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**Secretariat of the Commission for Environmental Cooperation****Determination in accordance with Article 14(1)  
of the North American Agreement for Environmental Cooperation**

**Submitters:** Friends of the Earth Canada  
Friends of the Earth-U.S.  
Earthroots  
Centre for Environmentally Sustainable Development  
Great Lakes United  
Pollution Probe  
Waterkeeper Alliance  
Sierra Club (U.S. and Canada)

**Represented by:** Waterkeeper Alliance and Sierra Legal Defence Fund

**Party:** United States

**Date received:** 20 September 2004

**Date of this  
determination:** 16 December 2004

**Submission I.D.:** SEM-04-005 (Coal-fired Power Plants)

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**I. INTRODUCTION**

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

The Submitters assert that the United States is failing to effectively enforce sections 303 and 402 of the federal Clean Water Act (CWA) in connection with mercury emissions from coal-fired power plants to air and water that are allegedly degrading thousands of rivers, lakes and other water bodies across the United States. The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1). The submission as a whole does not provide sufficient information to allow the Secretariat to review it, and

therefore fails to satisfy Article 14(1)(c).<sup>1</sup> Although the submission and its appendices provide sufficient information with respect to some of the Submitters' assertions, information necessary for the Secretariat's review is lacking for others. The Secretariat's reasons are set forth below in Section III.

## II. SUMMARY OF THE SUBMISSION

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

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

The submission then presents an explanation of state water quality standards (WQS). The Submitters assert that states designate uses, including both existing and desired uses, for all water bodies within their borders and that they are required to protect and maintain the level of water quality necessary to protect "existing uses."<sup>7</sup> They claim that "if a water in the U.S. was being used as a source for fish consumption on or after November 28, 1975, the CWA makes it clear that both point and nonpoint sources of pollutants must be controlled to allow this existing use to continue."<sup>8</sup> The submission describes the requirement to develop numeric or narrative water quality criteria to achieve and protect existing and designated uses of waterways under a three-tiered system for classifying water bodies, and also outlines the antidegradation provision, which the Submitters describe as "[t]he most critical

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<sup>1</sup> Article 14(1)(c), Guideline 5.2, 5.3.

<sup>2</sup> The Submitters describe FCAs as "warning the general public and sensitive subpopulations, such as pregnant women, of the dangers of consuming this otherwise healthy food." Submission at 1.

<sup>3</sup> Submission at 1.

<sup>4</sup> Submission at 12.

<sup>5</sup> Submission at 6.

<sup>6</sup> *Id.*

<sup>7</sup> Submission at 6-7.

<sup>8</sup> Submission at 7.

component of the state WQS scheme.”<sup>9</sup> According to the Submitters, “[t]he purpose of the antidegradation policy is to ensure that existing water uses and the level of water quality to protect those uses are maintained and protected.”<sup>10</sup> They assert that the antidegradation provisions “require that both point and nonpoint sources of pollution be maintained to protect designated and existing uses of all U.S. waterways.”<sup>11</sup> The Submitters assert that the USEPA retains oversight authority for all aspects of state WQS, including authority to approve state WQS or to promulgate its own standard if a state does not make changes USEPA says are needed to meet requirements of the CWA.<sup>12</sup>

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

Focusing on the years 1993 to 2003, the Submitters assert that the United States, through the USEPA, is failing on an ongoing basis to effectively enforce the NPDES provisions under section 402 of the CWA and the WQS provisions under section 303 of the CWA in three different ways. First, they contend USEPA issues NPDES permits or delegates to states the issuance of state permits meeting federal requirements that allow for ongoing point source discharges of mercury into U.S. waterways, without consideration for the cumulative impact of point and nonpoint discharges of mercury on degraded waters. They assert that a “factual record would establish whether the [USEPA] is allowing direct discharges of mercury to waterways that are currently under FCAs for mercury and thus no longer suitable for fishing.”<sup>17</sup> Second, they assert the USEPA approves inadequate state antidegradation policies and implementation procedures that fail to safeguard water bodies. Third, they claim the USEPA fails to use its authority to require states to adopt TMDLs for mercury where WQS are not being met, and to issue its own TMDLs where state action is inadequate.

