example, Submission, Exhibit 1, at 11, 15-16
93. *See*, for example, Submission, Exhibit 1, at 1-5, Exhibit 2, at 10-11.
94. Submission, Exhibits 1 and 2.
95. *See* Submission, Exhibit 1, at 11, 14, 19-20; Exhibit 2, at 3-4, 32-42.
96. Submission, Exhibit 2, at 41 (citing elevated copper and zinc levels in water bodies located near the Myra Falls mine) and at 37 (citing ongoing groundwater contamination at the Sullivan mine).
97. Submission, Exhibit 7, at 7.
98. Submission, at 14-15.
99. Submission, at 17.
100. Submission, at 11 (and cited references).

Taken together, this information, along with the detailed information regarding the ongoing *Fisheries Act* violations at the Britannia, Tulsequah Chief and Mt. Washington mines, raises central questions regarding the effectiveness of Canada's enforcement efforts with respect to mines in British Columbia generally. Notably, the additional forty-two mines that the Submitters identify have in common a crucial characteristic relevant to their potential to violate section 36(3), namely their known or potential capacity to generate acid mine drainage. The information presented in the submission, especially in view of the experience at the three highlighted mines, raises important questions regarding the extent to which these mines are contaminating or threaten to contaminate fisheries and Canada's efforts to address problems associated with those mines through enforcement of section 36(3).

Canada's response does not adequately answer these questions. Canada does not deny the Submitters' assertion that water pollution caused by mining has a deleterious environmental impact. As well, Canada notes that "mining operations are often situated near water bodies, and discharge effluents into waters frequented by fish.[101]" However, Canada states that "Canada and BC have legislation, regulations, policies and procedures including a range of compliance promotion and other enforcement tools in place to prevent mining operations from harming fish and fish habitat.[102]" Canada contends that whereas the submission appears to equate enforcement only with prosecutions, "Canada's actions with each of these three abandoned mines and other mines clearly demonstrate a comprehensive and productive strategy aimed at eliminating the discharge of deleterious substances and thereby achieving compliance with the Act.[103]" Canada adds that pollution problems associated with older mines are being addressed in new mines under federal and provincial environmental assessment and protection legislation and procedures.[104]

As the Secretariat has previously indicated, varied principles and approaches are encompassed in the term "effective enforcement," and under certain circumstances, enforcement measures other than prosecution may be more effective in securing compliance with a Party's environmental law.[105] Nonetheless, the response fails to make a sufficient connection between the full range of enforcement tools available to Canada and whether the tools are being used effectively to enforce section 36(3) of the *Fisheries Act* with respect to mines in British Columbia.

101. Response, at 9.
102. Response, at 15.
103. Response, at 12.
104. Response, at 15
105. SEM-97-001 (BC Hydro), Article 15(1) Recommendation (27 April 1998).

The response does provide a detailed and helpful description of the tools available to the federal government and British Columbia for addressing violations of section 36(3). Central to this description is the Draft Compliance and Enforcement Policy.[106] The purpose and scope of the Draft Compliance and Enforcement Policy is described in the following terms:

> This Compliance and Enforcement Policy lays out general principles for application of the habitat protection and pollution prevention provisions of the Act and explains the role of regulatory officials in promoting, monitoring and enforcing the legislation. It is a national policy which applies to all those who exercise regulatory authority, from ministers to enforcement personnel.[107]

Thus, the Draft Compliance and Enforcement Policy provides a template for what Canada asserts constitutes effective enforcement of section 36(3) of the *Fisheries Act*. It includes eight sections containing the framework and the specifics of the policy, listed under the following headings:

- What are enforcement and compliance?
- Guiding principles
- Jurisdiction and responsibilities
- Measures to promote compliance
- Inspection and investigation
- Responses to violation
- Penalties and Court Orders upon conviction
- Civil suit by the Crown to recover costs.

The Draft Compliance and Enforcement Policy defines compliance as the state of conformity with the law and instructs regulatory officials to secure compliance through two types of activities, compliance promotion and enforcement. It lists the following measures for promoting compliance:

- communication and publication of information;

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106. Canada also attaches to its response a document describing British Columbia's overall approach to and policies regarding environmental enforcement and compliance assurance. Response, Exhibit 8.
107. Response, Exhibit 4, at 1.

- public education;
- consultation with parties affected by these provisions of the *Fisheries Act*; and
- technical assistance.

It defines enforcement as compelling adherence to the law through the exercise or application of powers granted under the legislation and states that enforcement is to be carried out through the following measures:

- inspections to monitor or verify compliance;
- investigations of violations;
- issuance of warnings, directions by inspectors, authorizations, and Ministerial orders, without resorting to court action; and
- court actions, such as injunctions, prosecution, court orders upon conviction, and civil suits for recovery of costs.[108]

What the response lacks is a detailed explanation regarding the actual implementation and effectiveness of this policy and related federal and provincial measures with respect to mining operations in British Columbia. While the Draft Enforcement and Compliance Policy provides a helpful framework for assessing Canada's statement that it is systematically enforcing the pollution prevention provisions of the *Fisheries Act* against British Columbia's mines, the draft policy alone does not show the extent to which it has been implemented in practice or that its implementation has been effective.

Canada asserts that it regularly reviews and evaluates monitoring data and fisheries resource information for mines in British Columbia to ensure compliance, protect fisheries resources and select mines for inspection.[109] Canada states that the extensive monitoring, research and other data gathering activities it has conducted for over 15 years have resulted in a better understanding of the acid rock generation problems associated with mining.[110] However, Canada provides few specific details to show how it has used this information in enforcing section 36(3), through application of the Draft Enforcement and Compliance

108. Response, Exhibit 4, at 3.
109. Response, at 16.
110. Response, at 12.

Policy or otherwise, in relation to mining operations in British Columbia. Since Canada claims that the federal and provincial governments have consistently taken action to address the threat to fish and fish habitat posed by British Columbia mines in general, additional specific information should be available for development in a factual record.

Canada's response also indicates that the *MMLER* apply where a mine, as defined in those regulations, is in operation, and that as of the date of the response, revisions to *MMLER* were under consideration.[111] However, Canada does not provide information about whether the *MMLER* are being applied to any of the mines listed in the Appendix to the submission or the extent to which the *MMLER* are applied and enforced so as to ensure compliance with section 36(3).

Finally, while Canada "categorically denies the assertion in the submission that there is a pattern of non-enforcement due to staff and resource shortages,[112]" it provides no detailed information regarding whether and to what extent reductions in enforcement resources have had an impact on implementation of the Draft Enforcement and Compliance Policy and on the overall effectiveness of the enforcement of section 36(3) with respect to mines in British Columbia. Canada provides no details about the current level of enforcement staff and resources, how the allocation of those resources has changed over time, and whether there is any correlation between the level of enforcement staff and resources and the degree of the impact on fisheries from mining activities. Canada also offers no information about the progress or results of Environment Canada's 1998 review of its enforcement program, and how those results relate to the allegations raised in the submission.

In sum, a factual record is warranted to develop information regarding enforcement of section 36(3), through application of the Draft Compliance and Enforcement Policy or otherwise, at mines other than the three mines highlighted in the submission, except in regard to the effectiveness of the enforcement of section 36(3) at the Kemess Mine. In particular, a factual record is warranted for the following purposes:

- To develop information regarding the extent to which the mines listed in Appendix 1 discharge deleterious substances to fish-bearing waters, including information on whether any such discharges are authorized under the *Fisheries Act* and on whether the mines are violating section 36(3);

111. Response, at 15.
112. Response, at 16.

- To develop information regarding the extent to which the harmonized environmental assessment process or other federal or provincial compliance-promoting measures have been effective in preventing or addressing violations of section 36(3) at those mines;

- To develop information regarding the nature, extent and frequency of compliance monitoring for those mines;

- To examine the findings of compliance monitoring activities at those mines, including the frequency and seriousness of non-compliance with section 36(3) and, where applicable, the *MMLER*;

- To develop information regarding investigations, prosecutions or other enforcement action taken by the federal government or British Columbia in response to findings of non-compliance with section 36(3) of the *Fisheries Act* or the *MMLER* at those mines, including action taken when non-compliance persists;

- To examine the results and effectiveness of the enforcement or other action taken by Canada as a result of findings of non-compliance with section 36(3) at those mines; and

- To examine the results of Environment Canada's 1998 review of its enforcement program and other information relevant to whether reductions in enforcement resources have had an impact on the effectiveness of Canada's enforcement of section 36(3) with respect to mines in British Columbia.

A factual record would also provide an opportunity to examine the results of the "extensive monitoring, research and other data gathering activities" that Canada indicates has led to a better understanding of problems associated with acid mine drainage in British Columbia.[113] As well, the materials attached to the submission indicate that efforts to control acid mine drainage at some of the mines in the Appendix have, at least for the time being, had some success. Therefore, a factual record would also potentially provide an opportunity to present information regarding preventive or remedial measures that so far have been successful in controlling acid mine drainage.

113. Response, at 12.

3. Private Remedies

Under Article 14(3)(b)(ii), a Party may submit information regarding whether private remedies in connection with the matters raised in a submission are available to the submitter and whether they have been pursued. In its response, Canada asserts that interested persons may request government agencies to investigate alleged violations of environmental legislation and the Submitters appear not to have taken this step.[114] Canada also asserts that the Submitters do not appear to have pursued other administrative, quasi-judicial or judicial proceedings available to them, including civil actions for damages, private prosecutions and injunctions. Finally, Canada asserts that the one week that the Submitters gave the Party to respond regarding matters raised in the submission was not a reasonable opportunity and that proceeding further would encourage submitters to bypass domestic processes. While nothing in the NAAEC compels termination of a submission if a submitter fails to pursue private remedies or to allow a certain amount of time for a Party to respond to matters raised in the submission, in Canada's view, these are additional reasons why a factual record is not warranted here.

As noted above, the Submitters have described prior efforts they have made to pursue private remedies, in particular private prosecutions. In their view, those efforts were not satisfactory. Further, the Submitters do not have access to the same range of enforcement options as Canada or to the same range of monitoring and compliance information for pursuing private remedies. Canada acknowledges that, aside from the possibility of seeking damages or recovery of cleanup costs, there are no civil proceedings available for enforcing section 36(3) and enforcement is solely in the criminal courts.[115] Moreover, Canada identifies no potential avenue for the Submitters to seek redress of the alleged widespread failure to enforce section 36(3) effectively other than seeking remedies against individual mines. Given the number of mines of potential concern to the Submitters, the burden of seeking private remedies to address the alleged widespread pattern of ineffective enforcement would be significant.

Additionally, the response indicates that the pollution problems caused by the Britannia, Mt. Washington and Tulsequah Chief mines are long-standing and have each been the subject of a public process to

114. Response, at 7.
115. Response, at 14.

attempt to deal with the problems. Both the submission and the response indicate that citizens, as well as government agencies, have been aware of and concerned for years about the extent of the pollution caused by the three mines highlighted in the submission. Further, the two reports attached to the submission[116] that discuss more generally the environmental problems caused by mines in British Columbia were publicly released, demonstrating the efforts the Submitters have made to bring these issues to the attention of Canada and the general public.

For these reasons, the short period of time that the Submitters gave Canada to respond to their June 1, 1998 letter prior to filing the Submission is not a compelling reason to preclude preparation of a factual record. Further, the Secretariat is satisfied with the Submitters' explanation of why they did not pursue a private prosecution or other specific remedies in relation to any of the mines.

IV. RECOMMENDATION

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. Using three mines as examples, the submission raises central questions regarding the Party's efforts to control and prevent acid mine drainage so as to enforce compliance with section 36(3) of the *Fisheries Act* in relation to mining operations in British Columbia. The response reflects an appreciation for the importance of the environmental laws and natural resources at issue in this submission. However, while the response asserts that Canada is protecting fish and fish habitat through the effective use of different enforcement and compliance tools with respect to mining operations in British Columbia, it leaves open questions regarding the Submitters' assertions. The Secretariat concludes that the lack of information concerning Canada's actual use of various enforcement and compliance tools and their effectiveness in achieving and maintaining compliance with section 36(3) at the three highlighted mines as well as other mines known to be or to have the potential to be acid-generating supports developing additional information through the factual record process. Accordingly, in accordance with Article 15(1), and for the reasons set forth in this document, the Secretariat informs that Council of its determination that the purposes of the NAAEC would be well served by developing in a factual record regarding the Submission.

116. Submission, Exhibits 1 and 2.

Respectfully submitted on this 11th day of May, 2001.

Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

c.c.: Janine Ferretti, Executive Director, CEC

SEM-98-005

(Cytrar I)

SUBMITTER:	ACADEMIA SONORENSE DE DERECHOS HUMANOS
PARTY:	United Mexican States
DATE:	11 August 1998
SUMMARY:	The Submitters allege that Mexico has failed to effectively enforce environmental law by having authorized the operation of a hazardous waste landfill (CYTRAR) less than six kilometers away from Hermosillo, Sonora.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2)* (9 April 1999)	Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.
ART. 15(1) (26 October 2000)	Determination under Article 15(1) that development of a factual record is not warranted

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Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-98-005** (Cytrar I)
Peticionario:	Academia Sonorense de Derechos Humanos, A.C. Domingo Gutiérrez Mendívil
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	11 de agosto de 1998
Fecha de esta determinación:	26 de octubre de 2000

I. INTRODUCCIÓN

El Artículo 14 del *Acuerdo de Cooperación Ambiental de América del Norte* (en adelante, "ACAAN") permite al Secretariado de la Comisión para la Cooperación Ambiental de América del Norte* (en adelante, "CCAAN") examinar las peticiones presentadas por personas u organizaciones sin vinculación gubernamental, en las que se asevere que una de las partes firmantes del ACAAN está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, siempre que la petición cumpla con los criterios del Artículo 14(1). Cuando considera que una petición cumple con estos criterios, el Secretariado determina si se amerita solicitar una respuesta de la Parte aludida. A la luz de la respuesta proporcionada por la Parte, el Secretariado puede notificar al Consejo de la CCAAN que considera que la petición amerita la

* A partir del mes de octubre de 2000, la Comisión para la Cooperación Ambiental creada por el ACAAN, empleará el nombre Comisión para la Cooperación Ambiental de América del Norte para efectos de uso común.

elaboración de un expediente de hechos, en términos del Artículo 15 del Acuerdo. Mediante el voto de al menos dos terceras partes de sus miembros, el Consejo puede entonces ordenar al Secretariado la elaboración del expediente de hechos y, una vez concluido, autorizar su difusión pública.

Mediante esta Determinación conforme al artículo 15(1) del ACAAN, el Secretariado notifica a los peticionarios y al Consejo de la CCAAN las razones por las que considera que la petición SEM-98-005 no amerita la elaboración de un expediente de hechos, dándose por terminado el proceso respecto de esa petición.

II. ANTECEDENTES PROCESALES

El Secretariado de la CCAAN recibió el 23 de julio de 1998 una petición de la Academia Sonorense de Derechos Humanos, A.C., y Domingo Gutiérrez Mendívil (en adelante, "Peticionarios"), de acuerdo a lo dispuesto en los artículos 14 y 15 del ACAAN. En ella, los Peticionarios aseveran que ha habido una omisión en la aplicación efectiva de la legislación ambiental mexicana respecto de la autorización de operación del confinamiento controlado de residuos peligrosos Cytrar, S.A. de C.V. en Hermosillo, Sonora, México (en adelante, Cytrar). El 29 de julio del mismo año, el Secretariado comunicó a los Peticionarios ciertos errores menores de forma, mismos que éstos corrigieron mediante comunicación del 11 de agosto de 1998, fecha en que se considera formalmente recibida la petición.

Por las razones expuestas en la sección II de este documento, el 9 de abril de 1999, el Secretariado determinó que la petición cumple con los requisitos establecidos en el artículo 14(1) del ACAAN. Considerando los factores previstos en el artículo 14(2) del ACAAN, el Secretariado decidió que la petición ameritaría una respuesta de la Parte, por lo que en la propia determinación del 9 de abril solicitó a México su respuesta.

El 19 de julio de 1999 el Secretariado acusó recibo de la respuesta de México, recibida el 12 de julio de 1999. El 20 de julio de 1999, México informó al Secretariado que la sección segunda de la respuesta contenía información que se refería a una empresa no mencionada en la petición, por lo que debía mantenerse su confidencialidad con fundamento en el artículo 39(1)(b) del ACAAN. El 13 de septiembre de 1999, el Secretariado solicitó al gobierno de México ciertas aclaraciones respecto de su solicitud de confidencialidad, así como un resumen de la información confidencial para los efectos señalados en el apartado 17.3 de las

Directrices para la presentación de peticiones relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del ACAAN (en adelante, "Directrices"). El 13 de octubre de 1999, el Secretariado presentó el asunto al Consejo para su consideración. Estando pendiente una decisión del Consejo al respecto, dada la aserción de confidencialidad y a falta de un resumen de la Parte para efectos del apartado 17.3 de las Directrices,[1] la presente Determinación no incluye información de la sección segunda de la respuesta en cuanto a la otra empresa mencionada por la Parte. El resto de la respuesta de la Parte se resume en la sección III de este documento.

En la sección IV de esta Determinación se analiza la petición a luz de la respuesta de la Parte conforme al artículo 15(1), y se exponen las razones por las que el Secretariado considera que la petición SEM-98-005 no amerita la elaboración de un expediente de hechos conforme al ACAAN. Esta Determinación del Secretariado se refiere a las aseveraciones específicas de esta petición y no prejuzga de manera alguna sobre otros aspectos del asunto planteados fuera de la petición, o que pudieran plantearse en una petición distinta.[2] Esta Determinación se hace también sin perjuicio de reconocer que la aplicación efectiva de la legislación ambiental de las Partes sobre la disposición adecuada de los residuos peligrosos, es un compromiso que contribuye a la consecución de las metas del ACAAN.

III. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

El 9 de abril de 1999 el Secretariado determinó que la petición cumple con los requisitos del artículo 14(1) del ACAAN y, considerando los factores del artículo 14(2), solicitó una respuesta a la Parte. En esta

1. El apartado 17.3 de las Directrices establece:
   Tomando en consideración que la información confidencial o privada proporcionada por una Parte, organización sin vinculación gubernamental o persona puede contribuir de manera sustancial a la opinión del Secretariado en cuanto a si se amerita o no la elaboración de un expediente de hechos, los suministradores de esa información deberían esforzarse por proporcionar un resumen de esa información o explicación general de por qué esa información se considera como confidencial o privada.
2. Esta aclaración se hace en virtud de que, después de que fue presentada la petición, los Peticionarios y otras personas interesadas han proporcionado al Secretariado información relacionada con el confinamiento Cytrar. Dado que tal información no formó parte de la petición, no fue considerada en la elaboración de esta Determinación, porque el ACAAN y las Directrices no prevén un fundamento para hacerlo en esta etapa del proceso.

sección el Secretariado explica las razones y consideraciones de esas determinaciones.[3]

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
>
> (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[4] El Secretariado examinó esta petición con tal perspectiva en mente.

La primera cuestión es si la petición entraña, como se requiere, la aserción de una omisión en la aplicación efectiva de la legislación ambiental. El Secretariado determinó que la petición sí cumple con tales requisitos por las siguientes razones.

La petición "asevera" que México está incurriendo en omisiones en la aplicación efectiva de la Norma Oficial Mexicana *NOM-CRP-004-*

3. Este análisis se hizo estando en vigor las Directrices anteriores a las modificaciones adoptadas en junio de 1999, que no exigían al Secretariado explicar su razonamiento en cada paso, como lo hace ahora el apartado 7.2 de las Directrices.
4. Véanse en este sentido, e. g., la Determinación conforme al artículo 14(1) en relación con la petición SEM-97-005/Animal Alliance of Canada, et al.; y la Determinación conforme a los artículos 14(1) y (2) relativa a la petición SEM-98-003/Department of the Planet Earth, et al., en su versión revisada.

ECOL/1993- Que establece los requisitos que deben reunir los sitios destinados al confinamiento controlado de residuos peligrosos, excepto de los radioactivos[5] (en adelante, NOM-055-ECOL-1993); y del artículo 159 Bis 3 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (en adelante, LGEEPA). A efecto de calificar para el proceso del artículo 14(1), las disposiciones citadas en una petición deben satisfacer la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN, que se refiere al propósito principal de tales disposiciones.[6]

De la simple lectura de las disposiciones citadas, se desprende claramente que califican como legislación ambiental para efectos de los artículos 45(2) y 14 del ACAAN, porque son disposiciones cuyo propósito principal coincide con "... la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de [...] el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello...".[7]

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5. Publicada en el *Diario Oficial de la Federación* (en adelante, "DOF"), el 22 de octubre de 1993, la cual quedaría con la nomenclatura que actualmente ostenta, NOM-055-ECOL-1993, en virtud de Acuerdo publicado el 28 de noviembre de 1994 en el DOF.
6. El artículo 45(2) del ACAAN establece:
   Para los efectos del Artículo 14(1) y la Quinta Parte:
   (a) **"legislación ambiental"** significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
      (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
      (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
      (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas
      en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
   (b) Para mayor certidumbre, el término **"legislación ambiental**" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.
   (c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.
   Véanse en este sentido, e. g., las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).
7. En su preámbulo, por ejemplo, la NOM-055-ECOL-1993 establece: "Que la construcción de confinamientos controlados para la disposición final de residuos peligrosos debe reunir condiciones de máxima seguridad, a fin de garantizar la protección de la población y el equilibrio ecológico...".

Asimismo, el Secretariado determinó en marzo de 1999 que la petición satisface los seis requisitos listados en el artículo 14(1). La petición se presentó por escrito en español, que es el idioma designado por la Parte mexicana.[8] Los Peticionarios se identificaron como la Academia Sonorense de Derechos Humanos, A.C. y Domingo Gutiérrez Mendívil. La primera es una organización sin vinculación gubernamental y el segundo un particular, vinculado a esa organización, ambos con residencia en Hermosillo, Sonora, México.[9]

La petición contiene información suficiente, que permitió al Secretariado revisarla, en particular respecto del alegato principal de la petición, que se refiere a la aplicación efectiva de la NOM-055-ECOL-1993. La petición incluye información sobre la ubicación del confinamiento de residuos peligrosos Cytrar respecto de la ciudad de Hermosillo, información sobre el número de habitantes de esa ciudad, copia de las autorizaciones otorgadas para la operación de Cytrar a que hace referencia la petición, y copia de la Norma Oficial Mexicana que invocan los Peticionarios.[10]

Los Peticionarios manifiestan que la Parte ha incurrido en omisiones en la aplicación efectiva de su legislación ambiental, respecto del confinamiento de residuos peligrosos Cytrar. El alegato principal de la petición es que en noviembre de 1996 y de 1997, México expidió a Cytrar, S.A. de C.V. una autorización para la operación de un confinamiento de residuos peligrosos situado a menos de seis kilómetros de la ciudad de Hermosillo, Sonora, en contravención del artículo 5.1.5.1 de la NOM-055-ECOL-1993, que establece una distancia respectiva de al menos veinticinco kilómetros.[11] Cabe aclarar aquí que en ese sitio existía un

Por su parte, el artículo 159 Bis 3 de la LGEEPA señala: "Toda persona tendrá derecho a que la Secretaría, los Estados, el Distrito Federal y los Municipios pongan a su disposición la información ambiental que les soliciten, en los términos previstos por esta Ley. En su caso, los gastos que se generen, correrán por cuenta del solicitante. Para los efectos de lo dispuesto en el presente ordenamiento, se considera información ambiental, cualquier información escrita, visual o en forma de base de datos, de que dispongan las autoridades ambientales en materia de agua, aire, suelo, flora, fauna y recursos naturales en general, así como sobre las actividades o medidas que les afectan o puedan afectarlos. Toda petición de información ambiental deberá presentarse por escrito, especificando claramente la información que se solicita y los motivos de la petición. Los solicitantes deberán identificarse indicando su nombre o razón social y domicilio."

8. Véase el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
9. Véanse los artículos 14(1)(b) y (f) y 45(1) del ACAAN.
10. Véase el artículo 14(1)(c) del ACAAN y las páginas 1 a 3 y los anexos I a VII de la petición.
11. La autorización se concedió mediante los oficios DOO-800/005480, fechado al 11 de noviembre de 1996, y DOO-800-007251, de fecha 19 de noviembre de 1997, ambos emitidos por el Instituto Nacional de Ecología (en adelante, "INE"), órgano

confinamiento de residuos peligrosos desde 1988, y que el acto al que se refiere la petición es la autorización de operación otorgada a Cytrar, S.A. de C.V., que lo empezó a operar aparentemente en 1996.[12]

La petición indica también, que el confinamiento de residuos peligrosos será reubicado debido a las quejas ciudadanas, pero afirman los Peticionarios que la Parte pretende reubicarlo sin remediar o sanear la contaminación del sitio.[13] Los Peticionarios también aseveran que México ha violado el derecho a la información ambiental contemplado en el artículo 159 Bis 3 de la LGEEPA, al negarse a revelar en qué parte de Sonora se proyecta establecer el nuevo confinamiento.[14]

Aunque las presuntas omisiones en la aplicación efectiva de la legislación ambiental se refieren en particular a la empresa Cytrar, la petición no parece encaminada a hostigar una industria. La petición parece encaminada, antes bien, a promover la aplicación de la legislación ambiental respecto del confinamiento controlado de residuos peligrosos, para prevenir posibles daños a la salud de la población y al medio ambiente, en particular dada la distancia a que se encuentra el confinamiento Cytrar de la población de Hermosillo.[15]

La petición incluye copias de documentos relativos a un recurso de revisión y a un juicio de amparo iniciados por uno de los Peticionarios en relación con el asunto materia de la petición, y acompaña copia del oficio por el que la autoridad confirma la autorización impugnada.[16]

Habiendo revisado la petición de conformidad con el artículo 14(1) y constatado que satisface los requisitos en él establecidos, como ya se mencionó, el Secretariado determinó solicitar una respuesta a la Parte mexicana. La decisión del Secretariado se orientó por las consideraciones del artículo 14(2) del ACAAN, que dispone:

> Cuando considere que una petición cumple con los requisitos estipulados en el párrafo 1, el Secretariado determinará si la petición amerita solicitar

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desconcentrado de la Secretaría de Medio Ambiente, Recursos Naturales y Pesca (en adelante, "Semarnap"). Página 3 de la petición.

12. Lo anterior con base en la sección segunda de la respuesta de México, que la Parte ha designado como confidencial respecto del nombre de otras empresas mencionadas en esta sección, y que no se mencionan en la petición.
13. Cabe mencionar a modo de contexto, que a la fecha de la presente Determinación, el Secretariado tiene entendido que ese confinamiento ya no está operando, y que no ha sido reubicado ni se han anunciado los detalles de su supuesta reubicación.
14. Páginas 4 y 5 de la petición.
15. Véase el artículo 14(1)(d) del ACAAN y página 2 de la petición.
16. Véanse el artículo 14(1)(e) del ACAAN y los anexos VIII a X de la petición.

una respuesta de la Parte. Para decidir si debe solicitar una respuesta, el Secretariado se orientará por las siguientes consideraciones:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Al decidir si la petición ameritaría solicitar una respuesta a la Parte, el Secretariado tomó en cuenta todos estos criterios en conjunto.

Los Peticionarios alegan que existe enorme preocupación e inconformidad entre los habitantes de la ciudad de Hermosillo por la operación del confinamiento Cytrar que, aseveran, se encuentra ilegalmente ubicado a menos de 6 kilómetros de esa ciudad. Señalan también que existen cuatro colonias habitacionales en el límite de la ciudad próximo al confinamiento, destacando las Colonias Costa del Sol y Casa Linda.[17] En opinión del Secretariado, la presunta omisión de una Parte en la aplicación efectiva de su legislación ambiental en materia de residuos peligrosos y su disposición final, constituye un asunto cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, especialmente las planteadas en los artículos 1 y 5, dado que los residuos de ese tipo pudieran causar daños a la salud humana y al medio ambiente en caso de no manejarse con la diligencia que exijan las leyes.[18]

El Secretariado también tomó en consideración si se ha acudido a los recursos al alcance de los particulares, conforme al artículo 14(2)(c) del ACAAN. La petición abordó los recursos disponibles que fueron perseguidos, mostrando que con anterioridad a la presentación de la petición se tomaron "acciones razonables para acudir a dichos recursos". La petición indica que los Peticionarios han presentado un recurso de revisión y un juicio de amparo relacionados con la autorización de operación del confinamiento que es materia de la petición.[19]

17. Página 4 y anexo III de la petición.
18. Véanse los artículos 14(2)(a) y (b) del ACAAN.
19. Véanse el artículo 14(2)(c), los apartados 5.6(c) y 7.5(b) de las Directrices (estas disposiciones de las Directrices entraron en vigor en junio de 1999, después de que se presentó la petición el 11 de agosto de 1998, pero ello no afecta la conclusión del Secretariado) y la página 3 de la petición.

A propósito de la consideración prevista en el artículo 14(2)(c) del ACAAN, cabe abordar brevemente la opinión que la Parte ha manifestado al respecto, si bien es claro que le corresponde al Secretariado llevar a cabo esa consideración, como antecedente a que el Secretariado solicita una respuesta a la Parte. En su respuesta a la petición, la Parte afirma que considera que la petición resulta improcedente y que no debió ser admitida por el Secretariado, puesto que los Peticionarios no agotaron los recursos internos a su alcance conforme a la legislación mexicana. La Parte informa que los Peticionarios han promovido una denuncia popular, un recurso de revisión y dos juicios de amparo, afirmando que se encuentran pendientes de resolución. Según la respuesta de la Parte, ello implica que no se han agotado los recursos internos, lo cual a se vez constituye una transgresión al artículo 14(2)(c) del ACAAN por el Secretariado.

Como se ha mencionado ya, el artículo 14(2) plantea una serie de consideraciones que orientan al Secretariado en su determinación de si la petición amerita solicitar una respuesta de la Parte, una vez que ha decidido que una petición reúne los requisitos establecidos en el artículo 14(1). Entre esos criterios, el artículo 14(2)(c) incluye la cuestión de "...si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte...". La Parte en su respuesta parece interpretar ese artículo 14(2)(c) como estableciendo el *requisito* de que los Peticionarios *agoten* los recursos legales disponibles, en lugar de una *consideración del Secretariado* sobre si los Peticionarios han *acudido* a ellos. Al parecer del Secretariado, que difiere respetuosamente con lo asentado en la respuesta de la Parte, el texto del ACAAN es claro en este aspecto. Según lo que ese artículo señala, los factores en él listados son criterios que orientan la consideración del Secretariado para decidir si una petición amerita solicitar una respuesta a la Parte, a diferencia del artículo 14(1), que establece los requisitos que deben cumplir las peticiones.[20] Además,

20. Véanse los apartados 5.6 y 7.5 de las Directrices, que proporcionan mayor orientación sobre el sentido del artículo 14(2)(c) del ACAAN. El apartado 5.6 de las Directrices, establece: "La petición deberá abordar los factores a ser considerados y que se encuentran identificados en el artículo 14(2) del Acuerdo para asistir al Secretariado en su revisión conforme a esta disposición. Consecuentemente, la petición deberá abordar: ... los recursos que estén al alcance de los particulares y disponibles bajo las leyes de la Parte, que se han perseguido (artículo 14(2)(c))..." El apartado 7.5 de las Directrices estipula que el Secretariado "[p]ara evaluar si se ha acudido a los recursos al alcance de los particulares en los términos de la legislación de la Parte [...] se orientará por las siguientes consideraciones [...] b) si con anterioridad a la presentación de la petición se han tomado las acciones razonables para acudir a dichos recursos, considerando que en algunos casos podrían existir obstáculos para acudir a tales recursos." Véase en el mismo sentido, la Determinación del Secretariado conforme al artículo 15(1) del ACAAN respecto de la petición SEM-97-007/Insituto de Derecho Ambiental (14 de julio de 2000).

la Parte mexicana explica que considera que la denuncia popular prevista en la LGEEPA no es un recurso. Sobre este asunto, el Secretariado también difiere respetuosamente de la opinión de la Parte, y considera que para efectos del ACAAN, la denuncia popular contemplada por la LGEEPA es un recurso conforme a la legislación mexicana, disponible a los particulares para que planteen a la Parte cuestiones sobre cumplimiento de la legislación ambiental o daños al medio ambiente, previamente a la presentación de una petición.[21]

Finalmente, volviendo a la última de las consideraciones del artículo 14(2), el Secretariado observó que la petición no estuvo basada exclusivamente en noticias de los medios de comunicación, ya que no hay referencia en la petición a dicha fuente de información.[22]

Con base en todos estos factores, el Secretariado determinó que ameritaría solicitar a la Parte una respuesta a esta petición, de conformidad con el artículo 14(2) del ACAAN, y así lo hizo el 9 de abril de 1999. El Secretariado recibió la respuesta de México el 12 de julio de 1999.

IV. RESUMEN DE LA RESPUESTA DE LA PARTE Y CONSIDERACIONES CONFORME AL ARTÍCULO 14(3) DEL ACAAN

Como se ha indicado, la presente determinación no incluye información de la sección segunda de la respuesta de la Parte en cuanto a las otras empresas que la Parte menciona y que no se mencionan en la petición, dado que México considera que esa información debe mantenerse como confidencial.

En su respuesta, recibida el 12 de julio de 1999, México argumenta que la norma que invocan los Peticionarios respecto a la distancia requerida entre un confinamiento controlado de residuos peligrosos y los centros de población, no es aplicable en lo tocante a autorizaciones de *operación* de confinamientos de residuos peligrosos, sino a la *selección del sitio* para ubicarlos. La Parte afirma también que la selección del sitio donde se ubica el confinamiento fue autorizada en 1987, con anterioridad a la entrada en vigor de la NOM-055-ECOL-1993 u otro requisito equivalente. Además, la Parte señala que aún cuando fuera aplicable, esa disposición no es una disposición rígida, sino que la norma

21. Véase en este sentido, la Determinación del Secretariado conforme al artículo 15(1) del ACAAN respecto de la petición SEM-97-007/Insituto de Derecho Ambiental (14 de julio de 2000).
22. Véase el artículo 14(2)(d) del ACAAN.

misma plantea que su exigibilidad puede exceptuarse si se realizan medidas equivalentes a ese requisito.

La respuesta de la Parte niega que haya depósito ilegal de residuos peligrosos en el confinamiento. La Parte señala que no es posible remediar el sitio, dada la naturaleza misma de un confinamiento controlado, que define como la "obra de ingeniería para la disposición final de residuos peligrosos, que garantice su aislamiento definitivo."[23] Por último, sobre la supuesta reubicación del confinamiento y la supuesta violación del derecho a la información ambiental, la Parte en su respuesta indica que es verdad que la Secretaria de la Semarnap ha manifestado que Cytrar se va a reubicar, pero la Parte afirma que la ubicación del nuevo sitio no se ha determinado aún, por lo que no puede proporcionarse información al respecto.

Como se ha mencionado, la respuesta de la Parte manifiesta que algunos asuntos supuestamente materia de la petición, están pendientes de resolución, y menciona una denuncia popular, un recurso de revisión y dos juicios de amparo. De estos cuatro procedimientos, dos se mencionan también en la petición: el recurso de revisión y uno de los juicios de amparo (número 365/98). En vista de lo anterior, el Secretariado evaluó si de acuerdo con el artículo 14(3)(a) del ACAAN, debiera abandonar el trámite respecto de esta petición, porque las aseveraciones de la petición fuesen materia de un procedimiento judicial o administrativo pendiente de resolución. Conforme a dichos artículos, las aseveraciones de una petición no se revisarían más si el procedimiento aún está "pendiente de resolución", si se trata de un procedimiento "iniciado por la Parte de manera oportuna y conforme a su legislación", y si los asuntos materia de ese procedimiento son los mismos que los de la petición.[24] El Secretariado determinó que no está impedido para continuar la revisión de la petición, por las razones siguientes.

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23. Esta definición está prevista en el artículo 3º del Reglamento de la LGEEPA en Materia de Residuos Peligrosos (publicado en el DOF el 25 de noviembre de 1988; en adelante, "RRP").
24. El artículo 14(3) dispone:
    3. La Parte notificará al Secretariado en un plazo de 30 días y, en circunstancias excepcionales en un plazo de 60 días posteriores a la entrega de la solicitud:
    (a) si el asunto es materia de un procedimiento judicial o administrativo pendiente de resolución, en cuyo caso el Secretariado no continuará con el trámite; y
    (b) cualquier otra información que la Parte desee presentar, tal como:
    (i) si el asunto ha sido previamente materia de un procedimiento judicial o administrativo; y
    (ii) si hay recursos internos relacionados con el asunto que estén al alcance de la persona u organización que presenta la petición y si se ha acudido a ellos.

En primer lugar, al mencionar la existencia de algunos procedimientos pendientes de resolución, la respuesta de la Parte no señala que deba detenerse la revisión de la petición conforme a los artículos 14(3)(a) y 45(3) del ACAAN.[25] Además, y de mayor relevancia, es que en el caso que nos ocupa, el Secretariado concluyó que no es claro si todos los procedimientos mencionados por la Parte están aún pendientes de resolución, ni es claro tampoco si los dos procedimientos mencionados por la Parte, pero no mencionados por los Peticionarios, coinciden en su materia con el asunto materia de la petición.[26] Lo que sí es claro, es que los procedimientos en cuestión no actualizan el supuesto del artículo 14(3)(a) del ACAAN, porque no fueron iniciados por la Parte, sino por uno de los Peticionarios. Por ello, el Secretariado no está impedido para continuar la revisión de estas aseveraciones, y procedió a considerar la

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Por su parte, el artículo 45(3) define:

3. Para los efectos del Artículo 14(3), **"procedimiento judicial o administrativo"** significa:

(a) una actuación judicial, cuasi judicial o administrativa realizada por una Parte de manera oportuna y conforme a su legislación. Dichas actuaciones comprenden: la mediación; el arbitraje; la expedición de una licencia, permiso, o autorización; la obtención de una promesa de cumplimiento voluntario o un acuerdo de cumplimiento; la solicitud de sanciones o de medidas de reparación en un foro administrativo o judicial; la expedición de una resolución administrativa; y

(b) un procedimiento de solución de controversias internacional del que la Parte sea parte.

Véase, e.g., la Determinación del Secretariado de conformidad con el artículo 15(1) con relación a la petición SEM-96-003/The Friends of the Oldman River (2 de abril de 1997); y la Notificación del Secretariado al Consejo sobre la elaboración de un expediente de hechos con relación a la petición SEM-97-001/B.C. Aboriginal Fisheries Commission, et al. (27 de abril de 1998).

25. La respuesta de la Parte menciona la existencia de esos procedimientos pendientes en sustento de su consideración de que la petición no es procedente porque los Peticionarios no han agotado los recursos legales disponibles, en relación al artículo 14(2)(c) del ACAAN. Como se planteó en la sección anterior de esta Determinación, el Secretariado considera que no ha habido transgresión alguna a dicho artículo respecto de esta petición. Véase *supra*, página 7, y páginas 4, 5 y 12 de la respuesta de la Parte.

26. Véanse las páginas 2 a 4 de la respuesta de la Parte. El asunto materia de la denuncia popular interpuesta por los Peticionarios en contra de Cytrar, S.A. de C.V. que cita la Parte, no parece coincidir con los alegatos materia de la petición. Como la propia Parte señala, esa denuncia popular se refirió a supuestas violaciones a la legislación ambiental relativa a residuos peligrosos por parte de esa empresa, sin aparente referencia a su ubicación o autorización de operación. Respecto del juicio de amparo 0936/98 aludido por la Parte y que se refiere a un escrito por el que uno de los Peticionarios solicitó información a la Semarnap, al parecer del Secretariado, ese asunto podría estar relacionado con el alegato de la petición referente al artículo 159 Bis 3 de la LGEEPA, aunque no puede establecerse en definitiva que el mencionado escrito se refiera al mismo asunto que ese alegato de la petición, dado que ni los Peticionarios ni la Parte proporcionaron copia de los documentos relativos a esa solicitud.

petición a la luz de la respuesta de la Parte, para determinar si amerita la elaboración de un expediente de hechos.[27]

V. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 15(1) DEL ACAAN

El artículo 15(1) del ACAAN establece:

> 1. Cuando considere que, a la luz de la respuesta dada por la Parte, la petición amerita que se elabore un expediente de hechos, el Secretariado lo informará al Consejo e indicará sus razones.

Al efecto, el Secretariado consideró la petición a la luz de la respuesta proporcionada por la Parte, y en esta sección presenta las razones por las que considera que los alegatos de omisiones en la aplicación efectiva de la legislación ambiental planteados en la petición, no ameritan la elaboración de un expediente de hechos. Se abordan tres argumentos por separado. La aseveración principal, que es la supuesta omisión en la aplicación efectiva de la NOM-055-ECOL-1993 por la autorización de operación de Cytrar en 1996 y 1997. Y dos aseveraciones accesorias, que se refieren, una, a la supuesta omisión en la aplicación efectiva de la legislación ambiental dado que la Parte pretende dejar abandonada escoria que ha sido ilegalmente depositada en el sitio, sin sanear o remediar la contaminación del sitio. Y la otra, a la presunta omisión en la aplicación efectiva del derecho a la información ambiental respecto del sitio al que sería reubicado el confinamiento, conforme al artículo 159 Bis 3 de la LGEEPA.

El alegato principal de la petición es que la Parte autorizó en dos ocasiones, en 1996 y en 1997, la operación del confinamiento de residuos peligrosos Cytrar, a una distancia menor a 6 kilómetros de la ciudad de Hermosillo, Sonora, cuya población era de 448,966 habitantes en 1990, y que ello contraviene el artículo 5.1.5.1 de la NOM-055-ECOL-1993, que dispone que los confinamientos deben estar alejados al menos 25 kilómetros de los centros de población con 10,000 habitantes, con

27. El Secretariado en otras ocasiones similares ha considerado, como parte de su decisión sobre si una petición amerita que se elabore un expediente de hechos, la posibilidad de que elaborarlo implique duplicación o interferencia con un procedimiento pendiente, aunque el procedimiento no actualice el supuesto del artículo 14(3)(a). Véase en este sentido, la Determinación del Secretariado de conformidad con el artículo 15(1) con relación a la petición SEM-96-003/The Friends of the Oldman River (2 de abril de 1997). En el caso que nos ocupa, sin embargo, no se abordó este aspecto en esta Determinación, dado que por las otras razones que en ella se expresan, el Secretariado consideró que no amerita elaborarse un expediente de hechos respecto de esta petición.

proyección al año 2010.[28] Como se ha dicho, la Parte en su respuesta confirma los hechos mencionados, pero plantea tres argumentos refutando esta aseveración. En primer lugar, la Parte afirma que la NOM-055-ECOL-1993 no es aplicable a la autorización de *operación* de los confinamientos de residuos peligrosos, sino que se refiere a la *selección de los sitios* para ubicarlos. La Parte también señala que al momento de seleccionarse el sitio en que se ubicó el confinamiento, en 1987, no existía disposición que regulara la ubicación de confinamientos controlados de residuos peligrosos. Finalmente, la Parte afirma que suponiendo que se considere aplicable la disposición citada, dicha disposición no es rígida, sino que la norma misma plantea que su exigibilidad puede exceptuarse si se realizan medidas equivalentes a ese requisito.[29]

Sobre el primero de los argumentos de la Parte, es cierto que la NOM-055-ECOL-1993, en estricto sentido, no es aplicable a la operación de los confinamientos controlados de residuos peligrosos, sino a la selección de los sitios para ubicarlos.[30] Sin embargo, es importante aclarar la relación entre estos dos aspectos. El requisito de distancia relativa entre los confinamientos controlados de residuos peligrosos y los centros de población previsto en la NOM-055-ECOL-1993, es parte de un marco jurídico más amplio, que regula el manejo de residuos peligrosos y los servicios de manejo respectivos. La LGEEPA, cuyas disposiciones son de orden público e interés social, establece los fundamentos de ese marco jurídico, que se precisan a través de disposiciones reglamentarias y normas oficiales mexicanas.[31] Dicho marco jurídico está sucintamente descrito en el *Procedimiento que debe cumplir una empresa para obtener la autorización de instalación y operación para otorgar servicios de manejo de residuos peligrosos*.[32] Según se precisa en ese

28. Página 3 y anexos I a VII de la petición.
29. Páginas 7 a 9 de la respuesta.
30. En su artículo 2, la NOM-055-ECOL-1993 establece: "Campo de aplicación. La presente norma oficial mexicana es de observancia obligatoria para la selección de sitios destinados al confinamiento controlado de residuos peligrosos."
31. De la LGEEPA, destacan los artículos 1, 4 fracción VI, 6, y los Títulos primero, capítulo IV, sección V; y capítulos V y VI, entre otros. Son también parte de este marco jurídico los Reglamentos de la LGEEPA en materia de impacto ambiental, y de residuos peligrosos, así como las normas oficiales mexicanas NOM-052-ECOL-1993 *Listado de Residuos Peligrosos por su toxicidad al ambiente*, NOM-053-ECOL-1993 *Determinación de Residuos Peligrosos por su Toxicidad al ambiente*, NOM-054-ECOL-1993 *Incompatibilidad entre dos o más Residuos Peligrosos según la NOM-052-ECOL-1993*, NOM-056-ECOL-1993 *Obras complementarias de un confinamiento controlado de Residuos Peligrosos*, NOM-057-ECOL-1993 *Diseño, construcción y Operación de celdas de un confinamiento controlado para Residuos Peligrosos*, y NOM-058-ECOL-1993 *Operación de un confinamiento controlado de Residuos Peligrosos*.
32. Programa para la Minimización y Manejo Integral de Residuos Industriales Peligrosos en México 1996-2000, publicado en la Gaceta Ecológica número 39 verano de

procedimiento, algunos aspectos del trámite actual, son: la selección del sitio (atendiendo a los criterios establecidos en la NOM-055-ECOL-1993, de modo que se demuestre la viabilidad del sitio); la presentación de una fianza de cumplimiento y el pago de derechos; la obtención del permiso para la construcción en materia de impacto y riesgo ambiental, el cual se podrá instrumentar una vez satisfechos inclusive los requisitos que establezcan las autoridades estatales y/o municipales que correspondan; y la obtención del permiso para la operación en materia de impacto y riesgo ambiental (previa presentación de solicitud para el Manejo de Residuos Peligrosos -MRP), entre otros.[33] En este contexto, el hecho de que la petición haya asociado el requisito de distancia relativa a la operación del confinamiento, mientras que la norma que contiene ese requisito no es estrictamente aplicable a la operación del mismo, sino a la selección del sitio, no parece ser razón suficiente para considerar que la aplicación efectiva de ese requisito no amerite abordarse en este proceso de peticiones ciudadanas. En opinión del Secretariado, el proceso de peticiones ciudadanas puede contribuir mejor a la consecución de las metas del ACAAN, si los argumentos de las peticiones se abordan en contexto.

