

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

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

Submitter(s): Friends of the Earth Canada
Friends of the Earth-US
Earthroots
Centre for Environmentally Sustainable Development
Great Lakes United
Pollution Probe
Waterkeeper Alliance
Sierra Club (US and Canada)

Represented by: Waterkeeper Alliance and Ecojustice (formerly
Sierra Legal Defence Fund)

Party: United States

Date of this plan: 5 August 2008

Background

On 20 September 2004, the organizations listed above (“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”). The Submitters assert that the United States is failing to effectively enforce the federal Clean Water Act (CWA) against coal-fired power plants for mercury emissions that are allegedly degrading thousands of rivers, lakes and other waterbodies across the United States.

The Submitters assert that the number of fish consumption advisories—that warn of the presence of mercury in the fish—has risen from 899 to 2347 since 1993 and that, according to the US Environmental Protection Agency, 35% of the total lake acres and 24% of the river miles in the United States are now under fish consumption advisories. They contend that the US Environmental Protection Agency (EPA) “is allowing both nonpoint 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.” 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 to air and water contravene the National Pollutant Discharge Elimination System (NPDES) provisions under section 402 of the CWA and Water Quality Standards (WQS) provisions under section 303 of the CWA, respectively. Specifically, they assert that the United States, through the EPA, is failing to effectively enforce these provisions by issuing NPDES permits or delegating the issuance of State Pollutant Discharge Elimination System permits that allow for ongoing point source discharges of mercury into US waterways; approving inadequate state anti-degradation policies and implementation procedures that fail to safeguard water bodies; and failing to use its authority to require states to pass Total Maximum Daily Loads (TMDLs) for mercury where WQS are not being met or a beneficial use has been lost, and to issue its own TMDLs where state action is inadequate.

On 24 February 2005, the Secretariat determined that submission, as supplemented on 18 January 2005, pursuant to the Secretariat's determination that the original submission lacked sufficient information, met the requirements set forth in Article 14(1) of the NAAEC and requested a response from the United States in accordance with Article 14(2) of the NAAEC. The United States submitted its response on 25 April 2005, and provided supplemental information on 29 September 2005.

After consideration of the submission in light of the response of the United States, on 5 December 2005, the Secretariat issued a Notification to Council that development of a factual record is warranted. The Secretariat concluded that the response leaves open central questions raised in the submission concerning EPA's fulfillment of its obligations under §§303 and 402 of the CWA. In particular, the Secretariat considered that a factual record would shed light on the Submitters' assertions that:

1. EPA is failing to effectively enforce the CWA by issuing or renewing federal NPDES permits (or allowing states to issue or renew such permits) that allow for point source discharges of mercury into impaired waterways, and
2. EPA is neglecting to account for airborne mercury when implementing CWA provisions requiring the promulgation of TMDLs for mercury-impaired waterways.

In its Notification, the Secretariat determined that the asserted failure to directly control or regulate nonpoint air emissions of mercury from coal-fired power plants as a means of meeting requirements of the CWA would risk duplicating or interfering with pending proceedings challenging rules under the Clean Air Act regarding such emissions. Accordingly, the Secretariat declined to proceed further with that aspect of the submission. The Secretariat also dismissed some of the allegations concerning the anti-degradation policies and implementation procedures.

On 23 June 2008, in Council Resolution 08-03, the Council unanimously decided to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the NAAEC* (the *Guidelines*) with respect to submission SEM-04-005 (*Coal-fired Power Plants*) and with regard to questions identified by the Secretariat in its notification (see "**Overall Scope of the Fact Finding**," below).

The Council directed the Secretariat to provide the Parties with an overall work plan for gathering relevant facts and to provide the Parties with an opportunity to comment on the plan. The Council also directed the Secretariat that in preparing the factual record, it may include any relevant facts that existed before the entry into force of the NAAEC on 1 January 1994.

Under Article 15(4) of the NAAEC, in developing a factual record, “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee (JPAC); or (d) developed by the Secretariat or by independent experts.”

Overall Scope of the Fact Finding

To prepare the factual record, the Secretariat will gather and develop factual information relevant to the following questions concerning the alleged failure to effectively enforce §§303 and 402 of the CWA, as identified in Council Resolution 08-03:

- (1) Concerning National Pollutant Discharge Elimination System (NPDES) permits, or NPDES-equivalent permits, under the US Clean Water Act (CWA), for the forty coal-fired power plants reporting direct surface water discharges of mercury on the 2002 US Toxics Release Inventory in the ten US states identified by the submitters, did the relevant permitting authority determine that point source discharges for each coal-fired power plant would not have the reasonable potential to cause or contribute to an exceedance of the applicable water quality standard for mercury (*see* 40 US Code of Federal Regulations section 122.44(d)(1)(i))?
- (2) If so, what information was used by the relevant permitting authority to make that determination?
- (3) What information is generally used to make NPDES or US state-issued permitting decisions for point source discharges of mercury from coal-fired power plants?
- (4) With regard to the ten US states identified by the submitters, which mercury-impaired waterways are included on CWA section 303(d) lists?
- (5) With regard to the ten US states identified by the submitters, what have the states or the US Environmental Protection Agency (EPA) done to account for mercury from air depositions in Total Maximum Daily Load (TMDL) calculations established by EPA or by a state, and what are some of the examples of TMDL calculations for mercury from air deposition in other US states?

- (6) What has been EPA's response to a failure, if any, by any of the US states to list mercury-impaired waterways in accordance with CWA section 303(d) or to establish TMDLs for such waterways?

Overall Plan

The execution of the overall plan, prepared in accordance with Council Resolution 08-03, will begin as of **29 August 2008**. All other dates mentioned are best estimates. The overall work plan is as follows:

- Through public notices or direct requests for information, the Secretariat will explain the scope of the fact finding, and will invite the Submitters; JPAC; the general public; the regulated community (including power plants referred to in Council Resolution 08-03); and non governmental organizations to submit relevant information (section 15.2 of the *Guidelines*). [**beginning September 2008**]
- The Secretariat will directly request information relevant to the scope of the factual record from the relevant federal government authorities of the United States, and from state and local authorities in the United States, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). [**beginning September 2008**]
- The Secretariat will, as appropriate, hold fact-gathering meetings with individuals or organizations interested in submitting relevant information. [**September 2008–March 2009**]
- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. [**September 2008–March 2009**]
- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. [**September 2008–March 2009**]
- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested nongovernmental organizations or persons, the JPAC or independent experts. [**September 2008–March 2009**]
- In accordance with Article 15(4) of the NAAEC, the Secretariat will prepare the draft factual record based on the information gathered and developed. [**by June 2009**]
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5) of the NAAEC. [**June 2009**]

- As provided by Article 15(6) of the NAAEC, the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[July 2009]**
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7) of the NAAEC.

Additional Information

The submission, the Party's response, the Secretariat's determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions on the CEC home page <www.cec.org>, or upon request to the Secretariat at the following address:

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