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Submission at 7-8.

<sup>12</sup> Submission at 8.

<sup>13</sup> Submission at 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Submission at 10.

### 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,<sup>18</sup> Article 14(1) is not intended to be an insurmountable procedural screening device.

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

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

Consideration of the last of these requirements derived from the opening phrase of Article 14(1) warrants elaboration. The Secretariat has accepted for consideration previous submissions that asserted a failure to effectively enforce or fulfill a clear and specific legal obligation that a Party imposes on itself.<sup>19</sup> However, mindful of the government enforcement actions that are included in Article 5 of the NAAEC, the Secretariat has also dismissed assertions in previous submissions that challenged the kind of standard-setting that the NAAEC Parties reserved to themselves, as contrasted with assertions of a “failure to effectively enforce.”<sup>20</sup>

The Submitters assert that the United States is failing to effectively enforce provisions of the CWA in three ways: 1) by issuing NPDES permits or delegating to states the issuance of state permits that allow for the ongoing discharge of mercury into degraded waters; 2) by approving state antidegradation policies and implementation procedures that are failing to safeguard tiered water bodies; and 3) by failing to require States to adopt TMDLs for mercury where WQS are not being met or a beneficial use has been lost, and failing to

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<sup>18</sup> 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).

<sup>19</sup> See SEM-03-001 (Ontario Power Generation), Determination pursuant to Articles 14(1) and (2) (19 September 2003), [http://www.cec.org/files/pdf/sem/03-1-DET%2014\\_1\\_\\_2\\_\\_en.pdf](http://www.cec.org/files/pdf/sem/03-1-DET%2014_1__2__en.pdf); SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2), 5 NAELP 164, 171 (8 September 1999).

<sup>20</sup> See SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2), 5 NAELP 164, 171-73 (8 September 1999).

intervene by issuing its own TMDLs where State action is inadequate. Without endorsing the Submitters' legal interpretation of the CWA, the Secretariat concludes that the Submitters have set forth a colorable legal basis for their assertions.<sup>21</sup>

Regarding NPDES and state discharge permits, the essence of the Submitters' assertions is that the mercury discharges that the United States authorizes, or allows to be authorized, under NPDES or state permits prevent the United States from meeting the antidegradation requirements of the CWA. The list of "appropriate governmental action" included in NAAEC Article 5(1) to illustrate the ways in which each NAAEC Party "shall effectively enforce its environmental laws and regulations" includes "using licenses, permits or authorizations."<sup>22</sup> In the Secretariat's view, an assertion that a Party is failing to effectively enforce its environmental law by issuing or allowing permits that prevent legal requirements from being met is within the scope of Article 14. Bearing in mind the legal complexity underlying the interrelationship of permitting, WQS and antidegradation requirements under the CWA, the Secretariat concludes that the Submitters' assertions regarding the issuance of NPDES and state discharge permits fall within the scope of Article 14.

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<sup>21</sup> In this regard, the Secretariat notes that the United States' response to the SEM-98-003 (Great Lakes) submission stated as follows:

EPA and states also use water quality standards to assess the health of the nation's waters, *see, e.g.*, CWA sections 303(d)(1) and 305(b), 33 U.S.C. §§ 1313(d)(1) and 1315(b), for the purpose of developing regulatory and non-regulatory approaches for restoring waters impaired by toxics and other pollutants. One of the newest approaches in this area for addressing impairment due to atmospheric deposition is the development of Total Maximum Daily Loads ("TMDLs"). Under section 303(d)(1), states are required to identify the waters within their boundaries that are not expected to achieve applicable water quality standards (for toxics or for any other pollutant) after application of technology-based or other controls on CWA point and non-point sources. *See*, 33 U.S.C. § 1313(d)(1).