El segundo de los argumentos ofrecido por la Parte para desacreditar la aseveración de los Peticionarios, es que el sitio se aprobó antes de que entrara en vigor la NOM-055-ECOL-1993, o de que existiera un requisito equivalente. La primera disposición ambiental mexicana sobre este asunto, de que el Secretariado tiene conocimiento, entró en vigor el 7 de junio de 1988.[34] Según la respuesta de la Parte, la autorización de la ubicación del confinamiento se solicitó y se obtuvo en 1987, por lo que es claro que el requisito de distancia relativa aún no era aplicable en ese momento.[35]

1996, en su capítulo IV, punto 2; y página de Internet del INE (www.ine.gob.mx/usi/desydel/procedimie/proc-rp20.html).

33. En materia de impacto ambiental, véanse, el artículo 28 en relación con el 29 fracción VI, y 32 de la LGEEPA, en vigor a partir del 29 de enero de 1988, y artículo 28 fracción IV, del mismo ordenamiento en vigor a partir del 14 de diciembre de 1996; en ambos casos en consonancia con el artículo 11 del RRP.
34. Norma técnica ecológica *NTE-CRP-008/88, que establece los requisitos que deben reunir los sitios destinados al confinamiento controlado de residuos peligrosos, excepto de los radioactivos,* publicada en el DOF el 6 de junio de 1988 y que entró en vigor el día siguiente a su publicación. Esta NTE se abrogó al entrar en vigor la mencionada NOM-055-ECOL-1993.
35. Página 7 de la respuesta. En la sección segunda de la respuesta de la Parte, que está designada como confidencial, se detallan diversos actos específicos relacionados con la autorización del sitio, ocurridos entre el 29 de enero y el 22 de diciembre de 1987.

Por último, México argumenta que la disposición citada no es rígida, puesto que la norma contempla una excepción.[36] En efecto, la norma plantea la posibilidad de aplicar medidas equivalentes a los requisitos que establece, y dispone que la efectividad de las mismas debe demostrarse. Sin embargo, dicha excepción no parece haberse aplicado en el caso del confinamiento que operaría después Cytrar. Más allá de indicar que al confinamiento se le han establecido las condicionantes necesarias para que opere sin dañar el medio ambiente,[37] la Parte en su respuesta no explica por qué las condiciones que se exigieron tienen efectos equivalentes a una ubicación relativa mínima de 25 kilómetros, ni ello se desprende de la respuesta. En diversos documentos anexos a la respuesta de la Parte, se plantean las consideraciones que realizaron las distintas autoridades que han sido competentes respecto del sitio, pero esas consideraciones no incluyen mención alguna del requisito de distancia relativa de 25 kilómetros, ni plantean que se hubiese acreditado técnicamente la efectividad de medidas alternativas para exceptuar ese requisito, según la excepción en cuestión.[38] En consecuencia, este argumento ofrecido por la Parte no se acredita y no parece ser relevante.

Resumiendo, la aseveración de los Peticionarios de que México ha incurrido en omisiones en la aplicación efectiva de su legislación ambiental en el caso del confinamiento de residuos peligrosos Cytrar, se basa en la afirmación de que su ubicación respecto de la ciudad de Hermosillo es ilegal, porque viola un requisito de distancia relativa entre los confinamientos controlados de residuos peligrosos y los centros de población. Según se explicó anteriormente, la supuesta ilegalidad de la ubicación de Cytrar no se confirma con base en los argumentos de los Peticionarios, porque a la luz de la respuesta de la Parte, resulta que la norma que citan no estaba vigente al seleccionarse el sitio para ubicarlo. El Secretariado consideró la posibilidad de acudir a los Peticionarios para confirmar si esa es la única razón por la que consideran que Cytrar operaba de manera ilegal, y también la posibilidad de tomar en cuenta otra información relacionada con Cytrar, que los Peticionarios y otros interesados proporcionaron después de que se presentó la petición. Sin embargo, el Secretariado no encontró fundamento para hacerlo en el

36. En su punto 6.1, la NOM-055-ECOL-1993 establece: "La Secretaría de Desarrollo Social podrá autorizar la realización de medidas y obras cuyos efectos resulten equivalentes a los que se obtendrán del cumplimiento de los requisitos previstos en los puntos anteriores, cuando se acredite técnicamente su efectividad."
37. Página 10 de la respuesta.
38. Estos documentos, son anexos a la sección segunda de la respuesta de México, que dicha Parte ha designado como confidencial, salvo las autorizaciones de noviembre de 1996 y 1997, que se acompañaron también como anexos a la petición.

ACAAN y en las Directrices.[39] Limitado así el análisis a la aplicación efectiva del requisito de distancia relativa entre los confinamientos controlados y los centros de población, el Secretariado considera que este alegato de la petición no amerita la elaboración de un expediente de hechos porque ese requisito entró en vigor por primera vez el 7 de junio de 1988, y según lo afirma la Parte en su respuesta, la autorización para la ubicación del confinamiento que después operaría Cytrar, S.A. de C.V., se había solicitado y otorgado desde 1987.

Otro de los alegatos que hacen los Peticionarios es que con motivo de la supuesta reubicación del confinamiento, la Parte pretende dejar abandonada escoria que ha sido ilegalmente depositada en el confinamiento, sin sanear o remediar la contaminación del sitio.[40] La Parte en su respuesta no se pronuncia expresamente sobre si el sitio está o no contaminado, pero la Parte niega que se hayan depositado ilegalmente residuos peligrosos en el confinamiento. Los Peticionarios y la Parte parecen coincidir en que la reubicación del confinamiento implicará de hecho el cese de la operación actual del confinamiento y la apertura de un confinamiento nuevo, sin remoción de los residuos peligrosos existentes en el sitio actual.[41] La Parte sostiene que la legislación ambiental aplicable no exige remediar el sitio, sino que la remediación sería contraria a la naturaleza de un confinamiento controlado de residuos peligrosos.[42] Ahora bien, el único argumento concreto planteado por los Peticionarios para fundar la aseveración de que el sitio debe remediarse es la supuesta operación ilegal del sitio por la alegada violación a la NOM-055-ECOL-1993, que como se ha visto, no parece haber sido aplicable al momento de seleccionarse el sitio. Los Peticionarios no invocan otras disposiciones legales que sustenten una aseveración de que México incurre en una omisión en la aplicación efectiva de su legislación ambiental al no remediar el sitio. La petición tampoco contiene datos específicos sobre la supuesta contaminación ilegal del confinamiento. De nuevo, el Secretariado se limitó a considerar este alegato de la petición en estos términos, sin poder acudir a los Peticionarios para que detallaran su alegato, porque la posibilidad de hacerlo en esta etapa del proceso no está prevista en el ACAAN o en las Directrices. Estando limitado el análisis al alegato de que al reubicarse Cytrar, el sitio debe remediarse porque el confinamiento estaba ilegalmente ubicado, el Secretariado considera que no amerita que se

39. Véase en este sentido, la Determinación del Secretariado conforme al artículo 15(1) del ACAAN respecto de la petición SEM-97-007/Insituto de Derecho Ambiental (14 de julio de 2000).
40. Página 4 de la petición.
41. Véase *supra*, nota al pie número 13.
42. Página 12 de la respuesta.

elabore un expediente de hechos respecto de ese alegato, porque con base en la disposición que invocan los Peticionarios y a la luz de la respuesta de la Parte, no se confirma que el confinamiento se haya ubicado ilegalmente.

El último alegato de los Peticionarios a considerar, es que México se ha venido negando a revelar en qué parte del estado de Sonora se proyecta reubicar el confinamiento Cytrar, violando en consecuencia el derecho a la información ambiental previsto en el artículo 159 Bis 3 de la LGEEPA.[43] La respuesta de México afirma que aunque la Secretaria de la Semarnap ha dicho que el confinamiento Cytrar será reubicado, el sitio para ello aún no se ha determinado, y en consecuencia no podría proporcionarse esa información.[44] Dado que la aseveración de los Peticionarios no está respaldada por otra información, la respuesta de la Parte basta para descartar este alegato. En consecuencia, el Secretariado considera que no se amerita la elaboración de un expediente de hechos respecto de la supuesta omisión por parte de México en la aplicación efectiva del artículo 159 Bis 3 de la LGEEPA al no informar a los Peticionarios sobre el lugar a dónde será reubicado el confinamiento Cytrar.

VI. DETERMINACIÓN DEL SECRETARIADO

El Secretariado de la CCAAN ha revisado la petición SEM-98-005, presentada por la Academia Sonorense de Derechos Humanos y Domingo Gutiérrez Mendívil, conforme al artículo 15(1) del ACAAN. La petición se basa en la afirmación de que el confinamiento controlado de residuos peligrosos Cytrar opera ilegalmente por estar ubicado a menos de 6 kilómetros de la ciudad de Hermosillo, Sonora, México. Sin embargo, a la luz de la respuesta de la Parte, es claro que la norma en que se funda esa afirmación no estaba aún vigente cuando se autorizó el sitio ahora conocido como Cytrar. Principalmente en vista de lo anterior, y según se explica en el cuerpo de esta Determinación, el Secretariado considera que no se amerita la elaboración de un expediente de hechos respecto de esta petición.

Ahora bien, cabe aclarar que esta Determinación se refiere exclusivamente a los alegatos contenidos en dicha petición, y no contempla otros aspectos del asunto planteados fuera de la petición, o que pudieran plantearse en una petición distinta. Además, esta Determinación se hace sin perjuicio de reconocer que la aplicación efectiva de la legislación

43. Página 5 de la petición y *supra*, nota al pie número 7.
44. Página 12 de la respuesta.

ambiental sobre manejo adecuado de los residuos peligrosos, es un compromiso de las Partes que contribuye a la consecución de las metas del ACAAN.

Conforme a lo dispuesto por el apartado 9.6 de las Directrices, el Secretariado da por concluido el proceso respecto de la petición SEM-98-005 y explica sus razones a los Peticionarios y al Consejo de la CCAAN en este documento.

Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

por: Janine Ferretti
Directora Ejecutiva

c.c.: Lic. Domingo Gutiérrez Mendívil (original)
Lic. José Luis Samaniego, SEMARNAP
Sra. Norine Smith, Environment Canada
Sr. William Nitze, US-EPA

SEM-99-002

(Migratory Birds)

SUBMITTER: ALLIANCE FOR THE WILD ROCKIES, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ET AL.

PARTY: United States of America

DATE: 19 November 1999

SUMMARY: The Submitters allege that the United States is failing to effectively enforce the Migratory Bird Treaty Act (MBTA), which prohibits the killing of migratory birds without a permit.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2)* **(23 December 1999)**	Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.
ART. 15(1) **(15 December 2000)**	Notification to Council that a factual record is warranted in accordance with Article 15(1).

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North American Commission for Environmental Cooperation — Secretariat

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-99-002** (Migratory Birds)
Submitter(s):	Alliance for the Wild Rockies Center for International Environmental Law Centro de Derecho Ambiental del Noreste de Mexico Centro Mexicano de Derecho Ambiental Friends of the Earth Instituto de Derecho Ambiental Pacific Environment and Resources Center Sierra Club of Canada West Coast Environmental Law Association
Concerned Party:	United States of America
Date of this Determination:	15 December 2000

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation* (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on

* As of October 2000, the Commission for Environmental Cooperation, created by NAAEC, has used the name North American Commission for Environmental Cooperation (NACEC).

factors contained in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).[1]

The Submitters filed this submission, involving the asserted failure to effectively enforce the United States Migratory Bird Treaty Act (MBTA or the "Act"), on 19 November 1999. On 23 December 1999 the Secretariat determined that the submission met the criteria in Article 14(1) and that it merited a response from the Party in light of the factors listed in Article 14(2). On 29 February 2000 the Secretariat received a response from the Party. In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the response, warrants developing a factual record, and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that the United States Government is "failing to effectively enforce" section 703 of the MBTA, 16 U.S.C. § 703, which prohibits the killing or "taking" of migratory birds under certain circumstances. This assertion rests on a three-step analysis. The Submitters first assert that section 703 of the MBTA prohibits any person from killing or "taking" migratory birds, including destroying nests, crushing eggs, and killing nestlings and fledglings, "by any means or in any manner," unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit.[2]

Second, the Submitters assert that loggers, logging companies, and logging contractors consistently engage in practices that violate the Act.[3] The Submitters assert that, for example, "the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous.[4]"

1. This is the seventh Secretariat Notification to Council that the Secretariat considers development of a factual record to be warranted for a submission. Regarding the previous six, the Council has directed the Secretariat to develop a factual record for three (SEM-96-001, SEM-97-001 and SEM-98-007), deferred its decision on one (SEM-97-006), rejected the fifth (SEM-97-003), and is currently considering the sixth (SEM-98-006). The pertinent Council Resolutions (96-08, 98-07, 00-01, 00-02 and 00-03), are available on the CEC home page, <www.cec.org>.
2. Submission at 1.
3. Submission at 1-4, Appendix C.
4. Submission at 4.

Finally, the Submitters claim that the United States is failing to effectively enforce this requirement of the Act because of its failure to prosecute logging operations that violate the Act by killing birds.[5] The Submitters assert that, furthermore, the United States is failing to enforce against logging operations even though it is fully aware that they consistently violate the law.[6] The Submitters assert that the United States "has completely abdicated its enforcement obligations" under the MBTA because of its failure to prosecute logging operations that the Submitters claim routinely violate the Act.[7]

III. SUMMARY OF THE RESPONSE

The United States advances four arguments to support its position that development of a factual record is not warranted. First, the United States asserts that the Submitters have relied heavily on an unapproved 7 March 1996 draft Memorandum purporting to reflect a policy of the United States Fish and Wildlife Service (FWS) to exempt logging activities from enforcement actions under the MBTA. According to the United States, the Memorandum is unapproved and unofficial and embodies no FWS policy, formal or unwritten.[8]

Second, the United States asserts that development of a factual record is not warranted because under NAAEC Article 45(1)(a) the United States has not failed to effectively enforce the MBTA. Article 45(1)(a) of the NAAEC provides that a Party "has not failed to 'effectively enforce its environmental law'... where the action or inaction in question by agencies or officials of that Party reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters." The United States asserts that Article 45(1)(a) precludes a finding that the United States is failing to effectively enforce the MBTA because the current enforcement policies of the FWS "reflect a reasonable exercise of the agency's discretion regarding investigatory, prosecutorial, regulatory, and compliance matters.[9]"

Third, the United States makes the same assertion with respect to Article 45(1)(b). Article 45(1)(b) of the NAAEC provides that agency action or inaction does not amount to a failure to effectively enforce if it "results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher prior-

5. *See* Submission at 4-8.
6. *See, e.g.*, Submission at 1,5.
7. Submission at 1.
8. *See* Response at 7-8.
9. Response at 2.

ities." The United States asserts that the NAAEC precludes a determination that the United States is failing to effectively enforce the MBTA because "the current enforcement policies of the FWS result from '*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.'[10]"

Fourth, the response takes the position that the submission does not warrant development of a factual record because it fails to discuss the steps the United States is taking to protect migratory birds from logging activities. The United States asserts that it has used its authority under the *Endangered Species Act* (ESA) to protect migratory birds that are listed as endangered or threatened under that law. It states that it has used a number of "non-enforcement mechanisms" to provide additional protection.[11] The United States claims that because the submission does not acknowledge these efforts, it does not reflect "the complete framework under which the United States protects migratory birds.[12]"

IV. ANALYSIS

A. Introduction

In its 23 December 1999 Determination, the Secretariat concluded that the submission met each of the criteria contained in Article 14(1).[13] The CIEL submission is in English,[14] it clearly identifies the organizations making the submission,[15] it indicates that the matter had been appropriately communicated to the United States,[16] and it was filed by organizations established in the territory of a Party.[17] The submission is not aimed at harassing industry.[18]

Article 14(2) establishes guiding factors for the Secretariat to determine whether to request the Party to submit a response to a submission that meets the criteria in Article 14(1). The CIEL submission alleges harm from the alleged failure to effectively enforce environmental law in part because of the great public importance of migratory birds. The submis-

10. Response at 2.
11. Response at 2.
12. Response at 2.
13. Determination for SEM-99-002 (23 December 1999) at 3.
14. Article 14(1)(a).
15. Article 14(1)(b).
16. Article 14(1)(e).
17. Article 14(1)(f).
18. Article 14(1)(d).

sion also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[19] The submission asserts that private remedies to require the United States to enforce the MBTA are not available.[20] The submission indicates that it is not based exclusively on mass media reports.[21] Guided by these factors, on 23 December 1999, the Secretariat requested a response from the Party. A response from the Party was received on 29 February 2000.

Article 15(1) of the NAAEC directs the Secretariat to determine, based on its review of a submission and the Party's response, whether to dismiss a submission or to inform the Council that the Secretariat considers that the submission warrants developing a factual record. The text of Article 15(1) reads as follows:

> If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

B. Analysis of the Submission in Light of the U.S. Response

The Submitters assert that the United States Government is "failing to effectively enforce" section 703 of the MBTA, 16 U.S.C. § 703, which prohibits the killing or "taking" of migratory birds under certain circumstances. The Submitters assert that loggers, logging companies, and logging contractors consistently engage in practices that violate the Act.[22] The Submitters assert that, furthermore, the United States is failing to enforce against logging operations even though it is fully aware that they consistently violate the law.[23] The Submitters assert that the United States "has completely abdicated its enforcement obligations" under the MBTA because of its failure to prosecute logging operations that the Submitters claim routinely violate the Act. [24]

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19. Article 14(2)(b). The NACEC Secretariat noted that the sort of assertions in the submission "– that there is a widespread pattern of ineffectual enforcement – are particularly strong candidates for Article 14 consideration . . . ." Determination for SEM 99-002 (23 December 1999) at 5.
20. *See* Article 14(2)(c). The response does not take issue with this assertion (see Article 14(3)(b)(ii), providing that "[t]he Party shall advise the Secretariat . . . of any other information that the Party wishes to submit, such as . . . ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.").
21. *See* Article 14(2)(d).
22. Submission at 1-4, Appendix C.
23. *See*, *e.g.*, Submission at 1,5.
24. Submission at 1.

1. Information Supporting the Submitters' Assertion that the United States is Failing to Effectively Enforce the MBTA Against Logging Operations

The Submitters cite a 7 March 1996 FWS Memorandum for the proposition that the United States has a longstanding policy not to enforce against logging operations that violate the MBTA. The Submitters claim that the Memorandum provides support for their assertion that the United States is failing to effectively enforce the MBTA against logging operations.[25] The Memorandum states that the FWS "has had a long standing, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened, migratory birds and/or their nests.[26]"

The United States claims in its response to the Submission that the Memorandum is not the official United States policy the Submitters say it is. The United States characterizes the 7 March 1996 Memorandum as "an unapproved and unofficial draft memorandum," and as "a working document that had limited distribution, and was distributed solely for the purpose of soliciting comments during an internal decision-making process of the FWS.[27]" Thus, the United States asserts, the draft memorandum embodies no FWS policy, formal or unwritten, and the submission "misrepresents the true status of the FWS enforcement policy with respect to the MBTA.[28]"

The Submitters do not rely exclusively on the 7 March 1996 Memorandum to support their assertion that the United States is failing to effectively enforce the MBTA as it applies to logging activities by failing to prosecute violators. Instead, the Submitters provide other support for this assertion as well.

The Submitters identify specific situations in which they allege the Act was violated and no enforcement action was taken. Specifically, the Submitters identify two recent instances in which the Party did not initiate an enforcement action against logging operations that allegedly violated the MBTA by killing covered birds and destroying nests.[29] The Submitters assert that the failure to respond to these alleged violations constitutes a failure to effectively enforce the MBTA. The Party does not address these assertions.

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25. See e.g., Submission at 1.
26. Submission, Appendix A.
27. Response at 7.
28. Response at 8.
29. Submission at 6.

The Submitters also assert that violations for which no enforcement action is taken occur on a nationwide basis. They note the impacts in violation of the Act that logging has on birds and nests found on logged federal and non-federal lands throughout the United States. The Submitters further state that as far as they have been able to discern, the Party has never undertaken a single prosecution under the MBTA against a logging operation. The Submitters advise that they made a concerted effort to obtain from the Party information on any such prosecutions but that the Party indicated in its responses to the Submitters' requests for such information that they had no information that there have been any such prosecutions:

> [A] review of government files in response to the Submitting Party's requests, indicates that the United States has *never* enforced the MBTA against loggers, logging companies, or private landowners—in any context—no matter how egregious the violation may have been. In response to CIEL's request for information, FWS, the Forest Service, and the Department of Justice all responded that they had no documents relating to enforcement actions against anyone involved in a logging operation.[30]

Significantly, the United States does not appear to challenge either assertion by the Submitters — that logging operations cause deaths of birds covered by the MBTA and destruction of nests of such birds, or that the Party has never enforced against such operations. With respect to the level of enforcement issue, the United States appears to acknowledge that it has made little if any use of the enforcement provisions in the MBTA against logging operations, at least unless the migratory birds involved are protected under the Endangered Species Act. The United States reports that "the FWS has not taken enforcement actions against logging activities regarding their impacts on migratory birds that are not listed pursuant to the ESA... .[31]" Along the same lines, the United States notes that "[t]o date, the FWS has no record of prosecutions having been brought exclusively under the MBTA for takes caused by logging of migratory birds not listed under the [Endangered Species Act].[32]" The United States also indicates that the FWS "has not routinely reviewed [logging] activities with regard to whether or not a permit is required.[33]"

In sum, the Submitters' assertion that there is a failure to effectively enforce the MBTA against logging operations does not rely exclusively

30. Submission at 6. The Submitters also identify two specific incidents in which logging operations allegedly committed significant violations of the MBTA but for which no enforcement action was taken. Submission at 6.
31. Response at 8.
32. Response at 11.
33. Response at 11.

on the existence of an official FWS "non-enforcement" policy of the sort contained in the 7 March 1996 Memorandum. The Submitters have offered other information to support this assertion, notably an apparent lack of prosecutions nationwide as well a failure to prosecute alleged logging operation violators in particular circumstances. The United States does not seek to controvert the assertion that prosecutions under the MBTA against logging operations have been rare and it does not address the alleged failure to effectively enforce with respect to the particular examples provided. The information provided by the United States appears to support the assertion that logging operations that violate the MBTA are rarely prosecuted, if ever, at least so long as the operations do not violate the ESA as well.

2. *Application of Articles 14 and 15 to Assertions of a Wide-ranging Failure to Enforce Environmental Law Effectively*

The focus of the submission is on an asserted failure to effectively enforce that is nationwide in scope. While the Submitters identify some specific logging operations that allegedly violated the MBTA,[34] the reference to particular operations is clearly intended to be illustrative. The Submitters' primary concern is with an asserted nationwide failure on the part of the Party to investigate or prosecute logging operations that violate the MBTA by killing birds or destroying bird nests.

Given the Submitters' broad focus on an asserted nationwide failure to effectively enforce, the Secretariat now considers whether the citizen submission process is intended for assertions of this sort. One possible view is that the citizen submission process is reserved for assertions of particularized failures to effectively enforce. Under this view a factual record would be warranted, only when a submitter asserts that a Party is failing to effectively enforce with respect to one or more particular facilities or projects. This view of the Article 14 process, in short, reads the opening sentence of Article 14(1) to confine the citizen submission process to asserted failures to effectively enforce with respect to particular facilities or projects. Under this view, assertions of a wide-ranging failure to effectively enforce that do not focus on individual facilities or projects would not be subject to review under the citizen submission process.

The text of Article 14 does not appear to support limiting the scope of the citizen submission process in this way. The opening sentence of Article 14 establishes three specific parameters for the citizen submis-

34. *See*, *e.g.*, Submission at 6.

sion process. It thereby limits assertions of failures to effectively enforce to those meeting these three elements. First, the assertions must involve an "environmental law." Next, they must involve an asserted failure to "effectively enforce" that law (the assertion may not focus on purported deficiencies in the law itself). Third, assertions must meet the temporal requirement of claiming that there *is* a failure to effectively enforce.

The Parties' inclusion of these three limitations on the scope of the Article 14 process reflects that they knew how to confine the scope of the process and that they decided to do so in specific ways.[35] The Parties could have limited the species of actionable failures to effectively enforce to either particularized incidents of such, or to asserted failures that are of a broad scope, in the same way that they included the limits referenced above. They did not do so. The fact that the Parties did not limit assertions to either particularized incidents or to widespread failures to effectively enforce provides a strong basis for the view that the Parties intended the citizen submission process to cover both kinds of alleged enforcement failures.[36] Thus, the text of the opening sentence of Article 14(1) supports the view that a submission may warrant preparation of a factual record, regardless of the scope of the alleged enforcement failure, so long as the submission focuses on an asserted failure to effectively enforce an environmental law.[37]

35. The Secretariat routinely considers whether submissions meet these three criteria; indeed, the Secretariat has dismissed several submissions on the ground that they failed to meet one or more of them. *See, e.g.*, Determination for SEM-95-001 (21 September 1995) (submission did not involve alleged failure to enforce because it challenged adequacy of legislative act); Determination for SEM-98-002 (23 June 1998) (submission involved commercial forestry dispute, rather than an alleged failure to enforce an "environmental law"); Determination for SEM-97-004 (25 August 1997) (dismissing submission for failure to allege that Party "is failing" to effectively enforce); Determination for SEM-00-003 (12 April 2000) (dismissing submission as premature).

36. See Determination for SEM 99-002 (23 December 1999) at 5 ("Assertions of this sort – that there is a widespread pattern of ineffectual enforcement – are particularly strong candidates for Article 14 consideration, although submissions that focus on asserted failures to enforce concerning individual facilities may warrant consideration under Article 14 under some circumstances, depending on other factors.")

37. Article 14(1)(a)-(f), which establishes additional limits on the types of submissions subject to review under the Article 14 process, similarly does not reflect an intent to limit submissions to asserted failures to effectively enforce that focus exclusively either on particularized incidents or on asserted failures that are broad in scope. These provisions create certain threshold requirements that appear equally applicable to a submission focused on either type of asserted failure to effectively enforce (particularized incidents or widespread failures). For example, either type of submission must be in writing in an appropriate language (Article 14(1)(a)), clearly identify the submitter(s) (Article 14(1)(b)), and have been filed by an eligible entity (Article 14(1)(f)). Similarly, the requirement that a submitter provide sufficient information for the Secretariat to review the submission (Article 14(1)(c)) and that the submission appear to be aimed at promoting enforcement rather than at

Moreover, in deciding whether to request a response from a Party, Article 14(2) of the NAAEC directs the Secretariat to be guided by whether a submission "raises matters whose further study in this process would advance the goals" of the Agreement. The goals of the NAAEC are ambitious and broad in scope. These goals include, for example, "foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations," as well as "enhanc[ing] compliance with, and enforcement of, environmental laws and regulations.[38]"

Assertions that there is a failure to enforce with respect to a single incident or project may raise matters whose further study would advance these goals. Indeed, the Secretariat has concluded that such assertions merit developing a factual record in several instances and the Council has concurred.[39] But also, assertions that the failure to enforce extends beyond a single facility or project portend, at least potentially, a more extensive or broad-based issue concerning the effectiveness of a Party's efforts to enforce its environmental laws and regulations. In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat declines to adopt a reading of the Agreement that would yield such a result.[40]

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harassing industry (Article 14(1)(d)) are potentially relevant both to an alleged particularized failure and to an alleged widespread enforcement failure. Finally, the submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicate the Party's response, if any (Article 14(1)(e)). None of these requirements reflects a direct, or even an indirect, intent to exclude submissions that focus on alleged failures to effectively enforce involving particularized incidents or submissions that focus on alleged failures to effectively enforce that are broad in scope.

38. Article 1(a) and (g).

39. The treatment of SEM-98-007 by the Secretariat and Council is illustrative. This submission involves an asserted failure to effectively enforce for a single facility in Mexico. The Secretariat initially requested a response and later advised the Council that a factual record was warranted. The Council recently directed the Secretariat to proceed with such a factual record.

40. See Vienna Convention on the Law of Treaties, Article 31, providing that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

In sum, Article 14(1) establishes parameters for the scope of the citizen submission process. These parameters limit the scope of the process in several ways but they do not reflect an intention only to allow "particularized" assertions of a failure to effectively enforce and to exclude assertions such as those made here that there is a widespread failure to effectively enforce. Article 14(2) provides further support for the notion that the citizen submission process may include either type of assertion. Preparing factual records on submissions that take either approach would promote the objects and purposes of the NAAEC.

3. Analysis of the Asserted Failure to Effectively Enforce the MBTA Against Logging Operations in Light of the U.S. Response

The Submitters assert that logging operations have consistently violated the MBTA and that the Party has never prosecuted such violations, as noted above.[41] As indicated above, the response denies that the 7 March 1996 Memorandum accurately states a longstanding formal policy not to enforce the MBTA against logging activities. The response also confirms, however, that the United States has *never* prosecuted an MBTA violation in the context of logging activities, at least unless an endangered or threatened species was involved. As a result, the response appears to confirm that the lack of prosecutions under the MBTA (regardless of whether it is the result of a formal policy) is both longstanding (given that the MBTA has been in effect since 1918) and broad in geographical scope.

The Submitters assert that the alleged failure to effectively enforce against logging operations has significant consequences in that logging causes tens of thousands of direct deaths of migratory birds and destroys or crushes nests, eggs, nestlings and fledglings. Appendix C to the submission claims that logging, and the failure to enforce the MBTA against logging operations, have had "severe negative consequences for migratory bird populations." The United States alleges in its response that logging activities are not as significant a source of migratory bird takes as certain other causes, such as power line electrocution or feral cats.[42] The fact that there may be activities that have more significant consequences, however, does not necessarily mean that logging does not also have significant consequences. The response acknowledges that

41. Submission at 4.
42. *See* Response at 5 ("Although, logging activities are one of a long list of activities that may contribute to bird fatalities, they are not the most significant cause of bird mortality in the United States.").

logging can result in unlawful takes when it kills birds or crushes eggs.[43] As noted above, the response also confirms the importance of migratory birds. The Council itself has characterized migratory birds as "a particularly important component of North American biodiversity."

There is one portion of the United States' response that has particular bearing on the issue of whether preparing a factual record with respect to this submission is warranted. The response contends that the CIEL submission fails to take into consideration a "multitude of 'non-prosecutorial' alternatives" for protecting migratory birds that represent "a more productive use of limited resources." Because, as the response itself indicates, these alternatives are "non-enforcement initiatives,[44]" the Party's decision to pursue them in lieu of MBTA prosecutions cannot qualify as *bona fide* decisions to allocate resources to higher priority *enforcement* matters under Article 45(1)(b).[45] It may be, however, that in summarizing these non-enforcement strategies the response is suggesting that the issue of effective enforcement of the MBTA with respect to logging operations may not be worth studying through development of a factual record, if such non-enforcement strategies are effective in achieving the underlying goals of the governing statute.

The response describes several different types of "non-prosecutorial" or "non-enforcement" initiatives that, according to the United States, amount to a "proactive, preventative management" approach to the protection of migratory birds. Having considered the response's discussion of these initiatives, in the Secretariat's view, further study of the matters raised in the submission is warranted. Among other things, reasonable questions remain as to whether any of these alternatives, either alone or in combination, is effective in protecting migratory birds in the absence of enforcement against logging operations that violate § 703 of the MBTA.

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43. Response at 4. The Secretariat notes that it received a memorandum from the American Forest & Paper Association (AFPA) that is relevant to this issue. The AFPA, the "national trade association representing the forest products and paper industries in the United States," asserts that the U.S. case law holds that logging operations are not subject to the MBTA even if such operations kill birds covered by the Act. The Secretariat appreciates AFPA's interest in this proceeding. There is, however, no provision in the NAAEC for consideration of such memoranda at this stage of the citizen submission process. The Secretariat declines to adopt a more narrow reading of a Party's legislation than the one the Party itself appears to endorse. If the Council directs preparation of a factual record for this submission, the AFPA may submit comments, which the Secretariat may consider in its development of the factual record. (Article 15(4)).
44. Response at 18.
45. The response discusses these initiatives in the section devoted to analysis of the Party's "Resource Allocation."

The first alternative is population monitoring of migratory birds to facilitate identification of migratory bird species that are of most concern.[46] Although this kind of monitoring is unquestionably valuable in alerting the FWS to the existence of problems related to the health of migratory bird populations and the state of their habitat, monitoring alone is a means of facilitating, enhancing, and evaluating the value of other kinds of protective efforts. Information on the results of this monitoring that shows the government's approach is effective was not provided.

A second non-enforcement alternative is public outreach. Initiatives such as International Migratory Bird Day may educate members of the public on the importance of protecting migratory birds, but the response does not address issues such as the resources that have been committed to outreach efforts, whether these programs have addressed all significant sources of threats to migratory birds (including logging), the extent of their actual beneficial effect, or the comparative educational benefits of public outreach efforts and the use of MBTA prosecutions as "leveraging" tools.[47]

Another alternative identified by the response, avian mortality studies and management, goes beyond study and monitoring to encompass potential protective efforts.[48] According to the response, the FWS recommends management actions to reduce adverse impacts based on population trends data and monitoring. In "appropriate instances," monitoring can lead to enforcement action against entities such as electric utilities that install power lines that can electrocute birds.[49] The response does not provide information about how effective the identified management actions (such as those initiated by the Communications Tower Working Group) have been in avoiding migratory bird deaths and habitat losses. It also does not explain why the resources available to the United States to protect migratory birds have not been sufficient to target logging activities by, for example, developing a working group for logging that is similar to the communications tower group. The response seems to indicate that the United States has not targeted logging because it does not have a "great level of impact." As indicated elsewhere, however, the response fails to provide adequate information

46. Response at 19.
47. It is not clear from the response how the FWS would determine how successful these outreach efforts have been.
48. *See* Response at 19.
49. *E.g.*, *United States* v. *Moon Lake Elec. Ass'n, Inc.*, 45 F.Supp.2d 1070 (D. Colo. 1999).

about the absolute and relative aggregate impact of logging on migratory birds and their habitat. Finally, the response implies that the adverse effects of logging on migratory birds cannot be "readily addressed." But as indicated below, the response describes efforts by the United States Forest Service to require or induce the use of best management practices. Accordingly, there are important unresolved questions about whether the avian mortality studies and management actions described in the response are sufficiently effective to negate the utility of preparing a factual record as a means of advancing the goals of the NAAEC.

The response identifies landscape level bird planning as an additional means of protecting migratory birds and their habitat.[50] This kind of planning has the potential to protect migratory birds, but the plans described in the response do not appear to have been implemented yet and an assessment of their effectiveness in protecting migratory birds is therefore necessarily speculative. Moreover, the response does not indicate what component of the migratory bird problems identified through monitoring or otherwise will be addressed through implementation of the plans. Similarly, the participating countries apparently have just begun to implement initiatives such as the North American Bird Conservation Initiative and the Trilateral Committee for Wildlife and Ecosystem Conservation and Management.[51] The response does not indicate what resources the United States has committed to these endeavors, what powers the entities involved have to take actions or require those engaged in logging to take actions to protect migratory birds, what kinds of protections, if any, these endeavors have already achieved, or what kinds of protections the United States hopes to achieve through the activities of these agencies.

In sum, the assertions contained in the submission of a nationwide failure to effectively enforce the MBTA with respect to logging operations are of substantial importance. Further study of the assertions would advance several goals of the Agreement, including enhancing compliance with, and enforcement of, environmental laws and regulations,[52] and promoting transparency and public participation in the development of environmental laws, regulations, and policies.[53]

50. Response at 20.
51. *See* Response at 21.
52. Article 1(g).
53. Article 1(h).

C. Consideration of Article 45(1)(a) and (b)

1. Preliminary Framework for Analysis of Article 45(1) Issues

The submission charges that the United States has failed to effectively enforce the MBTA. As indicated above, Article 45(1) of the NAAEC provides that a Party has not failed to effectively enforce its environmental law if the action or inaction in question by agencies or officials of that Party either "reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters" or "results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.[54]" The United States asserts that it has not failed to effectively enforce the MBTA for both of these reasons.

The purpose of the citizen submission process suggests that the Secretariat should dismiss a submission if the relevant Party establishes that there is no failure to effectively enforce. A fundamental purpose of the process is to enhance domestic environmental enforcement by the three Parties.[55] Accordingly, if a Party has made a persuasive case that there is no failure to effectively enforce, there will be little point in going forward.

This is the first Party response in which a Party has made a detailed assertion that Article 45 makes continued review of the submission inappropriate. The nature of the Secretariat's review of the submission in light of the response with respect to these issues will likely be determined on a case-by-case basis.[56] The Secretariat anticipates, however, that the following analysis will generally be relevant.

In a particular submission, if a Party has asserted that its enforcement reflects a reasonable exercise of its discretion, the Secretariat should review at least two questions in assessing the extent to which the

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54. Article 45(1)(a) and (b).
55. *See, e.g.*, Sarah Richardson, "Sovereignty Revisited: Sovereignty, Trade, and the Environment–The North American Agreement on Environmental Cooperation", (1998) 24 *Can.-U.S. L.J.* 183, 190 (noting that "[t]aken together, Articles 14 and 15 ...represent a critical institutional mechanism to encourage the effective enforcement by the Parties of their domestic environmental law").
56. *Cf.* Scott C. Fulton & Lawrence I. Sperling, "The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere", (1996) 30 *Int'l Law* 111, 128-29, 138 (noting that the NAAEC leaves to "future development" determination of standards for determining the effectiveness of each the Parties' enforcement efforts rather than "setting forth precise standards").

Party provides support for this assertion. First, to what extent has the Party explained how it has exercised its discretion? Second, to what extent has the Party explained why its exercise of discretion is reasonable under the circumstances? If the Party has provided a persuasive explanation of how it has exercised its discretion, and why its exercise of discretion is reasonable, then under Article 45(1)(a), the Party would not have failed to effectively enforce its environmental law. In such a situation there would seem to be little reason to continue with further study of the matters raised in the submission. If, on the other hand, the Party has not explained how it exercised its discretion or why its exercise of discretion is reasonable, dismissal would not be warranted under Article 45(1)(a). The Secretariat might nevertheless determine that dismissal is warranted for other reasons.

With respect to the assertion that a Party's enforcement practices result "from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities," the Secretariat should review the extent to which the Party has explained at least three points: 1) its allocation of resources; 2) its priorities; and 3) the reasons why the Party's allocation of resources constitutes a *bona fide* allocation given the Party's priorities. If a Party has explained its allocation of resources and its priorities, and has provided a persuasive explanation of why its allocation of resources is *bona fide* in light of those priorities, then, again, under Article 45(1)(b), there is not a failure to effectively enforce. As a result, there is little reason to continue with further study of the submission.

2. *Application of this Framework to the CIEL Submission and the Party's Response*

A) How has the party exercised its discretion?

In the Secretariat's view, the Party has provided substantial information concerning *how* it has exercised its discretion for purposes of Article 45(1)(a). The Party has done so by offering three basic points. First, the Party identifies its significant "enforcement"-related initiatives. These include creation and implementation of a permitting scheme, issuance of regulations for the hunting of game birds that are designed to keep harvest levels in balance with a sustainable population, and related monitoring of game bird populations. The Party also identifies law enforcement investigations and prosecutions as enforcement-related approaches.

Next, the Party explains that its resources are limited. With respect to permitting, for example, the United States asserts that the FWS' Office of Migratory Bird Management lacks sufficient personnel to write permits for every incoming request.[57] The response asserts that on average, approximately three million people each year engage in 22 million days of migratory bird hunting. The FWS has been able to commit 18 staff positions and a total nationwide budget of just over $1 million in an effort to manage approximately 40,000 active permits and process approximately 13,000 applications for intentional take permits annually.[58] According to the United States, these resources are insufficient to the task and the agency faces "significant resource limitations.[59]" Thus, the Party asserts that simply addressing the large number of hunters and prospective hunters keeps its permitting resources more than fully occupied.

With respect to the impact of resource limitations on enforcement, the Party's response explains that the FWS' Division of Law Enforcement has "tremendous responsibilities" that include enforcement of a wide variety of statutes other than the MBTA that are designed to protect fish, wildlife, and plants.[60] The combination of this broad range of responsibilities and existing personnel shortages makes resource allocation decisions and the application of discretion in enforcement matters "unavoidable.[61]"

Third, the Party identifies the different types of activities that potentially violate the Act and it explains how it has exercised its discretion in using the applicable enforcement approaches to address these different types of activities. The Party indicates that in light of its limited resources and the significant workload created by managing "intentional" killers of migratory birds through the permitting process, it has exercised its discretion to focus its permitting program exclusively on such intentional actors and not to allocate permitting resources to address unintentional or incidental killings.[62] Logging operations fit into this "unintentional" or "incidental" killings category, as do several other activities discussed in more detail below, such as electric wires, oil pits, and other "attractive nuisance"-type enterprises that the Party indicates attract birds, causing some to die. In addition, the Party asserts

57. Permits are the mechanism the FWS has chosen in connection with the regulations it has issued to control the taking of migratory birds through hunting and other activities. 50 C.F.R. Parts 20-21. *See* Response at 9-10.
58. Response at 10.
59. Response at 11.
60. Response at 15.
61. Response at 16.
62. *See* Response at 11.

that, due to its limited resources, it has "legitimately concentrated its regulatory, enforcement, and scientific efforts to reducing unintentional takes of migratory birds caused by those activities where industry has created hazardous conditions which often attract migratory birds to their death.[63]" According to the Party, the FWS therefore "focuses less on preventing takes ensuing from otherwise legal activities that modify the local environment (logging, road construction)" than from intentional kills (such as from hunting) and from "activities where industry has created hazardous conditions which ...attract migratory birds to their death.[64]"

In sum, the United States provides much of the information needed to determine whether it is exercising its discretion in a reasonable way. It identifies its enforcement tools. It further explains and substantiates limits in the Party's resources. Further, it describes the types of activities that violate the Act, and explains that it has judged it more important to use permitting to regulate one type of activity (intentional killing) in lieu of using it to regulate another (incidental or unintentional killing). Similarly, the United States explains that it focuses its enforcement efforts on other types of incidental killing (electric wires, etc.) rather than on logging operations.

B) Is the Party's Exercise of Its Discretion Reasonable and/or its allocation of resources bona fide under the Circumstances?

1) Scope of the Regulations and Permitting Scheme

The Party falls short in one respect in showing that it has exercised its discretion reasonably and allocated its resources in a bona fide way by deciding to focus its regulatory and permitting resources exclusively on activities "where the take is the purpose of the activity in question" and to exempt incidental killing activities from this permitting scheme. What is missing is a showing as to why this exclusive focus on intentional killings, and this decision to ignore incidental killings for purposes of the regulation development and permit process, is reasonable and a bona fide allocation of resources. Section 703 of the MBTA makes it unlawful to take protected migratory birds "[u]nless and except as permitted by regulations" issued under the statute.[65] Section 704 authorizes the Secretary of the Interior to determine "when, to what extent, if at all,

63. Response at 11.
64. Response at 11-12.
65. 16 U.S.C. § 703.

and by what means ... to allow hunting, taking, ... [or] killing" of migratory birds by permit.[66] As the United States Supreme Court has described it, the MBTA is a "conservation statute[ ] designed to prevent the destruction of [migratory] birds.[67]" The Party indicates that the primary goals of the FWS in its management of migratory birds are "to conserve migratory bird populations and their habitats in sufficient quantities to prevent them from being considered as threatened or endangered and to ensure the citizens of the United States continued opportunities to enjoy consumptive and nonconsumptive uses of migratory birds and their habitats.[68]" The Party asserts that its approach is a reasonable strategy to achieve these goals, but it provides no support for this assertion that would allow for independent review.

The NAAEC is silent on the type of showing a Party should make in claiming under Article 45(1) that it is not failing to effectively enforce its environmental law. The NAAEC similarly is silent on how the Secretariat should review such a claim in deciding whether to dismiss a submission or advise the Council that development of a factual record is warranted. Neither the Council nor the Secretariat have addressed these issues in detail previously.

It would appear that, to support dismissal on the basis of an Article 45(1) claim, a Party must support the reasonableness, or *bona fide* nature, of its decisions, as well as address the issues outlined above. To do so, a Party should provide a careful identification of the reasons why it chose to follow one course rather than another.[69] Here, such a showing includes providing a careful identification of the reasons why the Party chose not to include logging operations in its permitting scheme.

It is precisely that kind of explanation, justifying the reasonableness of the Party's exercise of enforcement discretion in declining to establish a permitting scheme under § 704 of the MBTA for activities, like logging operations, which result in incidental killings, that is lacking in the response in this case. The United States does not provide information, for example, on the relative number of birds killed through inten-

66. 16 U.S.C. § 704(a).
67. *Andrus* v. *Allard*, 444 U.S. 51, 52-53 (1979).
68. Response at 5 (internal quotation marks omitted).
69. In its 19 July 1999 Article 15(1) Notification to Council that Development of a Factual Record is Warranted for SEM-97-006, the Secretariat noted that a Party must provide support for its statement under Article 45 that it has reasonably exercised its enforcement discretion and/or that its enforcement approach resulted from *bona fide* decisions to allocate resources to enforcement in respect of other matters determined to have higher priorities.

tional and incidental activities. Nor does the United States provide any other examples of where it has exercised its enforcement discretion under any of its environmental laws so as to categorically exclude a portion of the regulated community from permitting or prosecution. The U.S. has not provided this information, or any other facts, that explain why, as a policy matter, a regulation and permitting scheme focused solely on intentional killings is a reasonable exercise of discretion and bona fide allocation of resources to achieve the MBTA's goal of preventing the destruction of migratory birds.

The one assertion that the Party offers to support limiting the permit program to activities, such as hunting, whose purpose is to take migratory birds is that it is easier to monitor hunting than logging.[70] The Party presumably is thereby asserting that the ease of monitoring hunters enhances the likelihood that permits issued will be complied with, thereby enhancing the value of the permitting scheme. Presumably, the Party is suggesting that the difficulty in monitoring compliance by loggers with any permits that are issued undermines the utility of a permitting scheme focused on them. Again, however, the Party does not provide factual documentation or other support for this assertion. Nor does the Party refute the Submitters' contention that the FWS has the flexibility to impose and enforce nesting and breeding season logging restrictions.[71] It simply asserts that it is easier to monitor compliance by hunters than it would be to monitor compliance by loggers. This may well be the case, but in the Secretariat's view the Party needs to provide some support for its assertion that it is.

Thus, a factual record concerning the permitting issue would involve developing information concerning whether the Party's decision to exercise its discretion to focus its permitting efforts solely on intentional killing is reasonable in terms of achieving the purposes of the MBTA. Relevant information would include information on the numbers of birds saved through current permitting practices and information on the number of birds that could be saved through alternative permitting practices that included logging. It also would be useful to develop information on whether, and if so, why, it is easier to monitor compliance by hunters with permitting requirements than it is to monitor compliance by logging operations, and the challenges in each sphere.

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70. *See* Response at 11.
71. Submission at 17-18. To the contrary, the response notes that the Forest Service restricts operating seasons in timber sale contracts. Response at 22.

2) Prosecutions

The Party justifies the decision to initiate prosecutions under the MBTA against certain kinds of activities that result in unintentional takes of migratory birds but not others under the rubric of both a reasonable exercise of enforcement discretion (which, according to the Party, shields its decisions from further scrutiny under Article 45(1)(a)) and a *bona fide* allocation of resources to higher priority matters (which also, according to the Party, shields its decisions involving logging operations from further scrutiny under Article 45(1)(b)). As noted above, activities that result in unintentional or incidental takes include logging operations, as well as a host of other activities. The response provides a long list of other such activities, including the construction of power lines or open oil pits that attract birds, the use of fishing vessel nets and gear, oil spills and other industrial accidents, and the operation of wind generators, communication towers, and cars and aircraft.[72] The response indicates that the Party has decided to concentrate its regulatory and enforcement efforts on "reducing unintentional takes of migratory birds caused by those activities where industry has created hazardous conditions which often attract migratory birds to their death... Comparatively, the FWS focuses less on preventing takes ensuing from otherwise legal activities that modify the local environment (logging, road construction).[73]"

The Party invokes both of the Article 45(1) defenses to justify drawing this distinction. First, the Party asserts that the U.S. Congress and courts accept and acknowledge that non-prosecution of some violations of the MBTA is integral to the statutory scheme, and therefore that the Party is entitled to exercise some degree of enforcement discretion under the Act.[74] The Secretariat agrees that the MBTA provides the United States the authority to exercise some degree of enforcement discretion. However, in view of the categorical exemption from permitting and prosecution that the Submitters assert, this threshold acknowledgment does not answer whether the exercise of discretion here was reasonable or the result of a *bona fide* allocation of resources. Moreover, where a Party's environmental law itself does not contain an enforcement exemption for a particular sector of the regulated community, the likelihood that discretionary administrative actions creating such an exemption are not reasonable or *bona fide* increases as the scope of the exemption increases. Indeed, at the extreme, such administrative

72. Response at 6.
73. Response at 11.
74. Response at 12-13.

exemptions could completely undermine the effectiveness of an environmental law.

The Party further asserts that it has limited resources, just as it did in explaining why it has not extended the regulatory and permit program to logging operations. According to the response, the FWS' Division of Law Enforcement "struggles with a shortage of personnel and a lack of necessary funding to adequately staff itself in order to meet increasing demands.[75]" The Division has only about four enforcement officers per state or territory, so that each officer must cover a vast geographic area.[76]

Given this resource shortage, the Party asserts that it has justifiably decided to allocate its resources to the enforcement of activities other than logging that result in the incidental taking of migratory birds. According to the Party, the FWS guidance manual characterizes as a high investigative priority "unlawful commercial activities and activities involving pollution or energy production facilities which are destructive and detrimental to efforts to conserve wildlife.[77]" The question before the Secretariat is whether the Party has provided a persuasive explanation that it has exercised its enforcement discretion reasonably for purposes of Article 45(1)(a) in making these high priority matters, and that its allocation of enforcement resources to matters in the high priority category, which does not include logging, constitutes a *bona fide* allocation for purposes of Article 45(1)(b). The Secretariat's view is that the Party has not done so with respect to either of the Article 45(1) exclusions from the definition of a failure to effectively enforce environmental law. A more detailed review of the information provided in the response may be helpful.

75. Response at 16.
76. Response at 16.
77. Response at 13-14. The response does not provide a persuasive explanation for why it has limited the "High Priority" category in the fashion it has. The response indicates only that "the FWS views [the activities placed in the High Priority category] as areas where protective efforts will have the greatest success." *Id*. at 14. But the reasons why enforcement of activities in the High Priority category will provide greater success is not clear. Among the possible explanations are the availability of best management practices to avoid certain kinds of unintentional takes, the ease or difficulty of building a case against a violator, and the ability to "leverage" a prosecution against one violator into voluntary protective actions by others engaged in the same activity. Each of these explanations is addressed below. The response states simply that "[p]rosecution for electrocution of birds on powerlines ... is critical not because of how many birds [are] killed, but because of the thousands of miles of powerlines that cross the United States." *Id*. at 14. The response does not indicate how many acres of forest land are logged each year and why prosecution of loggers is less "critical" in light of the number of birds at risk in connection with each type of activity.

a) *Absolute and Comparative Numbers of Violations*

The Party provides several reasons why it believes it has exercised its discretion reasonably and made a *bona fide* allocation of enforcement and related resources. First, the Party asserts that more birds are killed through other types of activities that cause incidental deaths than are killed from logging operations. The response asserts that "[a]lthough logging activities are one of a long list of activities that may contribute to bird fatalities, they are not the most significant cause of bird mortality in the United States.[78]" Thus, the Party suggests that the scope of the problem is greater elsewhere than it is in the context of logging operations.

It may well be the case that other types of activities cause far more incidental deaths to migratory birds than occur from logging operations. The information supplied in the response, however, does not establish that this is the case. To some extent, at least superficially the information supplied in the response is not a like comparison. The response indicates that, for example, pesticide ingestion is estimated to kill millions of birds each year. It also indicates that electrocutions and power line impacts kill thousands to tens of thousands of birds annually.[79] These are aggregate numbers that purport to describe the cumulative effect of these activities on migratory birds throughout the Party's territory. The response next asserts that these numbers contrast sharply with the numbers provided in the submission concerning birds killed by timber harvesting. But the numbers provided in the submission relate to a small number of *individual* timber sales described in studies of which the Submitters were aware.[80] The response does not provide an estimate of the aggregate number of migratory birds killed by timber harvesting throughout the territory of the Party. Again, it would be helpful to be able to put this information in context by developing aggregate numbers of deaths of protected birds and destruction of bird nests each year from logging operations. This information, along with information on avian mortality due to causes other than logging, also would be useful for examining whether the overall migratory bird mortality allowed under FWS's policy of pursuing enforcement to conserve migratory bird populations and habitats so as to prevent them from being considered as threatened or endangered, particularly as it is applied to migratory bird species that are currently far from being threatened or endangered, is consistent with the broad goals of the MBTA.

78. Response at 5.
79. Response at 6.
80. Submission at 4.

Thus, it would be useful to have a better understanding of the actual numbers of birds protected under the MBTA that are killed by logging operations each year—in terms of absolute numbers of deaths and with respect to numbers of deaths relative to other types of activities that result in incidental takes to which the Party indicates it has assigned a higher investigative and enforcement priority. The submission asserts that "the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous.[81]" The information supplied in the response does not refute this assertion. Extrapolating from the numbers supplied in both the submission and the response in connection with just a handful of timber sales (666 nests likely to be destroyed by four timber sales in Arkansas and 9,000 young birds expected to be killed as a direct result of seven logging sales in Georgia),[82] it appears that logging operations likely cause the deaths of significant numbers of birds each year.

b) *Management Practices*

The second assertion the Party offers to show that it has exercised its discretion reasonably is that it can encourage parties engaged in non-logging activities that lead to incidental migratory bird deaths to engage in management practices that will minimize the risk of incidental takes, whereas such practices are not available for logging.[83] The essence of this assertion appears to be that it is reasonable to focus more on other activities that cause incidental deaths than on logging because more things can be done in these other areas to reduce or minimize such deaths. Again, on its face, this appears to amount to a reasonable basis for allocating resources to pursuing such other activities as a higher priority than logging.

The Party has not provided support, however, for the underlying factual premise that best management practices are more readily available for other kinds of activities that result in incidental bird takes than for logging.[84] The Party has not explained what such best management practices are for activities other than logging or how effective they are, or

81. Submission at 4.
82. Submission at 4. *See also* Response at 6.
83. Response at 14-15. As an example, the Party cites the case of *Moon Lake*, where prosecution of one operator encouraged operators of other power lines voluntarily to install equipment to minimize the hazard that powerlines pose to migratory birds from perching on them. Response at 14.
84. The Party states simply that "migratory bird mortality caused by logging activities is not susceptible to a simple technological fix. Logging activities modify habitat, as opposed to creating a hazardous attraction to migratory birds such as open oil pits." Response at 15.

are likely to be, in reducing deaths of migratory birds. In addition, the Party's response refers to a United States Forest Service Manual that apparently details "special measures" that loggers are told or encouraged to use to minimize bird deaths and nest destruction for threatened, endangered or sensitive bird species.[85] The Party does not provide a copy of relevant portions of the Manual or explain what these "special measures" are.[86] It also does not reconcile its reference to the Forest Service Manual (which apparently includes "special measures" for logging operations) with its statement earlier in the response that best management practices do not exist for logging.[87] Thus, there appears to be an internal inconsistency relating to this point in the response. This apparent inconsistency warrants clarification.

In short, it would be helpful to develop information regarding the types of best practices available to reduce incidental deaths of birds and destruction of migratory bird nests from various activities, as well as information concerning any reasons why it is easier for the Party to require or encourage the use of such best practices in contexts other than logging, or why the use of such practices in other contexts is likely to be more effective than it is likely to be in the logging context.

c) *Leveraging Resources*

Third, the response indicates that the FWS evaluates potential enforcement cases by analyzing whether it can "leverage its resources" by taking enforcement actions against one violator that serve to encourage voluntary efforts by similarly situated entities to protect migratory birds.[88] The response asserts that this discretionary technique works well in situations in which an industry can voluntarily make a relatively inexpensive alteration in operations or equipment. Once again, a greater ability to leverage resources in contexts other than logging would support giving priority to enforcement in these other areas. Because the Party has not provided sufficient information to permit the Secretariat to assess the relative availability of management practices and related "alterations" in logging and other contexts, it fails to provide a persuasive case that the Party is likely to be more effective in achieving this aim of leveraging its enforcement cases in other contexts than in connection with logging operations. It would be useful to develop information on why this is the case, including information from previous efforts to "leverage resources" in this way.

85. Response at 22.
86. The Response contains only a parenthetical reference to one such "special measure"–"restricting the operating season." Response at 22.
87. *See* Response at 14-15.
88. Response at 14.

d) *Litigation Risks/Difficulties*

Fourth, the Party justifies its decision not to enforce against logging operations that kill birds or destroy nests in violation of the MBTA by asserting that it is more difficult to build successful enforcement cases against logging operations due to difficulties in the governing legal scheme and difficulties in developing the necessary facts because of the large geographic areas covered (such as the difficulty of finding nests and dead birds).[89] Assuming that cases against logging operations are more difficult to bring than cases against other activities that incidentally kill birds, it is not clear from the response why the Party's failure to bring or pursue a single prosecution against logging operations given the apparently significant numbers of bird deaths amounts to a reasonable exercise of enforcement discretion or a *bona fide* allocation of enforcement and related resources. The response does not indicate, for example, whether there has ever been a case in which the evidence of a taking in violation of the MBTA attributable to logging has been readily available, and if so, why the FWS decided not to pursue enforcement of that violation. It would therefore be helpful to develop additional information about how difficult it is to accumulate the information necessary to pursue enforcement of § 703 of the MBTA against logging operations, as compared to enforcement against other kinds of activities that the Party has decided to pursue. It also would be helpful to develop information about what efforts the Party has made to substantiate an enforcement case against loggers and what the results of any such efforts have been.

e) *The Endangered Species Act*

Finally, the Party asserts in its response that it does focus on logging that kills birds when an endangered species is involved.[90] The Party seems to assert that endangered species are inherently more important and therefore deserve priority in terms of enforcement effort. The Party indicates that it uses the ESA as the basis for such prosecutions. One question concerning this assertion in the response is whether, as a matter of achieving the environmental protection goals of the MBTA and ESA statutes, it is always the case that prosecutions are of greater benefit when endangered species are involved than when they are not. It would be helpful to develop information concerning this exercise of discretion—e.g., it would be useful to know whether there are situations in which it may be more effective from an environmental protection stand-

89. Response at 18.
90. Response at 17.

point to pursue loggers who are killing migratory birds not covered by the ESA (perhaps many in number) than to pursue loggers who are killing migratory birds that are covered by that Act (perhaps few in number). Again, the critical factual backdrop here is that the Party has apparently *never* initiated a single prosecution under the MBTA, regardless of context. It would be helpful to develop information concerning why it has exercised its discretion in this way in terms of its choice of prosecution targets among alleged ESA and MBTA offenders. Another question here is whether the Party is asserting that it focuses on ESA prosecutions because they are easier to bring than MBTA prosecutions.

3. Conclusion on Article 45(1) Issues

To sum up, this submission and response raise an issue of central importance to the citizen submission process—how should the Secretariat, in fulfilling its responsibilities under Article 15(1), address a Party's claim that it is not failing to effectively enforce based on the definition of that term in Article 45(1)(a) and/or (b). One option is for the Secretariat automatically to dismiss the submission on the theory that if a Party makes an assertion that it has engaged in a reasonable exercise of discretion for purposes of Article 45(1)(a) or made a *bona fide* allocation of resources for purposes of Article 45(1)(b), the Secretariat is bound to accept it. There is nothing in the Agreement to suggest that the Secretariat is bound to adopt a Party's view that it qualifies for one of the Article 45(1) exclusions from the definition of a failure to effectively enforce environmental laws. Article 31(1) of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[91]" As indicated above, one of the Parties' fundamental purposes in establishing a citizen submission process under the NAAEC was "to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective environmental laws.[92]" If

91. 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). The United States has signed but not ratified the Vienna Convention. The Convention is generally regarded as an authoritative statement of the principles of treaty interpretation.
92. Raymond MacCallum, Comment, "Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation", (1997) 8 *Colo. J. Int'l Envtl. L. & Pol'y* 395, 400. See also *Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee* 5 (June 1998) (noting that the citizen submission process makes it possible for "some 350 million pairs of eyes to alert the Council of any 'race to the bottom' through lax enforcement.") *Cf.* Article 1(h) of the NAAEC (stating as one of the objectives of the Agreement the promotion of "public participation in the development of environmental laws, regulations and policies").

the Secretariat were obliged to accept at face value every assertion by a Party that it is not failing to effectively enforce its environmental laws because it qualifies for one of the Article 45(1) defenses, a Party could unilaterally force the termination of every single citizen submission simply by asserting such a defense. The effect would be the nullification of the opportunities nominally afforded by Articles 14 and 15 for citizen participation in the environmental enforcement process. Such a result would seriously undermine the utility of the submission process in promoting the Agreement's other goals, including fostering the protection and improvement of the environment in the territories of the Parties[93] and enhancing compliance with and enforcement of environmental laws.[94]

As a result, the Secretariat declines to read the Agreement as requiring dismissal of a submission simply on the basis of a Party's assertion that one of the Article 45(1) defenses applies. Instead, the Secretariat has determined that its role, and responsibility, is to evaluate each such Party claim on its individual merits. Thus, if a Party asserts that it is exercising its discretion reasonably, the Secretariat's responsibility is to review whether the Party has explained how it exercised its discretion. The Secretariat's responsibility is also to review whether the exercise of discretion was "reasonable." If a Party asserts that it has engaged in a *bona fide* resource allocation to higher priority matters, the Secretariat's responsibility is to review how the party has allocated its resources in light of its stated priorities. The Secretariat's responsibility is also to review whether that allocation is indeed *bona fide*. In this case, the Secretariat finds that the Party has not provided enough information regarding the exercise of its enforcement discretion and the allocation of its resources to enable the Secretariat to find that either Article 45(1)(a) or (b) justifies terminating this proceeding. Instead, additional information of the sort identified above is needed concerning whether the Party is failing to effectively enforce the MBTA based on Article 45(1)(a) and (b).

V. NOTIFICATION TO COUNCIL IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. The Submitters assert that logging operations have violated and are continuing to violate the MBTA on a nationwide basis and in particular identified situations. The Submitters further assert that the

93. Article 1(a).
94. Article 1(g).

Party has not brought a single prosecution under the MBTA for such alleged violations. In its response the Party does not challenge the first assertion. The Party acknowledges that no prosecution under the MBTA has been brought against a logging operation. In the Secretariat's view the Party has not adequately supported its claim that its failure to bring a single prosecution against logging operations is the result of a reasonable exercise of its discretion or a bona fide allocation of its resources. The Secretariat is not expressing a view as to the ultimate resolution of these issues. Instead, it has determined that the purposes of the NAAEC would be well served by developing in a factual record additional information of the types referred to above concerning them. In accordance with Article 15(1) of the NAAEC, the Secretariat so informs the Council and in this document provides its reasons.

Respectfully submitted on this 15th day of December 2000.

Janine Ferretti
Executive Director

SEM-00-004

(BC Logging)

SUBMITTER: DAVID SUZUKI FOUNDATION, ET AL.

PARTY: Canada

DATE: 15 March 2000

SUMMARY: The Submitters allege that the Government of Canada "is in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection."

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2)* **(8 May 2000)**	Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.
ART. 15(1) **(27 July 2001)**	Notification to Council that a factual record is warranted in accordance with Article 15(1).

* Published in Volume 5 (Fall 2000) of the *North American Environmental Law and Policy* Series.

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-00-004** (BC Logging)
Submitter(s):	David Suzuki Foundation Greenpeace Canada Sierra Club of British Columbia Northwest Ecosystem Alliance National Resources Defence Council
Represented by:	Sierra Legal Defence Fund Earthjustice Legal Defence Fund
Concerned Party:	Canada
Date Received:	15 March 2000
Date of this Determination:	27 July 2001

I. EXECUTIVE SUMMARY

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation of North America (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). When the Secretariat determines that a submission meets the requirements in Article 14(1), it then determines based on factors set out in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. If the Secretariat considers that the submis-

sion, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform the Council and provide its reasons (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 15 March 2000, the Submitters filed with the Secretariat a submission alleging that Canada is failing systemically to enforce sections 35(1) and 36(3) of the *Fisheries Act* effectively in connection with logging operations on public and private land in British Columbia and is also failing to meet its obligation in Article 7 of the NAAEC to ensure that its judicial proceedings comply with due process of law and are sufficiently open to the public. To support their allegations, the Submitters included information indicating that: 1) salmon populations in British Columbia are seriously declining; 2) logging has contributed to this decline in salmon populations; 3) certain logging activities that are likely to have harmful impacts on fish and fish habitat are allowed system-wide on public and private lands in British Columbia under provincial forestry laws and regulations; 4) in reliance on these provincial laws and regulations, Canada has scaled back its review of whether logging plans will ensure compliance with the *Fisheries Act*; 5) Canada rarely prosecutes *Fisheries Act* violations resulting from logging operations in British Columbia; and 6) Fisheries and Oceans Canada (the Department of Fisheries and Oceans, referred to hereafter as DFO) staff are concerned that British Columbia forestry laws and regulations are not sufficiently protecting fish and fish habitat. The Submitters described TimberWest's logging in three areas in the Sooke watershed as an example of a logging operation on private land that resulted in *Fisheries Act* violations as to which Canada's enforcement response was inadequate.

On 8 May 2000, the Secretariat determined that the Submitters' allegations regarding enforcement of the *Fisheries Act*, but not the allegation regarding Article 7, met the criteria in Article 14(1) and merited a response from the Party in light of the factors listed in Article 14(2).[1] On 6 July 2000, the Secretariat received a response from the Party. Canada responded to the Submitters' assertions regarding logging activity by TimberWest in three areas in the Sooke watershed but did not provide any response to the allegation in the submission of a province-wide failure to effectively enforce the *Fisheries Act* generally in connection with logging operations. This determination is the Secretariat's notification to Council, in accordance with Article 15(1), that certain aspects of the Submission, in light of the Response, warrant developing a factual record.

1. *See* SEM-00-004 (BC Logging), Determination pursuant to Articles 14(1) and (2) (8 May 2000).

II. SUMMARY OF THE SUBMISSION

The submission contains two basic assertions. First, the Submitters assert that the Party is failing to effectively enforce sections 35 and 36 of the federal *Fisheries Act* in connection with logging operations on public and private lands throughout British Columbia. Section 35(1) prohibits the harmful alteration, disruption or destruction of fish habitat in the absence of an authorization issued or regulations made under section 35(2). Section 36(3) prohibits the deposit of deleterious substances in waters frequented by fish unless the deposit is authorized by regulation. Second, the Submitters assert that the Party is failing to effectively enforce certain Articles of NAAEC. In its 8 May 2000 determination pursuant to Article 14(1) and (2), the Secretariat determined that this second assertion did not satisfy the requirements of Article 14(1) and did not request a response to this assertion from the Party. This notification will address only the first assertion, which is summarized briefly below.[2]

The Submitters assert that although Canada has the jurisdiction and responsibility under the *Fisheries Act* to protect fish and fish habitat, it is not doing so effectively in regard to logging activity in British Columbia. They claim that Canada relies heavily on British Columbia's regulation of forest practices under its 1995 *Forest Practices Code* to ensure compliance with the *Fisheries Act* but state that British Columbia routinely allows logging practices under the *Forest Practices Code* that result in *Fisheries Act* violations on public lands.[3] They further claim that on private lands, "no effective provincial environmental protections apply.[4]" Harmful logging practices on both public and private lands that the Submitters assert result in *Fisheries Act* violations for which Canada is failing to take effective enforcement action include clearcutting to the edge of small fish-bearing and non-fish bearing streams; logging, especially clearcutting, on steep, landslide-prone slopes adjacent to streams; and falling and yarding trees across small streams.[5]

To be clear, the Submitters do not contend that a factual record is warranted regarding whether British Columbia's laws and regulations regarding forest practices on public and private lands are adequate or effective for the purposes under provincial law for which they were adopted. Rather, they contend that Canada's reliance on those provincial laws and regulations amounts to an ineffective means for enforcing

2. A more detailed summary is presented in the Secretariat's determination pursuant to Articles 14(1) and (2) for this submission.
3. Submission at 10-12.
4. Submission at 1.
5. Submission at 10-12.

provisions of the federal *Fisheries Act*. Further, they contend that Canada has made a broad policy decision to reduce the federal role in reviewing logging practices for compliance with the *Fisheries Act* in reliance on those provincial laws and regulations, and therefore that the alleged ineffective enforcement is systemic throughout British Columbia.

A. Logging on Lands Subject to the B.C. *Forest Practices Code*

The Submitters point to the failure of the *Forest Practices Code* to ensure adequate protection on public lands of so-called "S4 streams," which are defined in the *Forest Practices Code* as fish-bearing streams less than 1.5 metres wide. They refer to a 1997 report examining a number of cutblocks logged or approved for logging in 1996 and indicating that 79 % of S4 streams in four forest districts in coastal British Columbia were clearcut to both banks, a practice permissible under the *Forest Practices Code*.[6] As evidence that these practices are continuing, the Submitters attach portions of two specific forest development plans for the years 2000 to 2004. Both plans anticipate an average of only 30 % retention of trees along S4 streams, with no minimum level of retention required, and one plan requires that at least 40 % of the riparian management zone of S4 streams be cut.[7]

With respect to non-fish bearing streams, classified in the *Forest Practices Code* as "S5 and S6 streams," the Submitters claim that "[w]hile the impact of increased sedimentation or higher temperatures may be minimal in any one stream, the cumulative effect of all tributaries flowing into fish streams can have significant negative impacts on fish habitat.[8]" The Submitters state that these streams receive little or no protection under the *Forest Practices Code* and that clearcutting to the banks of these streams is common.

The Submitters identify the logging of landslide-prone areas as another potentially destructive logging practice routinely permitted on public lands under the *Forest Practices Code*. They claim that clearcutting is allowed on Class V terrain, terrain for which the landslide risk is 70 % or greater, in a number of instances in British Columbia. They state, for example, that a review of 13 forest development plans showed that 28 % of all logging planned was scheduled for Class V terrain and that 97 % of that terrain was scheduled for clearcutting, the logging method most likely to cause landslides.[9]

6. Submission at 11 and Attachment 2.
7. Submission at 11-12 and Attachments 9 and 10.
8. Submission at 5.
9. Submission at 11 and Attachment 8.

The Submitters also assert that falling and yarding of trees across S4 fish-bearing streams is regularly permitted under the *Forest Practices Code*. They refer to a 1997 report indicating that falling and yarding was permitted across 79 % of the S4 streams reviewed for the report.[10] The Submitters also assert that falling and yarding across non-fish bearing streams (S5 and S6 streams) is permitted and routinely occurs under the *Forest Practices Code*.[11]

The Submitters claim that sections 35(1) and 36(3) of the *Fisheries Act* "are routinely and systematically violated" by these logging practices and that "no effective and appropriate enforcement action is being taken.[12]" According to the Submitters, the harmful logging practices on which they focus lead to *Fisheries Act* violations in several ways. First, they result in loss of streamside vegetation, which can cause a long-term decline in the availability of naturally-occurring woody debris that is needed to create a variety of habitat types beneficial to fish. Second, they can lead to increased stream temperatures due to both the loss of shade along the streams and increased sedimentation. Third, they can adversely affect water quality and quantity, for example by destabilizing stream banks and increasing sedimentation that damages fish respiratory organs, fills in gravel beds necessary for spawning and certain life stages, and reduces dissolved oxygen.[13] The Submitters list a number of specific areas where, they assert, logging operations have caused or are causing harm to fish and fish habitat.[14]

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10. The Submitters appear to refer to Attachment 2. Attachment 2, however, suggests a somewhat higher figure. According to the report, falling and yarding through streams was expressly prohibited for only 12 % of streams and occurred on 82 % of streams in the audit of forest development plans, logging plans and silviculture prescriptions (Attachment 2 at 20-21).
11. Submission at 10 and Attachment 2.
12. Executive Summary at iii.
13. Submission at iii and 3-6. Some of the publications that the Submitters cite in support of their assertions about the harmful consequences of certain logging practices are not attached to the submission. The better practice is for submitters to attach relevant pages of all material to which a submission refers, even if in support of a background assertion. At a minimum, to promote timely processing of submissions, submitters should make every effort to attach relevant portions of all documentation supporting assertions that are central to a submission, unless that documentation is easily accessible to the public, the Parties and the Secretariat through the internet or other widespread and readily available means.
14. Submission at 5, 6, 8-9 and Attachments 2, 6, 8 and 14. Although a number of these examples relate to logging that took place prior to 1994, they are used to illustrate the effects of practices that the Submitters allege are continuing today. The Submitters do not make any allegation that the Party failed to effectively enforce its laws prior to 1994.

B. Logging on Private Lands

The Submitters also assert that neither British Columbia nor Canada effectively ensures that logging on private land in British Columbia complies with the *Fisheries Act*, "particularly with respect to practices such as clearcutting to the streambanks of small streams and clearcutting landslide prone areas.[15]" They assert that the *Forest Practices Code* does not apply to private land and that the proposed *Private Land Forest Practices Regulation*[16] is "sorely inadequate given its lack of enforceable standards" and its lack of protection for small streams.[17] Specifically, they contend that the regulation, which is now in effect, provides no protection along streams less than 1.5 metres wide, nominal protection along larger streams, and no meaningful restrictions on clearcutting landslide-prone lands. Consequently, the Submitters contend, Canada's reliance on the regulation as means for ensuring compliance with the *Fisheries Act* amounts to ineffective enforcement of the *Fisheries Act*.

The Submitters cite logging by TimberWest of its private land in three areas in the Sooke watershed as "[o]ne particularly troubling example of private land logging. . . .[18]" and claim that while Canada has been made aware of these activities, it has taken no action against TimberWest. The Submitters indicate that, although requested to do so by the Submitters, Canada has not used its power under section 37(2) of the *Fisheries Act* to formally request plans and specifications from TimberWest and to order modifications to TimberWest's operations as necessary to comply with the *Fisheries Act*.[19]

C. Alleged Ineffective Enforcement

The Submitters assert that even though the damage described above is foreseeable and "the functioning of the *Forest Practices Code* does not assure compliance with the *Fisheries Act*, the Government of Canada seems to have simply left the protection of fish and fish habitat to the provincial government. . . .[20]" They state that Canada has stopped active involvement in the planning process relating to logging operations and

15. Submission at 8.
16. This regulation came into force 1 April 2000, after the date of the submission.
17. Submission at 9.
18. Submission at 8-9. See also Attachment 6 [referred to in the Submission as Attachment 5].
19. See Attachment 6 [referred to in the Submission as Attachment 5].
20. Submission at 12.

also is failing to take remedial action after damage has occurred. They point in particular to a 31 January 1996 DFO letter explaining that

> [DFO] is changing its logging referral procedures in view of the increased stream protection afforded by the Forest Practices Code. The Code enhances protection for fish habitat by broadening the definition of a fish stream and widening streamside buffers to include wildlife considerations. In view of this enhanced protection for fish streams detailed block by block responses will no longer be provided on Forest Development Plans. We will continue to participate in planning meetings and watershed restoration plans when our involvement is expected to be beneficial to the fishery resource.[21]

The Submitters also provided documentation indicating a widespread concern among staff of DFO that the *Forest Practices Code* is inadequate to ensure compliance with the *Fisheries Act*.[22] Specifically, DFO staff expressed concern that "current logging practices in [British Columbia] rarely provide riparian leave strips or setbacks that adequately protect [S4, S5 and S6] streams" and confirmed that the federal *Fisheries Act* continues to apply to the practice of logging adjacent to small streams in this province.[23] DFO staff also outlined interim standards considered acceptable to meet fish habitat objectives, including retention levels approaching 100 % in the riparian management zones of S4 streams (fish-bearing) and S5 and S6 streams (non-fish-bearing) that are direct tributaries to fish-bearing streams.[24]

With respect to DFO's alleged failure to take preventive action by being involved in the planning process, the Submitters appear to assert that Canada is failing effectively to use its powers under section 37 to protect fish and fish habitat proactively from the impacts of logging operations.[25] With respect to remedial action, the Submitters state that, despite prosecuting homeowners and others for *Fisheries Act* violations, "DFO statistics for the last three years in BC show that only one prosecu-

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21. Submission at 12, and Attachment 11.
22. Submission at 12; Attachment 12, at 17; letters attached to Submitters' 31 March 2000 letter to the Secretariat.
23. Letter of 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests (attached to Submitters' 31 March 2000 letter to the Secretariat). This letter also expresses DFO staff's view that a review of the riparian provisions of the B.C. *Forest Practices Code* is required.
24. Letter of 7 March 2000 from G.T. Kosakoski to John Wenger (attached to the Submitters' 31 March 2000 letter to the Secretariat).
25. Submission at iii and 8; Attachment 6; Submitters' 31 March 2000 letter to the Secretariat.

tion . . . for the type of activities outlined in this complaint has been brought[26]" and that "[t]hat prosecution was abandoned by DFO due to delay in pursuing the charges.[27]"

III. SUMMARY OF THE RESPONSE

Canada does not respond to the Submitters' assertion that logging activities in British Columbia routinely violate sections 35(1) and 36(3) of the *Fisheries Act* and that Canada is not taking appropriate and effective enforcement action. In this regard, Canada states:

> While the submission contains a number of general allegations, Canada has found in the submission only three documented assertions of alleged failures to effectively enforce the *Fisheries Act*. These are the only assertions that provide sufficient information to enable Canada to provide a meaningful response to the submission.[28]

Canada responds only to the Submitters' assertions that Canada is not enforcing sections 35(1) and 36(3) of the *Fisheries Act* in relation to TimberWest's logging operations on privately managed forest lands adjacent to the Sooke River, Martins Gulch (tributary to the Leech River), and De Mamiel Creek (referred to in the Submission as Demanuelle Creek).

(a) Sooke River

Canada asserts that it carried out investigations of TimberWest's logging operations on these lands from March to June 1999, and, as a result of the investigation, sent TimberWest a warning letter dated 27 June 2000[29] indicating that although the riparian zone had been compromised, there was insufficient observable evidence to proceed with a charge under either section of the *Fisheries Act*. The letter also indicated that the site would require monitoring in the future and that Canada would proceed with a further investigation if it appeared that harm to fish habitat would likely occur. Canada asserts that a subsequent inspection on 4 July 2000 did not reveal any harmful impact on fish habitat at the site.

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26. Submission at 12.
27. Submission at 12.
28. Response at 1.
29. Annex 2 to the Response.

(b) Martins Gulch

Canada asserts that field inspections on 17 March 1999 and 4 July 2000 indicated that logging operations in that area do not appear to have damaged fish habitat and that the site is low risk for future impacts.[30]

(c) De Mamiel Creek

Canada states that it cannot comment on the Submitters' assertions about logging in this area as the logging is being investigated as a potential offence under the *Fisheries Act*. Canada asserts that, pursuant to Articles 14(3) and 45(3)(a) of NAAEC, it therefore would be inappropriate for the Secretariat to proceed further with respect to De Mamiel Creek.[31]

IV. ANALYSIS

A. Introduction

This submission has reached the Article 15(1) stage of the factual record process. To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it merits requesting a response from the Party based upon a review of the factors in Article 14(2). As indicated above, the Secretariat determined on 8 May 2000 that the submission meets the criteria for continued review included in Article 14(1) and that, based on the factors in Article 14(2), the submission warranted a response from the Party.[32]

The Secretariat concluded that the submission meets the criteria in the opening sentence of Article 14(1). The assertion in the submission that the Party is failing to effectively enforce the federal *Fisheries Act* focuses on a Party's asserted failure to effectively enforce the law, not on the effectiveness of the law itself. In addition, the *Fisheries Act* qualifies as an "environmental law" for purposes of NAAEC in that its primary purpose is "protection of the environment, or the prevention of a danger to human life or health. . . .[33]" 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.

30. Response at 2.
31. Response at 2.
32. SEM-00-004 (BC Logging), Determination pursuant to Articles 14(1) and (2) (8 May 2000).
33. Article 45(2)(a).

The Secretariat also found that the submission meets the six specific criteria listed in Article 14(1). The submission is in English, a language designated by the Parties (Article 14(1)(a)). It identifies the organizations making the submission (Article 14(1)(b)). The submission provides sufficient information to allow the Secretariat to review the submission (Article 14(1)(c)). It appears to be aimed at promoting enforcement rather than at harassing industry in that it is focused on the acts or omissions of a Party rather than on compliance by a particular company or business (Article 14(1)(d)). The submission states that the Submitters communicated the issues raised in the submission to the Party and includes both copies of correspondence the Submitters sent to the Party, and correspondence they received in response (Article 14(1)(e)). And, finally, the submission was filed by a "person or organization residing or established in the territory of a Party" (Article 14(1)(f)).

In regard to the factors in Article 14(2), the Secretariat determined that the Submitters allege that violations by logging operations of *Fisheries Act* sections 35 and 36 cause substantial harm to the environment (Article 14(2)(a)). Further, the submission raises matters whose further study in the Article 14 process would advance the goals of the Agreement in that it asserts that the failure to enforce is significant in scope and that effective enforcement would "foster the protection of an important environmental resource. . .," "promote[.] sustainable development . . .," and "enhance compliance with, and enforcement of, environmental laws and regulations.[34]" (Article 14(2)(b)). The Submitters indicate that various parties have "urged DFO to enforce the *Fisheries Act*. . . ." and that they, and others, have brought prosecutions under the *Fisheries Act* which, in each instance, have been taken over by the Provincial Attorney General who stayed the proceedings (Article 14(2)(c)). Finally, the submission is not based exclusively on mass media reports but is supported by considerable documentation (Article 14(2)(d)).

Like previous submissions, this submission alleges a failure to enforce effectively both in specific cases and more broadly. It asserts a widespread, systemic failure by Canada to enforce sections 35(1) and 36(3) against logging operations in British Columbia and illustrates that alleged failure with, among other information, DFO's policy decision to discontinue block-by-block review of Forest Development Plans in reliance on the stream protection afforded in provincial forestry regulations. It also provides the specific example of TimberWest's operations in the Sooke watershed. The Secretariat has previously concluded that

34. Submission at 15, referencing NAAEC Article 1(a), (b), and (g).

Articles 14 and 15 apply both to submissions alleging failures to enforce effectively in regard to particularized incidents and to submissions alleging failures to enforce effectively more broadly or systemically.[35] Likewise, the Council unanimously has instructed the Secretariat to prepare factual records with respect to both particularized allegations of ineffective enforcement[36] and allegations of a widespread, systemic failure to enforce effectively.[37]

The kind of systemic ineffective enforcement alleged in this submission is analogous to the systemic failure to effectively enforce alleged in the *BC Hydro* submission. The submitters of the *BC Hydro* submission contended in part that Canada's systemic reliance on British Columbia's Water Use Planning Process as sufficient to eliminate the need to issue authorizations to BC Hydro facilities to harm fish habitat under section 35(2) of the *Fisheries Act* amounted to a systemic failure to effectively enforce the *Fisheries Act* and the *Canadian Environmental Assessment Act*.[38] Similarly, the Submitters here contend that Canada's systemic reliance on British Columbia's regulation of forest practices to justify a reduced federal role in enforcing the *Fisheries Act* amounts to a failure to effectively enforce the *Fisheries Act*.

Accordingly, following the same approach consistently taken in previous submissions, the Secretariat concluded that both the alleged failure to enforce sections 35(1) and 36(3) with respect to TimberWest's logging operations in the Sooke watershed and the alleged systemic failure to enforce sections 35(1) and 36(3) against logging operations in British Columbia are within the scope of Article 14.

Article 15(1) of NAAEC now requires the Secretariat to consider whether the submission, in light of Canada's response, warrants developing a factual record. Article 15(1) requires that if the Secretariat determines that a factual record is warranted, it must inform the Council and provide reasons for its determination. As discussed below, the Secretariat has determined that development of a factual record is warranted to

35. *See* SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001). For a detailed discussion of the rationale for this conclusion, *see*, SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000). *See also*, SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999) ("Submissions . . . which focus on the effectiveness of enforcement in the context of asserted widespread violations . . . are inherently more likely to warrant scrutiny by the Commission than allegations of failures to enforce concerning single violations. This is so even though it may be appropriate for the Commission to address the latter, depending on the circumstances.").
36. SEM-96-001 (Cozumel) and SEM-98-007 (Metales y Derivados).
37. SEM-97-001 (BC Hydro).
38. SEM-97-001 (BC Hydro), Final Factual Record at para. 54 (11 June 2000).

compile additional information concerning the effectiveness of Canada's enforcement of the *Fisheries Act* in relation to logging operations in British Columbia.

B. Why Development of a Factual Record is Warranted

The Secretariat is of the view that development of a factual record is warranted regarding several matters raised in the Submission. The Submitters allege a widespread failure by Canada to effectively enforce sections 35 and 36 of the *Fisheries Act* in the context of logging on both public and privately owned land in British Columbia. Against a background of a documented serious decline in the salmon fishery in British Columbia, the submission raises central questions regarding Canada's reliance on British Columbia's regulation of forest practices as a means for enforcing and ensuring compliance with sections 35 and 36 of the *Fisheries Act*.

The submission contains detailed information regarding only one specific logging operation — TimberWest's logging in the Sooke watershed — that according to the Submitters violated sections 35 and 36 in three instances. However, the Secretariat does not share Canada's view that the Submitters do not provide enough information about the Submitters' allegation of a widespread, systemic failure of effective enforcement to allow for a meaningful response or further review.