EPA expects states to list waters impaired or threatened by atmospheric deposition of toxic pollutants and to develop TMDLs for them. *See*, 64 Fed. Reg. 46,012 at 46,022-23 (Aug. 23, 1999) (proposed rule to codify EPA's interpretation). A TMDL identifies the pollutant load that a receiving water can assimilate and still achieve applicable water quality standards, and then allocates that load (allowing for a margin of safety) among NPDES-permitted facilities and other categories of sources of the pollutant, including conceivably long-range atmospheric deposition sources. *See*, 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2. Although a TMDL itself imposes no enforceable requirements [on regulated entities], it can serve as an assessment and planning tool that local, state, and federal authorities can use to impose controls or pollution reduction targets for the purpose of achieving the applicable water quality standards. The development of TMDLs for pollutants originating from air deposition can be complicated by a lack of data and the current dearth of readily available analytical approaches and models. *See*, 64 Fed. Reg. at 46,022. For this reason, EPA is currently working with states on two pilot projects, including one for mercury for Devil's Lake in Wisconsin, to develop TMDLs for pollutants originating from air deposition, in hope that this will facilitate the development of TMDLs elsewhere.

SEM-98-003 (Great Lakes), U.S Response to Submission 98-003 (3 December 1999). *See also* Submission, Appendix 7 at note 26 and accompanying text.

<sup>22</sup> Article 5(1)(i). The Secretariat has previously made reference to the actions listed in Article 5(1) in determining whether an assertion relates to enforcement. *See, e.g.*, SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2), 5 NAELP 164, 170 (8 September 1999).

The essence of the Submitters' second, related contention is that the United States, by approving inadequate state antidegradation policies and implementation methods, is failing to effectively fulfill its legal obligation under the antidegradation provisions of the CWA to prevent emissions and discharges of coal-fired power plants to air and water from degrading Tier I, Tier II and Tier III water bodies.<sup>23</sup> With respect to all three classes of waters, the Submitters contend that air emissions of mercury are causing degradation that contravenes antidegradation requirements, and that the USEPA is not fulfilling its legal obligation to require states to adopt or adjust controls on point and nonpoint sources of mercury that will prevent degradation of water quality. With regard to Tier II waters, the Submitters add that USEPA is allegedly failing to fulfill its obligation to allow degradation of Tier II water bodies only if public hearings are held and best management practices (BMPs) have been implemented for all nonpoint sources of pollution, including air emissions from coal-fired power plants. The Secretariat concludes that the assertion regarding approval of state antidegradation policies and implementation methods involves an asserted failure to effectively enforce, because for all tiered classes of water bodies, the Submitters assert that the United States is failing to meet legal requirements related to preventing water quality degradation.

The essence of the third assertion is that the United States is failing to effectively fulfill its legal obligation to ensure that states adopt TMDLs for mercury for water bodies that fail to meet water quality standards for mercury. The Submitters assert that the United States is failing to effectively fulfill TMDL requirements in two ways: first, by failing to ensure that states, taking into account FCAs, properly declare waters to be impaired; and second, by failing to adopt TMDLs for waters that are or should be listed as impaired. The Secretariat concludes that the assertions regarding failure to effectively enforce TMDL requirements also meet the threshold criteria of Article 14.

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

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

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

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<sup>23</sup> Submission at 10-11.

- (f) is filed by a person or organization residing or established in the territory of a Party.<sup>24</sup>

### **1. The submission satisfies five of the six criteria**

The submission meets the criteria in Article 14(1)(a), (b), (d), (e) and (f). First, the submission is in English, a language designated by the United States.<sup>25</sup> Second, it clearly identifies the organizations making the submission.<sup>26</sup> Third, the submission appears to be aimed at promoting enforcement rather than at harassing industry.<sup>27</sup> 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 standing to benefit economically from the submission, and the submission does not appear frivolous.<sup>28</sup> The submission indicates that the matter has been communicated in writing to the relevant authorities of the United States and indicates that no response was received.<sup>29</sup> Finally, the Submitters are established in the United States and Canada.<sup>30</sup>

### **2. The submission, as a whole, does not satisfy Article 14(1)(c)**

The submission as a whole does not provide sufficient information to allow the Secretariat to review it, and therefore fails to satisfy Article 14(1)(c).<sup>31</sup> Although the submission and its appendices provide sufficient information with respect to some of the Submitters' assertions, information necessary for the Secretariat's review is lacking for others.