The Submitters allege that Canada places undue reliance on provincial forestry laws and regulations that as written and as applied do not, in the Submitters' view, provide adequate protection of small fish-bearing streams and non-fish-bearing streams tributary to fish-bearing streams. The Submitters support these assertions with, among other things, information regarding the serious decline in salmon populations in British Columbia, information regarding how British Columbia's regulation of logging practices on both public and private lands do not prohibit activities likely to harm fish and fish habitat, statistics regarding the extent to which forest development plans that British Columbia has approved have allowed — as written and as implemented — logging practices that are likely to harm fish and fish habitat, information on the ways in which those practices harm fish and fish habitat, documentation of DFO's relaxed review of forest development plans in light of British Columbia's *Forest Practices Code*,[39] information regarding the lack of *Fisheries Act* prosecutions regarding logging operations in British Columbia and documentation of concern among DFO staff that provin-

39. Submission at 12, and Attachment 11.

cial forestry regulations are failing to ensure adequate protection of fish habitat. The submission also provides an example of a logging operation that, in the Submitters' view, and apparently in the view of Canada as well, appears to have resulted in *Fisheries Act* violations.

While Canada has responded to the allegations regarding TimberWest, it provided no response to the Submitters' allegation of a widespread, systemic failure to enforce the *Fisheries Act* effectively in regard to logging operations in British Columbia. Specifically, Canada provided no information regarding its approach for ensuring that logging operations in British Columbia comply with sections 35 and 36, and for taking enforcement action when violations occur, and no information regarding whether that enforcement approach is effective.[40] This lack of a response leaves unanswered the central questions that the submission raises. Accordingly, development of a factual record is warranted in relation to the matters described below.

1. The Asserted Widespread Ineffective Enforcement of Fisheries Act Sections 35(1) and 36(3) in British Columbia

The Submitters make a number of assertions, for which they cite to supporting documentation, regarding Canada's alleged ineffective enforcement of the *Fisheries Act* in relation to logging on public and private lands in British Columbia. Taken together, these assertions raise central questions regarding whether, as the Submitters allege, Canada is ineffectively enforcing the *Fisheries Act* in British Columbia with regard to logging.

First, by way of background, the Submitters assert that fisheries are an important Canadian resource and that the decline and extinction of fish stocks in western Canada has a significant adverse impact from an ecological, aboriginal and economic perspective.[41] The enactment of the pollution prevention and habitat protection provisions of the *Fisheries Act* reflects a broad recognition in Canada of the importance of Canadian fisheries. Citing to several studies, the Submitters also describe the importance of riparian areas in forests as fish habitat.[42]

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40. Presumably, however, information regarding these issues is available or could be developed. For example, it would be relevant to gather any analysis Canada may have conducted to support its province-wide policy decision to reduce the level of federal review of Forest Development Plans in light of the stream protections provided under provincial regulations.
41. Submission at 2.
42. Submission at 2-3. In support of these background assertions, notes ii and iii of the submission refer to two publications that are not attached to the submission and were not readily available to the Secretariat.

Next, the Submitters assert that certain logging activities have profound, long-term, and destructive impacts on fish habitat, including loss of streamside vegetation; altered water temperature; and degradation of water quality and quantity by, among other things, the deposit of silt or sediment.[43] Canada's response confirms that logging practices as to which the Submitters voice concern can result in impacts to fish and fish habitat that violate the *Fisheries Act*.[44] The Submitters point out that in addition to fish-bearing streams, non-fish bearing streams play a significant role in preserving fish habitat and are also prone to destructive impacts from logging, which in turn harm fish and fish habitat.[45]

The Submitters also point to studies in specific areas in British Columbia that link a decline in salmon numbers and salmon health to logging.[46] While the studies referred to by the Submitters appear to have examined primarily logging practices that pre-date enactment of the *Forest Practices Code* and the entry into force of the NAAEC, the Submitters assert that logging activities contributing to a decline in salmon numbers and salmon health continue today. In particular, they point to TimberWest's operations and identify recent logging plans that allow logging practices likely to harm fish and fish habitat to occur.[47] Moreover, they contend that the harm to fisheries due to the logging practices on which they focus is systemic because those practices are routinely and systemically allowed under British Columbia's forest practices regulations.

Finally, and most significantly, the Submitters make assertions regarding the ineffectiveness of Canada's reliance on provincial regulation of forest practices to ensure compliance with the *Fisheries Act*. They

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In addition to the reports that the Submitters cite, some of the material that the Submitters did attach to the submission support their assertions regarding the importance of riparian areas in forests as fish habitat. *See* Attachment 2 at 1, 3; Attachment 3 (bull trout); Attachment 14 at 9-14; Letter of 28 February 2000 from D.M. Petrachenko, Director General, Pacific Region, DFO, to Lee Doney, Deputy Minister, Ministry of Forests; Letter of 7 March 2000 from G.T. Kosakoski to John Wenger.

43. Submission at 3-5 and Attachment 2. In support of this assertion, the Submitters cite a number of publications that they do not attach to the Submission. See Submission, notes v-xvi. These assertions find additional support in the materials attached to the submission. *See* Attachment 2 at 1, 3: Attachment 3 (bull trout); Attachment 8 at 9.
44. Response at Annex 2. Canada's warning letter to TimberWest notes that clear-cutting all but a narrow strip of trees in a riparian area could lead to increased water temperatures, streambank destabilization and introduction of sediment.
45. Submission at 5 and publications referred to in the submission, notes xvii and xviii, but not attached to the Submission. These assertions find additional support in the materials attached to the submission. *See* Attachment 2; Attachment 14 at 12.
46. Submission at 5-6 and publications referred to in Submission, notes xix-xxxi.
47. *See* notes 7-11 *supra* and accompanying text.

point to provincial regulation of forest practices on public lands as well as to British Columbia's regulation of forestry on private lands. Further, to show that the alleged failure to effectively enforced is widespread and systemic, they point to a specific DFO policy decision to reduce the level of review of Forest Development Plans throughout the province in light of the stream protections provided by provincial regulation of forest practices.

With regard to public lands, they assert that British Columbia regulates logging on public land under the *Forest Practices Code* but routinely permits activities that are likely to result in damage to fish and fish habitat. They focus in particular on the falling and yarding of logs across fish habitat, logging of landslide-prone lands, and clearcutting of riparian areas, with an emphasis on the adverse impacts of those practices on small fish-bearing streams (classified as S4 streams) and non-fish-bearing streams (classified as S5 and S6 streams).[48] The Submitters note that protections that apply to larger fish-bearing streams (S1, S2 and S3 streams) under the *Forest Practices Code* do not apply to S4, S5 and S6 streams.[49] Among other information, they rely on a 1997 paper and field audit report of 13 forest development plans in British Columbia showing that falling and yarding, as well as clearcutting to both banks, was allowed for 79 % of S4 streams and that 28 % of all logging was planned for Class V terrain — terrain for which the risk of landslides is 70 % or greater. They also identify specific forest development plans containing no mandatory retention of trees along S4 streams and, in one case, a requirement to cut at least 40 % of the riparian area along S4 streams. These planned and actual retention levels are far less than the 100 % retention along S4 streams and along S5 and S6 streams directly tributary to fish-bearing streams that DFO staff proposed as interim standards that would provide adequate protection for fish.[50]

The Submitters assert that the logging practices that harm fish and fish habitat on public land also are common on private land. They assert that the overall harm caused by logging activities in British Columbia includes harm due to logging activities on private land and that certain logging activity on private lands results in violations of the *Fisheries Act*. The Submitters' assertion of Canada's widespread failure to enforce the *Fisheries Act* provisions in relation to logging on private land in British Columbia must be viewed in light of the Submitters' specific allegations regarding TimberWest as well as the concerns they set forth regarding

48. Submission at 10-12; Attachments 2, 9, 10, and 14.
49. Submission at 9, 11.
50. *See* notes 22-24 *supra* and accompanying text.

the alleged inadequacy of the *Private Land Forest Practices Regulation* for ensuring compliance with the *Fisheries Act*. They claim that regulation of logging practices on private land in British Columbia is less stringent and less effective than on public land. In particular, they allege that the *Forest Practices Code* does not apply to private land and that the *Private Land Forest Practices Regulation*,[51] which applies to some but not all private land,[52] is (where applicable) inadequate as a means for enforcing the *Fisheries Act* because it does not contain enforceable standards or protect small fish-bearing and non-fish-bearing streams.[53]

In light of the cumulative information regarding the decline of fisheries in British Columbia, the logging practices likely harmful to fish and fish habitat that are allowed under British Columbia's forest practices laws and regulations, and Canada's seeming reliance on provincial forest regulations as a means for enforcing the *Fisheries Act*, the Submitters conclude that Canada is failing to enforce the *Fisheries Act* effectively on a widespread basis by not prosecuting violations of sections 35(1) and 36(3) under section 40; by not exercising its powers under section 35(2); and by not exercising its powers under section 37. In particular, the Submitters make the following assertions regarding Canada's allegedly ineffective enforcement approach in relation to logging in British Columbia:

- Even though damage from activities associated with logging is foreseeable, and harmful alteration, disruption or destruction of fish habitat and the deposit of deleterious substances is likely to be occurring despite compliance with the *Forest Practices Code*, Canada is not enforcing the *Fisheries Act* in relation to these

51. The Regulation came into force 1 April 2000.
52. The Submitters criticize the overall regulatory approach of the *Private Land Forest Practices Regulation*, claiming that it applies not to all logging on private lands but only where owners of private land have volunteered to abide by the *Regulation* in exchange for beneficial tax treatment. They conclude that «[t]here is no regulation of private lands where a landowner foregoes government subsidies» and that the *Private Land Forest Practices Regulation* is «far worse thant having no regulation at all." Submission at 9. However, it appears that while it is correct that the *Private Land Forest Practices Regulation* does not apply to all private land, it could apply to logging practices on private land in the Forest Land Reserve in British Columbia that is not eligible for maximum property tax benefits under the *Assessment Act*. For purposes of this submission, the essential point is that the regulation does appear to leave logging on some private land unregulated.
53. Submission at 9. Again, the Submitters do not contend that the regulation is ineffective for the purposes for which it was adopted under provincial law, and the Secretariat would not examine that issue in a factual record. Instead, the issue is whether Canada's reliance on the regulation as a means for enforcing and ensuring compliance with the federal *Fisheries Act* amounts to effective enforcement of the *Fisheries Act*.

destructive logging activities permitted on public land under the *Forest Practices Code*.[54]

- As with logging on public lands, Canada has not addressed the limitations of British Columbia's regulation of forest practices on private lands by exercising its powers to prevent violations of the *Fisheries Act* from occurring or to take remedial action once violations have occurred. The Submitters cite one example of Canada's allegedly ineffective approach in regard to destructive logging practices on private land – TimberWest's logging of its land in the Sooke watershed.[55] They assert that despite Canada's knowledge that TimberWest's logging practices were violating the *Fisheries Act*, Canada took no enforcement action.

- In the last three years only one prosecution, abandoned because of delay, has been brought for *Fisheries Act* violations by logging operations even though *Fisheries Act* prosecutions have been brought in relation to other kinds of activities.[56]

- Canada effectively withdrew from enforcing the preventive provisions of the *Fisheries Act* in relation to logging activities in British Columbia after the province introduced the *Forest Practices Code,* as evidenced by Canada's province-wide policy decision to provide for reduced federal review in the logging referral process.[57] Specifically, Canada no longer provides block by block responses on Forest Development Plans in relation to stream protection even though DFO staff perceive the *Forest Practices Code* as not providing adequate protection for fish and fish habitat along small fish-bearing and non-fish-bearing streams.[58]

54. Submission at 12-13.
55. Submission at 8-9; Attachments 5, 6, and 7.
56. Submission at 12 and Attachment 13.
57. Submission at 1.
58. Submission at 12 and Attachments 11, 12 and 13 (p. 5). Attachment 12 is a report by Dovetail Consulting which describes itself as a «summary of a two-day workshop», «the purpose of which was to consult with scientists to obtain their input on ecological aspects of MacMillan Bloedel's BC Coastal Forest Project.» The Submission indicates in Note xlvi that Dovetail Consulting prepared the report, which is dated 5 March 1999 for DFO. The letters from the Department of Fisheries and Oceans to the BC Ministry of Forests provided to the Secretariat subsequent to the submission, provide further support for the assertion that Canada has general concerns about logging practices adjacent to small fish-bearing streams and non-fish bearing direct tributaries to fish-bearing streams. *See* notes 22-24 *supra*, and accompanying text.

- Canada does not exercise its powers under section 37 to require logging companies to submit relevant information where the logging activities will result or are likely to result in the harmful alteration, disruption or destruction of fish habitat or the deposit of a deleterious substance.[59] By way of example, the Submitters assert that although requested by the Submitters, Canada did not use its powers under section 37(2) of the *Fisheries Act* to request plans and specifications from TimberWest and to order modifications to the work, if necessary. Nor, according to the Submitters, does Canada invoke its permitting powers under section 35 to allow harmful alteration, disruption or destruction of fish habitat on conditions.[60]

These cumulative assertions, together with the supporting material, raise central questions about Canada's enforcement of the *Fisheries Act* in relation to logging on public and private land in British Columbia. In effect, the Submitters assert that harm to fish and fish habitat is taking place as a result of logging due to a gap in the protection of fish and fish habitat in British Columbia. They maintain that provincial regulation of forest practices is not effectively protecting fish and fish habitat, and that because this deficiency is built into Canada's province-wide approach for ensuring the compliance of logging activities with the *Fisheries Act*, it is systemic. They assert that Canada, by relying on British Columbia's regulation of forest practices instead of fulfilling its distinct responsibilities for enforcing the *Fisheries Act*, is allowing that province-wide gap to persist. Most significantly, they identify a wide discrepancy between the level of fish protection along S4, S5 and S6 streams that DFO staff indicate is needed and the level achieved in practice through implementation of British Columbia's strictest forestry laws and regulations.

As indicated above, Canada has provided no information in response to the Submitters' allegations that Canada's reliance on British Columbia to ensure protection of fish and fish habitat from the adverse impacts of logging amounts to ineffective enforcement of *Fisheries Act* sections 35 and 36. Canada did provide information indicating that, in response to concerns from residents in the Sooke watershed in March

59. Submission at iii and 8, Attachment 6; Submitters' 31 March 2000 letter to the Secretariat. Section 37 empowers the Minister to request information about a project where the project will result or is likely to result in harmful alteration, disruption or destruction of fish habitat or the deposit of a deleterious substance and, with Cabinet approval, to require modifications to or restrict or close the project.

60. Submission at iv and 8. Section 35(2) contemplates that a proponent of a work or undertaking will seek authorization to commit harmful alteration, disruption or destruction of fish habitat rather than that DFO will issue such authorizations on its own initiative.

1999, it has commenced a criminal investigation and issued a warning letter regarding the logging activities of TimberWest as to which the Submitters voice concern in the submission. However, Canada is otherwise silent about the exercise of its powers under sections 35, 36, 37 and 40 of the *Fisheries Act* in regard to logging in British Columbia. In short, Canada provides no information on its overall approach for enforcing the *Fisheries Act* in the context of logging on public and private land in British Columbia or on whether that approach is effective. This lack of a response leaves unanswered the central questions that the Submission raises regarding Canada's reliance on provincial regulation of forestry as a means for enforcing the *Fisheries Act* in relation to logging throughout British Columbia.

The Secretariat is therefore of the view that the Submission, in light of Canada's Response, warrants development of a factual record to consider the unanswered questions raised by the submission. Specifically, a factual record is warranted to examine what formal or informal policies Canada has in place for enforcing the *Fisheries Act* in respect to logging on public and private lands in British Columbia, whether and how those policies are being implemented, and whether those policies and their implementation amount to effective enforcement of the Act. Within this framework, and with a focus on the logging practices that the Submitters discuss in the submission, matters to address in a factual record include:

- the extent to which, and the circumstances in which, Canada exercises its powers under section 37 of the *Fisheries Act* in order to prevent or mitigate harmful impacts to fish and fish habitat of logging on public land and private land in British Columbia;

- the extent to which and the circumstances under which Canada exercises its powers under section 35(2) in the context of logging on public land in British Columbia and the effectiveness of actions taken under section 35(2) to prevent the harmful alteration, disruption and destruction of fish habitat;

- information underlying or supporting Canada's decision to reduce the level of review of Forest Development Plans in British Columbia in light of stream protections provided in the *Forest Practices Code*;

- the extent to which Canada works with the British Columbia Ministries of Forest and Environment, Lands and Parks, to prevent or mitigate harmful impacts to fish and fish habitat of logging activities on public and private land;

- the extent to which Canada monitors logging operations regulated in British Columbia by the *Forest Practices Code* or the *Private Land Forest Practices Regulation* to determine compliance with the *Fisheries Act*, and the results of monitoring activities including the frequency, number and severity of suspected violations of the *Fisheries Act* by logging operations on public and private land in British Columbia;

- the extent to which Canada monitors logging operations in British Columbia that are not regulated by either the *Forest Practices Code* or the *Private Land Forest Practices Regulation* to determine compliance with the *Fisheries Act*, and the results of monitoring activities including the frequency, number and severity of suspected violations of *Fisheries Act* by such logging operations;

- the extent to which and the circumstances under which Canada investigates suspected violations of the *Fisheries Act* by logging operations on public and private land in British Columbia;

- the type, number and effectiveness of enforcement actions taken in recent years in connection with *Fisheries Act* violations by logging operations in British Columbia, including, but not limited to, the number of *Fisheries Act* charges, prosecutions, and convictions, and the sentences handed down; and

- actions taken by Canada to follow up DFO's letter of 28 February 2000 to the British Columbia Deputy Minister of Forests, and related letters sent to the District Managers of the Ministry of Forests.[61]

2. The Assertion of Ineffective Enforcement Against TimberWest

Canada responds briefly to the Submitters' specific allegations relating to TimberWest's logging operations on private land in the Sooke area, but not to their broader assertion of a widespread failure to enforce the *Fisheries A*ct effectively in relation to logging operations on private land in British Columbia. The Secretariat is of the view that certain aspects of the Submitters' allegations regarding Canada's enforcement approach in regard to TimberWest's logging operations warrant examination in a factual record, while other aspects do not warrant further review.

61. *See* notes 22-24 *supra* and accompanying text.

a. Whether the specific allegations regarding TimberWest's De Mamiel Creek logging operations are subject to pending administrative or judicial proceedings

As noted above, Canada submits that the assertions in the Submission concerning the enforcement of the *Fisheries Act* in relation to TimberWest's logging operations in the vicinity of De Mamiel [or Demanuelle] Creek in Sooke are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a) and Article 45(3)(a). Article 14(3)(a) provides that the Secretariat "shall proceed no further" where the matter alleged in the submission is the subject of "a pending judicial or administrative proceeding."

A "judicial or administrative proceeding" is defined in Article 45(3) as

> (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
>
> (b) an international dispute resolution proceeding to which the Party is party.

In previous determinations, the Secretariat has stated that the threshold consideration of whether an administrative or judicial proceeding is pending should be construed narrowly to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3). Only those proceedings specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, in accordance with a Party's law, and concerning the same subject matter as the allegations raised in the submission should preclude the Secretariat from proceeding further under Article 14(3).[62] Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, and that are not designed to culminate in a specific decision, ruling or agreement within a definable period of time should not be considered as falling within Article 45(3)(a).[63]

62. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001).
63. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

Bearing these parameters in mind, the investigative actions Canada has taken in relation to logging around De Mamiel Creek do not fall within the definition of "judicial or administrative proceedings" within the meaning of Articles 14(3) and 45(3). Most significantly, a criminal investigation is not among or of the same nature as the actions explicitly mentioned in Article 45(3)(a). While a criminal investigation might lead in some cases to a proceeding listed in Article 45(3)(a), it is not an integral part of "mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; [or] the process of issuing an administrative order."

It might result in a criminal charge leading to a judicial or administrative proceeding seeking sanctions or remedies within the scope of Article 45(3)(a). On the other hand, an investigation could also culminate in a warning letter, some other kind of enforcement action not contemplated in Article 45(3)(a) or no enforcement action at all. Further, a criminal investigation does not always have a clear and definable beginning or endpoint. In short, therefore, a criminal investigation is not a pending judicial or administrative proceeding designed to culminate in a specific ruling or decision within a definable period of time and is not encompassed in Article 45(3)(a).

Although the ongoing criminal investigation regarding De Mamiel Creek is not a judicial or administrative proceeding that under Article 14(3)(a) requires the Secretariat to proceed no further, the Secretariat nonetheless believes that a factual record with respect to De Mamiel Creek is not warranted as long as the criminal investigation remains active and ongoing. In previous determinations, the Secretariat considered the rationale underlying Article 14(3) and identified two reasons for excluding matters that fall within Article 45(3)(a) – a need to avoid duplication of effort and a need to refrain from interfering with pending litigation.[64] The Secretariat has noted in the past that these considerations can also be relevant for a Party's proceedings that fall outside Article 45(3)(a) but nonetheless relate to the same subject matter as is raised in a submission.[65]

The concerns that weigh against development of a factual record when pending litigation is addressing the same subject matter as is

64. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).
65. SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998).

raised in a submission[66] are similar to the concerns relevant to whether a factual record is warranted with regard to a matter that is also subject to a timely, active, pending criminal investigation. The Secretariat has observed that "[c]ivil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices," and that the factual record process "may unwittingly intrude on one or more of the litigant's strategic considerations.[67]" Similarly, a criminal investigation often involves a degree of secrecy and sensitivity that make it uniquely vulnerable to unintended interference. The factual record process presents a risk of interfering, possibly seriously, with a criminal investigation. In many cases, the mere fact that a criminal investigation is underway is kept secret in order to ensure its success. If a Party is required to disclose information relating to an ongoing criminal investigation, the disclosure could jeopardize or compromise the investigation by disclosing closely-held investigative techniques or the identity of investigators, informers or witnesses. The Secretariat is reluctant to embark on a process which a party demonstrates may intrude in these ways on timely, active and ongoing criminal investigations carried out by a Party to ensure compliance with its environmental laws.

Here, Canada has stated that as of the time of its response, an investigation was ongoing regarding De Mamiel Creek, and the Secretariat has no information indicating that Canada's investigation relating to De Mamiel Creek was not timely or that it is no longer active. Accordingly, if a factual record is developed for this submission, the Secretariat will not consider whether Canada is failing to effectively enforce the provisions of the *Fisheries Act* in relation to logging operations at De Mamiel Creek as long as the investigation remains active and charges may result. However, the Secretariat is not precluded from looking at all matters relating to De Mamiel Creek. For example, in examining the Submitters' allegation that Canada is failing to enforce the *Fisheries Act* effectively against logging operations in British Columbia generally, information regarding the circumstances leading to the TimberWest investigation might be relevant to a description of why investigations are pursued in some circumstances and not others.

66. The Secretariat is not precluding the possibility that in a future submission involving proceedings to which Article 14(3)(a) does not apply, these concerns might be outweighed by other factors warranting preparation of a factual record.
67. SEM-96-003 (Oldman River I), Determination pursuant to Articles 14 and 15 (2 April 1997).

b. Whether a factual record is warranted in regard to TimberWest's Sooke River and Martins Gulch logging operations

Canada's response indicates that TimberWest's forest harvesting practices at the Sooke River site gave rise to concerns over the year preceding the response. These concerns resulted in an investigation and, ultimately, a warning letter detailing the concerns. After the investigation, DFO staff concluded that the riparian zone had been compromised and was unstable.[68] DFO staff also concluded that the site would require monitoring in future years. The Secretariat considers a factual record to be appropriate with respect to the Sooke River logging operation to gather information as to whether the warning letter, any continued monitoring of the site and other aspects of Canada's enforcement approach have been effective. Particularly in light of the widespread nature of the allegations in the submission, this examination would provide an example of Canada's ongoing compliance and enforcement activities at a site where there is a known risk that logging activities could result in violations of the *Fisheries Act*.

The Secretariat considers that development of a factual record is not warranted in relation to TimberWest's specific logging activities in the Martins Gulch area. In its response, Canada indicates DFO inspected these activities and the site and found little or no impact on fish habitat. Canada also asserts that the site is considered low risk for future impacts. The Secretariat sees no value in the development of a factual record in relation to whether Canada is failing to take effective enforcement action in regard to the Martins Gulch logging operation given the results of compliance activities already undertaken. Nonetheless, information regarding Canada's approach in regard to Martins Gulch might be useful in the broader context of examining how Canada generally assesses the risk of future impacts due to particular logging operations and the need for ongoing monitoring and enforcement.

V. RECOMMENDATION

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. The Submitters have raised central questions regarding the effectiveness of Canada's enforcement of the *Fisheries Act* in connection with logging in British Columbia. They have supported their allegations

68. Response at Annex 2.

with statistics on the extent to which logging practices likely to be harmful to fish and fish habitat are allowed under the British Columbia *Forest Practices Codes* and *Private Land Forest Practices Regulation*, the example of TimberWest's logging practices on private land in the Sooke River watershed, Canada's province-wide policy to reduce the level of federal review of Forest Development Plans in light of stream protections provided in provincial forest practices regulations and documentation of concern among DFO staff regarding the ability of provincial forestry regulations to ensure compliance with the *Fisheries Act*. The Submitters have also described the declines in salmon populations in British Columbia and the nature of the harm due to logging practices as to which they contend Canada is failing to take effective enforcement action. Canada's response has persuaded the Secretariat that a factual record is not warranted with respect to the allegations concerning ineffective enforcement of the *Fisheries Act* regarding TimberWest's logging near Martins Gulch and De Mamiel Creek. However, Canada's response leaves entirely unanswered the central questions the submission raises regarding the effectiveness of Canada's enforcement generally of sections 35(1) and 36(3) of the *Fisheries Act* in connection with logging on public and private lands in British Columbia. Accordingly, in accordance with Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the purposes of the NAAEC would be well served by developing a factual record regarding the Submission.

Respectfully submitted on this 27th day of July 2001.

Janine Ferretti
Executive Director

SEM-00-005

(Molymex II)

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PARTY:	United Mexican States
DATE:	6 April 2000
SUMMARY:	The Submitters allege that Mexico has failed to effectively enforce the General Law of Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecologico y la Proteccion al Ambiente*—LGEEPA) in relation to the operation of the company Molymex, S.A. de C.V. in the town of Cumpas, Sonora, Mexico.

SECRETARIAT DETERMINATIONS:

ART. 14(1)* **(13 July 2000)**	Determination that criteria under Article 14(1) have not been met.
REV. SUB. ART. 14(1)(2) (19 October 2000)	Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.
ART. 15(1) (20 December 2001)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

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Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y 14 (2) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. de petición:	**SEM-00-005** (Molymex II)
Peticionaria(os):	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	6 de abril de 2000
Fecha de la determinación:	19 de octubre de 2000

I. ANTECEDENTES

El 6 de abril de 2000, la Academia Sonorense de Derechos Humanos, A.C. y el Lic. Domingo Gutiérrez Mendivil (los "Peticionarios"), presentaron al Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición de conformidad con los artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo").

El Secretariado puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN.

Con fecha del 13 de julio del 2000, el Secretariado determinó que la Petición no cumplía con el requisito establecido en el inciso e) del

artículo 14(1) del Acuerdo, dado que la Petición no señalaba que el asunto planteado en la Petición hubiese sido previamente comunicado por escrito a las autoridades pertinentes en México.

Con base en el apartado 6.2 de las *Directrices para la presentación de peticiones relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del ACAAN* (Directrices), los Peticionarios presentaron información adicional a la Petición, el 26 de julio de 2000. Tomando en cuenta esta nueva información, el Secretariado determina que se encuentran satisfechos los requisitos del artículo 14(1) del Acuerdo. Asimismo, el Secretariado ha considerado la Petición a la luz de los requisitos del artículo 14(2), y determina que amerita solicitar una respuesta de la Parte respecto de algunas de sus aseveraciones, por las razones que se expresan en este documento.[1]

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que México ha omitido aplicar de manera efectiva su legislación ambiental en relación con el funcionamiento de la planta productora de trióxido de molibdeno, operada por la empresa Molymex, S.A. de C.V. ("Molymex"), ubicada en el municipio de Cumpas, en el estado de Sonora, México.

Según los Peticionarios, la autoridad en México ha dejado de aplicar las siguientes disposiciones de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (la "LGEEPA"): (i) los artículos 28, fracción III, 29 fracciones IV y VI, y 32,[2] al permitir la operación de la planta Molymex sin autorización en materia de impacto ambiental; (ii) el artículo 98, fracción I, al tolerar que la planta Molymex realice un uso de suelo incompatible con la vocación natural del mismo; (iii) el artículo 99, fracción III, toda vez que no se ha expedido el plan de desarrollo urbano de Cumpas, en el que se definan los usos, reservas y destinos del suelo; (iv) el artículo 112, fracción II, al omitir definir las zonas en las que se permita la instalación de industrias contaminantes; (v) el artículo 153, fracción VI, ya que se ha permitido que los residuos generados durante el proceso de tostación de molibdeno (supuestamente introducidos al

1. Véase el apartado 7.2 de las Directrices.
2. Aunque los Peticionarios mencionan estos tres artículos, las transcripciones que aparecen en la petición corresponden al texto de la LGEEPA anterior a las reformas publicadas en el Diario Oficial de la Federación el día 13 de diciembre de 1996. Esto sin embargo, no modifica sustancialmente el sentido de los argumentos de los Peticionarios, tanto por la naturaleza de los argumentos, como debido a que el texto vigente de la LGEEPA incorpora en sus artículos 29 y 30, el contenido de los anteriores artículos 28, 29 y 32.

país bajo el régimen de importación temporal) permanezcan en México; (vi) el artículo 153, fracción VII, al otorgar autorizaciones a Molymex para la importación de materiales supuestamente peligrosos, sin que se haya garantizado el cumplimiento de la normatividad aplicable, ni la reparación de los daños y perjuicios que pudieran causarse en el territorio nacional.

Asimismo, los Peticionarios argumentan supuestas violaciones al cumplimiento de la norma oficial mexicana *NOM-022-SSA1-1993- Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto al bióxido de azufre (SO2). Valor normado para la concentración de bióxido de azufre (SO2) en el aire ambiente, como medida de protección a la salud de la población* (la "NOM-022-SSA1-1993").

Finalmente, los Peticionarios solicitan al Secretariado la elaboración de un informe en los términos del artículo 13 del Acuerdo. Sobre este punto, en su determinación del 13 de julio de 2000, el Secretariado informó a los Peticionarios que dicha consideración se haría al concluirse el proceso conforme a los artículos 14 y 15 del ACAAN.

III. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

Artículo 14(1) del ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
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> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Previamente, en la Determinación del Secretariado conforme al artículo 14(1) del ACAAN, del 13 de julio de 2000, se expusieron las razones por las que la Petición en su versión inicial, cumple los requisitos señalados en ese artículo, salvo el contenido en el inciso e).

Después de analizar la información adicional proporcionada por los Peticionarios, en opinión del Secretariado se encuentra satisfecho el requisito establecido en el referido inciso e) del artículo 14(1) del Acuerdo, toda vez que los Peticionarios manifiestan que el asunto ha sido previamente comunicado a las autoridades pertinentes en México a través de diversos procedimientos administrativos y judiciales, y acompañan copia de 24 documentos, incluyendo comunicaciones a las autoridades y las respuestas que han recibido de aquéllas. Si bien todos los documentos se refieren a la planta Molymex, cabe mencionar que algunos parecen referirse a asuntos que no se plantearon específicamente en la Petición como omisiones en la aplicación efectiva de la legislación ambiental.[3]

Artículo 14(2) del Acuerdo

Para determinar si la petición amerita una respuesta de la Parte, el Secretariado debe guiarse por las consideraciones que establece el artículo 14(2). Dichas consideraciones son las siguientes:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

3. Véase por ejemplo, el anexo listado en noveno lugar, de la información adicional a la petición.

Al hacer esas consideraciones, el Secretariado contempló lo siguiente.

Los Peticionarios afirman que existen riesgos a la salud de los pobladores del municipio de Cumpas, Sonora, y diversos impactos ambientales negativos en dicha localidad, supuestamente derivados de las emisiones de trióxido de molibdeno y bióxido de azufre producidas por Molymex.[4] Según los Peticionarios, estos supuestos riesgos e impactos ambientales han sido tolerados por las autoridades en México, en violación a diversas disposiciones ambientales, que se refieren a la evaluación del impacto ambiental, al uso del suelo, a la importación de residuos peligrosos y a la emisión de contaminantes a la atmósfera. En términos de daños directos a la Academia Sonorense de Derechos Humanos, y a Domingo Guitérrez Mendívil, quien la preside, la Petición indica que el hijo menor de éste último ha sufrido algunos efectos a la salud,[5] aunque la Petición se refiere, más bien, a daños y riesgos sufridos en general por los habitantes del poblado de Cumpas, Sonora. La Petición afirma que desde 1994 los habitantes de Cumpas han reclamado de manera constante la supuesta contaminación producida por Molymex.[6] Los daños a que se refieren los Peticionarios pueden resumirse como sigue.

Los Peticionarios afirman que se ha modificado la actividad que realiza la planta Molymex sin contar con autorización en materia de impacto ambiental, por lo que se han omitido aplicar los artículos 28, fracción III, 29 fracciones IV y VI, y 32 de la LGEEPA.[7] De la Petición y los documentos anexos, se desprende que la empresa Molymex se constituyó en 1979, que la planta Molymex operó hasta 1990 a base de material con una pureza de 92 %, extraído de la mina Cumobabi, que dejó de operar en 1991. Según la Petición, la planta Molymex reinició su operación en 1994, utilizando una materia prima distinta a la original, que aseveran es un residuo de la fundición de cobre que contiene 30 % de impurezas, incluyendo arsénico, cadmio, mercurio, plomo y selenio, (en cantidades que no se indican).[8]

Los Peticionarios también aseveran que las autoridades no han aplicado de manera efectiva los artículos 99, fracción III y 112, fracción II, de la LGEEPA al no establecer los usos de suelo en los planes de

4. Páginas 4 y 5 de la petición, y artículo 14(2)(a) del ACAAN.
5. Página 4 de la petición.
6. Página 3 de la petición.
7. Página 5 de la petición.
8. Página 3 de la petición.

desarrollo urbano del municipio de Cumpas, conforme a los criterios para el uso sustentable del suelo y la prevención de la contaminación ambiental, contenidos en esos artículos, y señalando las zonas en que se permita la instalación de industrias contaminantes.[9] Afirman que, contrariamente a lo dispuesto por el artículo 98, fracción I, de la LGEEPA, la operación de Molymex no es compatible con la vocación natural del suelo, que es ganadera.[10] La Petición indica también, que la población originalmente se ubicaba a 2 km. de la planta, pero que ahora la mancha urbana se extiende a 500 m. de la misma.[11]

Los Peticionarios afirman que se ha omitido aplicar algunas disposiciones de la legislación ambiental sobre materiales y residuos peligrosos (artículos 153, fracción VI y VII, de la LGEEPA). Afirman que Molymex ha importado materiales supuestamente peligrosos, sin garantizar el cumplimiento de la normatividad aplicable, ni la reparación de los daños y perjuicios que pudieran causarse en el territorio nacional,[12] y que los residuos generados a partir de esos materiales (supuestamente introducidos al país bajo el régimen de importación temporal) no se han repatriado.[13]

Finalmente, los Peticionarios argumentan que la norma oficial mexicana NOM-022-SSA1, que se refiere a la protección de la salud de la población respecto del bióxido de azufre (SO_2) en el aire ambiente, no se aplicado de manera efectiva. Afirman que se emite este contaminante por encima de lo permitido por la norma, así como otros contaminantes como partículas suspendidas totales, y partículas de trióxido de molibdeno y de sulfuro de molibdeno. Aseveran que en las modificaciones realizadas a la licencia de funcionamiento de Molymex, la autoridad autorizó a dicha empresa para que viole los límites máximos de emisión establecidos en la NOM-022-SSA1.[14] Señalan que la emisión de estos contaminantes ha causado daños a la salud, principalmente enfermedades respiratorias, y al medio ambiente, afectando a los cultivos y al ganado. También indica la Petición, que el trióxido de molibdeno tiene efectos tóxicos generales, y que el sulfuro de molibdeno puede causar daños al hígado y al riñón, y tener efectos carcinogénicos y teratogénicos.[15]

9. Página 9 y 10 de la petición.
10. Página 8 de la petición.
11. Página 3 de la petición.
12. Página 12 de la petición.
13. Página 11 de la petición.
14. Página 5 de la petición.
15. Página 4 de la petición.

Cabe mencionar también, algunas acciones gubernamentales relacionadas con el asunto, que se mencionan en la Petición y sus anexos: la expedición de una licencia de funcionamiento el 11 de febrero de 1994, y sus modificaciones el 27 de mayo de ese año y el 17 de junio de 1997; una nota de la Profepa del 1º de abril de 1995, en que se plantean los problemas de contaminación generados por la planta Molymex; la clausura parcial temporal del horno de tostación de Molymex del 3 al 7 de abril de 1995; una nota de Semarnap sobre el caso de Molymex, sin fecha pero aparentemente posterior al 22 de mayo de 1998; una autorización en materia de impacto ambiental del 29 de enero de 1999 para un proyecto de ampliación de la planta Molymex.

Por lo que se refiere al artículo 14(2)(b) del ACAAN, el Secretariado consideró que la aplicación efectiva de la legislación para la protección de la salud humana y el medio ambiente respecto de emisiones contaminantes a que se refiere esta Petición, es un asunto cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del Acuerdo. En particular, el Secretariado considera que los asuntos que esta Petición plantea, relacionados con la aplicación efectiva de los límites de emisión de contaminantes establecidos para la protección de la salud, de los requerimientos de evaluación del impacto ambiental, y de los criterios para la planeación adecuada del uso del suelo y para la prevención de la contaminación, son relevantes a las metas del ACAAN. Específicamente, los artículos 1 y 5 del Acuerdo establecen, entre otras metas, las de alentar la protección y el mejoramiento del ambiente para el bienestar de las generaciones presentes y futuras, de mejorar la aplicación y la observancia de las leyes ambientales, y de lograr niveles altos de protección del ambiente y de cumplimiento de las leyes de las Partes.

Con relación a la consideración prevista en el inciso c) del artículo 14(2) del ACAAN, la Petición aborda los recursos disponibles conforme a la legislación de la Parte, a los que se ha acudido, y el Secretariado considera que se ha hecho un esfuerzo razonable para acudir a ellos.[16] Los Peticionarios indican que diversos procedimientos administrativos y judiciales han sido iniciados por algunos individuos y organizaciones ciudadanas con motivo de las actividades de Molymex, entre los cuales se incluyen los siguientes: las denuncias populares números 9601/002/2623 del 20 de diciembre de 1995, 9709/094/2623 del 8 de septiembre de 1997 y 9911/160/2623 del 17 de noviembre de 1999; la denuncia penal de fecha 15 de noviembre de 1999, con base en la cual se inició la

16. Véanse también los apartados 5.6(c) y 7.5 de las Directrices.

averiguación previa penal número A.P. 1145/HM-IV/99; los juicios de amparo números 168/2000 ante el Juez Segundo de Distrito en el Estado de Sonora, del 25 de febrero de 2000 y 154/2000 ante el Juez Tercero de Distrito en el Estado de Sonora, concluido mediante sentencia el día 6 de marzo de 2000.[17] Es preciso hacer notar que algunos de esos procedimientos iniciados por los Peticionarios, parecen estar pendientes de resolución a la fecha de esta Determinación.[18] En opinión del Secretariado es importante considerar la posibilidad de que elaboración de un expediente de hechos respecto de una petición pudiera duplicar o interferir con un procedimiento pendiente.[19] Sin embargo, el Secretariado considera también, que es apropiado, en su caso, hacer esa consideración al momento del análisis de la petición a la luz de la respuesta proporcionada por la Parte para determinar si se amerita elaborar un expediente de hechos, y no en la consideración de si se amerita solicitar una respuesta a la Parte. En particular, es claro que en su respuesta conforme al artículo 14(3), la Parte podrá proporcionar al Secretariado información relevante a esa consideración.

Finalmente, la Petición no parece basarse exclusivamente en noticias de los medios de comunicación, aunque los Peticionarios sí hacen referencia a algunas noticias de ese tipo.[20]

El Secretariado, conforme a lo anteriormente expuesto y considerando en conjunto los factores del artículo 14(2) del ACAAN, determina que la Petición amerita solicitar una respuesta de la Parte, respecto de algunas de sus aseveraciones. Al parecer del Secretariado, en el caso de dos aseveraciones, la Petición no logra establecer con certeza que exista una relación entre los hechos que plantea y una disposición legal ambiental aplicable. En primer lugar, respecto de las aseveraciones de que México incurre en una omisión en la aplicación efectiva de la legislación ambiental al tolerar que la planta Molymex realice un uso de suelo incompatible con la vocación natural del mismo, porque no se desprende de la información proporcionada, que las actividades de Molymex son legalmente incompatibles con la vocación natural de los predios que ocupa. Y en segundo lugar, respecto de la aseveración de

17. Véase la información adicional a la petición.
18. En particular, el juicio de amparo número 168/2000 y la denuncia penal presentada el 15 de noviembre de 1999, listados respectivamente, como anexos séptimo y décimo tercero de la información adicional a la petición.
19. Véase la Determinación del Secretariado de conformidad con el artículo 15(1) con relación a la petición SEM-96-003/The Friends of the Oldman River (2 de abril de 1997).
20. Véase el artículo 14(2)(d) del ACAAN y páginas 5 de la información adicional a la petición.

que los materiales que ha importado Molymex son materiales o residuos peligrosos conforme a la legislación aplicable, y que se han importado bajo el régimen de importación temporal. Por lo tanto, sobre estos alegatos, que se refieren a los artículos 98, fracción I, y 153, fracciones VI y VII de la LGEEPA, el Secretariado determina que no se amerita solicitar una respuesta a la Parte.

Por el contrario, y habiendo considerado en conjunto los factores del artículo 14(2) del ACAAN según lo anteriormente expuesto, el Secretariado determina que la Petición amerita solicitar una repuesta de la Parte respecto de los alegatos relativos a los artículos 28, fracción III, 29 fracciones IV y VI, 32, fracción III,[21] y 112, fracción II de la LGEEPA y la norma oficial mexicana NOM-022-SSA1.

IV. DETERMINACIÓN DEL SECRETARIADO

Después de revisar la información adicional a la Petición, recibida el 26 de julio de 2000, conforme al apartado 6.2 de las Directrices, el Secretariado determina que la Petición SEM-00-005 cumple con todos los requisitos contenidos en el artículo 14(1) del ACAAN. Asimismo, el Secretariado determina, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, que la Petición amerita solicitar una respuesta a la Parte interesada sobre algunas de las aseveraciones que contiene la Petición SEM-00-005, presentada por la Academia Sonorense de Derechos Humanos, A.C., et. al.

A través de esta Determinación, el Secretariado solicita una respuesta de México respecto a los alegatos de esta Petición SEM-00-005, relativos a la supuesta omisión en la aplicación efectiva de los artículos 28, fracción III, 29 fracciones IV y VI, 32, fracción III,[22] y 112, fracción II de la LGEEPA y la norma oficial mexicana NOM-022-SSA1. La Parte podrá proporcionar una respuesta dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a ella, conforme a lo establecido en el artículo 14(3) del ACAAN.

Con esta Determinación se envía a la Parte interesada, una copia de la Petición y de la información adicional proporcionada por los Peticionarios, así como de los anexos respectivos.

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21. Ahora artículos 29 y 30 de la misma ley.
22. *Idem*.

Sometido respetuosamente a su consideración, el 19 de octubre de 2000.

Secretariado de la Comisión para la Cooperación Ambiental

por: Carla Sbert
Oficial Jurídica de la Unidad sobre Peticiones Ciudadanas

c.c.: Lic. José Luis Samaniego, SEMARNAP (con anexos)
Sra. Norine Smith, Environment Canada
Sr. William Nitze, US-EPA
Sra. Janine Ferretti, Directora Ejecutiva de la CCA
Lic. Domingo Gutiérrez Mendívil, Academia Sonorense de Derechos Humanos

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-00-005** (Molymex II)
Submitters:	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Party:	United Mexican States
Date of Receipt:	6 April 2000
Date of this Notification:	20 December 2001

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (the "NAAEC"), the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform the Council and provide its reasons (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)). The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's Article 15(1) analysis with respect to the submission filed 6 April 2000 by Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendivil (the "Submitters") in accordance with NAAEC Articles 14 and 15.

The submission asserted that Mexico is failing to effectively enforce its environmental law in relation to the operation of a molybdenum plant by the company Molymex, S.A. de C.V. ("Molymex"), located in the municipality of Cumpas, Sonora, Mexico.

On 13 July 2000, the Secretariat determined that the submission did not meet all the requirements of NAAEC Article 14(1). Based on section 6.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines"), the Submitters filed a revised submission containing additional information on 26 July 2000.

After consideration of this revised submission, the Secretariat determined on 19 October 2000 that the requirements of NAAEC Article 14(1) were met in respect of the alleged failures to effectively enforce Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112 of the General Law on Ecological Balance and Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), and Mexican Official Standard NOM-022-SSA1/1993, titled *Environmental health. Criterion for the assessment of ambient air quality with respect to sulfur dioxide (SO_2). Standard value for sulfur dioxide (SO_2) concentration in ambient air, as a public health protection measure.* ("NOM-022-SSA1-1993").[1] Furthermore, the Secretariat determined that in light of the criteria set out in Article 14(2), the submission warranted requesting a response from the Party as regards these provisions. On 18 January 2001, the Party filed its response with the Secretariat in accordance with NAAEC Article 14(3).

Having examined the submission in light of the Party's response, in accordance with NAAEC Article 15(1), the Secretariat hereby notifies Council that the submission warrants the development of a factual record with respect to the assertions for which the Secretariat considered the submission to warrant a response from the Party. The submission raises matters relating to the Molymex plant that the response of Mexico does not resolve, concerning the effective enforcement of Mexico's environmental laws governing environmental impact, the definition of zones in which polluting facilities may be sited, and the emission of SO_2

1. Published in the Official Gazette of the Federation (*Diario Oficial de la Federación*–- DOF) on 23 December 1994.

into the ambient air. The Secretariat considers that clarifying and documenting these matters in a factual record would advance the goals of the NAAEC of promoting transparency, public participation, and the effective enforcement of environmental law.

II. SUMMARY OF THE SUBMISSION

The submission refers to the enforcement of environmental law in connection with the Molymex plant, located in the vicinity of Cumpas, Sonora. Molymex, S.A. de C.V., was incorporated on 30 May 1979, and until 1990 operated a roasting furnace fed with ore of approximately 92 % purity. The ore was extracted from the Cumobabi mine, which closed in 1991. Starting in 1994, Molymex began to process molybdenum sulfide and unroasted molybdenum concentrate.[2] In 1998, the company was authorized to expand the plant, and added a second furnace. The authorized production at the plant increased from 7,500 tons per year in 1994 to 4,200 tons per month (50,400 tons per year) as of the completion of the authorized expansion project in 1999.[3] Since 1994, there have been constant complaints from the residents of Cumpas regarding the pollution generated by Molymex.[4]

The submission asserts that Mexican authorities failed to enforce the following provisions of the LGEEPA: (i) Articles 28 paragraph III, 29 paragraphs IV and VI, and 32, by allowing the Molymex plant to operate without an environmental impact authorization, despite the change in the nature of its operations from 1991 to 1994;[5] (ii) Article 98 paragraph I, by tolerating a land use by the Molymex plant that is incompatible with the appropriate categories of land use thereon;[6] (iii) Article 99 paragraph III, because of the failure to issue an urban development plan for Cumpas, defining the allowed and prohibited land uses;[7] (iv) Article 112 paragraph II, by failing to define the zones in which polluting facilities may be sited;[8] (v) Article 153 paragraph VI, since waste generated during the molybdenum roasting process (allegedly imported into the country under the temporary import regime) was allowed to remain in Mexico;[9] and (vi) Article 153 paragraph VII, by issuing authorizations to Molymex for the importation of allegedly hazardous materials without

2. The foregoing information from page 3 of the submission.
3. The foregoing information from page 8 of the submission.
4. Page 3 of the submission.
5. Page 5 of the submission.
6. Page 8 of the submission.
7. Page 9 of the submission.
8. Page 10 of the submission.
9. Page 11 of the submission.

requiring insurance in the event of non-compliance with the applicable law and to cover harm caused on national territory.[10] The Submitters further assert that Mexico authorized Molymex to violate the SO_2 concentration limits in ambient air established by Mexican Official Standard NOM-022-SSA1-1993, for the protection of public health.[11]

The Secretariat, after reviewing the submission and the additional information filed by the Submitters, requested a response from the Party regarding only the alleged failures to enforce LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112, as well as Mexican Official Standard NOM-022-SSA1/1993, for the reasons discussed in the Determination of 19 October 2000.

III. SUMMARY OF THE RESPONSE OF THE PARTY

The Secretariat received Mexico's response to the submission on 18 January 2001 (the "Response"). The Party argues that Molymex, when it commenced operating in 1979, was not required to obtain an environmental impact authorization, since such an obligation was not prescribed by any legal provision in the Mexican legal system at that time.[12] The Party asserts that obligating the company to submit to an environmental impact assessment procedure at present would amount to retroactive application of a law with prejudice to Molymex. This, it contends, would violate Article 14 of the Political Constitution of the United Mexican States (the "Constitution"). The Party further contends that environmental impact assessment is an exclusively preventive procedure.[13]

The Party states that the Molymex expansion project submitted for approval in 1998 was subjected to an environmental impact assessment procedure, since on that date the LGEEPA did in fact require it.[14]

Furthermore, the Party states that it did not default on its obligation to define a zone where polluting facilities may be sited, as prescribed by LGEEPA Article 112(II), since the municipalities are the level of government empowered by Mexican law to define such zones, and the Municipal President and Secretary of Cumpas issued a zoning permit to Molymex on 7 September 1998. This, argues the Party, "implies that, by means of this permit, the zone in which the company was permitted to situate its facility was defined.[15]"

10. Page 12 of the submission.
11. Page 5 of the submission.
12. Page 3 of the Response.
13. Page 4 of the Response.
14. Page 5 of the Response.
15. Page 11 of the Response.

Finally, the Party states that "the company has not violated the maximum contaminant limit for sulfur dioxide in ambient air established by the standard [NOM-022-SSAI/1993]" and states that at the Cumpas sampling point, the limit of 0.13 ppm of SO_2 was not exceeded during any 24-hour period between 1995 and 2000. According to the Response, during the same period, the annual arithmetic mean SO_2 concentration has not exceeded or equaled the limit of 0.03 ppm.[16]

The Party, in its Response, concludes that "the evidence and information provided and cited in this response to the Secretariat indicate that there is no failure to effectively enforce [Mexico's] environmental law.[17]"

IV. ANALYSIS

A. Introduction

The process in regard to this submission is currently at the NAAEC Article 15(1) stage. To reach this stage, the Secretariat must first determine that the submission meets the requirements of Article 14(1) and that it merits a response from the Party, in consideration of the criteria of Article 14(2).

On 13 July 2000, the Secretariat determined that the submission did not meet all the requirements of NAAEC Article 14(1),[18] but the requirements of NAAEC Article 14(1)(a), (b), (c), (d) and (f) were deemed to be met. As stated in that Determination, the submission was filed with the Secretariat by a person and a non-governmental organization, asserting that Mexico is failing to effectively enforce various articles of the LGEEPA and NOM-022-SSA1-1993. These provisions qualify as "environmental law" under the definition contained in NAAEC Article 45(2). The submission was filed in writing and in Spanish, the language designated by Mexico for such purposes. The Submitters clearly identify themselves in the submission, and at least Academia Sonorense de Derechos Humanos, A.C. is domiciled in the city of Hermosillo, Sonora, Mexico. The Secretariat determined that the information and documents provided by the Submitters are sufficient to enable the Secretariat to review the submission, with the exception of the alleged failure to effectively enforce LGEEPA Articles 98 paragraph I and 153 paragraph VII

16. Page 16 of the Response.
17. Page 17 of the Response.
18. SEM-00-005 (Molymex II), Secretariat's Determination under Article 14(1), (13 July 2000).

(i.e., the matter of Molymex having been allowed to carry on operations that are incompatible with the appropriate categories of land use, and the matter of authorizations having been issued to Molymex to import allegedly hazardous material without guaranteeing compliance with the applicable law, nor repair of any damage or injury that may be caused on national territory). The Secretariat concluded that the submission is not aimed at harassing industry, but rather at promoting the enforcement of environmental law in Mexico. However, the requirement of Article 14(1)(e) was deemed not to be met, since the submission did not assert that the matter had been communicated in writing to the relevant Mexican authorities.

To correct this deficiency, the Submitters filed a revised submission with the Secretariat on 31 July 2000 in accordance with section 6.2 of the Guidelines. The Submitters state that the matter has previously been communicated to the relevant authorities in Mexico through various administrative and judicial proceedings, and they attach copies of 24 documents, including letters to the authorities and the responses to those letters. Consequently, on 19 October 2000, the Secretariat determined that the submission as amended met all the requirements of NAAEC Article 14(1). At the same time, it determined that in regard to the alleged failures to effectively enforce LGEEPA Articles 98 paragraph I and 153 paragraph VII, the submission does not provide sufficient information.[19]

The Secretariat proceeded to evaluate the submission in view of the criteria set out in NAAEC Article 14(2), concluding in its Determination of 19 October 2000 that the submission warranted a response from the Party in respect of the alleged failures to effectively enforce LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112 paragraph II, as well as Mexican Official Standard NOM-022-SSA1/1993.[20] The Submitters assert the existence of health risks to the residents of Cumpas, Sonora, as well as various negative environmental impacts at that locality, allegedly caused by molybdenum trioxide and sulfur dioxide emissions produced by Molymex. The submission discusses the available remedies that have been pursued under the Party's law, and the Secretariat considers that a reasonable effort has been made to pursue them. The Submitters indicate that various administrative and judicial actions have been brought by different individuals and civic organizations in regard to Molymex's activities. The submission does

19. SEM-00-005 (Molymex II), Secretariat's Determination under Articles 14(1) and (2), (19 October 2000).
20. SEM-00-005 (Molymex II), Secretariat's Determination under Articles 14(1) and (2), (19 October 2000).

not appear to be based exclusively on media reports, although the Submitters do refer to certain reports of this type. Finally, the Secretariat considered that further study in this process, of the effective enforcement of the public health and environmental protection provisions referred to in the submission on pollutant emissions, environmental impact assessment requirements, and land use planning criteria, would advance the goals of the NAAEC.

As a consequence of that Determination, the Party filed its response with the Secretariat on 18 January 2001.

B. Why Development of a Factual Record is Warranted

In accordance with NAAEC Article 15(1), and in light of Mexico's Response, the Secretariat considers the submission to warrant the development of a factual record. The submission raises matters of effective enforcement that are not resolved by Mexico's Response. These matters relate to environmental impact assessment of the activities of Molymex that began in 1994; to the definition of zones in Cumpas in which polluting facilities may be sited, and to sulfur dioxide emissions repeatedly denounced by the residents of Cumpas (which the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) described in 1995 as violating the concentration limits for SO_2 in ambient air established to protect public health).

The response asserts that the environmental impact procedure is purely a preventive instrument that cannot be applied retroactively, and states that the environmental authority has other instruments at its disposal with which to control any impacts that may occur. The factual record is warranted to review the effective enforcement of the environmental impact provisions in the case of Molymex, including the matter of retroactivity vis-à-vis environmental impact, which is not resolved by the Party's Response.

The response does not clarify the matter of whether there exists a definition, based on general criteria, of the zones in Cumpas in which polluting facilities may be sited, nor where Molymex is located with respect to that general zoning, although the Party asserts that a zoning permit issued to Molymex establishes such zoning. The factual record would provide clarification on these matters.

Finally, Mexico's response asserts that the company has not violated Mexican Official Standard NOM-022-SSA1/1993, but it does not

include information on the specific measures taken in regard to the company (for example, any inspection reports or any reports on perimeter monitoring which the company allegedly filed with the authorities) to support that assertion. This information would be compiled in the factual record whose development is warranted in regard to this submission.

The examination of these issues as a whole would provide an understanding and an illustration of how the public health and environmental provisions relating to polluting facilities are applied to Molymex. The factual record would also compile additional information on the health and environmental effects identified by Profepa in 1995, which are attributed to Molymex by the Submitters. The factual record would provide a better understanding of the enforcement of the environmental law referred to in this submission to Molymex, contributing to its effective enforcement, and thereby advancing the goals of the NAAEC.

1. Alleged Failures to Effectively Enforce the LGEEPA Environmental Impact Provisions

LGEEPA Article 28 provides that anyone who carries out works or activities that may cause ecological imbalance or exceed the limits and conditions set out in the applicable environmental provisions shall obtain a prior environmental impact authorization. The activities of the chemical industry, which encompass the molybdenum roasting activity of Molymex, fall under this provision (pursuant to LGEEPA Article 28 paragraph III). Finally, the current Article 30 provides that in order to obtain an environmental impact authorization, the interested parties shall file an environmental impact statement with the Ministry of the Environment, Natural Resources and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*—Semarnap; the "Ministry" [21]).[22]

21. Now the Ministry of the Environment and Natural Resources (Semarnat).
22. The transcriptions appearing in the submission correspond to the text of the LGEEPA in force prior to the reform published in the DOF of 13 December 1996. This, however, does not substantially affect the force of the Submitter's arguments, due to both the nature of the arguments and the fact that the previous Articles 28, 29 and 32 are incorporated into the current LGEEPA Articles 29 and 30. Prior to the reform of December 1996, the equivalent provisions of the LGEEPA provided as follows:

    "Article 28.- The performance of public or private works or activities that may cause ecological imbalance, or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted by the Federation, requires the prior authorization of the federal government acting by the Ministry, the states, or the municipalities, according to the jurisdictions established by this

The Submitters argue that Molymex did not comply with these provisions, since "it has been carrying on its activities in the municipality of Cumpas, Sonora without an environmental impact authorization.[23]" In its response, the Party responds to this assertion with three arguments: first, that environmental impact assessment did not apply because it was not required when Molymex commenced its operations; second, that environmental impact assessment is a purely preventive procedure; third, that the relevant environmental impact provisions were in fact enforced in regard to Molymex, since the expansion project of 1998 did undergo assessment and obtained the relevant authorization.

In its first argument, the Party states that when Molymex commenced its operations in 1979, "there was no obligation in Mexican law to obtain an environmental impact authorization prior to initiating construction," and for that reason, this requirement was not imposed on the company.[24] Indeed, both the submission and the response indicate that Molymex commenced its operations in 1979, when no legal provision required it to file an environmental impact statement.

However, the submission specifically contends that the authority should have required Molymex to file an environmental impact statement once that obligation was incorporated into Mexican law in 1982,[25] and especially when the company resumed its operations in 1994 after having been idle since 1990. In this regard, the Party cites the first paragraph of Article 14 of the Constitution, which states that "no law may be given retroactive effect with prejudice to any person." With reference to this article, the Party maintains that it cannot legally require Molymex to submit an environmental impact statement, since when the company commenced its operations, there was no such requirement in law. In support of its assertion, the Party cites a 1921 decision of the Mexican

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Law, and all such works or activities shall comply with any requirements imposed upon them once the potential environmental impact is assessed, without prejudice to any other authorizations within the purview of the competent authorities." Article 29(III) invested the Federal Government with the responsibility of assessing environmental impact, "particularly with regard to the following activities: III. The chemical, petrochemical, steel, pulp and paper, sugar, beverage, cement, automotive, and electricity generation and transmission industries." Article 32 provided that "in order to obtain the authorization contemplated in Article 28 hereof, the interested parties must file an environmental impact statement with the competent authority."

23. Page 6 of the submission.
24. Page 3 of the response.
25. The environmental impact procedure first appears as a requirement in the Federal Environmental Protection Law (*Ley Federal de Protección al Ambiente*) of 1982 and, in more detailed form, in the LGEEPA of 1988.

Supreme Court (*Suprema Corte de Justicia de la Nación*), which lays down the prohibition against retroactive application of law.[26]

The Submitters argue that the retroactive application of a law is valid in some cases. In justification, they cite two 1924 decisions in which the Supreme Court ruled that where public or societal interest so dictates, a court decision may be held to have retroactive effect.[27] The Party, in its response, does not refer to this argument of the Submitters, merely citing a previous decision to the contrary. It does not explain why the subsequent court decisions cited by the Submitters would not be applicable, even though these might support the application of the environmental impact procedure to activities that commenced before it was enacted.

Moreover, under the LGEEPA Environmental Impact Regulations (RIA) in force as of 8 June 1988 and until 29 June 2000,[28] the Party was empowered to require Molymex to file an environmental impact statement, even though the company's activities had commenced prior to the enactment of this requirement in Mexican law. Transitory Article 5 of the RIA empowered the Ministry to require an environmental impact statement even in cases of works or activities in place on 8 June 1988, provided that such works or activities met certain criteria set out in that article: (i) that they covered by Article 5 of those regulations, and (ii) that they cause ecological imbalance or exceed the limits or conditions set out in the environmental protection regulations and technical standards.[29]

26. Page 4 of the Response.
27. Page 7 of the submission.
28. The date when it was repealed by new regulations. We refer to these regulations and not the current ones, since those were in force when the submission was filed.
29. Transitory Article 5 provides as follows:
"Article 5.- In cases of works or activities *being carried out at the time this provision comes into force*, provided that they are contemplated by Article 5 of the Regulation and that they cause environmental imbalance or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted to protect the environment, the Ministry *may* require their owners or the persons carrying them out to file the general form of the environmental impact statement within a period not exceeding thirty working days from the notice of such requirement" (emphasis added). Article 5 of the Regulation states as follows:
"Article 5.- The following natural or legal persons shall possess prior environmental impact authorization from the Ministry: those who seek to carry out public or private works or activities that may cause environmental imbalance or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted by the Federation; they shall also fulfil any requirements imposed on them in relation to the matters under federal jurisdiction by virtue of Articles 5 and 29 of the Law, particularly the following:
...V. The chemical, petrochemical, steel, pulp and paper, sugar, beverage, cement, automotive, and electricity generation and transmission industries;..."

But most important, since operations at the plant were suspended in 1991 (although whether the suspension was total or partial is unclear), the application of the environmental impact procedure to the activities commenced in 1994 would not appear to be retroactive.

In sum, then, the assertion that the Party cannot legally apply the environmental impact procedure to the Molymex operations commenced in 1994 is questionable on at least three grounds. First, there are mutually contradictory judicial interpretations of the retroactivity prohibition contained in Article 14 of the Constitution, particularly where the public interest is at issue, as in the present case. Second, in cases of ongoing activities where the activity is interrupted, it is not clear that the application of a provision upon its resumption should be considered retroactive. Finally, RIA Transitory Article 5 authorized the Party in certain cases to apply the legal provisions concerning environmental impact retroactively.

Irrespective of the question of retroactivity, there are other factors that appear to indicate that it was appropriate for the authority to require Molymex to file an environmental impact statement. The Submitters assert that the Molymex plant operated until 1990 using material of 92 % purity extracted from the Cumobabi mine, which closed in 1991. According to the submission, Molymex resumed operations in 1994 using a different raw material which is a waste byproduct of the copper smelting process containing 30 % impurities, including arsenic, cadmium, mercury, lead and selenium (in quantities not indicated). The submission also asserts that Molymex operated a seven-hearth roasting furnace until 1991, but when it resumed its operations in 1994, it added three more hearths. Based on these facts, the Submitters argue that the Molymex plant's activity had changed, and as a consequence, the company should have been required to file an environmental impact statement for strict compliance with LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, and 32.[30]

Although the response does not make direct reference to these facts, its second argument about environmental impact relates to them. The response states that "any claim that environmental impact assessment should be applied to existing industrial activities that neither required an assessment at the time they commenced, nor were obligated to obtain any such authorization, *is contrary to the preventive nature* of this instrument" (emphasis added). The Party argues that environmental impact assessment "is of an exclusively preventive nature, and thus its

30. The foregoing information on pages 3-8 of the submission.

precepts and provisions are prior to works and activities, not subsequent." It further argues that "at all times, Semarnat has the power to control all the works and activities within its sphere of jurisdiction that may generate or are generating environmental impacts, using such instruments as licenses, permits, standards, economic instruments, registers, etc., above and beyond the environmental impact assessment procedure.[31]"

Despite the fact that the environmental impact assessment procedure is essentially preventive, as indicated above, in some circumstances such an instrument may be employed to assess the environmental consequences of an ongoing work or activity, or of changes to an activity. This is evidenced by the aforementioned RIA Transitory Article 5, which contemplates environmental impact assessment of activities already in process. Moreover, the Party adduces, as its third argument regarding this assertion, the fact that environmental impact assessment was applied to the Molymex expansion project of 1998.

The Party states that the Molymex expansion project filed in 1998 was indeed subjected to the environmental impact procedure,[32] since this was a requirement of the version of LGEEPA in force at that time.[33] The response does not explain why different treatment was accorded to the changes made in 1994, which were also subsequent to the entry into force of the LGEEPA. According to the submission, Molymex appears to have suspended its operations for three years (presumably the period 1991–1994) and to have resumed its operations using a different raw material from the original, with a roasting furnace consisting of ten hearths instead of the original seven.[34] Clearly, the activity with which Molymex resumed its operations is different from the previous one, in terms of both the raw material used and the production volume (both having an obvious effect on the type and volume of the plant's potential emissions). It cannot be deduced from the response, nor from the environmental impact authorization itself, that the environmental impact assessment process for the expansion project of 1998 covered the changes of 1994. Consequently, the matters raised by the Submitters regarding the effective enforcement of the environmental impact provisions with relation to the activities commenced in 1994 remain unresolved, since these activities are different from the expansion project.

31. The foregoing information on page 5 of the Response.
32. The environmental impact authorization was issued to Molymex on 29 January 1999.
33. Page 5 of the Response.
34. Pages 3 and 7 of the submission.

In light of the foregoing, the three arguments adduced by the Party in its response do not convincingly address the assertion that Mexico is failing to effectively enforce the environmental impact assessment procedure in regard to the Molymex plant. In light of the response and the foregoing reasoning, the Secretariat considers the development of a factual record in regard to the enforcement of LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, and 32 paragraph III to be warranted in respect of Molymex's operations. In the preparation of the factual record, additional information would be obtained on the activities with which Molymex resumed its operations in 1994, and the application of the environmental impact assessment procedure to these activities would be reviewed.

2. *Alleged Failures to Effectively Enforce LGEEPA Article 112 paragraph II*

LGEEPA Article 112 paragraph II states as follows:

> Article 112.- In respect of air pollution prevention and control, the governments of the States, the Federal District and the Municipalities, in accordance with the distribution of powers established by Articles 7, 8 and 9 of this Law, as well as the relevant local laws:
>
> > II. Shall apply *general criteria* on air quality protection *in the urban development plans* under their jurisdiction, *defining zones* in which polluting facilities may be sited (emphasis added).

The Submitters contend that the Municipality of Cumpas, in violation of LGEEPA Article 112 paragraph II, did not issue the municipal urban development plan, and thus it failed to define the zones in which polluting facilities may be sited.[35]

The Party states in its response that "within its scope of jurisdiction and by means of City Council Resolution Number Nineteen, Special Session no. Eleven of 4 September 1998 (sic), the President and Municipal Secretary of Cumpas, Sonora, signed document no. 854-98 of 7 September 1998, whereby an industrial land use permit was issued to the Company; this permit may be implicitly construed as the instrument used to define the zone in which the Company was permitted to situate its facility.[36]"

35. Page 11 of the submission.
36. Page 11 of the Response.

The provision in question establishes the municipal authority's responsibility to enact a general legal provision that defines the territorial parameters governing the authorities and private parties in regard to the siting of polluting facilities.[37] From paragraph II of that article and related provisions, it is clear that the parameters contained in the urban development plans are provisions of an impersonal, general and abstract nature.

In contrast, a land use permit is a personalized, individualized, concrete provision which, like any such provision, is based on a general standard. Therefore, one cannot consider that the requirement of issuing general criteria that define the zones in which polluting facilities may be sited, as prescribed by LGEEPA Article 112 paragraph II, is met by issuing a land use permit.

Notwithstanding the foregoing, it should be noted that the submission contains contradictory statements on this point. On the one hand, the Submitters argue that the Municipality of Cumpas "did not issue the municipal urban development plan," and that therefore, "it did not define the zones in which polluting facilities may be sited." On the other hand, it states that the urban development masterplan for Cumpas establishes a zone "devoted to industrial use" and that Molymex is located outside of that zone.[38]

The Party, in its response, neither denies nor affirms the existence or applicability of that urban development masterplan for Cumpas, nor does it clarify whether that plan contains definitions of zones in which polluting facilities may be sited. Based solely on the Submitters' assertions,[39] it would appear that the municipal authority did fulfill its

37. This is a local power by virtue of Article 115(V)(a) of the Constitution, which states:
"V. The Municipalities, under the terms of the applicable federal and state laws, are empowered to:
"a) Formulate, approve and administer zoning schemes and municipal urban development plans;"
This same power is reiterated in Article 136(VIII) of the Political Constitution of the State of Sonora; Article 37(V) of the Organic Law of Municipal Administration (*Ley Orgánica de Administración Municipal*) (of the State of Sonora); and Article 6(X) of the Sonora State LGEEPA. The government of the State of Sonora is empowered to establish a Sectoral Urban Development Program and "to cooperate with the municipalities in the definition of standards to govern projects carried out by the public, private and civic sectors in relation to urban development." (Article 29(IV) of the Organic Law of the Executive Branch of the State of Sonora (*Ley Orgánica del Poder Ejecutivo del Estado de Sonora*).
38. The foregoing information from page 11 and Appendix IV of the submission.
39. The submission attaches a copy of a document from November 1980 titled "Urban Development Masterplan, Municipality of Cumpas, Strategic Guidelines" (Appendix IV), but that document is incomplete, consisting of only 3 poorly legible pages.

responsibility to establish a specific zone in which polluting industrial activities may be carried on.

Neither is it possible to determine from the information provided by the Submitters and the Party whether the Molymex plant is improperly located. While a zoning map and two photographs are annexed to the submission,[40] it is impossible to discern from them whether Molymex is or is not located in a zone in which polluting facilities may be sited.

Considering that the mere issuance of a land use permit does not satisfy the obligations established by LGEEPA Articles 112 paragraph II, additional information must be gathered to determine whether the municipal urban development plan defines zones in which polluting facilities may be sited, and whether the Molymex plant is located outside of such zones. This matter should be relatively easy to clarify, and would be appropriate to do so in the factual record that is warranted in regard to the submission.

3. Alleged Failures to Effectively Enforce NOM-022-SSA1/1993

NOM-022-SSA1-1993 establishes that:

> The concentration of sulfur dioxide as an air pollutant shall not exceed the limit of 0.13 ppm, or the equivalent of 341 $\mu g/m^3$ in 24 hours once a year, and 0.03 ppm (79 $\mu g/m^3$) in annual arithmetic mean, for the protection of the health of the susceptible population.[41]

The Submitters append to their submission, and the Party to its Response, an operating permit issued 11 February 1994 by means of *oficio* No. DS-139-4-SPA-126, whose condition no. XVII sets out the following concentration limits for sulfur dioxide from the molybdenum disulfide roasting process: 0.065 % in volume, at startup, shutdown or machine failure in any 6-hour period, and 0.13 ppm during a 24-hour period. This operating permit was amended numerous times:

- On 27 May 1994, the SO_2 concentration limit was replaced by 650 ppmv (parts per million by volume) for 6 hour average, in force as of 1 May 2005.[42]

40. Appendices I–III of the submission.
41. Point 4, "Specifications", of NOM-022-SSA1-1993.
42. Page 3 of Appendix 5 of the Response.

- The *oficio* of 3 April 1996 changes the deadline for bringing the emissions of the Molymex roasting furnace into compliance to 1 October 1997.[43]

- The operating permit was amended again on 30 May 1996, but the limit for sulfur dioxide emissions was maintained at 650 ppmv, with a deadline for compliance of 31 December 1997. The same permit grants a deadline of 9 December 1996 for installation of a stack for compliance with NOM-022-SSA1-1993.[44]

- The *oficio* of 17 June 1997 extends the deadline for compliance with the concentration limit of 650 ppmv of sulfur dioxide to 1640 days, starting on 31 December 1997 (i.e., until mid-2002), and additionally authorizes the plant to operate at its installed capacity. The *oficio* further indicates that the company shall comply with the concentration limits for SO_2 in ambient air established in *oficio* DFS-D-0114-97, although the Secretariat ignores what those limits are because it was not provided a copy of this *oficio*.[45]

- On 29 January 1999, the molybdenum sulfide roasting capacity was increased to 4,200 tons per month, leading to an increase in molybdenum trioxide production from 15 to 40 million pounds per year, following the installation of the second roaster (expansion project of 1998).[46]

- Finally, on 29 November 2000, the operating permit was revised to a production level of 30,000 tons per year of molybdenum trioxide. With respect to SO_2, this revision again maintains the limit of 650 ppmv, with a deadline for compliance of 31 December 2001.[47]

Regarding verification of Molymex's compliance with the applicable environmental law and the conditions and measures imposed by the authorities, the only document appended to Mexico's response is a report sent to the Semarnap Legal Affairs Branch (*Dirección General de Asuntos Jurídicos*) on 17 January 2001, from the State Deputy Attorney for Industrial Auditing (*Subdelegación de Verificación Industrial*) of the Sonora State Profepa Office.[48] The response and that document state that the

43. Page 2 of Appendix 7 of the Response.
44. Pages 5–6 of Appendix 6 of the Response.
45. Page 2 of Appendix 8 of the Response.
46. Page 3 of Appendix 1 of the Response.
47. Pages 2 and 9 of Appendix 9 of the Response.
48. Appendix 10 of the Response.

company is in compliance with its air emissions obligations[49] as well as with certain conditions of its operating permit. According to the report, the company filed the results of the perimeter monitoring stations with the authority as of October 1994, although neither those results nor any documents relating to acts of inspection and monitoring whereby the authorities verified compliance by the company are annexed to the response.

Meanwhile, the Submitters transcribe in their submission various portions of a document produced by Sonora Branch Office B39 of the Office of Profepa in April 1995. These transcriptions indicate that the environmental authority of Mexico "authorized the company to violate Mexican Official Standard NOM-022-SSA1/1993.[50]"

NOM-022-SSAI-1993 is a mandatory standard whose enforcement is not left to the discretion of the authorities, and which does not allow for extensions.[51] Yet Molymex was granted extensions for compliance with the applicable concentration limits, and the Party does not explain in its response how those limits and extensions make for the effective enforcement of NOM-022-SSA1-1993.[52] First, the limit established by the standard refers to concentrations in ambient air, whereas the limits and extensions granted by means of *oficios* DFS-D-0986-97 and DS-SMA-UNE-LF-282 refer to concentrations at the stack. The Party does not provide information on the relationship between stack emissions and compliance by the company with NOM-022-SSA1/1993. In addition, the

49. Specifically, that document asserts compliance with Article, 13(I) and (II), 16, 17(I)–(VIII), 23, and 26 of the LGEEPA Regulation respecting Air Pollution Prevention and Control *(Reglamento de la LGEEPA en Materia de Prevención y Control de la Contaminación de la Atmósfera*) (presumably because the document does not so specify).

50. The foregoing information from pages 4–5 of the submission.

51. According to the Federal Metrology and Standardization Law (*Ley Federal sobre Metrología y Normalización*), compliance with the Mexican Official Standards (such as NOM-022-SSAI-1993) is not voluntary, and the authority is obligated to enforce and guarantee compliance with them. In this regard, Article 52 of that Law states: "Article 52.- All products, processes, methods, facilities, services and activities shall comply with the Mexican Official Standards." In addition, NOM-022-SSAI-1993 states that: "This Mexican Official Standard shall be observed by the federal and local authorities responsible for enforcement and assessment of air quality for the purposes of public health protection... The competent authorities, within the scope of their powers, shall enforce compliance with this Mexican Official Standard... This Mexican Official Standard comes into force as a mandatory standard on the day following its publication in the Official Gazette of the Federation."

52. It can be discerned from the documents relating to the operating permit that the authority, in deciding to grant the permit, took account of the calculations performed by the company on dispersion of pollutants (including SO_2), but nowhere is the relationship between the limits established for stack emissions and compliance with the ambient air concentration limits explained.

information provided with the response in regard to measurements of SO_2 in ambient air is scant. The Party does no more than assert, without attaching supporting information, that "the State Profepa Office in Sonora reported that in view of the annual results from 1995 to 2000 at each of the four perimeter monitoring stations, the sulfur dioxide concentrations are within the limits established in the aforementioned official standard [referring to NOM-022-SSA1/1993].[53]" Notwithstanding this statement, the question of whether the operating permit authorizes the company to produce emissions above the limits for human health protection established by NOM-022-SSA1-1993, as well as the question of how that authorization would amount to effective enforcement of that standard, remain unresolved.

In light of the foregoing, and despite the information provided by the Party, the matters raised by the submission in regard to the alleged failure to effectively enforce NOM-022-SSA1/1993 remain unresolved. It would be appropriate to address these matters in the factual record concerning this submission. In particular, the factual record should present information on the relationship between the SO_2 emissions permitted to Molymex and the observance of the maximum SO_2 concentration in ambient air as established by NOM-022-SSA1/1993 for the protection of human health. Likewise, further information would be gathered on measurements and other acts of enforcement carried out with respect to stack emissions and ambient SO_2 concentration, and the concrete results of such measurements, so as to illustrate the Party's assertion of compliance on the part of Molymex and effective enforcement of the NOM in question. Finally, the factual record would document the alleged human health and environmental effects or risks that the Submitter, and previously the Mexican environmental authority, attributed to SO_2 emissions from the Molymex plant.

On balance, although the Submitters did not provide overwhelming evidence of failures to effectively enforce the environmental law on the part of Mexico with respect to Molymex, the Secretariat considers that the Profepa memorandum on which the Submitters base the central concerns of their submission raises important matters that remain unresolved relating to the effective enforcement of environmental law in regard to Molymex. In addition, the Secretariat finds that the development of a factual record on several of the assertions in this submission would help to resolve the concerns of the Submitters and certain members of the community of Cumpas, Sonora, resulting in greater transparency, public participation and effective enforcement of environmental law.

53. Page 16 of the Response.

V. RECOMMENDATION

For the reasons set forth in this notification, the Secretariat hereby informs the Council that in light of the response of Mexico, it considers the development of a factual record to be warranted for the assertions contained in submission SEM-00-005 regarding LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112, and in regard to Mexican Official Standard NOM-022-SSA1/1993, all in relation to the operation of the Molymex plant in Sonora, Mexico. The submission raises questions which the response leaves unresolved regarding the effective enforcement of environmental law with respect to the Molymex plant, in regard to the environmental impact authorization for activities commenced in 1994; the definition of zones in Cumpas in which polluting facilities may be sited; and the sulfur dioxide emissions that have been of constant concern for the population of Cumpas (which the environmental authority itself considers to have violated the SO_2 concentration limits in ambient air). The factual record would clarify unresolved matters and gather additional information on the effective enforcement of these provisions with respect to Molymex. This would serve to illustrate the enforcement of environmental law for the protection of public health and the environment, as it relates to polluting facilities, and thus contribute to effective enforcement and advance the goals of the NAAEC.

Respectfully submitted for your consideration on this 20th of December 2001.

Janine Ferretti
Executive Director

SEM-00-006

(Tarahumara)

SUBMITTERS:	COMISION DE SOLIDARIDAD Y DEFENSA DE LOS DERECHOS HUMANOS A.C. (COSYDDHAC)
PARTY:	United Mexican States
DATE:	9 June 2000
SUMMARY:	The Submitters allege a failure by Mexico to effectively enforce its environmental law by denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the State of Chihuahua. They particularly assert failures to effectively enforce environmental law relative to the citizen complaint process, to alleged environmental crimes and other to alleged violations with respect to forest resources and the environment in the Sierra Tarahumara.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (6 November 2001)	Determination that criteria under Article 14(1) have been met and determination pursuant to Article 14(2) that the submission merits requesting a response from the Party.

Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

Determinación en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. Petición:	**SEM-00-006** (Tarahumara)
Peticionario:	Comisión de Solidaridad y Defensa de los Derechos Humanos A.C. (COSYDDHAC)
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	9 de junio de 2000
Fecha de la determinación:	6 de noviembre de 2001

I. INTRODUCCIÓN

El 9 de junio del 2000, la "Comisión de Solidaridad y Defensa de los Derechos Humanos A.C." (la "Peticionaria"), presentó al Secretariado de la Comisión para la Cooperación Ambiental de América del Norte (la "CCA") una petición de conformidad con los artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo"). La Peticionaria asevera que México ha incurrido en omisiones en la aplicación efectiva de su legislación ambiental por la denegación de justicia ambiental a Pueblos Indígenas en la Sierra Tarahumara en el Estado de Chihuahua. En particular asevera omisiones en la aplicación efectiva de la legislación ambiental relacionada con el proceso de denuncia popular, presuntos delitos ambientales y otras supuestas violaciones relacionadas con los recursos forestales y el medio ambiente en la Sierra Tarahumara.

El artículo 14 del ACAAN faculta al Secretariado para examinar peticiones de cualquier persona u organización sin vinculación guber-

namental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN.

La petición original constaba de cinco capítulos y 45 páginas. Las *Directrices para la presentación de peticiones* (las "Directrices"), sugieren una extensión máxima de 15 páginas para la presentación de peticiones, excluyendo anexos e información de apoyo (véase el apartado 3.3 de las Directrices). El 19 de junio del 2000, el 20 de febrero del 2001, y el 6 de abril del 2001, el Secretariado solicitó a la Peticionaria que modificara la petición para corregir este defecto de forma. En su última comunicación, el Secretariado propuso a la Peticionaria un modo de proceder para reducir la petición y posteriormente comenzó la revisión conforme al artículo 14(1) con base en esa petición reducida.

Esta Determinación contiene el análisis de la petición con base en los artículos 14(1) y (2) del ACAAN. El Secretariado ha determinado que algunas de las aserciones de la petición no satisfacen los requisitos del artículo 14(1), mientras que otras sí los satisfacen y ameritan solicitar a México una respuesta atendiendo a los criterios del artículo 14(2).

II. RESUMEN DE LA PETICIÓN

En la petición, COSYDDHAC asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental en relación con el procesamiento efectivo de denuncias populares, la persecución de delitos ambientales, la consulta a Pueblos Indígenas previa a la expedición de permisos de tala y el acceso a la información ambiental[1]. Según la Peticionaria, la Parte está incurriendo en las siguientes omisiones en la aplicación efectiva de su legislación ambiental:

> ...
>
> A. Omisión de la Parte, en la aplicación efectiva del artículo 189 en relación con el 191 de la LGEEPA [*Ley General del Equilibrio Ecológico y la Protección al Ambiente*], en su aspecto de garantizar a los Pueblos Indígenas, en tanto grupos sociales, el acceso a la Justicia Ambiental

1. En la petición se cuentan al menos 112 situaciones concretas, considerando los ejemplos de la totalidad de los encabezados, donde se afirma que la Parte no aplicó su ley ambiental de manera efectiva. La estructura original de la petición dedicaba un capítulo de hechos (Capítulo III, ahora apéndice I) para narrar la historia procesal de cada una de las denuncias populares y acciones de la autoridad que se emplean como ejemplos para documentar cada una de las 21 aserciones (contenidas en el Capítulo IV que se conservó en el cuerpo de la petición).

por medio de la interposición de Denuncia Popular, o desde otra óptica, la omisión de la Parte al negarle a estos Pueblos interés jurídico en sentido lato, tanto como legitimatio ad processum, y legitimatio ad causam.

B. Omisión de la Parte, en la aplicación efectiva del artículo 189, en relación con el 190 y 191, todos de la LGEEPA, relativa a la negativa de admitir una Denuncia Popular que cumple con todos los requisitos legales.

C. Omisión de la Parte en la aplicación efectiva del artículo 176 de la LGEEPA, en su aspecto de garantizar a los afectados con motivo de una resolución final dictada en un procedimiento administrativo, el acceso a la Justicia Ambiental por medio de la interposición del Recurso de Revisión, en contra de aquélla, o desde otra óptica, la omisión de la Parte al negarle a los Pueblo Indígenas, interés jurídico en sentido lato, tanto como legitimatio ad processum, y legitimatio ad causam, en la materia señalada.

D. Omisión de la Parte en la aplicación efectiva del artículo 176 de la LGEEPA, relativa a que a todo Recurso de Revisión debe recaer una resolución que ponga fin al mismo.

E. Omisión de la Parte en la aplicación efectiva del artículo 15.2 del Convenio 169 de la OIT [Organización Internacional del Trabajo], en relación con autorizaciones otorgadas para el aprovechamiento de recursos forestales maderables.

F. Omisión de la Parte en la aplicación efectiva del artículo 199 en relación con el 189 de la LGEEPA, relativa a la falta de resolución o conclusión de Denuncias Populares.

G. Omisión de la Parte en la aplicación efectiva del artículo 418 del CFPP (sic), en lo tocante a no participar al MP [Ministerio Público] Federal, la probable existencia de delitos ambientales consistentes en el desmonte, destrucción de vegetación natural y cambio de uso de suelo sin contar con autorización, a pesar de haber tenido conocimiento de los mismos en ejercicio de funciones.

H. Omisión de la Parte en la aplicación efectiva del artículo 418 del CPF, en lo tocante al desmonte de terreno, y cambio de uso de suelo, sin autorización de la Ley Forestal.

I. Omisión de la Parte en la aplicación efectiva del artículo 418 del CPF, en lo tocante a no participar al MP Federal, la probable existencia de delitos ambientales consistente en cortar, arrancar, derribar o talar árboles sin autorización, a pesar de haber tenido conocimiento de los mismos en ejercicio de funciones.

J. Omisión de la Parte en la aplicación efectiva del artículo 418 del CPF, en lo relativo al delito de cortar, arrancar, derribar, talar arboles, o realizar aprovechamiento de recursos forestales sin contar con la autorización de la Ley Forestal.

K. Omisión de la Parte en la aplicación efectiva del artículo 418 del CPF, en lo tocante a no participar al MP Federal, la probable existencia de delitos ambientales consistente en ocasionar dolosamente incendio en bosque y vegetación forestal dañando recursos naturales, la flora, fauna silvestre y ecosistema.

L. Omisión de la Parte en la aplicación efectiva del artículo 418 del CPF, en lo concerniente al delito de ocasionar dolosamente incendio en bosque y vegetación forestal dañando recursos naturales, la flora, fauna silvestre y ecosistema.

M. Omisión de la Parte en la aplicación efectiva del artículo 419 del CPF, en lo tocante a no participar al MP Federal, la probable existencia de delitos ambientales consistentes en el transporte, acopio, y transformación de recursos forestales sin autorización de la Ley Forestal, a pesar de haber tenido conocimiento de los mismos en ejercicio de funciones.

N. Omisión de la Parte en la aplicación efectiva del artículo 416 del CPF, en lo tocante a no participar al MP Federal, la probable existencia de delitos ambientales consistentes en descargar y depositar aguas residuales en aguas nacionales, en menoscabo de la salud pública, recursos naturales, flora, fauna y calidad del agua.

O. Omisión de la Parte en la aplicación efectiva del artículo 169 in fine de la LGEEPA, el cual establece en base a una lectura integral, que una vez dictada la resolución a que hace referencia el numero 168 de la ley en cito, de verificarse hechos, actos u omisiones que pudieran configurar uno o más delitos, la autoridad ambiental deberá hacerlos del conocimiento del MP.

P. Omisión de la Parte en la aplicación efectiva del artículo 202 de la LGEEPA, en lo tocante a que la PROFEPA, Chihuahua, a pesar de haber realizado visitas de inspección, derivadas en su mayoría de Denuncias Populares, en las cuales constato de manera directa la comisión de actos, hechos y omisiones constitutivos de delitos ambientales, no interpuso Denuncia Penal sobre los mismos.

Q. Omisión de la Parte en la aplicación efectiva del artículo 191 de la LGEEPA al no acumular una Denuncia Popular interpuesta a un expediente preexistente abierto con motivo de una Denuncia Popular previamente presentada de contenido igual.

R. Omisión de la Parte en la aplicación efectiva del artículo 191 y 192 de la LGEEPA, al no haber acordado una Denuncia Popular, y en consecuencia, dejado de efectuar las diligencias necesarias con el fin de determinar la existencia de los actos, hechos u omisiones planteadas en la misma.

S. Omisión de la Parte en la aplicación efectiva del artículo 191 en relación con el 190 de la LGEEPA, en lo tocante a no acordar una Denuncia Popular, al no haber sido turnada la misma al órgano competente.

T. Omisión de la Parte en la aplicación efectiva del artículo 193 de la LGEEPA, al resolver una Denuncia Popular sin informar al Denunciante las consideraciones adoptadas respecto a las pruebas e información aportada.

U. Omisión de la Parte en la aplicación efectiva del artículo 159 Bis 3, en relación con el 159 Bis 4, ambos de la LGEEPA, al negarse a proporcionar información ambiental solicitada.