The starting point for the Submitters is information regarding FCAs in place across the United States. The Submitters incorporate into the submission information available from United States government sources regarding all FCAs currently in effect in the United States.<sup>32</sup> The Submitters treat these FCAs as an indicator of water quality impairment, citing information indicating that USEPA appears to concur, at least to some extent, with this approach.<sup>33</sup>

With this baseline of information regarding impaired waters subject to FCAs, the Submitters point to additional information in support of the asserted failures to effectively enforce the CWA. Overall, the water bodies of interest to the Submitters can be discerned by cross referencing all waters subject to mercury FCAs with Tier I water bodies that have been historically used for fishing or designated as "fishable," and all Tier II and III water bodies. The only Tier I, Tier II or Tier III water body specifically identified in the body of the submission as failing to meet antidegradation requirements is Everglades National Park, which according to Submitters is classified as an outstanding national resource water

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<sup>24</sup> Article 14(1)(a)-(f).

<sup>25</sup> Submission at 13; Article 14(1)(a), Guideline 3.2.

<sup>26</sup> Submission at 13; Article 14(1)(b).

<sup>27</sup> Submission at 13; Article 14(1)(d).

<sup>28</sup> See Guideline 5.4.

<sup>29</sup> Submission at 13, Appendices 6 and 7; Article 14(1)(e); Guideline 5.5.

<sup>30</sup> Submission at 13; Article 14(1)(f).

<sup>31</sup> Article 14(1)(c), Guideline 5.2, 5.3.

<sup>32</sup> Submission at 1, 4-5 and notes 2-5, 39-42, 44-46.

<sup>33</sup> Submission at 10-11, note 19, 110.

(ONRW) and Tier III waterway.<sup>34</sup> The Submitters assert that a mercury FCA in the Everglades watershed indicates a violation of mandatory Tier III protections in Everglades National Park.<sup>35</sup> Relying on Toxic Release Inventory (TRI) data<sup>36</sup> and other sources, the Submitters also point to information indicating that at least one NPDES or state-permitted electric generating facility in each of the states of Pennsylvania, Kentucky, Illinois and Ohio discharged to either a lake or river under a statewide mercury FCA in 2002; and information identifying three permitted power plants in Michigan that, according to the Submitters, discharged mercury into three identified water bodies under mercury FCAs in 2002. With regard to TMDLs, the Submitters point to West Virginia as a state that they contend has failed to properly list impaired waters for which TMDLs for mercury should be adopted and they attach to the submission a report on a mercury TMDL pilot study for a portion of the Florida Everglades.<sup>37</sup>

In regard to NPDES-related requirements of the CWA, the Submitters essentially assert that when a NPDES or state permit authorizes a coal-fired power plant to discharge mercury to a water body that is under a mercury FCA (and therefore, according to the Submitters, not in compliance with WQS), the CWA requires one of two responses (or both): either 1) the permit must be adjusted to allow less mercury to be discharged, or 2) measures must be taken to ensure that mercury discharges from other point or nonpoint sources (including air emissions) affecting that water body be reduced or eliminated. In either case, according to the submission, the CWA requires the permitted discharge to be considered relative to other mercury sources, a requirement the Submitters contend the United States is failing to fulfill.<sup>38</sup> The Secretariat concludes that the information in the submission and its attachments is sufficient to allow consideration of the Submitters' claims regarding the issuance of NPDES or state permits, but only with respect to all NPDES or state-permitted electric utilities in Pennsylvania, Kentucky, Illinois, Ohio (identifiable through USEPA's TRI data referenced in the submission),<sup>39</sup> and the three identified utilities in Michigan. The Submitters rely on information indicating that all of these utilities discharge mercury to waters subject to mercury FCAs. This information should be sufficient to permit the United States to explain in a response whether and, if so, how it has fulfilled the CWA's

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<sup>34</sup> Submission at 11.

<sup>35</sup> *Id.*

<sup>36</sup> By citing the publicly-available TRI data on the USEPA's website, the Submitters effectively incorporate into the submission the specific permitted electric utilities that are identified in those data as discharging mercury to waters covered by the CWA. The Secretariat assumes that information on which of those facilities discharge mercury pursuant to NPDES or state discharge permits is a matter of public record. However, more information identifying specific permitted facilities would assist the Secretariat's further consideration of this submission.