La Peticionaria afirma que estas presuntas omisiones en la aplicación efectiva de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (LGEEPA), el *Código Penal Federal* (CPF), la *Ley Forestal* (LF) y el *Convenio sobre Pueblos Indígenas y Tribales No. 169 de la Organización Internacional del Trabajo* (Convenio 169 de la OIT) constituyen la denegación de justicia ambiental a Pueblos Indígenas en la Sierra Tarahumara en el Estado de Chihuahua, en contravención de lo dispuesto por los artículos 6 y 7 del ACAAN. La parte final de la petición asevera que las 21 aserciones y sus ejemplos "configuran una pauta persistente[2]".

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1)

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;

2. Petición, p. 18.

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;

(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios, en esta etapa se requiere de cierta revisión inicial para verificar que la petición cumple con estos requisitos[3]. El Secretariado examinó esta petición con tal perspectiva en mente.

La petición cumple con los requisitos establecidos en los incisos (a), (b), (d) y (f) del artículo 14(1) porque fue presentada por escrito en español, uno de los idiomas oficiales de las Partes[4]; la Peticionaria se identifica claramente en la petición como una organización sin vinculación gubernamental -COSYDDHAC- con domicilio en la Ciudad de Chihuahua, Estado de Chihuahua, México[5]. Finalmente, la petición parece encaminada a promover actividades de aplicación de la legislación ambiental y no a hostigar una industria, ya que se enfoca principalmente en la forma en que la autoridad ambiental ha atendido las denuncias presentadas por Pueblos Indígenas y otros grupos interesados en la protección de los recursos naturales en la Sierra Tarahumara.

Se estima cumplido también el requisito señalado en el inciso (c) porque la petición y sus anexos contienen suficiente información para analizar las aseveraciones que se plantean. Se ha proporcionado al Secretariado información suficiente sobre los medios por los que los Pueblos Indígenas y otros grupos de la Sierra Tarahumara han pretendido participar en la aplicación efectiva de la ley para la protección de los recursos naturales de esa Sierra, sobre el trámite que la autoridad le ha dado a las denuncias (populares y penales) que estos

3. En este sentido, véanse SEM-97-005 (Biodiversidad) Determinación conforme al artículo 14(1) en relación con la petición (26 de mayo de 1998); y SEM-98-003 (Grandes Lagos) Determinación conforme a los artículos 14(1) y (2) relativa a la petición, en su versión revisada (8 de septiembre de 1999).
4. Véase también el apartado 3.2 de las *Directrices para la Presentación de Peticiones*.
5. Petición, p. 1 y anexo 0.

grupos han presentado[6] y sobre las razones por las que la Peticionaria considera omisa la actuación de la autoridad en cuanto a la aplicación efectiva de la legislación ambiental[7].

En cuanto al inciso (e), en la petición se afirma que el asunto se ha comunicado a las autoridades pertinentes de la Parte y se anexan las respuestas de la Parte a tales comunicaciones[8]. La mayoría de las aseveraciones de la petición se refieren a asuntos que se han comunicado a las autoridades pertinentes de la Parte[9]. Se han presentado 46 escritos (incluyendo denuncias, recursos y amparos) que comunican a la autoridad tanto los daños ambientales por actividades presuntamente ilegales que afectan el bosque de la Sierra Tarahumara percibidos por Pueblos Indígenas y otros grupos, como la falta de respuesta adecuada por parte de la autoridad a esas denuncias. Por ejemplo, el Anexo 51 de la petición contiene una denuncia sobre la destrucción del bosque de la Sierra Tarahumara que afirma que: "[l]os daños culturales y sociales provocados por esta situación son cada vez más críticos para los pobladores, manifestándose en la pauperización, emigración y degradación de las culturas serranas..." y solicita "dar trámite efectivo a las denuncias ambientales que se han interpuesto ante la PROFEPA por tala ilegal[10]".

Además de los requisitos listados en el artículo 14(1), el preámbulo de ese artículo plantea que una petición debe aseverar "que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". La mayoría de las aseveraciones de esta petición sí se ajustan a lo dispuesto en este preámbulo, mientras que algunas de las aseveraciones no se ajustan porque no se refieren a disposiciones que sean "legislación ambiental" en los términos del ACAAN[11], o porque se refieren a situaciones consumadas respecto de las cuales la autoridad

6. Véase el Apéndice 1 de la petición reducida que relata los hechos en que se basa la petición.
7. Véase el Capítulo IV de la petición.
8. Petición, p. 18, Capítulo V. "Peticiones" y los anexos 3, 4, 6, 8, 9, 12, 14, 15, 19, 21, 27, 29 al 48, 50, 52, 53, 54, 56, 58, 60, 62, 64, 65, 67, 68, 69, 70, 72, 73, 75, 77, 78, 79, 80.
9. Véanse los anexos 5, 10, 20, 49 y 51 de la petición. Más adelante se indican sobre cuáles de las aseveraciones no se estima cumplido este requisito.
10. Denuncia popular presentada por la Coalición Rural, 8 de noviembre de 1999, encabezado F; contestación de la Parte en los anexos 53 y 54.
11. El artículo 45(2) del ACAAN establece la definición de legislación ambiental:
"Para efectos del Artículo 14 y la Quinta Parte
(a) "legislación ambiental" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

ambiental no podría haber realizado algún acto de aplicación de la legislación ambiental al momento de presentarse la petición, y en consecuencia no puede afirmarse que México "está incurriendo" en una omisión en esos casos.

En seguida se analizan con mayor detalle las presuntas omisiones que alega la Peticionaria, agrupadas para facilitar su análisis en torno a los cuatro temas principales a que se refiere la petición: atención a la denuncia popular y el recurso de revisión; persecución de probables delitos ambientales; aplicación del Convenio 169 de la OIT; y acceso a la información ambiental.

i. Presuntas omisiones relacionadas con la denuncia popular y el recurso de revisión[12]

La petición afirma que México está incurriendo en omisiones en la aplicación efectiva de la legislación ambiental mexicana respecto de 36 denuncias populares sobre tala ilegal y destrucción del bosque de la Sierra Tarahumara en Chihuahua, México. Estas denuncias populares fueron promovidas entre febrero de 1998 y marzo de 2000 por diversos grupos: la Comunidad de San Ignacio de Ararenco; las Comunidades de los Ejidos de Ciénega de Guacayvo, de San Diego de Alcalá y de El Consuelo; los Pueblos Indígenas Raramurí y Tepehuan; y por la Coalición Rural/Rural Coalition. La petición asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental por el inadecuado procesamiento que la autoridad ambiental ha dado a estas denuncias y a 3 recursos de revisión presentados en relación con esas denuncias. Señala que estas omisiones se dan en el contexto de los artículos 6 y 7 del ACAAN, que establecen el compromiso de las Partes del ACAAN de "iniciar de manera oportuna procedimientos judiciales, como es la interposición de Denuncias

(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

(b) Para mayor certidumbre, el término "legislación ambiental" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

(c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte."

12. Planteadas en los encabezados A, B, C, D, F, Q, R, S, y T de la petición.

Penales, para procurar sanciones y soluciones adecuadas en caso de violaciones a la legislación ambiental", así como la garantía de "la disponibilidad de mecanismos administrativos para la aplicación de la legislación ambiental, que comprende[n], por principio, el acceso a [...] lo[s] mismo[s], conforme a la legislación nacional[13]".

La denuncia popular es un mecanismo que permite a cualquier persona, organización o grupo social comunicar a la autoridad presuntas violaciones a la ley ambiental o daños al medio ambiente[14]. Como se ha dicho al revisar otras peticiones relacionadas con el mecanismo de denuncia popular, es evidente que las disposiciones de la LGEEPA que establecen la denuncia popular califican como "legislación ambiental" en los términos de la definición del artículo 45(2) del ACAAN, porque son disposiciones cuyo propósito principal es la protección del medio ambiente[15].

La petición afirma que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental porque las denuncias presentadas por los Pueblos Indígenas y otros grupos de la Sierra Tarahumara no se han tramitado conforme a lo que establece la LGEEPA: algunas no han sido admitidas; algunas que sí se han admitido no se han resuelto ni tramitado como lo marca la ley; no se han realizado las diligencias que la ley exige; además de que no se han admitido o resuelto recursos de revisión relacionados con las denuncias populares presentadas. En el caso de esta petición, la mayoría de las denuncias populares se refieren a actividades o hechos que los denunciantes consideran una amenaza al ecosistema de la Sierra Tarahumara, y a la subsistencia y patrimonio cultural de las culturas serranas, aunque no especifican las violaciones a disposiciones legales precisas en que se basan[16].

13. Para las dos referencias anteriores, véase la p. 1 de la petición.
14. El artículo 189 de la LGEEPA dispone: "Toda persona, grupos sociales, organizaciones no gubernamentales, asociaciones y sociedades podrán denunciar ante la Procuraduría Federal de Protección al Ambiente o ante otras autoridades todo hecho, acto u omisión que produzca o pueda producir desequilibrio ecológico o daños al ambiente o a los recursos naturales, o contravenga las disposiciones de la presente Ley y de los demás ordenamientos que regulen materias relacionadas con la protección al ambiente y la preservación del equilibrio ecológico ..."
15. Véanse SEM 98-002 (Ortiz Martínez) Determinación conforme al artículo 14(1) (23 de junio de 1998), y SEM-97-007 (Lago de Chapala) Determinación conforme al artículo 15(1) (14 de julio del 2000).
16. La LGEEPA no exige como requisito que los denunciantes identifiquen las disposiciones legales que consideran infringidas con los hechos que denuncian (ver artículo 190). Por su parte, el apartado 5.2 de las Directrices sólo exige que "en el caso de la Ley General de Equilibrio Ecológico y la Protección al Ambiente de México, el peticionario deberá identificar el capítulo o la disposición aplicable de la ley."

En cuanto al recurso de revisión, este es también un mecanismo establecido por la LGEEPA para permitir a los particulares contribuir en la aplicación de la ley ambiental. Los artículos 176 al 181 de la LGEEPA disponen que las personas afectadas por una resolución administrativa definitiva, y emitida con motivo de diversos actos de aplicación de la ley citada pueden impugnar tales resoluciones. En ciertos casos, las personas afectadas pueden solicitar que se lleven a cabo las acciones necesarias "para que sean observadas las disposiciones jurídicas aplicables, siempre que demuestren en el procedimiento que dichas obras o actividades originan o pueden originar un daño a los recursos naturales, la flora o la fauna silvestre, la salud pública o la calidad de vida" (artículo 180 de la LGEEPA). Es claro entonces, que las disposiciones que establecen el recurso de revisión satisfacen la definición de legislación ambiental del ACAAN porque al igual que en el caso de la denuncia popular, estas disposiciones establecen un mecanismo cuyo propósito principal es la protección del medio ambiente mediante la participación de cualquier persona en la vigilancia del cumplimiento de la ley ambiental[17].

En resumen, estas aseveraciones se consideran procedentes conforme al artículo 14(1) del ACAAN en tanto se refieren principalmente a la tramitación adecuada de la denuncia popular y el recurso de revisión como mecanismos para la protección ambiental a los cuales la legislación ambiental de la Parte concede amplio acceso público. Por el contrario, los hechos a los que se refieren las denuncias populares mismas no son materia de esta petición y no serán materia de análisis ulterior en este caso. El Peticionario tuvo cuidado de plantear en esta petición las cuestiones de aplicación de la ley ambiental que enfrentan las comunidades de la Sierra Tarahumara, sin plantear presuntas omisiones en la aplicación efectiva de "disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas", que podrían estar excluidas de revisión en este proceso en virtud de lo dispuesto por el artículo 45(2)(b) del ACAAN. Como se ha visto, la petición no se trata de los daños al medio ambiente reportados en las denuncias populares, sino que se centra en la manera pre-

17. Dado que se trata de disposiciones adjetivas, se evalúa si el recurso de revisión se ha invocado en relación directa a una disposición sustantiva que no cumpla con la definición de legislación ambiental. [Véase SEM 98-002 (23 de junio de 1998) Determinación conforme al artículo 14(1) (Ortiz Martínez)] En el caso de esta petición presentada por COSYDDHAC, los recursos de revisión se refieren al acceso y tramitación adecuada de la denuncia popular, que a su vez satisface la definición en cuestión.

suntamente omisa en que México aplica la denuncia popular como herramienta de acceso a la justicia ambiental respecto de algunos Pueblos Indígenas y otros grupos en la Sierra Tarahumara. En este sentido, la petición logra enfocar el asunto de manera que (en su mayoría) las presuntas omisiones que se plantean son omisiones en la aplicación efectiva de disposiciones cuyo propósito principal es "la protección de medio ambiente ... a través de ... la protección de la flora y fauna silvestres...", conforme al artículo 45(2)(a)(iii) del Acuerdo.

ii. Presuntas omisiones relacionadas con la persecución de probables delitos ambientales[18]

La Peticionaria señala que México está incurriendo en omisiones en la aplicación efectiva de probables delitos ambientales que se han denunciado o sobre los que la autoridad ambiental ha tenido conocimiento durante inspecciones y en el ejercicio de otras funciones.

La petición asevera que México está incurriendo en omisiones en dos sentidos: al no aplicar los artículos 416, 418, y 419 del CPF a hechos presuntamente delictivos y al no ejercer las facultades que posee la autoridad ambiental para iniciar investigaciones o dar parte al Ministerio Público de hechos que pudieran configurar esos delitos, conforme a los artículos 169 y 202 de la LGEEPA[19].

18. Planteadas en los encabezados G, H, I , J ,K, L, M,N ,O y P de la petición.
19. "Artículo 416.- Se impondrá pena de tres meses a seis años de prisión y de mil a veinte mil días multa, al que sin la autorización que en su caso se requiera, o en contravención a las disposiciones legales, reglamentarias y normas oficiales mexicanas:
I.- Descargue, deposite, o infiltre, o lo autorice u ordene, aguas residuales, líquidos químicos o bioquímicos, desechos o contaminantes en los suelos, aguas marinas, ríos, cuencas, vasos y demás depósitos o corrientes de agua de jurisdicción federal, que ocasionen o puedan ocasionar daños a la salud pública, a los recursos naturales, a la flora, a la fauna, a la calidad del agua de las cuencas o a los ecosistemas.
Cuando se trate de aguas para ser entregadas en bloque a centros de población, la pena se podrá elevar hasta tres años más; ..."
"Artículo 418.- Al que sin contar con la autorización que se requiera conforme a la Ley Forestal, desmonte o destruya la vegetación natural, corte, arranque, derribe o tale árboles, realice aprovechamientos de recursos forestales o cambios de uso del suelo, se le impondrá pena de tres meses a seis años de prisión y por el equivalente de cien a veinte mil días multa....La misma pena se aplicará a quien dolosamente ocasione incendios en bosques, selva, o vegetación natural que dañen recursos naturales, la flora o la fauna silvestre o los ecosistemas."
"Artículo 419.- A quien transporte, comercie, acopie o transforme recursos forestales maderables en cantidades superiores a cuatro metros cúbicos rollo o su equivalente, para los cuales no se haya autorizado su aprovechamiento conforme a la Ley Forestal, se impondrá pena de tres meses a seis años de prisión y de cien a veinte mil días multa, excepto en los casos de aprovechamientos de recursos forestales para uso doméstico, conforme a lo dispuesto en la Ley Forestal."

Del texto de los artículos 416 y 418 del CPF se desprende claramente que éstos satisfacen la definición de legislación ambiental del ACAAN porque su propósito principal es la protección del medio ambiente a través de la protección de la flora y fauna silvestre. En el caso del artículo 419 del CPF que tipifica como delitos la realización (en determinadas circunstancias) de actividades de explotación comercial de los recursos naturales, se satisface también la definición de "legislación ambiental". La exclusión prevista en el artículo 45(2)(b) de disposiciones cuyo propósito principal sea la "administración" de actividades de explotación comercial, de subsistencia o por poblaciones indígenas, debe entenderse referida a actividades de ese tipo que sean lícitas, no a actividades que constituyen delitos. Además, la exposición de motivos que correspondió a la publicación del artículo 419 del CPF indica expresamente que el propósito principal de todas las disposiciones que contienen los delitos ambientales es la protección del medio ambiente y los recursos naturales[20].

Como se ha dicho, el segundo aspecto de las aseveraciones relacionadas con los delitos ambientales se refiere a las disposiciones adjetivas relevantes. La petición señala que a través de denuncias populares se hicieron del conocimiento de la autoridad ambiental hechos que posiblemente constituyen delitos. Afirma que, además, la autoridad realizó al menos 15 visitas de inspección en las que la autoridad habría identificado posibles delitos ambientales. Según la Peticionaria, en ninguno de esos casos se interpuso una denuncia penal, lo que constituye una omisión en la aplicación efectiva de las disposiciones que establecen las facultades indagatorias y persecutorias de la Parte, es decir, de los artículos 169 y 202 de la LGEEPA.

Las disposiciones mencionadas, son "legislación ambiental" para efectos del artículo 14 del ACAAN porque su propósito principal, al igual que el de los delitos ambientales, es la protección del medio ambiente. Por otra parte, se trata de presuntas omisiones en las que la

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El párrafo relevante del artículo 169 dispone: "... En los casos en que proceda, la autoridad federal hará del conocimiento del Ministerio Público la realización de actos u omisiones constatados en el ejercicio de sus facultades que pudieran configurar uno o más delitos."

"Artículo 202.- La Procuraduría Federal de Protección al Ambiente en el ámbito de sus atribuciones, está facultada para iniciar las acciones que procedan, ante las autoridades judiciales competentes, cuando conozca de actos, hechos u omisiones que constituyan violaciones a la legislación administrativa o penal."

20. Exposición de motivos del Decreto que reforma, adiciona y deroga diversos artículos del Código Penal para el Distrito Federal en materia de fuero común, y para toda la República en materia de fuero federal. El Decreto se publicó en el D.O.F. el 24 de diciembre de 1996.

Parte "está incurriendo", en los términos del artículo 14(1), ya que las facultades indagatorias en cuestión no parecen haber prescrito al momento de presentarse la petición[21]. Sólo se excluyen de revisión ulterior las aseveraciones planteadas en los encabezados J y L, que se refieren a hechos procesales consumados respecto de los cuales no había otro acto de aplicación qué realizar al momento de presentarse la petición: no "haber turnado de inmediato al MP Federal" las materias denunciadas el 3 de julio de 1999 y el 9 de mayo de 1999, sino hasta el 16 de julio de 1999 en el primer caso citado, y hasta el 5 de julio de 1999, en el segundo[22].

iii. Presunta omisión relacionada con el Convenio 169 de la OIT[23]

La petición asevera que la Parte ha omitido aplicar de manera efectiva el artículo 15.2 del Convenio 169 de la OIT al otorgar autorizaciones para el aprovechamiento de recursos forestales maderables en la Sierra Tarahumara, sin consultar previamente a los Pueblos Indígenas que podrían resultar afectados por esas actividades.

Es claro que el Convenio 169 de la OIT es derecho interno vigente de la Parte conforme al artículo 133 de la Constitución Política de los Estados Unidos Mexicanos, pero no se desprende la misma certidumbre sobre la forma en que la disposición invocada por la Peticionaria satisface la definición de "legislación ambiental" prevista en el ACAAN. El citado artículo 15.2 del Convenio 169 de la OIT establece: "En caso de que pertenezca al Estado la propiedad de los minerales o de los recursos del subsuelo, o tenga derechos sobre otros recursos existentes en las tierras, los gobiernos deberán establecer o mantener procedimientos con miras a consultar a los pueblos interesados, a fin de determinar si los intereses de estos pueblos serían perjudicados y en qué medida, antes de emprender o autorizar cualquier programa de prospección o explotación de los recursos existentes en sus tierras ...".

La aseveración de la Peticionaria es que ese Convenio no se ha aplicado de manera efectiva porque se han concedido autorizaciones para la explotación forestal de la Sierra Tarahumara sin consultar a los Pueblos Indígenas que pudiesen resultar afectados (en concreto, a 9 comunidades). Como se ha visto, en virtud del artículo 45(2)(b) del ACAAN están exceptuadas de revisión en el proceso del artículo 14 las disposiciones cuyo propósito principal es la "administración de la

21. Véanse los artículos 100 y subsiguientes del Código Penal Federal.
22. Petición, p. 12.
23. Planteada en el encabezado E de la petición.

recolección, extracción o explotación de recursos naturales con fines comerciales, [y] la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas". Sin excluir que en otro contexto pudiera llegarse a una conclusión distinta, en el caso de este alegato la disposición invocada parece tener como propósito la "administración" de la explotación de recursos de manera que se tomen en cuenta los intereses de los Pueblos Indígenas que puedan resultar afectados. Se sigue entonces, que en este caso concreto no puede revisarse esta aseveración porque no se satisface la definición de legislación ambiental. Es importar subrayar, sin embargo, que esta conclusión se refiere sólo a este caso concreto y que no se extiende a otras disposiciones del Convenio de la OIT, sino únicamente al fragmento del artículo 15.2 sobre el que la petición afirma que existe una omisión en la aplicación efectiva de la legislación ambiental al no consultar a esos grupos antes de otorgar autorizaciones de aprovechamiento forestal. Por último, cabe aclarar que esta conclusión tampoco implica determinación alguna respecto de si el Convenio mismo se está o no aplicando de manera efectiva.

Además, la petición no afirma, ni se desprende de ella, que esta presunta omisión ha sido comunicada a la Parte como lo requiere el artículo 14(1)(e). Por todo lo anterior, las aseveraciones planteadas en el encabezado E de la petición no satisfacen los requisitos del artículo 14(1) y no se analizarán más en el proceso de esta petición.

iv. Presunta omisión en relación con el acceso a la información ambiental[24]

Por último, la Peticionaria afirma que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental al negar información ambiental sobre las denuncias que los Pueblos Indígenas y otros grupos de la zona han presentado por daños y tala ilegal en la Sierra Tarahumara. La petición relata que el 1 de marzo del 2000 "se presentó una petición de información ambiental para verificar lo manifestado por la Profepa respecto de las denuncias populares que ha recibido y atendido relativas a la materia forestal en la Sierra Tarahumara, y sobre la cual recaería acuerdo negando la petición...[25]".

La Peticionaria asevera que al negar esta solicitud la Parte omitió aplicar de manera efectiva el artículo 159 Bis 3 de la LGEEPA en relación con el artículo 159 Bis 4. La petición se refiere a la negativa de la autoridad a proporcionar información ambiental en relación con las

24. Planteada en el encabezado U de la petición.
25. Petición, p. 15.

denuncias. Al igual que el acceso al mecanismo de denuncia popular, el acceso público a la información ambiental es un mecanismo para la protección ambiental, por lo que estas disposiciones satisfacen la definición de legislación ambiental para efectos del artículo 14.

Sin embargo, la petición no afirma ni se desprende de ella que se haya comunicado a la Parte este asunto en concreto (el que se haya negado información ambiental) como lo exige el artículo 14(1)(e). No habiéndose cumplido en la petición uno de los requisitos previsto en el artículo 14(1) respecto de este alegato, no puede continuarse ahora la revisión de esta presunta omisión en la aplicación efectiva de la legislación ambiental.

En resumen, las aseveraciones de que México incurre en omisiones en la aplicación efectiva de su legislación ambiental respecto del Convenio 169 de la OIT (encabezado E) y respecto del acceso a la información ambiental (encabezado U) planteadas en la petición, así como las señaladas en los encabezados B, J, L y Q de la petición, no cumplen con todos los requisitos del artículo 14(1) del ACAAN y no se revisarán más en este proceso. Por el contrario, los requisitos del artículo 14(1) sí se cumplen respecto de las aseveraciones de la petición contenidas en los encabezados A, C, D, F, R, S y T relativos a la denuncia popular y el recurso de revisión, y las contenidas en los encabezados G, H, I, K, M, N, O y P, relativos a la investigación y persecución de probables delitos ambientales. En consecuencia, se emprendió el análisis de la parte procedente de la petición, conforme al artículo 14(2) del ACAAN.

IV. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(2)

Una vez que se ha determinado que las aserciones de una petición satisfacen los requisitos del artículo 14(1), el Secretariado analiza la petición para determinar si ésta amerita que el Secretariado solicite una respuesta a la Parte. Conforme al articulo 14(2) del ACAAN, son cuatro los criterios que guían la decisión del Secretariado en esta etapa:

a) si la petición alega daño a la persona u organización que la presenta;

b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Al hacer esas consideraciones respecto de esta petición, el Secretariado contempló lo siguiente:

Al considerar la cuestión del daño [artículo 14(2)(a)], se observó que la petición alega la presunta falta de aplicación efectiva de la denuncia popular como herramienta de acceso a la justicia ambiental a Pueblos Indígenas y otros grupos de la Sierra Tarahumara. Esa supuesta falta de acceso a la denuncia popular representa un daño a los Pueblos Indígenas y otros grupos de la Sierra Tarahumara en tanto restricción al ejercicio del derecho otorgado por la ley ambiental a "toda persona, grupos sociales, organizaciones no gubernamentales, asociaciones y sociedades...[26]" de participar en la protección del medio ambiente mediante la denuncia de posibles hechos que causen desequilibrio ecológico o contravengan la ley ambiental.

Por lo que se refiere al artículo 14(2)(b) del ACAAN, el Secretariado considera que la aplicación efectiva de la denuncia popular como herramienta de acceso a la justicia ambiental, a que se refiere la petición, así como la aplicación efectiva de la legislación penal para la protección de los recursos boscosos de la Sierra Tarahumara, es un asunto cuya ulterior consideración en este proceso contribuirá a la consecución de las metas del Acuerdo. Específicamente, los artículos 1 y 5 del Acuerdo establecen, entre otras metas, las de alentar la protección y el mejoramiento del ambiente para el bienestar de las generaciones presentes y futuras, incrementar la cooperación entre las Partes para mejorar la aplicación y la observancia de las leyes ambientales, y lograr niveles altos de protección del ambiente y de cumplimiento de las leyes de las Partes. Además, la petición hace referencia en particular a las metas de acceso a los particulares a los procedimientos para la aplicación de las leyes y reglamentos ambientales, y a las garantías procesales que deben alcanzarse en esos procedimientos, plasmadas en los artículos 6 y 7 del Acuerdo. Los objetivos del ACAAN se promoverían también con la revisión de esta petición en tanto se relaciona directamente con la participación en la protección ambiental de un sector de la sociedad mexicana que históricamente ha estado marginado –los Pueblos Indígenas y otras comunidades rurales de la Sierra Tarahumara– y cuya

26. LGEEPA, artículo 189.

contribución para la protección de los bosques de esa región es fundamental.

Con relación a la consideración prevista en el inciso c) del artículo 14(2) del ACAAN, la petición aborda los recursos disponibles conforme a la legislación de la Parte a los que se ha acudido. Como se ha visto, el asunto mismo que plantea la petición es que los esfuerzos de emplear los recursos disponibles conforme a la legislación de la Parte para denunciar daños al medio ambiente de la Sierra Tarahumara no fueron exitosos. En vista de los múltiples intentos relatados en la petición de emplear el mecanismo de denuncia popular y otros recursos, el Secretariado considera que se ha hecho un esfuerzo razonable para acudir a ellos y que no es razonable esperar que se hiciera más[27].

Finalmente, la petición no parece basarse exclusivamente en noticias de los medios de comunicación, ya que ni siquiera hace referencia a noticias de ese tipo [artículo 14(2)(d)].

Considerando en conjunto los factores del artículo 14(2) del ACAAN, el Secretariado determina que esta petición sí amerita solicitar una respuesta de la Parte, respecto de las aseveraciones que según la determinación planteada en la sección anterior de este documento, satisfacen los requisitos del artículo 14(1).

V. DETERMINACIÓN DEL SECRETARIADO

El Secretariado determina que la petición SEM-00-006 (Tarahumara), presentada por la Comisión de Solidaridad y Defensa de los Derechos Humanos A.C. (COSYDDHAC), cumple con todos los requisitos del Artículo 14(1) del ACAAN, respecto de las aseveraciones contenidas en los encabezados A, C, D, F, R, S y T, relativos a la denuncia popular y el recurso de revisión, y las contenidas en los encabezados G, H, I, K, M, N, O y P, relativos a la investigación y persecución de probables delitos ambientales. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que, respecto de esas aseveraciones, la petición SEM-00-006 amerita solicitar una respuesta a la Parte interesada, en este caso los Estados Unidos Mexicanos, y así lo hace a través de esta Determinación.

Conforme a lo establecido en el artículo 14(3) del ACAAN, la Parte podrá proporcionar una respuesta a la petición dentro de los 30 días

27. Véanse los apartados 5.6(c) y 7.5 de las Directrices.

siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a la misma. Dado que ya se ha enviado a la Parte interesada copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Sometido respetuosamente a su consideración, el 6 de noviembre de 2001.

Secretariado de la Comisión para la Cooperación Ambiental

por: Carla Sbert
Oficial Jurídica
Unidad de Peticiones Ciudadanas

c.c.p.: Dra. Olga Ojeda Cárdenas, SEMARNAT
Ms. Norine Smith, Environment Canada
Ms. Judith E. Ayres, US EPA
Sr. Javier Avila Aguirre, COSYDDHAC
Sra. Janine Ferretti, Directora Ejecutiva

SEM-01-001

(Cytrar II)

SUBMITTERS:	ACADEMIA SONORENSE DE DERECHOS HUMANOS, A.C. AND LIC. DOMINGO GUTIÉRREZ MENDÍVIL
PARTY:	United Mexican States
DATE:	14 February 2001
SUMMARY:	The submission asserts that Mexico is failing to effectively enforce its environmental law in relation to the establishment and operation of the Cytrar hazardous waste landfill near the city of Hermosillo, Sonora, Mexico.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (24 April 2001)	Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.
ART. 14(3) (13 June 2001)	Determination that the Secretariat lacks sufficient information to determine whether it should proceed no further with its consideration pursuant to Article 14(3)(a).

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. de petición:	**SEM-01-001** (Cytrar II)
Peticionarios:	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	14 de febrero de 2001
Fecha de la determinación:	24 de abril de 2001

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 14 de febrero de 2001, la Academia Sonorense de Derechos Humanos, A.C. y el Lic. Domingo Gutiérrez Mendivil (los "Peticionarios"), presentaron al Secretariado una petición de conformidad con los artículos 14 y 15 del ACAAN. Los Peticionarios aseveran que el gobierno

de México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de presuntas irregularidades en la construcción y operación del confinamiento de residuos peligrosos conocido como Cytrar, y respecto al negado acceso a los Peticionarios a la información relacionada con esas presuntas irregularidades. Esta es la segunda petición presentada respecto de este asunto. La primera petición puede consultarse bajo el número de identificación SEM-98-005.

El Secretariado determina que esta petición satisface los requisitos del artículo 14(1) del Acuerdo, y que amerita solicitar una respuesta a la Parte mexicana conforme al artículo 14(2), por las razones que se expresan en esta Determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que México ha omitido aplicar de manera efectiva su legislación ambiental en relación con el confinamiento de residuos peligrosos conocido como Cytrar, ubicado en la proximidad de la ciudad de Hermosillo, en el estado de Sonora, México, y con el derecho a la información ambiental relacionada con ese confinamiento. El confinamiento ya no está operando, debido a que en 1998 la autoridad ambiental negó a Cytrar, S.A. de C.V. la renovación de su autorización de operación. La petición asevera que México ha incurrido en omisiones en la aplicación efectiva del artículo 7 de la *Ley Federal de Protección al Ambiente* de 1982 (LPFA)[1], de los artículos 28, 29, 32, 153 y 159 bis 3 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (en adelante, LGEEPA), del artículo 7 del *Reglamento de la LGEEPA en Materia de Residuos Peligrosos* (en adelante, RRP), del artículo 415 del *Código Penal Federal* (en adelante, CPF), y de la Norma Oficial Mexicana *NOM-057-ECOL-1993 Que establece los requisitos que deben observarse en el diseño, construcción y operación de celdas de un confinamiento controlado de residuos peligrosos* (en adelante, NOM-057).[2]

La petición plantea cinco aseveraciones que se describen separadamente a continuación, si bien la relación entre todas ellas es

1. La LFPA estuvo en vigor hasta 1988. La LGEEPA que la sustituyó conserva disposiciones en materia de impacto ambiental equivalentes en lo esencial (artículos 28 al 30). En adelante se hace referencia sólo a las disposiciones vigentes.
2. Así como de la anterior Norma Técnica Ecológica *NTE-CRP-010/88,* publicada en el *Diario Oficial de la Federación* (en adelante, "DOF"), el 14 de diciembre de 1988 y la Norma Oficial Mexicana *NOM-PA-CRP-006/93*, la cual quedaría con la nomenclatura que actualmente ostenta, *NOM-057-ECOL-1993*, en virtud del Acuerdo publicado el 22 de octubre de 1993.

importante para la consideración de esta petición. La primera aseveración de la petición se refiere a la falta de autorización en materia de impacto ambiental del confinamiento. Los Peticionarios aseveran que la Parte mexicana omitió aplicar de manera efectiva los artículos 28, 29 y 32 de la LGEEPA, respecto del confinamiento de residuos peligrosos ahora conocido como Cytrar, al no requerir una manifestación de impacto ambiental previamente a la realización de las obras y actividades del confinamiento y al permitir su operación a los subsecuentes responsables sin que contaran con autorización en esa materia. Afirman que la evaluación de impacto ambiental era exigible al confinamiento desde el inicio, porque el requisito en la LFPA data de 1982, además de que sería exigible de manera retroactiva, al tratarse de una disposición de orden público e interés social.[3]

La segunda aseveración de los Peticionarios es que la autoridad ambiental omitió aplicar de manera efectiva los artículos 153 de la LGEEPA y 7 del RRP que prohiben la importación de residuos peligrosos para su disposición final en territorio nacional y exigen la repatriación de los residuos peligrosos generados bajo el régimen de importación temporal. Esta afirmación se basa en el hecho de que en 1997 el confinamiento Cytrar recibió tierras contaminadas y otros residuos peligrosos abandonados por la empresa Alco Pacífico, S.A. de C.V. para su disposición final. Según la petición, la fundidora de plomo Alco Pacífico abandonó tierras contaminadas y residuos peligrosos importados ilegalmente desde Estados Unidos y residuos generados a partir de materia prima introducida al país bajo el régimen de importación temporal, que debían haberse retornado al país de origen. Esa empresa operaba bajo el régimen de maquila en el Florido, Tijuana, BC. y fue clausurada por la autoridad ambiental en abril de 1991. Según la petición y la información que la acompaña, la autoridad ambiental gestionó la disposición final de esos residuos en Cytrar, para lo cual recibió 2 millones de dólares estadounidenses asignados por el Juez del Condado de Los Angeles, California, E.E. U.U. A.A. Al parecer, dicha suma fue una parte de la multa impuesta por el mismo juez a la compañía transportista S.R.S./Quemetco en virtud del transporte ilegal de residuos peligrosos al sitio de Alco Pacífico. Esta aseveración se entiende en el sentido de que México está omitiendo sancionar la supuesta violación a los artículos 153 de la LGEEPA y 7 del RRP, que se cometió presuntamente al depositar los residuos peligrosos en Cytrar para su disposición final, siendo que según los Peticionarios, dichos residuos peligrosos deben repatriarse.[4]

3. Véanse las páginas 3, 9 a 12 y los anexos 10 y 19 de la petición.
4. Véanse las páginas 3 a 6, 12 y 13, y los anexos 15 y 37 a 39 de la petición.

La tercera aseveración de la petición es que el confinamiento de residuos peligrosos no observó las especificaciones de la NOM-057 respecto de la construcción de sus celdas y que la Parte mexicana no ha sancionado esta supuesta violación de su legislación ambiental. Según las autorizaciones concedidas por el Instituto Nacional de Ecología a Cytrar, en 1996 el confinamiento contaba con una celda con capacidad de 16,200 m^3, y contaba con una nueva celda con capacidad para 110,000 m^3 en 1997.[5] En apoyo a la afirmación de que se han incumplido estas especificaciones, la petición incluye un extracto de una manifestación de impacto ambiental presentada por Cytrar en 1994, que describe el diseño de las celdas.[6] Los Peticionarios afirman que "... los muros de contención de las celdas del confinamiento CYTRAR no cuentan con la capa de suelo cemento que se menciona en [la manifestación de impacto ambiental] y en algunas áreas al parecer tampoco existe la capa de arena de 30 cm. De ahí que los materiales que se utilizaron como alternativa al muro de 60 cm de concreto que exige en su párrafo 5.1.5 la Norma Oficial Mexicana NOM-CRP-006-ECOL/1993, ni remotamente tienen una resistencia de 240 Kg/cm^2."[7]

La cuarta aseveración de la petición es que la Parte ha omitido aplicar de manera efectiva el artículo 415 del CPF al no ejercer acción penal tras la denuncia de hechos que el Peticionario presentó el 8 de diciembre de 1997 y que amplió el 3 de diciembre de 1998. La fracción primera del artículo 415 del CPF dispone una pena de tres meses a seis años de prisión y de mil a veinte mil días de multa, a quien sin autorización de la autoridad federal competente o contraviniendo los términos en que haya sido concedida, realice cualquier actividad con materiales o residuos peligrosos que ocasionen o puedan ocasionar daños a la salud pública, a los recursos naturales, la fauna, la flora o a los ecosistemas. La denuncia que presentaron los Peticionarios se refiere a los hechos que son objeto de las tres aseveraciones que se resumieron en los párrafos precedentes. Esto es, a la presunta operación del confinamiento sin que haya mediado autorización en materia de impacto ambiental, a la supuesta disposición final ilegal de residuos peligrosos que debieron repatriarse y al presunto incumplimiento de las especificaciones sobre construcción de las celdas.[8]

Por último, la petición asevera que al negarse a proporcionar diversa información ambiental relacionada con Cytrar a los Peticionarios, la Parte mexicana ha violado el derecho a la información ambiental

5. Véanse los anexos 3 y 4 de la petición.
6. Misma que la autoridad ambiental no aprobó, según afirman los Peticionarios.
7. Véase las páginas 6, 7 y 12 y el anexo 19 de la petición.
8. Véanse las páginas 6, 14 y 15 y los anexos 8 y 15 de la petición.

contemplado en el artículo 159 Bis 3 de la LGEEPA. Se anexa a la petición una solicitud de información escrita que se refirió principalmente a la naturaleza y origen de los residuos depositados en el confinamiento Cytrar. La respuesta mediante la cual la autoridad ambiental negó la entrega de dicha información fue declarada por la justicia federal como violatoria de la garantía de legalidad regulada en los artículos 14 y 16 constitucionales, por falta de motivación.[9] Los Peticionarios indican que a pesar del amparo de la justicia federal, la información solicitada aún no se ha proporcionado y que por ello la Parte está incurriendo en una omisión en la aplicación efectiva de su legislación ambiental.

Por otra parte, la petición afirma que el Secretariado está facultado para elaborar un informe sobre el caso Cytrar según el artículo 13 del ACAAN, por referirse a un asunto relacionado con las funciones de cooperación del Acuerdo. Afirman que llevarlo a cabo propiciaría el cumplimiento de los objetivos de la Agenda de América del Norte para la Acción 2000-2002.

III. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

Artículo 14(1) del ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

9. Véase el anexo 32 de la petición.

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[10] Con tal perspectiva en mente el Secretariado determina que la petición sí satisface los requisitos de ese artículo y explica a continuación las razones de esta determinación.

Los artículos 28, 29, 32, 153 y 159 bis 3 de la LGEEPA, 415 del CPF y la NOM-057 que invoca la petición satisfacen la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN, que se refiere al propósito principal de tales disposiciones.[11] De la simple lectura de dichos artículos se desprende claramente que son disposiciones cuyo propósito principal coincide con "... la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de [...] el control de químicos, sustancias, materiales

10. Véanse en este sentido, e. g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999).

11. El artículo 45(2) del ACAAN establece:

Para los efectos del Artículo 14(1) y la Quinta Parte:

(a) "**legislación ambiental**" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:

(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

(b) Para mayor certidumbre, el término **"legislación ambiental"** no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

(c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.

Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998), SEM-98-001 (Guadalajara), Determinación conforme al artículo 14(1) (13 de septiembre de 1999) y SEM-98-002 (Ortiz Martínez), Determinación conforme al artículo 14(1) (18 de marzo de 1999).

o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello...".[12]

La expresión "está incurriendo" en el artículo 14(1) impone una consideración temporal respecto de las aseveraciones de una petición.[13] Esta consideración se satisface si la Parte correspondiente puede tomar medidas de aplicación de su legislación ambiental respecto de los asuntos materia de la petición y está omitiendo hacerlo, si bien los hechos a los que sea aplicable dicha legislación ambiental pueden ser hechos pasados.[14] Aunque los Peticionarios plantean sus aseveraciones en términos de que México "ha incurrido" en omisiones respecto del confinamiento Cytrar, que ya no está operando, las supuestas omisiones en las que la Parte "ha incurrido", sí corresponden a posibles acciones de aplicación que la autoridad competente pudiera llevar a cabo, es decir, a omisiones en que la Parte supuestamente "está incurriendo".

De la información contenida en la petición se desprende que las facultades para imponer sanciones administrativas no habían prescrito al momento de presentarse la petición en febrero de 2001,[15] suponiendo que las presuntas violaciones administrativas sucedieron: hasta noviembre de 1998 cuando parece haber cesado la operación presuntamente ilícita del confinamiento por falta de autorización de impacto ambiental[16]; en 1997 cuando supuestamente se iniciaron los

12. De modo ilustrativo, se transcribe una de las disposiciones referidas:
LGEEPA, Artículo 153.- La importación o exportación de materiales o residuos peligrosos se sujetará a las restricciones que establezca el Ejecutivo Federal, de conformidad con lo dispuesto en la Ley de Comercio Exterior. En todo caso deberán observarse las siguientes disposiciones:
... III.- No podrá autorizarse la importación de materiales o residuos peligrosos cuyo único objeto sea su disposición final o simple depósito, almacenamiento o confinamiento en el territorio nacional o en las zonas donde la nación ejerce su soberanía y jurisdicción, o cuando su uso o fabricación no esté permitido en el país en que se hubiere elaborado; ...
...VI.- Los materiales y residuos peligrosos generados en los procesos de producción, transformación, elaboración o reparación en los que se haya utilizado materia prima introducida al país bajo el régimen de importación temporal, inclusive los regulados en el artículo 85 de la Ley Aduanera, deberán ser retornados al país de procedencia dentro del plazo que para tal efecto determine la Secretaría;...
13. Véase en este sentido, e. g., SEM-97-004 (Canadian Env. Defence Fund), Determinación conforme al artículo 14(1) (27 de agosto de 1997).
14. Véase en este sentido, e. g., SEM-96-001 (Cozumel), Recomendación conforme al artículo 15(1) (7 de junio de 1997).
15. Véase el artículo 79 de la *Ley Federal de Procedimiento Administrativo*, que dispone que la facultad para imponer sanciones administrativas prescribe en cinco años, contados a partir del día en que se cometió la falta o infracción, si fueren consumadas, o desde que cesó si fuere continua.
16. Véase el anexo 4 de la petición, del que se desprende que la autorización de operación concedida a Cytrar por un año, expiró el 19 de noviembre de 1998.

envíos de Alco Pacífico a Cytrar[17]; y entre 1996 y 1997 cuando parece haberse construido la última celda.[18] Por otra parte, en cuanto a la presunta omisión en la aplicación del artículo 415 del CPF, a partir de los hechos descritos en la petición parece que las actuaciones realizadas por las autoridades han interrumpido la prescripción de la acción penal, y por lo tanto, la aseveración sí se refiere a una supuesta omisión en que la Parte "está incurriendo".[19] Por último, dado que al momento de presentarse la petición la Parte no había proporcionado la información solicitada a los Peticionarios, la supuesta omisión en la aplicación del artículo 159 bis 3 de la LGEEPA continuaba en ese momento, y esta aseveración satisface también la consideración temporal del artículo 14(1).

En vista de todo lo anterior, no obstante que el confinamiento se encuentre cerrado y que la petición se refiera a actos consumados, la petición cumple con esta consideración temporal del artículo 14(1). Las aseveraciones se entienden en el sentido de que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental al no sancionar que la empresa Cytrar, S.A. de C.V. haya operado el confinamiento sin contar con autorización en materia de impacto ambiental, que supuestamente haya construido sus celdas sin observar las especificaciones de la NOM-057, que presuntamente haya recibido para su disposición final residuos peligrosos cuya importación está prohibida y que debieron repatriarse, conforme al artículo 153 de la LGEEPA, y al no proporcionar información en presunta violación al artículo 159 bis 3 de la LGEEPA.

La petición también satisface los seis requisitos listados en el artículo 14(1). La petición se presentó por escrito en español, que es el idioma designado por la Parte mexicana.[20] Los Peticionarios se identificaron como la Academia Sonorense de Derechos Humanos, A.C. y Domingo Gutiérrez Mendívil. La primera es una organización sin vinculación gubernamental y el segundo un particular, vinculado a esa organización, ambos con residencia en Hermosillo, Sonora, México.[21]

La petición contiene información suficiente, que permitió al Secretariado revisarla. La petición incluye información sobre los

17. Véase el anexo 39 de la petición.
18. Véase el punto 1.1 de los anexos 3 y 4 de la petición.
19. Véase el anexo 9 de la petición y el artículo 110 del CPF, que dispone que las actuaciones que se practiquen en averiguación del delito interrumpen la prescripción de las acción.
20. Véanse el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
21. Véanse los artículos 14(1)(b) y (f) y 45(1) del ACAAN y los anexos 44 y 45 de la petición.

antecedentes del confinamiento y sobre las acciones de la autoridad ambiental respecto del confinamiento (incluyendo copia de las autorizaciones otorgadas para su operación y de algunas notas sobre los residuos abandonados por la antigua fundidora Alco Pacífico y su traslado a Cytrar). Asimismo, la petición describe y documenta los esfuerzos de los Peticionarios por obtener de la autoridad ambiental mayor información relacionada con el cumplimiento de la legislación ambiental en la operación del confinamiento.[22]

Si bien respecto de algunos puntos tomados por separado la información de apoyo no es concluyente, en conjunto la información proporcionada en la petición es suficiente para que el Secretariado la revise. Los Peticionarios como particulares no gozan de facultades de verificación y pueden estar limitados por razones técnicas y económicas para obtener información de fuentes externas a la autoridad ambiental. Los Peticionarios indican que la autoridad les ha negado mayor información. Afirman que han solicitado que se verifique el cumplimiento de las especificaciones de construcción, y que la autoridad se ha negado a hacerlo.[23] También señalan que se les ha negado información sobre la naturaleza y origen de los residuos depositados en el confinamiento, y sobre el convenio por el que la Profepa y el Juez del Condado de Los Angeles determinaron disponer en Cytrar de los residuos abandonados por Alco Pacífico.[24] Considerando todo lo anterior, se estima que la información proporcionada en la petición es suficiente para satisfacer el requisito conforme al artículo 14(1)(c) del ACAAN.

La petición no parece encaminada a hostigar una industria aunque las presuntas omisiones en la aplicación efectiva de la legislación ambiental se refieren en particular a la empresa Cytrar, S. A. de C.V., que fue la última empresa responsable del confinamiento a que se refiere la petición. La petición parece encaminada, antes bien, a promover la aplicación de la legislación ambiental, porque se centra en la aplicación por la autoridad ambiental de diversas disposiciones sobre disposición

22. Véase el artículo 14(1)(c) del ACAAN. Posteriormente a la presentación de la petición, otros interesados enviaron al Secretariado información relacionada con el asunto materia de la petición. El Secretariado mantendrá dicha información en el archivo para su consideración en el caso de que se llegue a elaborar un expediente de hechos y hasta ese momento.
23. La petición señala que, no obstante la negativa de realizar la verificación de las celdas, la autoridad ambiental anunció en julio de 1998 que se realizaría una auditoría ambiental para garantizar que se tomarían las medidas necesarias de prevención, o en su caso de remediación, antes de sellar las celdas del confinamiento. Los Peticionarios consideran que no hay intención de realizar dicha auditoría, ya que la autoridad ambiental anunció en febrero de 2001 que se fijó a la empresa un plazo de 45 días para sellar el confinamiento.
24. Véanse las páginas 6 a 8, y los anexos 20 a 23 de la petición.

final de residuos peligrosos respecto del confinamiento y en la falta de acceso que se ha dado a los Peticionarios a la información ambiental relativa al posible incumplimiento de algunas obligaciones ambientales del confinamiento. No parece que los Peticionarios hayan sido competidores de dicha empresa, ni en el momento en que se presentó la petición, ni cuando dicha empresa estaba aún operando. La petición no es intrascendente, ya que la disposición adecuada de residuos peligrosos es una materia de importancia indiscutible, que representa además un problema reconocido ampliamente en México.[25]

La petición incluye copias de múltiples comunicaciones por escrito enviadas a la autoridad ambiental, mediante las cuales los Peticionarios han comunicado el asunto materia de la petición a las autoridades pertinentes de la Parte mexicana (en particular, al Ministerio Público Federal mediante la denuncia penal de diciembre de 1997, ampliada en diciembre de 1998; y a la Profepa mediante la denuncia popular de marzo de 1998), así como las respuestas que aquéllos recibieron, además de otros documentos que muestran que las autoridades están al tanto de dicho asunto.[26]

Habiendo estimado cumplidos los requisitos del artículo 14(1) respecto de esta petición por las razones arriba expuestas, el Secretariado pasa a la consideración de si la petición amerita solicitar una respuesta a la Parte interesada.

Artículo 14(2) del ACAAN

Para determinar si la petición amerita una respuesta de la Parte, el Secretariado debe guiarse por las consideraciones que establece el artículo 14(2). Dichas consideraciones son las siguientes:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

25. Véase el artículo 14(1)(d) del ACAAN, el apartado 5.4 de las Directrices. y el anexo 44 de la petición.
26. Véanse el artículo 14(1)(e) del ACAAN y los anexos 13 a 15, 27 a 32 y 37 a 39 de la petición.

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Para hacer esta determinación, el Secretariado contempló lo siguiente.

Los Peticionarios afirman que "resulta evidente el perjuicio que [...] causa a todos los habitantes de Hermosillo, Sonora, la existencia del confinamiento de residuos peligrosos CYTRAR, que está contaminando el suelo y la atmósfera con desechos tóxicos expuestos al aire libre, y que inminentemente contaminará si es que se contaminaron ya [*sic*] los mantos freáticos que existen en el sitio". De la información incluida en la petición no se desprende certeza sobre la existencia o no de daños relacionados con el confinamiento. Según la autoridad ambiental, ésta negó a Cytrar la renovación de su autorización de operación sin que el confinamiento hubiese alcanzado su capacidad instalada, no por haberse comprobado que existan daños o incumplimiento por parte de la empresa, sino en respuesta a las preocupaciones de la ciudadanía. Ahora bien, dichas preocupaciones parecen basarse tanto en la proximidad con la ciudad de Hermosillo de una actividad percibida como altamente peligrosa, como en la falta de información que pudiera cambiar dicha percepción. En particular, no parece haber información disponible a la ciudadanía sobre el cumplimiento (por parte de Cytrar y sus antecesoras) de las obligaciones y especificaciones diseñadas para prevenir que el confinamiento de residuos peligrosos cause daños a la salud humana y al medio ambiente, que se invocan en la petición.[27]

Los artículos 1 y 5 del ACAAN plantean, entre otras metas, mejorar la aplicación efectiva de la legislación ambiental, lograr niveles altos de protección del medio ambiente y de cumplimiento de las leyes de las Partes, así como promover la transparencia y la participación pública. La observancia y la aplicación efectiva de la legislación relacionada con la disposición final de residuos peligrosos y el acceso de los interesados a la información relativa a ello, a que se refiere esta petición, están directamente relacionados con dichas metas del ACAAN. El ulterior estudio de los asuntos planteados en esta petición contribuiría a su consecución.

Con relación a los recursos disponibles conforme a la legislación de la Parte a los que se ha acudido, la Petición aborda este punto y muestra

27. Veánse las páginas 7 a 9 y los anexos 5, 8, 13, 15, 17, 20 a 23, 25, 26, 30, 32, 40 y 41 de la petición.

que se ha hecho un esfuerzo razonable para acudir a ellos.[28] Los Peticionarios indican que han iniciado diversos procedimientos administrativos y judiciales y proporcionan copia de los siguientes: la denuncia popular del 11 de marzo de 1998; la denuncia penal del 8 de diciembre de 1997, ampliada el 3 de diciembre de 1998, con base en la cual se inició la averiguación previa penal número 56/98/H-11; la queja ante la Comisión Estatal de Derechos Humanos del 2 de mayo de 1987; los juicios de amparo números 85/98 ante el Juez Primero de Distrito del Estado de Sonora, número 386/2000, número 679/99 y número 181/2000 (éste último concluido mediante sentencia en parte favorable al Peticionario), todos ante el Juez Tercero de Distrito del Estado de Sonora.[29]

Finalmente, la Petición no parece basarse exclusivamente en noticias de los medios de comunicación, aunque los Peticionarios sí hacen referencia a algunas noticias de ese tipo.[30]

Considerando en conjunto los factores del artículo 14(2) del ACAAN, el Secretariado determina que esta petición sí amerita solicitar una respuesta de la Parte.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado determina que la Petición SEM-01-001 (Cytrar II), presentada por la Academia Sonorense de Derechos Humanos, A.C., *et. al* cumple con todos los requisitos contenidos en el artículo 14(1) del ACAAN. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que dicha petición amerita solicitar una respuesta a la Parte interesada, en este caso México, y así lo hace a través de esta Determinación.

La Parte podrá proporcionar una respuesta dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a ella, conforme a lo establecido en el artículo 14(3) del ACAAN. Dado que ya se ha enviado a la Parte interesada una copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Por otra parte, se informa a los Peticionarios que su solicitud para que el Secretariado lleve a cabo un informe conforme al artículo 13 del

28. Véanse también los apartados 5.6(c) y 7.5 de las Directrices.
29. Véanse los anexos 5, 8, 12, 13, 15, 17, 27, 31 y 32 la petición.
30. Véanse los anexos 22, 23, 33, 36, 40 y 41 de la petición.

Acuerdo, sería tomada en consideración una vez concluido el proceso conforme al artículo 14 del mismo.

Sometida respetuosamente a su consideración, el 24 de abril de 2001.

Secretariado de la Comisión para la Cooperación Ambiental

por: Carla Sbert
Oficial Jurídica
Unidad sobre Peticiones Ciudadanas

c.c.: Dra. Isabel Studer, SEMARNAT
Sra. Norine Smith, Environment Canada
Dr. Alan Hetch, US-EPA
Sra. Janine Ferretti, Directora Ejecutiva de la CCA
Lic. Domingo Gutiérrez Mendívil, Academia Sonorense de Derechos Humanos

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation

Submission Number:	**SEM-01-001** (Cytrar II)
Submitter(s):	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Concerned Party:	United Mexican States
Date Received:	14 February 2001
Date of this Determination:	13 June 2001

I. INTRODUCTION

The Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions from any nongovernmental person or organization who asserts that a Party to the *North American Agreement on Environmental Cooperation* (the "NAAEC" or the "Agreement") is failing to effectively enforce its environmental law, where the Secretariat deems that the submission meets the requirements of NAAEC 14(1). Where the submission so merits, and with consideration to the criteria of Article 14(2), the Secretariat may request that the Party provide a response to the submission. Within 30 days of delivery of the request or, in exceptional circumstances, within 60 days, the Party may notify the Secretariat whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and any other information that the Party wishes to submit. Where it considers that, in light of the response of the Party, the submission warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

On 14 February 2001, Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendívil (the "Submitters") filed a submission with the Secretariat in accordance with Articles 14 and 15 of the NAAEC. On 24 April 2001, the Secretariat determined that this submission meets the criteria of NAAEC 14(1) and requested a response from the Mexican government pursuant to Article 14(2).[1] On 4 June 2001, the Party notified the Secretariat that it should proceed no further, due to the existence of an arbitration proceeding to settle an international dispute. The Secretariat hereby provides its determination pursuant to NAAEC 14(3)(a).

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico is failing to effectively enforce its environmental law in relation to the hazardous waste landfill known as Cytrar, located near the city of Hermosillo in the state of Sonora, Mexico, and in relation to the right to environmental information concerning this landfill. The landfill is no longer in operation, since in 1998, the environmental authority denied renewal of the operating authorization to Cytrar, S.A. de C.V. The submission makes five separate assertions concerning the effective enforcement of environmental law by Mexico in relation to the Cytrar landfill.

The Submitters assert that the Mexican government failed to effectively enforce Articles 28, 29 and 32 of the *General Law on Ecological Balance and Environmental Protection* (hereinafter, "LGEEPA"), concerning the hazardous waste landfill known as Cytrar, through its failure to require an environmental impact statement prior to the performance of works and activities at the landfill site, and by allowing the persons subsequently responsible to operate the landfill without the appropriate authorization.

The submission also asserts that the environmental authority failed to effectively enforce Article 153 of the LGEEPA and Article 7 of the *LGEEPA Regulation on Hazardous Waste (Reglamento de la LGEEPA en Materia de Residuos Peligrosos)*, which prohibit the importation of hazardous waste for final disposal and require the repatriation of hazardous waste generated under the temporary import regime, since in 1997, the Cytrar landfill received contaminated soil and other hazardous waste abandoned by the company Alco Pacífico, S.A. de C.V. for final disposal, which allegedly should have been returned to the country of origin.

1. SEM–01–001 (Cytrar II), Determination under Articles 14(1) and (2) (24 April 2001).

According to the Submitters, the hazardous waste landfill did not observe the specifications of Mexican Official Standard *NOM-057-ECOL-1993 Establishing the requirements for the design, construction and operation of controlled hazardous waste landfill cells* with regard to the construction of the cells, and the Mexican government did not sanction this alleged violation of its environmental law.

The submission asserts that the Party failed to effectively enforce Article 415 of the *Federal Criminal Code (Código Penal Federal)* by failing to bring a criminal action following the report of the facts filed by the Submitters on 8 December 1997 and the additional information provided by the Submitters on 3 December 1998.

Finally, the Submission asserts that in refusing to provide various environmental information relating to Cytrar to the Submitters, the Mexican government violated the right to environmental information contemplated in LGEEPA Article 159 Bis 3.

III. RESPONSE OF THE PARTY

In its response, received 4 June 2001, the Party asserts that "the Government of the United Mexican States is not legally able to respond to the matter in question, since it is the subject of an arbitration proceeding to settle an international dispute with the company Técnicas Medioambientales Tecmed, S.A. [an investment partner of Cytrar S.A. de C.V.], presumably arising from alleged non-compliance with the *Acuerdo para la Promoción y Protección Recíproca de Inversiones* (APRI) with Spain." [Translation.][2]

The Party therefore requests that the Secretariat proceed no further with its consideration of submission SEM-01-001, pursuant to the provisions of NAAEC 14(3)(a).

IV. ANALYSIS WITH REFERENCE TO NAAEC 14(3)

Although the NAAEC does not provide specific criteria for the Secretariat's determination of whether a submission warrants the development of a factual record in light of a Party's response,[3] the Agreement

2. ICSID, Case No. ARB(AF)/00/2, listed as number 27 in the list of pending cases.
3. Article 15:Factual Record
   1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

requires the Secretariat to proceed no further with its consideration of a submission where the matter is the subject of a pending judicial or administrative proceeding. Specifically, Article 14(3)(a) provides as follows:

> 3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:
>
> (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and
>
> (b) of any other information that the Party wishes to submit, such as
>
> (i) whether the matter was previously the subject of a judicial or administrative proceeding [...]

The Secretariat has, in the context of other submissions, considered the provision invoked by the Party in its response, and it interpreted Article 14(3)(a) as providing for termination of the processing of a submission in two factual situations: first, the existence of a pending judicial or administrative proceeding, and second, the fact that the matter that is the subject of the submission is also the subject of the proceeding.[4] In the case at hand, the Secretariat was able to confirm the existence of only the first of these situations.

According to Article 45(3)(b), a "judicial or administrative proceeding" for purposes of Article 14(3), includes "an international dispute resolution proceeding to which the Party is party". In this regard, it is clear that an arbitration proceeding before the International Centre for Settlement of Investment Disputes (ICSID) for the settlement of an international dispute in relation to the alleged default by a Party to the NAAEC of a bilateral agreement with another state (such as the *Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España)* qualifies as an "international dispute resolution proceeding." Mexico, in its response of 4 June 2001, asserts, and the list of cases pending resolution before the ICSID confirms, that there is indeed a pending proceeding for the resolution of a dispute initiated by Técnicas Medioambientales Tecmed, S.A. against the United Mexican States.[5]

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4. See, in this regard, SEM–99–001 (Methanex) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (30 June 2000).
5. However, two clarifications are in order. First, Mexico is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of

However, the Secretariat was unable to determine that the matter that is the subject of submission SEM-01-001 (Cytrar II) is also the subject of the pending international proceeding, since it could not ascertain the subject of the international proceeding. In its response, Mexico asserts:

> The relationship between these cases arises from the fact that the hazardous waste landfill referred to by the citizen submission was purchased on 17 November 1997 by the company Cytrar S.A. de C.V., of which the company Técnicas Medioambientales Tecmed S.A. is an investment partner. [Translation][6]

In the opinion of the Secretariat, the fact that there be an investment relationship between the company that initiated the international proceeding in which Mexico is a Party (Técnicas Medioambientales Tecmed S.A.) and the company whose operations are asserted by the submission to be related to failures to effectively enforce the law (Cytrar, S.A. de C.V.) does not necessarily imply that the subject of the international dispute is the same of that of the submission.

Under NAAEC 15(1), the Secretariat has broad discretion to determine whether or not a submission warrants the development of a factual record, and must provide the reasons for its determination. Only in the specific case where the matter that is the subject to a submission is the subject of a pending proceeding is the Secretariat authorized to proceed no further with its consideration of a submission without analyzing the subject matter of the submission in greater depth to determine whether it warrants the development of a factual record. In order to dismiss a submission on these exceptional grounds, it is clear that the Secretariat must ascertain that it is presented with a situation that requires dismissal under NAAEC 14(3)(a). Also, it follows from this article that the Party will notify the Secretariat of all facts necessary to reach such a determination. In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the

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Other States and we therefore assume that the framework within which this arbitration is occurring is that of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes. Second, that the foundation for the arbitration in question is not «as provided by chapter 11 Investments, Articles 1005 and 1110, of the North American Free Trade Agreement,» since said Articles of NAFTA do not apply to disputes with Spain; rather, we assume that it is Articles IV.1, V and XI of the *Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España.*

6. Response of Mexico, 1 June 2001, received 4 June 2001.

situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect. For example, the Secretariat determined in one case that it should give no further consideration to a submission based on an analysis of the Party's detailed explanation of the identity between the matter that was the subject of the submission and the matter that was the subject of the related international dispute, as supported by the arbitration notice for that dispute.[7]

In the arbitration case to which Mexico refers, the Secretariat may infer from the information available on the ICSID Web site that the proceeding has not gone beyond the constitution of the tribunal.[8] To have reached this stage (as set out in the Appendix to the Acuerdo, Title Three, paragraph 1) the investor must have: (i) notified Mexico of its intention to file a claim for arbitration and (ii) filed the arbitration claim with the ICSID. Based on these documents, for example, it would be possible to ascertain the nature of the dispute in this arbitration proceeding so as to determine whether it coincides with the matter that is the subject of the submission. However, neither these documents, nor any other detailed description of the subject matter of the arbitration proceeding, have been provided to the Secretariat.

V. DETERMINATION

The Secretariat considers that it lacks sufficient information to determine that it should proceed no further with its consideration of the submission pursuant to NAAEC 14(3)(a), as the Party asserts. However, since only the regular period of time has elapsed for the Party to file a response further to this request from the Secretariat, the Party has the remaining 30 days in which to provide the Secretariat with a response to the submission and/or the information necessary to determine that the matter that is the subject of submission SEM-01-001 (Cytrar II) is the same as the matter that is the subject of the international dispute [ARB(AF)/00/2] in which Mexico is a party.

7. See SEM-99-001 (Methanex) Determination in Accordance with Article 14(3) (30 June 2000).
8. <http://www.worldbank.org/icsid/cases/cases.htm>.

Respectfully submitted, 13 June 2001.

Secretariat of the Commission for Environmental Cooperation

per: Carla Sbert
Legal Officer
Submissions on Enforcement Matters Unit

c.c.: Dr. Isabel Studer, SEMARNAT
Ms. Norine Smith, Environment Canada
Dr. Alan Hetch, US-EPA
Ms. Janine Ferretti, Executive Director, CEC
Lic. Domingo Gutiérrez Mendívil, Academia Sonorense de Derechos Humanos

SEM-01-002

(AAA Packaging)

SUBMITTERS: Names withheld pursuant to Article 11(8)(a)

PARTY: Canada

DATE: 12 April 2001

SUMMARY: The Submitters allege that the government of Canada, is failing in its obligation as enumerated in Article 2(3) of the North American Agreement on Environmental Cooperation (NAAEC), which states that 'each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (24 April 2001) Determination that criteria under Article 14(1) have not been met.

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation

Submission I.D.:	**SEM-01-002** (AAA Packaging)
Submitter(s):	Names withheld pursuant to Article 11(8)(a)
Concerned Party:	Canada
Date received:	12 April 2001
Date of this determination:	24 April 2001

I - INTRODUCTION

On April 12, 2001, 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)).

The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to meet its obligations under Article 2(3) of the *NAAEC*, which provides:

> Each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a Pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.

Specifically, the Submitters allege that Canada "has failed to issue a prohibitory and/or injunctive order halting the export to the United States, by AAA Packaging, of products containing the banned hazardous substance 'isobutyl nitrite' . . . .[1]" The Submitters claim that under United States law, isobutyl nitrite is a regulated hazardous substance and its importation is banned. The only information provided in support of the submission is a series of undated Vancouver Sun articles, which the Submitters claim were published on or about January 2001.

III - ANALYSIS

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. 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,[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]

The opening sentence of Article 14(1) 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. . . ." Following this first sentence, Article 14(1) lists six spe-

1. Submission, at 1.
2. *See e.g.*, SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (May 26, 1998).
3. *See* SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (May 26, 1998).

cific 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.[4]

This submission contains two plain defects, either one of which is alone sufficient to warrant dismissal at this stage. First, the submission does not meet all of the criteria inherent in the first sentence of Article 14(1). Although the submission appears to meet the requirement that it be filed by a "non-governmental organization or person[5]" and the temporal requirement inherent in the phrase "is failing," it does not meet the requirement that it focus on an asserted failure to enforce a Party's environmental laws.[6]

Article 45(2) of the *NAAEC* prescribes, among other criteria, that for purposes of Article 14 an "environmental law" is "any statue or regulation of a Party, or provision thereof." The sole provision that the Submitters claim Canada is not enforcing is *NAAEC* Article 2(3).[7] The

4. Article 14(1)(a)-(f).
5. Article 45(1) defines a "non-governmental organization" to include any non-profit or public interest organization or association which is neither affiliated with, nor under the direction of, a government. There is no indication from the submission that either Submitter is affiliated with, or under the direction of, a government.
6. *Cf.* SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) (14 December 1998).
7. The Submitters assert that in the United States, isobutyl nitrite is regulated and its importation banned under provisions of the Consumer Product Safety Act, citing

Secretariat has dismissed previous allegations of ineffective enforcement of a Party's international obligations on the ground that the international obligations at issue, including in one case obligations set forth in the *NAAEC*, had not been imported into a Party's domestic law and therefore did not meet the Article 45(2) definition of "environmental law.[8]" As the Secretariat noted in regard to the B.C. Logging submission, SEM-00-004, Canada does not appear to have taken action to incorporate the *NAAEC* into its domestic law, as distinguished from its purely international obligations.[9] Further, the Secretariat concluded with regard to the B.C. Logging submission that, in general, the remedy for a *NAAEC* Party's alleged failure to fulfill any of its obligations under *NAAEC* Articles 6 and 7 lies with the other *NAAEC* Parties.[10] The same holds true for any obligations contained in *NAAEC* Article 2(3). Accordingly, although the Secretariat is not excluding the possibility that future submissions might raise questions concerning a Party's international obligations that would meet the criteria of Article 14(1), the Submitters here have not alleged that Canada is failing to enforce its environmental law within the meaning of Article 14.

The second fatal defect in the submission is that, while it appears to meet some of the criteria contained in Article 14(1)(a)-(f), it plainly does not meet the requirements of Article 14(1)(e).[11] The only indication that the government of Canada is aware generally of issues related to matters raised in the submission is in a newspaper article attached to the submission reporting that Health Canada is investigating the Canadian company that allegedly produces and markets isobutyl nitrite to customers in the United States and elsewhere. However, nothing in the submission indicates that the specific matter addressed in the submission – Canada's enforcement of *NAAEC* Article 2(3) – has been communicated in writing by the Submitters or others to the relevant Canadian authorities, and no copies of relevant correspondence is attached to the submis-

15 U.S.C. §§ 2051-2084. However, these provisions of United States law clearly are not environmental laws of Canada.

8. SEM-00-04 (B.C. Logging), Determination pursuant to Articles 14(1) and 14(2) (8 May 2000); SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (4 January 1999); SEM-97-005 (Animal Alliance), Determination pursuant to Article 14(1) (26 May 1998). While the Secretariat is not bound by principles of *stare decisis* to follow these determinations, relying on them helps to ensure consistency in the Secretariat's determinations under Articles 14 and 15.
9. SEM-00-04 (B.C. Logging), Determination under Articles 14(1) and 14(2) (8 May 2000).
10. SEM-00-04 (B.C. Logging), Determination under Articles 14(1) and 14(2) (8 May 2000).
11. Because either deficiency discussed in this determination clearly warrants dismissal, there is no need to address all of the criteria in Article 14(1)(a)-(f).

sion.[12] Nor does the submission indicate or attach copies of the response, if any, of the relevant Canadian authorities.

IV - CONCLUSION

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.[13]

Yours truly,

per: Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

c.c.: Dr. Alan Hecht, US-EPA
Ms. Norine Smith, Environment Canada
Dra. Isabel Studer, SEMARNAT
Ms. Janine Ferretti, Executive Director

12. *See* Guideline 5.5.
13. *See* Guideline 6.2.

SEM-01-003

(Dermet)

SUBMITTERS:	MERCERIZADOS Y TEÑIDOS DE GUADALAJARA, S.A.
PARTY:	United Mexican States
DATE:	14 June 2001
SUMMARY:	The submitters assert that Mexico failed to enforce effectively environmental laws, by denying probative value in a civil trial, in relation to groundwater contamination caused by the firm Dermet, S.A. de C.V. of Guadalajara in Jalisco.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (19 September 2001)	Determination that criteria under Article 14(1) have not been met.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. de petición:	**SEM-01-003** (Dermet)
Peticionarios:	Mercerizados y Teñidos de Guadalajara, S.A.
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	14 de junio de 2001
Fecha de la determinación:	19 de septiembre de 2001

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 14 de junio de 2001, la empresa Mercerizados y Teñidos de Guadalajara, S.A. (el "Peticionario"), presentó al Secretariado una petición de conformidad con los artículos 14 y 15 del ACAAN. El Peticionario asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental al negar valor probatorio,

en juicio civil, a un dictamen técnico de la autoridad ambiental sobre la contaminación del manto freático en una sección de la ciudad de Guadalajara, ocurrida en 1992.

El Secretariado determina que esta petición no satisface lo dispuesto por el artículo 14(1) del Acuerdo por las razones que se expresan en esta Determinación.

II. RESUMEN DE LA PETICIÓN

Mercerizados y Teñidos de Guadalajara, S.A. (Mercerizados) asevera que el Gobierno de México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental al negar valor probatorio en juicio civil, a un dictamen técnico de la Procuraduría Federal de Protección al Ambiente (Profepa), relativo a la contaminación del manto acuífero, generada en 1992 por la empresa productora de plaguicidas y fungicidas Dermet, S.A. de C.V. (Dermet), en la ciudad de Guadalajara, Jalisco.

De la información contenida en la petición y sus anexos, se desprenden los siguientes antecedentes:

- Mercerizados es una empresa fabril en el ramo textil, que anteriormente estaba ubicada en la calle seis número 2742 de la zona industrial de la Ciudad de Guadalajara.

- En 1992, esta empresa solicitó la intervención de la Delegación de la Procuraduría Federal de Protección al Medio Ambiente en Jalisco, debido a que empezó a detectar daños en los equipos de las instalaciones donde fabricaba hilo mercerizado y baja de calidad en la producción, por la presencia de sales de cobre provenientes del pozo de agua utilizado por la empresa. Profepa indicó a Mercerizados que no contaba con presupuesto para hacer los estudios necesarios, por lo que Mercerizados pagó $82,429.50 pesos para que se realizaran.[1]

1. Mercerizados no parece haber planteado ningún recurso ante esa solicitud, más allá de haber reclamado en el juicio contra Dermet el reembolso de este monto. No se señala ni en la petición ni en los documentos anexos a ésta, cuál fue el fundamento legal de esa solicitud de Profepa, ni se plantea algún alegato específico sobre este aspecto como parte de la petición.

- En julio de 1993, la Profepa realizó un estudio para determinar la presencia de sulfato de cobre en el interior de la empresa Dermet[2] y el 5 de enero de 1994 concluyó un dictamen técnico al respecto.[3]

- El 6 de enero de 1994, Profepa decretó la clausura total definitiva de Dermet.[4] Profepa revocó la clausura el 12 de enero de 1994, tras celebrar un convenio de concertación con Dermet a fin de que ésta llevara a cabo el saneamiento del subsuelo y del manto freático de la zona ubicada frente al número 2734 de la calle 4 de la zona industrial de Guadalajara, Jalisco.[5]

- El 10 de febrero de 1994, Profepa proporcionó un dictamen técnico a Mercerizados sobre los daños y perjuicios sufridos, y señaló a Mercerizados que ésta debía buscar la indemnización de esos daños por la vía civil.[6]

- En septiembre de 1994, Mercerizados inició juicio civil contra Dermet por daños y perjuicios. En enero de 1999, el juez determinó que Mercerizados no había probado la acción, considerando que el dictamen técnico de Profepa era sólo una prueba documental privada que no era suficiente para fijar las causas y el monto de los daños y perjuicios reclamados, sino que conforme a lo dispuesto por el Código Federal de Procedimientos Civiles (CFPC) era necesario fijarlos mediante prueba pericial desahogada en el juicio.[7]

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2. "Estudio para determinar la presencia de sulfato de cobre en el interior de la Compañía Dermet, S.A. de C.V.", ordenado a través del oficio de comisión P.FB27-002-0498-(93)-10321 del 30 de julio de 1993; elaborado por el Ing. Luis Javier Rodríguez Ortiz. Véase el acuerdo de clausura (Anexo I de la petición) y la cláusula segunda del Convenio de Concertación celebrado entre Dermet y la Profepa el 12 de enero de 1994 (Anexo II de la petición).
3. Según el acuerdo de clausura (Anexo I de la petición), a través del oficio P.F.B27-005-(93)-545-02038 de fecha 4 de noviembre de 1993, se ordenó la elaboración del informe o dictamen técnico relativo al análisis del estudio para determinar la presencia de sulfato de cobre; informe que fue concluido por el Ing. Ramón Humberto González Núñez, Subdelegado de Verificación Normativa, Apoyo Técnico y Auditoría, el 5 de enero de 1994.
4. Véase anexo I de la petición. Acuerdo de clausura contenido en el oficio P.F.B27/005/004/94.
5. Véase Anexo II de la petición.
6. Véase la sentencia definitiva emitida el 28 de enero de 1999 correspondiente al juicio civil ordinario número 28/94 promovido ante el Juzgado Segundo de Distrito en Materia Civil en el Estado de Jalisco, por Mercerizados y Teñidos de Guadalajara, S.A., en contra de Dermet, S.A. de C.V. (anexo IV de la petición, pág. 3).
7. Anexo IV de la petición, Sentencia definitiva emitida el 28 de enero de 1999 correspondiente al juicio civil ordinario número 28/94 promovido ante el Juzgado Segundo de Distrito en Materia Civil en el Estado de Jalisco, por Mercerizados y Teñidos de Guadalajara, S.A., en contra de Dermet, S.A. de C.V.

- Mercerizados recurrió esta sentencia en las instancias judiciales correspondientes, más no logró la indemnización buscada porque aunque se reconoció en la última instancia que el dictamen de Profepa tenía valor de prueba plena como documental pública, el tribunal competente confirmó que la acción para demandar el pago de los daños y perjuicios había prescrito el 8 de febrero de 1994, antes de que Mercerizados iniciase la acción civil, el 23 de septiembre de 1994.[8]

Respecto de estos hechos, el Peticionario afirma que "[l]a Delegación Jalisco de la Procuraduría Federal de Protección al medio Ambiente, cuando recibió de los técnicos que comisionó para realizar la investigación los resultados y se percató que la contaminación provenía de la citada empresa DERMET, S.A., ordenó y ejecutó la clausura de la misma, pero por influencias políticas de sus dueños, escudándose en el convenio de concertación [celebrado con Dermet] la levantó, no importándole que no estuviera saneado el manto acuífero y menos que se nos hubieran resarcido los costos de la investigación que financiamos, ni los daños y perjuicios que resentimos y para desafanarse de nosotros, invocando lo preceptuado por el artículo 194 de la Ley General del Equilibrio Ecológico y la Protección al Ambiente, disponiendo que cuando por infracción a las disposiciones de dicha ley, se ocasionen daños y perjuicios, los afectados podrán solicitar a la Secretaría la formulación de un dictamen técnico el cual tendrá valor de prueba en caso de ser presentado en juicio, nos entregó dos dictámenes uno técnico y el otro acerca del monto de los daños y nos conminó para que acudiéramos a entablar demanda ante la autoridad judicial, ya que ella dijo no podía hacer nada mas, por carecer de atribuciones y ser lo procedente, presentar con base en tales dictámenes, la reclamación en vía jurisdiccional y así fueran los Tribunales, los que decidieran nuestras reclamaciones.(*sic*)"

Mercerizados argumenta que "...basta tener en cuenta lo preceptuado por el Acuerdo de Cooperación Ambiental de América del Norte, en los artículos 5o., punto 2, incisos "j". "l", artículo 6o., punto 3, incisos "a" y "d", artículo 7, punto 1, inciso "d"; para reconocer que al contrario de como arguyó, [la Delegación de la Procuraduría Federal de Protección al Medio Ambiente] contaba con facultades para seguir el procedimiento, hasta lograr que se saneara el pozo contaminado y nos indemnizaran."

Mercerizados afirma en la petición que México ha omitido aplicar de manera efectiva los artículos 5(2)(j) y (l) , 6(3)(a) y (d) y 7(1)(d) del

8. Anexos V a VIII de la petición.

ACAAN y el artículo 194 de la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA)[9] con relación a estos hechos.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
>
> (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[10] El Secretariado revisó la petición con tal perspectiva en mente y determina que no satisface los requisitos umbrales contenidos en el preámbulo de ese artículo, porque los hechos que plantea no constituyen posibles "omisiones en la aplicación efectiva de la legislación ambiental" en que la Parte "está incurriendo". A continuación se explican las razones de esta determinación.

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9. A partir de la reforma a la LGEEPA de diciembre de 1996, esta disposición está prevista en el artículo 204 de esa ley.
10. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999).

El Peticionario alega omisiones en la aplicación efectiva de la legislación ambiental por parte de la Delegación Estatal de Jalisco de la Profepa, y por parte de la autoridad judicial federal (a través del Segundo Juzgado de Distrito, el Segundo Tribunal Unitario y el Cuarto Tribunal Colegiado, todos en materia civil, del Tercer Circuito del Poder Judicial de la Federación).

Tras el análisis detallado de la petición y los anexos que la acompañan, el Secretariado considera que los hechos planteados por el Peticionario no sugieren posibles *omisiones en la aplicación efectiva* de la legislación ambiental. A pesar de que el resultado de los procedimientos seguidos por Mercerizados ante las autoridades ambiental y judicial no fue la indemnización por los daños y perjuicios causados por la contaminación producida por Dermet, es claro que esa indemnización se negó en última instancia porque corrió el plazo de prescripción de la acción civil por daños y perjuicios, y no a causa de una omisión en la aplicación efectiva del artículo 194 de la LGEEPA, o de los artículos 5, 6 y 7 del ACAAN. A su vez, la razón por la que corrió el plazo de prescripción sin que se ejerciera la acción no fue tampoco la supuesta omisión en la aplicación efectiva de la legislación ambiental invocada en la petición.

Los hechos en que se funda la petición no sostienen la aseveración de que México "está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental", por lo siguiente:

- Mercerizados tuvo acceso a procedimientos previstos en la legislación de la Parte para que un particular demande por daños a otro particular, en congruencia con el artículo 6(3) del ACAAN.[11]

- Profepa emitió un dictamen técnico sobre los daños y perjuicios causados a Mercerizados, conforme al artículo 194 de la LGEEPA, mismo que Mercerizados presentó en juicio civil.[12]

11. Los artículos 5(2), 6(3)(a)(d) y 7(1)(d) del ACAAN contemplan el compromiso de las Partes del ACAAN de garantizar que los particulares tengan acceso a procedimientos que sean sencillos, efectivos y con requisitos y tiempos razonables, para demandar por daños a otras personas. Por su parte, la legislación civil mexicana prevé que quien sufre daños y perjuicios derivados de hechos ilícitos puede demandar una indemnización al responsable.Véase el artículo 1910 del Código Civil.
12. Dictamen técnico relativo al análisis del estudio para determinar la presencia de sulfato de cobre, Subdelegado de Verificación Normativa, Apoyo Técnico y Auditoría, 5 de enero de 1994.

- Profepa no tiene facultades para ejercitar una acción civil por daños y perjuicios a nombre de un particular.[13]

- En la última instancia, la autoridad judicial federal reconoció pleno valor probatorio al dictamen de Profepa.[14]

- No es requisito para iniciar una acción por daños y perjuicios el contar con un dictamen técnico de la autoridad ambiental.[15]

Por todo lo anterior, no pueden revisarse en el proceso del artículo 14 del ACAAN las aseveraciones de que México está incurriendo en una omisión en la aplicación efectiva de los artículos 194 y 5, 6 y 7 del ACAAN al haberse negado valor probatorio en juicio al dictamen de la Profepa y al no haber ésta actuado para que se indemnizara a Mercerizados.[16]

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13. Según el Peticionario, los artículos 5, 6 y 7 del ACAAN facultaban a la Profepa para seguir el procedimiento iniciado por su denuncia popular, hasta lograr que se indemnizara a Mercerizados. (Véase pág. 2 de la petición.) Al momento de la presentación de la denuncia popular y de la elaboración del estudio y los dictámenes por la Profepa, este órgano no contaba con facultades para iniciar procedimientos en materia civil a nombre de un tercero. Las facultades de Profepa se encontraban establecidas en el Reglamento Interior de la entonces Secretaría de Desarrollo Social, y en el Acuerdo que regula la organización y funcionamiento interno del Instituto Nacional de Ecología y de la Procuraduría de Protección al Ambiente Publicados, respectivamente, en el DOF del 4 de junio de 1992 y del 17 de julio de 1992. Tampoco en el ACAAN se establecen facultades de las autoridades ambientales de las Partes para perseguir el pago de daños y perjuicios a nombre de los particulares. Del artículo 6(3) del ACAAN se desprende claramente que corresponde a los particulares iniciar los procedimientos para la reparación de los daños originados como consecuencia de una violación a la legislación ambiental vigente.
14. Véanse las sentencias correspondientes, anexas a la petición. En particular, véase la pág. 79 de la Sentencia emitida por el Cuarto Tribunal Colegiado en Materia Civil del Tercer Circuito el 26 de marzo de 2001 respecto del Amparo Directo número 3771/2000.
15. Véase la resolución del 26 de marzo de 2001 del Cuarto Tribunal Colegiado de Circuito, en el sentido de que la LGEEPA no establece que el dictamen técnico a que se refiere el artículo 194 de la LGEEPA sea un requisito de procedibilidad para el ejercicio de la acción de pago de daños y perjuicios. (pág. 79)
16. La petición no se refiere a acciones que Profepa hubiese realizado u omitido realizar respecto de la contaminación del manto freático en aplicación de la legislación ambiental. Por ejemplo, en la petición se menciona que la Parte actuó sin importar "que no estuviera saneado el manto acuífero" (petición párrafo Tercero), pero la petición no asevera que se haya incurrido en una omisión en la aplicación efectiva de alguna disposición de la legislación ambiental de la Parte sobre este aspecto del caso, sino que se limita a aseverar una supuesta omisión por no haberse obtenido una indemnización por los daños y perjuicios presuntamente sufridos por Mecerizados. El Secretariado no expresa ninguna opinión sobre si esa u otra aseveración hubiera satisfecho los criterios del artículo 14(1).

Sólo resta considerar el argumento del Peticionario en el sentido de que el hecho de que el asunto haya tardado en resolverse desde febrero de 1992 (cuando se presentó la denuncia a Profepa) hasta marzo de 2001 (cuando se dictó la resolución definitiva en amparo), es una omisión en la aplicación efectiva de los artículos 5, 6 y 7 del ACAAN. En particular, el artículo 7(1)(d) establece que los procedimientos previstos en la legislación de cada Parte, "no sean innecesariamente complicados, no impliquen costos o plazos irrazonables ni demoras injustificadas".

Independientemente de la razón que pudiera asistir al Peticionario para considerar el lapso de tiempo que tomó la resolución de su asunto como irrazonable o injustificado, esa tardanza no es una omisión en que la Parte "está incurriendo" o que continuase al momento de presentarse la petición. Como se ha asentado al analizar otras peticiones, la expresión "está incurriendo" en el artículo 14(1) impone una consideración temporal respecto de las aseveraciones de una petición.[17] Esta consideración se satisface si al momento de presentarse la petición, la Parte correspondiente puede tomar medidas de aplicación de su legislación ambiental respecto de los asuntos materia de la petición y está omitiendo hacerlo.[18] En el caso del plazo que tardaron las autoridades mexicanas correspondientes en resolver el asunto de Mercerizados, es evidente que se trata de un hecho consumado que no puede modificarse, respecto del cual no existen facultades que la Parte esté omitiendo aplicar. Por esta razón, este último argumento tampoco puede revisarse conforme al artículo 14 del ACAAN.

Habiendo determinado que la petición no se ajusta a los requisitos umbrales del primer párrafo del artículo 14(1) del ACAAN, el Secretariado no analizó la petición a la luz de los requisitos listados en ese artículo.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado determina que la petición SEM-01-003 (Dermet), presentada por la empresa Mercerizados y Teñidos de Guadalajara, S. A. no se refiere a omisiones en que la Parte está incurriendo en la aplicación efectiva de su legislación ambiental conforme al artículo 14(1) del ACAAN, por lo que el Secretariado no procederá a examinar la petición.

17. Véase en este sentido, e.g., SEM-97-004 (Canadian Env. Defence Fund), Determinación conforme al artículo 14(1) (27 de agosto de 1997).
18. Véase en este sentido, e.g., SEM-96-001 (Cozumel), Recomendación conforme al artículo 15(1) (7 de junio de 1997).

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, el Secretariado notifica esta determinación al Peticionario, y le informa que no obstante, de acuerdo con el apartado 6.2 de las Directrices, el Peticionario cuenta con 30 días para presentar una petición que cumpla con el artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: Janine Ferretti
Directora Ejecutiva

c.c.: Dra. Olga Ojeda, SEMARNAT
Sra. Norine Smith, Environment Canada
Dr. Alan Hecht, US-EPA
Lic. Andrés Garcen Vergara, Mercerizados y Teñidos de Guadalajara, S.A.

SEM-02-001

(Ontario Logging)

SUBMITTERS: SIERRA LEGAL DEFENCE FUND, ET AL.

PARTY: Canada

DATE: 6 February 2002

SUMMARY: The Submitters assert that Canada is failing to effectively enforce section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA) against the logging industry in Ontario.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (25 February 2002) Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.