<sup>37</sup> Submission at 3-4, 10 and notes 95-100. The TMDL study for the Everglades does not specifically discuss the impact of mercury emissions from coal-fired power plants on Everglades water quality. While noting that "[b]oth long distance transport and localized deposition around certain types of sources are important," the report noted that "[t]he principal concerns [in the Everglades] focus on local effects of waste incinerators and other emissions sources in southeast Florida, increased release of mercury or other substances from the Everglades Agricultural Area promoted by drainage and soil disturbance, or hydrologic changes." Submission, Appendix 10 at 6. Acknowledging uncertainty and debate over the relative importance of local versus long range mercury sources, the TMDL study included source-receptor modeling only for local sources and concluded that "local sources account for more than 50% of mercury deposited in southern Florida." *Id.* at 58. The local sources accounted for in the TMDL study included no coal combustion sources. *Id.* at 76.

<sup>38</sup> Submission at 10.

<sup>39</sup> *See* Submission at notes 95-98.



requirements for NPDES or state discharge permits, including consideration of other point and nonpoint sources, in connection with the power plants identified.

The Secretariat concludes that the submission does not include sufficient information to allow consideration of the assertions regarding approval of state antidegradation policies and procedures and enforcement of TMDL requirements.<sup>40</sup> Recently, the Secretariat dismissed a submission on the grounds that “[w]ithout additional information that would allow the Secretariat to discern more clearly the context in which the Submitter seeks to have factual information presented in a factual record, the Secretariat is not able to review the submission.”<sup>41</sup> The same applies here with respect to the Submitters’ assertions regarding antidegradation and TMDL requirements, and regarding NPDES or state permits other than those identified above.

Although cross referencing mercury FCAs with Tier I, Tier II and Tier III water bodies is a starting point, it is not sufficient. For example, to review these assertions, the Secretariat would need additional information regarding 1) exceedances of water quality standards for mercury in particular Tier I, Tier II and Tier III water bodies subject to FCAs; 2) the nature of the alleged failure to ensure that particular state antidegradation policies and implementation methods meet federal requirements with regard to those water bodies; and 3) the actions the Submitters believe the United States is failing to effectively take with respect to particular states in which the Submitters believe antidegradation policies and implementation methods are in violation of the CWA.<sup>42</sup> With respect to antidegradation requirements for Tier II water bodies, the Secretariat also requires more specific information identifying the Tier II water bodies with respect to which the Submitters believe the United States has failed to require BMPs for coal-fired power plants, as well as more information regarding the nature of the asserted failure: do the Submitters assert that the United States has taken no action, or that the United States has taken inadequate action, for example by either failing to identify the power plants that contribute to the degradation of water quality or not ensuring that identified sources employ BMPs?

In regard to TMDLs, the submission states that a “factual record would determine which state continuing planning processes fail to incorporate an existing TMDL or incorporate[] a TMDL that does not have any regulation or BMP for mercury air emissions from coal-fired plants”; that it “would also determine if EPA is failing to use its authority to require states to pass TMDLs where WQS are not being met or a beneficial use has been lost”; and that it would further examine “if EPA is failing to intervene by issuing its own TMDLs where state

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<sup>40</sup> Although the Submitters’ assertions regarding NPDES and state discharge permits appear to implicate the TMDL scheme to some extent, those assertions do not incorporate the full scope of the Submitters’ TMDL assertions.

<sup>41</sup> SEM-04-004 (Oldman River III), Determination pursuant to Article 14(1) (14 October 2004).