Secretariat of the Commission for Environmental Cooperation

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

Submission Number:	**SEM-02-001** (Ontario Logging)
Submitters:	Canadian Nature Federation Canadian Parks and Wilderness Society Earthroots Federation of Ontario Naturalists Great Lakes United Sierra Club (United States) Sierra Club of Canada Wildlands League
Represented by:	Sierra Legal Defence Fund (SLDF)
Concerned Party:	Canada
Date received:	6 February 2002
Date of this determination:	25 February 2002

I - INTRODUCTION

On 6 February 2002, 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 Secretariat has determined that the submission meets all of the requirements in Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce section 6(a) of the *Migratory Birds Regulations* ("MBR")[1] adopted under the *Migratory Birds Convention Act, 1994* ("MBCA")[2] in regard to the logging industry in Ontario. Section 6(a) of the MBR provides that "[...] no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird [...] except under authority of a permit therefor." Violations of section 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.[3]

The Submitters claim that their research, based on statistical data, estimates that in the year 2001, clear-cutting activity destroyed over 85,000 migratory bird nests in areas of central and northern Ontario.[4]

The Submitters allege that Environment Canada ("EC"), through its Canadian Wildlife Service ("CWS"), is primarily responsible for enforcing the MBCA.[5]

The Submitters assert that logging activity in Ontario is carried out under *Forest Management Plans* prepared under the supervision of the Ontario Ministry of Natural Resources ("MNR") in accordance with provincial standards and without any input from federal authorities on matters related to enforcing the MBCA, which is a federal act.[6] They

1. C.R.C., c. 1035.
2. S.C. 1994, c. 22.
3. Section 13 of the MBCA provides that for a summary conviction offence, a company faces a maximum fine of $100,000, an individual a maximum $50,000 fine. Individuals are also liable to jail terms up to 6 months, or a combination of jail and a fine. For indictable offences, the maximum fines are $250,000 for a company and $100,000 for an individual. Individuals are also liable to jail terms up to 5 years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled.
4. Submission at 4 and Appendix 6 of the Submission: Dr. Elaine MacDonald & Kim Mandzy, "*Migratory Bird Nest Destruction in Ontario*" (Toronto: SLDF, 2001).
5. Submission at 3.
6. Submission at 5.

assert that while EC can be contacted for input on *Forest Management Plans* and has produced a non-binding guideline[7] directing that activities be avoided during critical periods of migratory birds' lifecycles, "EC fails to take enforcement activities to ensure that this requirement [...] is adhered to.[8]" The Submitters further assert that "despite the estimated widespread destruction of bird nests,[9]" an access to information request filed in 2001 revealed no investigations or charges in Ontario for violations of section 6(a) of the MBR.[10]

The Submitters claim that "EC itself acknowledges that migratory bird nests are destroyed during logging operations.[11]" They assert that the CWS considers nest destruction during logging to be "incidental" kill and that the CWS has decided not to use proactive enforcement measures against the logging industry because violations of section 6(a) of the MBR that occur during logging operations are not intentional.[12]

The Submitters assert that "[t]he term 'incidental' is not a recognized justification under the MBCA or MBR for destroying bird nests or eggs.[13]" They assert that the MBCA is a public welfare law and that "[w]hen these laws are infringed it is often the result of unintentional, not wilful, conduct."[14]

They allege that the CWS favours conservation initiatives over enforcement in regard to the logging industry even though "[...] there is no evidence that the existing vague strategy of the Wildlife Service is effective compared to a more proactive strategy[15]" and "non-enforcement initiatives do not negate the need for enforcement.[16]" The Submitters further assert that through a "self-imposed prohibition against using enforcement action" in cases of incidental kill, "Wildlife Service officials appear to be making a choice about priorities without any authority to do so.[17]" Finally, they contend that even though logging has

7. *Environmental Assessment Guideline for Forest Habitat of Migratory Birds.*
8. Submission at 5, note 32.
9. Submission at 1.
10. Submission at 6 and Appendices 7 and 8 of the submission (access to information request respecting enforcement efforts under s. 6(a) of the MBR dated 13 July 2001 from Elaine MacDonald, SLDF to Michael Bogues, Chief Access to Information and Privacy Secretary, Environment Canada, and materials received in response to access to information request).
11. Submission at 5.
12. Submission at 8.
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. Submission at 11.
17. Submission at 8.

been an important industry in Canada and Ontario for many decades, when the MBCA was updated in 1994, the Canadian government

> [...] did not exempt the logging industry from laws to protect migratory birds or their nests. The Wildlife Service cannot undermine Parliament's intention by arbitrarily failing to enforce the MBCA.[18]

The Submitters assert that Canada does not follow its own *Compliance and Enforcement Policy for Wildlife Legislation*, which states that "[c]ompliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada," since "the actual practice of enforcing some of the law and only against some parties, but excluding the logging industry for subs. 6(a) violations, is hardly 'fair' or 'consistent'.[19]"

The Submitters assert that "[a] systematic failure to enforce against an entire industry known to engage in practices that violate the MBCA cannot be a legitimate exercise of [prosecutorial] discretion[20]" pursuant to Article 45(1)(a) of the NAAEC "because the CWS has made a sweeping policy decision, not a case-by-case judgement associated with prosecutorial discretion.[21]"

The Submitters then cite two reasons why "[t]he failure to enforce subs. 6(a), MBR against logging companies, contractors and individual operators is not a *bona fide* decision to allocate resources to the enforcement of other environmental matters that have higher priority" pursuant to Article 45(1)(b) of the NAAEC. First,

> despite their legal jurisdiction to do so, EC has failed to conduct an environmental assessment of a single *Forest Management Plan* or proposed logging operation for the threat to migratory birds. A reasonable exercise of enforcement discretion presupposes some assessment of the relative costs associated with each option.

Second, the Submitters list four reasons why "the cost of enforcing [subs.] 6(a), MBR need not have a significant impact on EC's enforcement budget:[22]" (i) because of competition, the logging industry would be responsive to enforcement action; (ii) EC could work with MNR to include MBCA requirements in the province's *Forest Management*

18. Submission at 9.
19. Submission at 11.
20. Submission at 10.
21. Submission at 9.
22. Submission at 10.

Planning Manual; (iii) surveyors must already search for certain nests and the added cost of searching for all nests would be roughly similar across companies; and (iv) logging operations could be scheduled to reduce their impact during the nesting season. The Submitters further claim that pursuant to Article 5(1) of the NAAEC, Canada is required to effectively enforce its environmental laws.[23]

The Submitters assert that the alleged failure to enforce section 6(a) of the MBR against the logging industry, in addition to the harmful impact on the migratory bird population, has negative consequences for wildlife biodiversity, tourism, respect for the law, fair competition within the logging industry and healthy wood stocks.[24]

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,[25] 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.

A. Article 14(1)

The opening sentence 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 these requirements.

The Submission is filed by nongovernmental organizations within the meaning of Article 45(1) of the NAAEC. The Submission alleges that

23. Submission at 3.
24. Submission at 1. At pp. 3-4, the Submitters cite a Canadian government study, *The Economic Significance of Nature-Related Activities*, as well as the *Strategy and Action Plan* of the *North American Bird Conservation Initiative*, in support of their allegations.
25. 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 Party, Canada, is failing to effectively enforce section 6(a) of the MBR. Section 6(a) of the MBR comes within the definition of "environmental law" found in Article 45(2)(a) of the NAAEC, since it is a provision of a regulation of a Party, the primary purpose of which is the protection of the environment through the protection of wild flora or fauna. Section 6(a) of the MBR is not directly related to worker safety or health. The Submission alleges an ongoing failure to effectively enforce section 6(a) of the MBR against the logging industry in Ontario. Finally, the Submission alleges a failure to effectively enforce section 6(a) of the MBR and not a deficiency in the law itself.

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.[26]

The submission meets these criteria. The submission is in English, a language designated by the Parties.[27] It clearly identifies the organizations making the submission.[28]

The submission provides sufficient information to allow the Secretariat to review the submission with respect to the assertions of a

26. Article 14(1)(a)-(f).
27. Article 14(1)(a), Guideline 3.2.
28. Article 14(1)(b) and submission at ii.

failure to effectively enforce the law cited.[29] First, information about the research method used and results obtained in estimating the number of alleged violations of section 6(a) of the MBR referenced in the submission is provided in an appendix to the submission.[30] Second, assertions concerning the Party's failure to effectively enforce section 6(a) of the MBR are based on government materials available on the Internet, caselaw, and information obtained pursuant to an access to information request, all of which is reproduced in appendices to the submission.[31]

The submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d) of the NAAEC. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business.[32]

The submission meets the criterion contained in Article 14(1)(e) of the NAAEC, that it indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The submission states that the issues raised in the submission have been communicated to the Party. The submission also provides copies of correspondence sent to the Party, and copies of the reply received. It states that a request for information on enforcement of and compliance with section 6(a) of the MBR with respect to logging operations went unanswered.[33]

Finally, because the Submitters are established in the United States or Canada, the submission meets the requirement in Article 14(1)(f) that it be filed by a "person or organization residing or established in the territory of a Party.[34]"

B. 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 such a 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

29. Article 14(1)(c), Guideline 5.2, 5.3.
30. Appendix 6 to the submission.
31. Appendices 1, 8, 10, 11 to the submission.
32. See Guideline 5.4(a).
33. Submission at 12-13 and Appendix 9 to the submission.
34. Submission at ii.

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 requesting a response from the Party.

The Submitters allege harm to the persons they represent:

> The Submitters represent many outdoor enthusiasts, birders and conservationists. Since birds are an integral part of the sounds, sights, and diversity of the natural landscape, a failure to protect them ultimately diminishes the splendour of the outdoors for enthusiasts and birders. The destruction of migratory bird nests and eggs harms conservationists by destroying the subject of their study and by damaging the delicate balance in the ecosystem. Moreover, birds have their own intrinsic value regardless of human benefit. All of this harm is beyond monetary calculation.[36]

Such assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.[37] We note that the Submitters claim that "[t]he failure to enforce subs. 6(a), MBR is the direct cause of the harm suffered by these groups.[38]"

35. Article 14(2) of the NAAEC.
36. Submission at 13.
37. 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 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."
38. Submission at 13.

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[39] The Submitters allege that

> [a] blanket absence of enforcement against the logging industry may result in lower costs for timber harvests but higher costs to our environment because of the harm to migratory birds. This failure to enforce environmental law may thereby distort the significant trade in wood products between the parties, contrary to Article 1(e) [of the NAAEC], by permitting some producers to externalise environmental costs.[40]

Article 1(e) of the Agreement lists as an objective of the NAAEC to "avoid creating trade distortions or new trade barriers." A failure by one Party to effectively enforce a regulatory provision mirroring an obligation also undertaken by another Party pursuant to a bilateral treaty could conceivably result in trade distortions in the regulated industry. Therefore, a submission such as the one under review, seeking to ensure effective enforcement of such provision, advances the goals of Article 1(e) of the Agreement.

The Submitters characterize the alleged failure by EC to effectively enforce section 6(a) of the MBR as a "widespread pattern of ineffectual enforcement.[41]" The Secretariat has previously determined that "[a]ssertions of this sort – that there is a widespread pattern of ineffectual enforcement – are particularly strong candidates for Article 14 consideration.[42]"

The submission also furthers the Agreement's objective of enhancing "compliance with and enforcement of environmental laws and regulations.[43]" Finally, the submission promotes the conservation of shared bird populations "for the well-being of present and future generations.[44]"

The Submitters assert that "Canadian caselaw demonstrates the difficulty of pursuing private remedies for MBCA violations" because courts have refused to grant standing to private parties barring proof that the applicant faces the infringement of some personal or private right or will suffer personal damages.[45] They also assert that charges

39. Article 14(2)(b) of the NAAEC.
40. Submission at 13.
41. Submission at 10.
42. SEM-99-002 (Migratory Birds), Determination pursuant to Article 14(1) and (2) of the NAAEC (23 December 1999).
43. Article 1(g) of the NAAEC.
44. Article 1(a) of the NAAEC.
45. Submission at 14.

sworn by private individuals are not a viable alternative because logging operations are carried on in remote areas where access is often forbidden, making it difficult for citizens to witness violations of section 6(a) of the MBR; citizens usually do not have the expertise or financial resources to prosecute charges in court; in any private prosecution, the Crown could intervene to withdraw or stay the charge; and prosecutions are after-the-fact events that do not remedy the harm done.[46] It therefore appears from the submission that private remedies may in effect not be available.

Finally, the submission is not based exclusively on mass media reports. The submission is based primarily on SLDF research, government information available on the Internet, caselaw and information obtained pursuant to an access to information request.

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 section 6(a) of the MBR merits requesting a response from the Party.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-02-001 (Ontario Logging) 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 Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

per: Katia Opalka
Legal Officer, Submissions on Enforcement Matters Unit

c.c.: Ms. Norine Smith, Environment Canada
Ms. Judith E. Ayres, US-EPA
Dra. Olga Ojeda, SEMARNAT
Ms. Janine Ferretti, CEC Executive Director
Mr. Albert Koehl, SLDF

46. Submission at 15.

SEM-02-002

(Mexico City Airport)

SUBMITTERS: JORGE RAFAEL MARTINEZ AZUELA, ET AL.

PARTY: United Mexican States

DATE: 7 February 2002

SUMMARY: The submitters assert that Mexico is failing to effectively enforce its environmental laws with respect to the noise emissions originating at the Mexico City International Airport (AICM). According to the Submitters, there are studies showing that the noise emissions of the AICM exceed the limits established in environmental law, causing irreversible damage to the thousands of persons living near the airport.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (22 February 2002)	Determination that criteria under Article14(1) have been met and that the submission merits requesting a response from the Party.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. de petición:	**SEM-02-002** (Aeropuerto de la Ciudad de México)
Peticionarios:	Jorge Rafael Martínez Azuela Jorge Martínez Sánchez Raúl Morelos C. Jorge Alberto Tellez Murillo Saúl Gutiérrez Hernández Norma Guadalupe Viniegra Cantón
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	7 de febrero de 2002
Fecha de la determinación:	22 de febrero de 2002

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 7 de febrero de 2002, Jorge Rafael Martínez Azuela y otros vecinos de la zona circundante al Aeropuerto Internacional de la ciudad de México (AICM) (los "Peticionarios"), presentaron al Secretariado una petición de conformidad con los artículos 14 y 15 del ACAAN. Los Peticionarios aseveran que el gobierno de México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de las emisiones de ruido originadas por ese aeropuerto.

El Secretariado determina que esta petición satisface los requisitos del artículo 14(1) del Acuerdo, y que amerita solicitar una respuesta a la Parte mexicana conforme al artículo 14(2), por las razones que se expresan en esta Determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que existen estudios que muestran que las emisiones de ruido del AICM exceden los límites establecidos en la legislación ambiental, causando daños irreversibles a las miles de personas que residen en la periferia de ese aeropuerto. Los Peticionarios afirman que las autoridades ambientales federales y locales han omitido aplicar de manera efectiva los artículos 5 fracciones V y XIX, 8 fracción VI, 155 y 189 al 204 de la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA), la Norma Oficial Mexicana NOM-ECOL-081-1994[1] (NOM-081) y los artículos 80 al 84 de la Ley Ambiental del Distrito Federal (LADF). La petición contiene dos aseveraciones: a) que México incurre en omisiones en la aplicación efectiva de su legislación ambiental por la nula vigilancia y aplicación de sanciones al AICM, no obstante que sus operaciones rebasan los límites máximos permisibles de emisión de ruido establecidos en la NOM-081; y b) que México incurre en omisiones respecto de los procedimientos de denuncia popular y denuncia ciudadana iniciados ante el gobierno federal y del Distrito Federal, respectivamente, relativos a las posibles violaciones del artículo 155 de la LGEEPA y la NOM-081.

Los Peticionarios argumentan que conforme a los artículos 5 fracciones V y XIX y 155 la autoridad ambiental federal está obligada a lo siguiente respecto del AICM: "...(i) vigilar el cumplimiento de la NOM-081; (ii) adoptar medidas para evitar que se transgredan los límites máximos permisibles de emisión de ruido establecidos en la NOM-081, y; (iii) aplicar las sanciones correspondientes en caso de que se transgredan dichos límites." Señalan también que "... el artículo 8,

1. Que establece los límites máximos permisibles de emisión de ruido de las fuentes fijas y su método de medición. (Publicada en el D.O.F. de fecha 13 de enero de 1995.)

fracción VI de la LGEEPA, en relación con el artículo 9 del mismo ordenamiento, confiere al gobierno del Distrito Federal la facultad de aplicar las disposiciones jurídicas relativas a la prevención y control de la contaminación por ruido, proveniente de fuentes fijas que funcionen como establecimientos de servicios."[2]

La petición afirma que como consecuencia de la falta de aplicación por parte de México de su legislación ambiental en este caso, los vecinos del AICM han sufrido daños al sistema auditivo, diversos efectos negativos por la interrupción del sueño y la merma del desarrollo académico de los niños de la zona, cuyas clases se interrumpen por el paso de un avión aproximadamente cada 7 minutos. Según los Peticionarios, los estudios concluyeron que "[n]o existe procedimiento alguno que pueda mitigar el ruido aeroportuario cercano al AICM.[3]" La petición afirma que: "Es claro por lo tanto, que la forma de proteger el ambiente y salvaguardar la integridad física de los habitantes de las inmediaciones del AICM, es cerrar la fuente fija que produce las emisiones de ruido por encima de los estándares legal y mundialmente aceptables. En la alternativa, solicitamos una recomendación en el sentido de que se tomen las medidas pertinentes para reducir el ruido y que se valore la posibilidad de compensar económicamente por los daños sufridos a los vecinos del AICM.[4]"

III. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

Artículo 14(1) del ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;

2. Ambas citas vienen de la página 5 de la petición.
3. El estudio que citan los Peticionarios dice literalmente: «There are few, if any, mitigating procedures that could be implemented to reduce noise exposure at the AICM».
4. Página 7 de la petición.

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;

(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[5] Con tal perspectiva en mente el Secretariado determina que la petición sí satisface los requisitos de ese artículo y explica a continuación las razones de esta determinación.

Las disposiciones legales que invoca la petición satisfacen la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN, que se refiere al propósito principal de tales disposiciones.[6]

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5. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999).
6. El artículo 45(2) del ACAAN establece:
   Para los efectos del Artículo 14(1) y la Quinta Parte:
   (a) "**legislación ambiental**" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
      (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
      (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
      (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
   (b) Para mayor certidumbre, el término **"legislación ambiental**" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.
   (c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.
   Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998), SEM-98-001 (Guadalajara), Determinación conforme al artículo 14(1) (13 de septiembre de 1999) y SEM-98-002 (Ortiz Martínez), Determinación conforme al artículo 14(1) (18 de marzo de 1999).

Los artículos 5 fracciones V y XIX, y 8 fracción VI de la LGEEPA establecen simplemente la distribución de competencias entre la federación y el Distrito Federal,[7] para la vigilancia del cumplimiento de las normas oficiales mexicanas y la aplicación de la legislación ambiental en materia de ruido. Los artículos 155 y 189 al 204 de la LGEEPA, la NOM-081 y los artículos 80 al 84 de LADF son disposiciones cuyo propósito principal coincide con "... la prevención de un peligro contra la vida o la salud humana, a través de [...] la prevención, el control o el abatimiento de una fuga, descarga o emisión de contaminantes ambientales...".[8]

La petición también satisface los seis requisitos listados en el artículo 14(1). La petición se presentó por escrito en español, que es el idioma designado por la Parte mexicana.[9] Los Peticionarios se identificaron como Jorge Rafael Martínez Azuela, Jorge Martínez Sánchez,

Raúl Morelos C., Jorge Alberto Tellez Murillo, Saúl Gutiérrez Hernández y Norma Guadalupe Viniegra Cantón, personas que residen en la zona circundante al AICM en el Distrito Federal.[10]

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7. El artículo 8 9 de la LGEEPA establece las facultades de los municipios, que son aplicables al Distrito Federal en los términos del artículo 9 de la LGEEPA.
8. El artículo 155 de la LGEEPA dispone: Quedan prohibidas las emisiones de ruido, vibraciones, energía térmica y lumínica y la generación de contaminación visual, en cuanto rebasen los límites máximos establecidos en las normas oficiales mexicanas que para ese efecto expida la Secretaría, considerando los valores de concentración máxima permisibles para el ser humano de contaminantes en el ambiente que determine la Secretaría de Salud. Las autoridades federales o locales, según su esfera de competencia, adoptarán las medidas para impedir que se transgredan dichos límites y en su caso, aplicarán las sanciones correspondientes.
   En la construcción de obras o instalaciones que generen energía térmica o lumínica, ruido o vibraciones, así como en la operación o funcionamiento de las existentes deberán llevarse a cabo acciones preventivas y correctivas para evitar los efectos nocivos de tales contaminantes en el equilibrio ecológico y el ambiente.
   Por su parte, la NOM-081 dispone:
   1. OBJETO. Esta norma oficial mexicana establece los límites máximos permisibles de emisión de ruido que genera el funcionamiento de las fuentes fijas y el método de medición por el cual se determina su nivel emitido hacia el ambiente.
   2. CAMPO DE APLICACION. Esta norma oficial mexicana se aplica en la pequeña, mediana y gran industria, comercios establecidos, servicios públicos o privados y actividades en la vía pública.
   5. ESPECIFICACIONES ...5.4 Los límites máximos permisibles del nivel sonoro en ponderación "A" emitido por fuentes fijas, son [... de 6:00 a 22:00 horas, 68 dB(A); y de 22:00 a 6:00 horas, 65 dB(A)]...
   6. VIGILANCIA... 6.1 La Secretaría de Desarrollo Social, por conducto de la Procuraduría Federal de Protección al Ambiente, así como los Estados y en su caso los Municipios, son las autoridades competentes para vigilar el cumplimiento de la presente norma oficial mexicana.
9. Véanse el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
10. Véanse los artículos 14(1)(b) y (f) y 45(1) del ACAAN y la página 2 y 8 de la petición.

La petición contiene información suficiente, que permitió al Secretariado revisarla, satisfaciendo el requisito conforme al artículo 14(1)(c) del ACAAN. Incluye información sobre la exposición al ruido generado por las operaciones del AICM de las personas que residen en las inmediaciones de ese aeropuerto,[11] sobre la legislación ambiental aplicable[12] y sobre los esfuerzos de algunos residentes para procurar la aplicación efectiva de la legislación correspondiente por la autoridad ambiental.[13] Los Peticionarios sustentan sus aseveraciones en dos estudios realizados en torno a los efectos en la salud de las personas expuestas a esas emisiones de ruido, ambos realizados por la organización MITRE. Afirman haberse allegado de la información relativa al contenido de los estudios a través de Internet. Anexan a la petición el estudio titulado "Análisis de Ruido, Aeropuerto Internacional de la Ciudad de México" de septiembre de 2001, pero señalan que no lograron obtener copia del segundo estudio, titulado "Aeropuerto Internacional de la Ciudad de México, Análisis de Ruido" de octubre del mismo año. También acompañan a al petición un videocassette con un documental realizado por el Instituto Mexicano de Recursos Naturales Renovables, A.C. sobre la contaminación por ruido generada por el AICM, en el que se hace referencia al estudio anexo.[14]

La petición no parece encaminada a hostigar a una industria, sino a promover la aplicación de la legislación ambiental, porque se centra en la presunta falta de aplicación por la autoridad ambiental de las disposiciones legales sobre la emisión de ruido. La petición no es intrascendente, ya que las emisiones de ruido por encima de los límites establecidos en las normas respectivas a que se refiere la petición, están prohibidas por la LGEEPA, que es una ley de orden público e interés social. Asimismo, la petición no es intrascendente porque se refiere a la presunta exposición de miles de personas que residen en las inmediaciones del AICM a los efectos nocivos para la salud relacionados con estas emisiones de ruido. Los Peticionarios señalan que el propósito de la petición es que la Parte aplique de manera efectiva la legislación ambiental en cuestión. La petición invoca los objetivos planteados por el ACAAN consistentes en alentar la protección y el mejoramiento del medio ambiente en el territorio de las Partes, para el bienestar de las generaciones presentes y futuras [artículo 1(a)]; y en mejorar la observancia y la aplicación de las leyes y reglamentos ambientales [artículo 1(g)].[15]

11. Véanse las páginas 3 y 4 de la petición.
12. Véanse las páginas 1, 2, 4 y 5 de la petición.
13. Véanse las páginas 3, 9 a 12 y los anexos 3 y 4 de la petición.
14. Véanse las páginas 2, 5 a 7 y los anexos 1 y 2 de la petición.
15. Véase el artículo 14(1)(d) del ACAAN, el apartado 5.4 de las Directrices y la página 3 de la petición.

La petición incluye copia de dos comunicaciones por escrito enviadas a la autoridad ambiental, mediante las cuales los Peticionarios han comunicado el asunto materia de la petición a las autoridades pertinentes de la Parte mexicana, tanto federales como del Distrito Federal, así como la respuesta a una de ellas, en la que la autoridad afirma que está al tanto de dicho asunto.[16]

Habiendo estimado cumplidos los requisitos del artículo 14(1) respecto de esta petición por las razones arriba expuestas, el Secretariado pasa a la consideración de si la petición amerita solicitar una respuesta a la Parte interesada.

Artículo 14(2) del ACAAN

Para determinar si la petición amerita una respuesta de la Parte, el Secretariado debe guiarse por las consideraciones que establece el artículo 14(2), que son:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Para hacer esta determinación, el Secretariado contempló lo siguiente.

Según los Peticionarios, de los estudios que citan se desprende que los habitantes localizados dentro de un radio de 51 km² alrededor del AICM, padecen emisiones de ruido superiores a los estándares mundialmente aceptables. Señalan que los estudios revelan que al menos 30 de esos 51 Km² están densamente poblados, y que los estudios indican que "[b]ajo cualquier estándar, la existencia de áreas residenciales localizadas inmediatamente fuera de un aeropuerto de alto tráfico debe ser materia de seria preocupación ambiental." El corto elaborado por el

16. Véanse el artículo 14(1)(e) del ACAAN, la página 3 y los anexos 3 y 4 de la petición.

Instituto Mexicano de Recursos Naturales Renovables, A.C. señala que en el AICM se dan trescientas veinte mil operaciones aereonáuticas anuales, y que en temporada alta y horas pico, llegan a darse cincuenta y cinco operaciones por hora. El número de personas afectadas por estas operaciones se estima entre medio millón y hasta dos millones de personas.[17]

En la petición se resumen los daños sufridos por los Peticionarios en estos términos:

> Lo mas preocupante de la situación es que la pérdida de la audición inducida por el ruido es **irreversible** por la incapacidad de regeneración de las células ciliares de la audición, de ahí la urgencia de que la **Parte** tome las medidas legales pertinentes y aplique de manera inmediata los recursos legales de que dispone para evitar que se siga violando la normatividad ambiental en materia de ruido. (énfasis en el original)
>
> La pérdida de la audición es sólo una de las tantas molestias y daños a la salud que la exposición a las altas emisiones de ruido provoca; otros efectos relacionados que hemos experimentado son: (i) aumento del estrés; (ii) dificultad de concentración; y (iii) reducción del rendimiento, como consecuencia de la interrupción del sueño por las noches debido a las emisiones de ruido. Estos síntomas se presentan con mayor gravedad en los niños quienes además de ser irascibles en extremo, ven mermado su desarrollo académico pues como es de todos sabido en las escuelas es necesario interrumpir las clases cada vez que pasa un avión lo cual sucede cada 7 minutos aproximadamente.[18]

En relación con el apartado (b) del artículo 14(2) del ACAAN, el Secretariado considera que el ulterior estudio de los asuntos planteados en esta petición contribuiría a la consecución de las metas del Acuerdo y promovería el acceso de los interesados a información adicional sobre la presunta falta de aplicación de la legislación ambiental a que se refiere esta petición. Los artículos 1 y 5 del ACAAN plantean, entre otras metas, mejorar la aplicación efectiva de la legislación ambiental, lograr niveles altos de protección del medio ambiente y de cumplimiento de las leyes de las Partes, así como promover la transparencia y la participación pública. La observancia y la aplicación efectiva de disposiciones cuyo cumplimiento prevendría daños a la salud de miles de personas, están directamente relacionados con estas metas del ACAAN.

Con relación a los recursos disponibles conforme a la legislación de la Parte a los que se ha acudido, la Petición aborda este punto y muestra

17. Véase el anexo 1 de la petición.
18. Véanse las páginas 3 y 4 de la petición.

que se ha hecho un esfuerzo razonable para acudir a ellos.[19] Los Peticionarios indican que presentaron una denuncia popular, el 31 de octubre de 2001, a la Procuraduría Federal de Protección al Ambiente y una denuncia ciudadana, el 23 de noviembre de 2001, ante la Secretaría de Medio Ambiente del Distrito Federal. El 31 de enero de 2002, la Dirección General de Desarrollo Delegacional de la Delegación Venustiano Carranza del Distrito Federal notificó a los denunciantes, en respuesta a la denuncia popular presentada el 31 de octubre de 2001 a la Procuraduría Federal de Protección al Ambiente, que "... es un problema del cual esta consiente (sic) la autoridad y que tomaremos en cuenta sus observaciones." Los Peticionarios indican que esa respuesta no se ajusta al procedimiento previsto en la LGEEPA, por su extemporaneidad y porque no indica las acciones que la autoridad lleva o llevará a cabo para atender las presuntas violaciones a la NOM-081. A la fecha de la petición, los denunciantes no habían recibido respuesta alguna respecto de la denuncia ciudadana del 23 de noviembre de 2001.[20]

Por último, la Petición no parece basarse exclusivamente en noticias de los medios de comunicación, ya que los Peticionarios tienen conocimiento directo del asunto porque residen en las inmediaciones del AICM.

Considerando en conjunto los factores del artículo 14(2) del ACAAN, el Secretariado determina que esta petición sí amerita solicitar una respuesta de la Parte.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado determina que la Petición SEM-02-002 (Aeropuerto de la Ciudad de México), presentada por Jorge Rafael Martínez Azuela, *et. al* cumple con todos los requisitos contenidos en el artículo 14(1) del ACAAN. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que dicha petición amerita solicitar una respuesta a la Parte interesada, en este caso México, y así lo hace a través de esta Determinación.

La Parte podrá proporcionar una respuesta dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a ella, conforme a lo establecido en el artículo 14(3) del ACAAN. Dado que ya se ha enviado a la Parte

19. Véanse también los apartados 5.6(c) y 7.5 de las Directrices.
20. Véanse las páginas 9 a 11 de la petición.

interesada una copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Sometida respetuosamente a su consideración, el 22 de febrero de 2002.

Secretariado de la Comisión para la Cooperación Ambiental

por: Carla Sbert
Oficial Jurídica
Unidad sobre Peticiones Ciudadanas

c.c.: Dra. Olga Ojeda, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sra. Janine Ferretti, Directora Ejecutiva de la CCA
Sr. Jorge Rafael Martínez Azuela

SEM-02-003

(Pulp and Paper)

SUBMITTERS: SIERRA LEGAL DEFENCE FUND, ET AL.

PARTY: Canada

DATE: 8 May 2002

SUMMARY: While noting that pollution from pulp mills has dropped since adoption of the PPER in 1992, the Submitters have documented over 2,400 documented violations of the PPER at mills in central and eastern Canada from 1995 to 2000 and claim very few were prosecuted. They claim that low numbers of prosecutions correlate with continuing high numbers of violations in Quebec and the Atlantic Provinces.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (7 June 2002) Determination that criteria under Article 14(1) have been met and that the submission merits requesting a response from the Party.

Secretariat of the Commission for Environmental Cooperation

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

Submission Number:	**SEM-02-003** (Pulp and Paper)
Submitters:	Friends of the Earth Union Saint-Laurent Grands Lacs Conservation Council of New Brunswick Ecology Action Centre Environment North
Represented by:	Sierra Legal Defence Fund (SLDF)
Concerned Party:	Canada
Date received:	8 May 2002
Date of this determination:	7 June 2002

I - INTRODUCTION

On 8 May 2002, 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 Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations (PPER)* against pulp and paper mills in Ontario, Quebec and the Atlantic Provinces (i.e. New Brunswick, Nova Scotia and Newfoundland). The Secretariat has determined that the submission meets all of the requirements in Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations (PPER)* against pulp and paper mills in Ontario, Quebec and the Atlantic Provinces.

The Submitters first provide general assertions regarding the amount and pollutant content of effluent from Canada's 157 pulp and paper mills, contending the mills have "added tonnes of harmful substances to our waterways and caused extensive harm to aquatic ecosystems.[1]" They claim that the pulp and paper industry made progress in investing in environmental upgrades in the early 1990's but that those investments have dropped sharply since 1995.[2]

Next, the Submitters describe the pollution prevention provisions of the *Fisheries Act* and the *PPER* that they contend Canada is failing to effectively enforce in Ontario, Quebec and the Atlantic Provinces. They note that under the *Fisheries Act*, "it is an offence to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation.[3]" They identify as relevant to their submission two provisions of the federal government's Compliance and Enforcement Policy for the pollution prevention and habitat protection provisions of the *Fisheries Act*. First is the policy that "fair, predictable, and consistent enforcement govern the application of the law, and responses by enforcement personnel to alleged violations.[4]" Second is the intent stated in the Policy "to

1. Submission at 3.
2. Submission at 3.
3. Submission at 3. *See Fisheries Act*, s. 36(3).
4. Submission at 4 (quoting *Fisheries Act* Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy, Introduction).

ensure that violators will comply with the *Fisheries Act* within the shortest possible time, that violations are not repeated and that all available enforcement tools are used.[5]"

The Submitters note that the 1991 *PPER* regulations, which took effect in July 1992, define acutely lethal effluent, biological oxygen demand (or BOD) and total suspended solids (or TSS) as deleterious substances under the *Fisheries Act*. According to the Submitters, the *PPER* authorize deposits of BOD and TSS as long as certain conditions are met, but (at least since 1995) they strictly prohibit acutely lethal effluent.[6] The Submitters describe the conditions on discharges of BOD and TSS as "relating to monitoring equipment, monitoring reports, preparing a remedial plan in case the effluent fails certain acute lethality tests, preparing and implementing an emergency response plan, and preparing environmental effects monitoring studies.[7]"

They also describe the test methods and effluent monitoring requirements for BOD, TSS and acute lethality and note that each day on which the *PPER* are violated constitutes a separate offence. They note that trout acute lethality test failure is an automatic *PPER* (and hence *Fisheries Act*) violation that requires accelerated follow-up testing, and that failure of an acute lethality test for *Daphnia magna*, while not an automatic violation, also requires follow-up test procedures. For both kinds of acute lethality test, failure to conduct required follow-up test procedures violates the *PPER* and the *Fisheries Act*.

The Submitters next present in detail their assertion that Canada is failing to effectively enforce the *Fisheries Act* and the *PPER* in regard to pulp and paper mills in Ontario, Quebec and the Atlantic Provinces. The two categories of violations for which they contend enforcement is deficient are (1) failure to meet a "deleterious substances" test and (2) failure to conduct follow-up testing when there is an effluent test failure.

In regard to Quebec, the Submitters obtained data that they claim show 960 acute lethality, BOD and TSS violations from 1995 to 2000 at nine mills. They claim that in 2000, 26 Quebec mills had 171 violations (presumably acute lethality, BOD and TSS violations); 24 mills failed the trout acute lethality test, 33.3 % of which also violated follow-up test procedures; and 28 mills, after failing the *Daphnia magna* acute lethality test,

5. Submission at 4.
6. Submission at 5.
7. Submission at 5.

violated the acute lethality follow-up procedures.[8] In all, the Submitters claim that there were at least 250 reported potential offences of the *PPER* follow-up test procedures throughout Quebec in 2000. The Submitters claim that, despite these violations, they could find no *Fisheries Act* prosecutions or convictions of any Quebec mills, and they state that they are particularly concerned about apparent lack of effective enforcement at six mills, based on data from 2000. Of these, they highlight especially the Tembec Inc. mill in Temiscaming, for which they claim no prosecution was brought under either federal or provincial effluent regulations despite an alleged 275 reported violations from 1995 through 2000.

In Ontario, the Submitters contend that 13 mills had over 225 acute lethality, BOD and TSS test failures between 1996 and 2000. In 2000 alone, they claim that 7 mills were responsible for 18 such test failures, six of which mills failed the trout acute lethality test and two of which also failed the trout lethality test follow-up procedures. They also claim that 9 mills violated the *Daphnia magna* follow-up procedures. In all, the Submitters claim there were at least 94 follow-up test procedure violations at Ontario mills in 2000. The Submitters assert that from 1995 to 2000, six Ontario mills were prosecuted under the *PPER*, which they believe explains the lower number of violations in Ontario as compared to Quebec and the Atlantic Provinces, where the Submitters claim there have been fewer prosecutions. Nonetheless, on the basis of 2000 data, the Submitters identify two Ontario mills for which they "have concerns about the apparent lack of effective enforcement of the federal laws.[9]"

The Submitters obtained only partial data for mills in the Atlantic Provinces for the years 1995 to 2000 and claim therefore that they understate the number of violations in those provinces. According to the Submitters, the data they obtained show that 19 mills reported 1,081 acute lethality, BOD and TSS violations from 1995 to 2000. The Submitters did not calculate follow-up test procedure violations for the Atlantic Provinces. They claim that despite the number of test failure violations, they found only "two prosecutions of mills in the Atlantic Region under the federal laws since the *PPER* came into force.[10]" Based on 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding four Atlantic Provinces mills. According to the Submitters, the Atlantic Provinces mill allegedly with the most violations from 1995 to 2000, the Irving Saint John mill, was prosecuted under

8. Appendix 6 to the submission provides a flowchart showing the acute lethality testing procedures and the points at which violations occur.
9. Submission at 9.
10. Submission at 10.

the federal laws in 1998 but still had 22 test failure violations and an unknown number of follow-up test violations in 2000.

The Submitters contend that the exclusions in NAAEC Article 45(1) from the definition of "failure to effectively enforce environmental law" do not apply. They claim that Canada's alleged failure to effectively enforce the *Fisheries Act* and the *PPER* do not reflect a reasonable exercise of discretion or result from *bona fide* decisions to allocate resources to other enforcement matters within the meaning of Article 45(1). Among other things, they assert that "[i]t is not a reasonable exercise of discretion where an available enforcement tool, such as prosecutions, is used so infrequently in the face of widespread and numerous violations.[11]"

Finally, as discussed further below, the Submitters present information in support of their contention that the submission meets the requirements of Article 14(1)(a)-(f) and that the submission merits requesting a response from Canada based on the criteria in Article 14(2).

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,[12] 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.

A. Article 14(1)

The opening sentence 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 these requirements.

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11. Submission at 11.
12. *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).

First, the Submitters are nongovernmental organizations as defined in Article 45(1) of the NAAEC. Second, the submission asserts that a Party, Canada, is failing to effectively enforce section 36 and other sections of the *Fisheries Act* related to pollution prevention, as well as provisions of the *PPER*. As the Secretariat has found in other submissions, the pollution prevention provisions of the *Fisheries Act* are environmental law within the meaning of NAAEC Article 45(2).[13] Third, as the Submitters "assert that the Government of Canada *is* in breach of its commitment under the NAAEC by failing to effectively enforce its *Fisheries Act* and [*PPER*],[14]" the submission alleges an ongoing failure to effectively enforce the *Fisheries Act* and the *PPER*. Notably, it appears Canada could still take enforcement action with respect to at least some of the alleged violations that the Submitters specifically identify.[15] Finally, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.

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.[16]

13. *See* SEM-98-004 (BC Mining), Article 15(1) Notification at 11 (11 May 2001).
14. Submission at 2 (emphasis added).
15. *See, e.g., Fisheries Act* s. 82(1).
16. Article 14(1)(a)-(f).

The submission meets these criteria. The submission is in English, a language designated by the Parties.[17] It clearly identifies the organizations making the submission.[18]

The submission provides sufficient information to allow the Secretariat to review the submission.[19] The Submitters provide extensive data regarding numerous specific violations of the *PPER* and the *Fisheries Act*, as well as data regarding the extent to which Canada has taken enforcement action in response to those violations.[20]

The submission appears to be aimed at promoting enforcement rather than at harassing industry. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, the Submitters are not competitors of any of the mills alleged to have violated the *PPER,* and the submission does not appear frivolous.[21]

The Submitters indicate that the matter "has been communicated in writing to the Government of Canada in a report released in 2001 entitled *Pulping the Law*.[22]" As the Submitters noted, the report indicated that the Submitters were planning to file a submission with the CEC on matters addressed in the report.[23] The Submitters also note that newspaper articles that they attach as an appendix to the submission demonstrate that the relevant authorities of Canada were aware of and responded to the report. In addition, the Submitters show that Sierra Legal Defence Fund raised the enforcement matters at issue in the submission in a written summary presented to the House of Commons Standing Committee on Environment and Sustainable Development in 1998, in connection with proceedings that Environment Canada and Fisheries and Oceans Canada attended. Accordingly, the submission meets the requirements of Article 14(1)(e).[24]

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17. Article 14(1)(a), Guideline 3.2; submission at 12.
18. Article 14(1)(b); submission at 12.
19. Article 14(1)(c), Guideline 5.2, 5.3.
20. *See, e.g.,* Submission, Appendix 5.
21. *See* Guideline 5.4.
22. Submission at 13.
23. Submission, Appendix 3, at 4.
24. As the communications mentioned here, taken together, are sufficient for purposes of Article 14(1)(e), the Secretariat takes no position as to whether, as the Submitters claim, the mills' self-reporting of *PPER* violations to Environment Canada would be sufficient to meet Article 14(1)(e). Notably, while this self-reporting brings violations to the attention of the government, it differs from the other communications on which the Submitters rely in that it does not clearly communicate a concern regarding a possible failure to effectively enforce environmental law.

Finally, because the Submitters are established in the United States or Canada, the submission meets the requirement in Article 14(1)(f) that it be filed by a "person or organization residing or established in the territory of a Party.[25]"

B. 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 such a 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:
>
> (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.[26]

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

Citing in particular to the *Pulping the Law* report in Appendix 3 to the submission, the Submitters explicitly allege harm to the persons they represent:

> The Submitters are non-governmental environmental organizations whose members include thousands of individuals who have a shared interest in protecting the waters of Canada, including the reduction and

25. Submission at ii.
26. Article 14(2) of the NAAEC.

> elimination of pollution from pulp and paper mills in central and eastern Canada. The members make use of these waters and water pollution harms the entire ecosystem, including people, fish and their habitat.[27]

Similar assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.[28]

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[29] The Submitters note, *inter alia*, that further study in the citizen submission process would foster the protection and improvement of the environment as contemplated in NAAEC Article 1(a); promote sustainable development based on cooperation and mutually supportive environmental and economic policies, as contemplated in NAAEC Article 1(b); increase cooperation between governments to better conserve, protect and enhance the environment, as contemplated in NAAEC Article 1(c); avoid creating trade distortions or new trade barriers, as contemplated in NAAEC Article 1(e); strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices, as contemplated in NAAEC Article 1(f); enhance compliance with, and enforcement of, environmental law and regulations, as contemplated in NAAEC Article 1(g); and promote pollution prevention policies and practices, as contemplated in NAAEC Article 1(j). The Secretariat agrees that further study of the matters raised in the submission would advance these goals, particularly those set out in NAAEC Articles 1(a), 1(e), 1(g) and 1(j).

The submission is particularly likely to advance the goals of the NAAEC in that the Submitters allege a failure to effectively enforce environmental law in numerous specific cases over a wide geographic area and time period, so as to illustrate a "systemic problem of persistent non-enforcement by the Canadian government.[30]" The Secretariat has previously noted that assertions of a widespread failure to effectively

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27. Submission at 14.
28. 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 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."
29. Article 14(2)(b) of the NAAEC.
30. Submission at 15.

enforce an environmental law "are particularly strong candidates for Article 14 consideration.[31]"

The Submitters assert that "[t]here are no realistic alternative private remedies available.[32]" They claim that they either do not have status for civil remedies or such remedies would be impractical to pursue. They also claim that bringing private prosecutions, which the government can stay, is a financial burden and not a viable option in light of the number of alleged violations and alleged failures to take enforcement action included in the submission. Taking note of these burdens, and noting also that the Submitters or others have made Canadian authorities aware of their enforcement concerns as long ago as 1998, the Secretariat gives considerable weight to the assertion that further pursuit of private remedies was not a practicable option for the Submitters in regard to the matters raised in the submission.

Finally, the submission is not based exclusively on mass media reports. As the Submitters note, the submission is based primarily on information obtained from the federal government, industry and SLDF research, and not simply mass media reports.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that Canada is failing to effectively enforce provisions of the *PPER* and the *Fisheries Act* in regard to pulp and paper mills in Ontario, Quebec and the Atlantic Provinces merits a response from Canada.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-02-003 (Pulp and Paper) 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 Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

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31. SEM-99-002 (Migratory Birds), Determination pursuant to Article 14(1) and (2) of the NAAEC (23 December 1999).
32. Submission at 15.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

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Ms. Judith E. Ayres, US-EPA
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