<sup>42</sup> The Secretariat does not assume that the asserted failure to effectively enforce the CWA’s antidegradation requirements is the same for all states. For example, where a FCA advisory in a state indicates that WQS are not being met, a number of scenarios are theoretically possible. For example, USEPA or a state might have taken action to enforce antidegradation requirements that will require additional time to result in improvements to water quality; action might have been taken that will only partially, or inadequately, meet antidegradation requirements; or no action might have been taken. The submission makes no distinction among such scenarios.

action is inadequate.”<sup>43</sup> Citing the example of West Virginia, the Submitters also assert that “the CEC may need to inquire into the possible failure to use FCAs to declare waters impaired.”<sup>44</sup> Despite the information regarding West Virginia’s alleged failure to properly list impaired waters and establish TMDLs, the submission contains insufficient information for the Secretariat to consider the full scope of the assertion that the United States is failing to effectively enforce TMDL requirements.<sup>45</sup> To trigger the process under Articles 14 and 15, the Submitters must provide additional and more specific information regarding which states the Submitters believe have failed to adopt, in the manner required, TMDLs addressing air emissions from coal-fired power plants and regarding the nature of those alleged failures with respect to particular states.<sup>46</sup>

In short, although the submission raises serious questions, it does not contain sufficient information regarding the nexus between air emissions of particular coal-fired plants and impairment of particular water bodies, or, in the absence of such information, a sufficient indication that the lack of this information forms an integral part of the assertion of a failure to effectively enforce the CWA.<sup>47</sup> The Secretariat must be equipped at the appropriate time with enough information to consider whether a factual record is warranted. While the Submitters cannot be expected to provide information that would more appropriately be expected in a response to the submission from the United States government (or more appropriately developed during preparation of a factual record), the Secretariat concludes that they have not met the threshold of information required to trigger the Articles 14 and 15 process. The legal complexity of the CWA scheme for addressing point and nonpoint sources of pollution, the focus in the submission on air emissions from coal-fired power plants as a source of water quality degradation and the likelihood that a significant portion of the pollution of concern to the Submitters is interstate in nature underscore the need for additional information to support the Secretariat’s consideration of the submission as a whole.

The Secretariat also believes the Submitters could provide additional information or clarification regarding whether private remedies available under the Party’s law have been pursued, a factor relevant to the Secretariat’s consideration of whether to request a response to a submission from the Party concerned.<sup>48</sup> On its face, Article 14(2)(c) does not restrict the Secretariat’s consideration only to whether the Submitters of a submission have pursued

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<sup>43</sup> Submission at 11-12.

<sup>44</sup> Submission at 12.

<sup>45</sup> As noted above in note 40, certain aspects of the TMDL assertions may be implicated in the NPDES-related assertions for power plants in Illinois, Kentucky, Michigan, Ohio and Pennsylvania.

<sup>46</sup> Again, the Secretariat does not assume that the alleged failure to enforce TMDL requirements is the same for all states. See note 38.

<sup>47</sup> Appendix 7 to the submission is a letter from Waterkeeper Alliance to USEPA Administrator Leavitt, objecting to the USEPA’s *Proposed National Emissions Standards for Hazardous Air Pollutants; and in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Proposed Rule*. The letter contends that the Proposed Rule fails to adequately address the antidegradation requirements of tiered waterbodies and BMPs under CWA mandates. However, the submission does not indicate that the Submitters focus their assertions regarding failure to effectively enforce the CWA’s antidegradation and TMDL requirements on the Proposed Rule, or that they contend that the Proposed Rule is the only mechanism that the United States currently has in progress that relates to the nonpoint sources of water pollution of concern to the Submitters.

<sup>48</sup> Article 14(2)(c).

private remedies, but rather contemplates some consideration of whether others have pursued private remedies as well. Because of the many legal issues regarding interpretation of the CWA underlying this submission, the Submitters should be able to provide some indication of whether and how courts in the United States have addressed key legal questions that are critical to their assertions, including questions regarding the availability of private remedies. While the Secretariat does not expect a comprehensive search, some additional information regarding the legal underpinnings of the submission would assist in its further consideration.

#### **IV. CONCLUSION**

For the foregoing reasons, the Secretariat has determined that although submission SEM-04-005 (Coal-fired Power Plants) meets most of the requirements of Article 14(1), it does not satisfy Article 14(1)(c) with respect to all of its assertions. Pursuant to Guideline 6.2 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Submitters will have 30 days to provide the Secretariat with a submission that conforms fully to the criteria of Article 14(1) and the guidelines. In the alternative, the Submitters may inform the Secretariat that they wish to retain only those portions of the submission that the Secretariat has determined satisfy Article 14(1).

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

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