

Secretariat of the Commission for Environmental Cooperation

**Request for Information
for Preparation of a Factual Record
Submission SEM-04-005 (*Coal-fired Power Plants*)
15 September 2008**

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1. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of NAAEC allows persons or nongovernmental organizations in North America to inform the Secretariat, in a submission, that any member country (also called a "Party") is failing to effectively enforce its environmental law. This initiates a process of review of the submission, after which the Council may instruct the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Article 15(4) and 21(1)(a) of NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by JPAC or by interested nongovernmental organizations or persons; or developed by the Secretariat or independent experts.

On 23 June 2008, in its Resolution 08-03, the Council decided unanimously to instruct the Secretariat to develop a factual record in connection with submission SEM-04-005 (*Coal-fired Power Plants*), in accordance with Article 15 of NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”). The Secretariat is now requesting information relevant to matters to be addressed in the factual record. The following sections provide background on the submission and describe the kind of information requested.

2. The *Coal-fired Power Plants* submission and Council’s instructions

On 20 September 2004, several US and Canadian nongovernmental organizations (the “Submitters”)¹ presented to the Secretariat of the CEC a submission—in accordance with Article 14 of NAAEC— asserting that 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 (EPA), 35 percent of the total lake acres and 24 percent of the river miles in the United States are now under fish consumption advisories. They contend that the 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:

- 1) issuing NPDES permits or delegating the issuance of State Pollutant Discharge Elimination System (SPDES) permits that allow for ongoing point source discharges of mercury into mercury-impaired US waterways;
- 2) approving inadequate state anti-degradation policies and implementation procedures that fail to safeguard water bodies; and

¹ The Submitters are Friends of the Earth Canada, Friends of the Earth-US, Earthroots, Centre for, Environmentally Sustainable Development, Great Lakes United, Pollution Probe, Waterkeeper Alliance, and Sierra Club (US and Canada), represented by Waterkeeper Alliance and Ecojustice.

- 3) 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.

The United States responded to the submission on 25 April 2005, and provided supplemental information on 29 September 2005. On 5 December 2005, the Secretariat notified the Council that it considered that the submission warranted a factual record.

On 23 June 2008, in its Resolution 08-03, the Council decided unanimously to instruct the Secretariat to develop a factual record, in accordance with Article 15 of NAAEC and the Guidelines, with regard to the following questions identified by the Secretariat in its notification:

- (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,^[2] 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?³

The Council directed the Secretariat to consider, in developing the factual record, whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, the factual record may include relevant facts that existed prior to 1 January 1994.

² Note that appendix 12 D of the submission refers to 36 power plants in 10 states, which are listed below in Section 3. Request for Information.

³ SEM-04-005 (*Coal-fired Power Plants*) Council Resolution 08-03 (23 June 2008).

3. Request for information

The Secretariat seeks factual information relevant to the six categories above that are listed in Council Resolution 08-03.

The power plants and US states referred to in information categories 1, 4-6 are listed in the table below.

US State (categories 4-6)	Power plant name (category 1)
Alabama	▪ Widows Creek ▪ Charles R. Lowman ▪
Illinois	▪ Powerton ▪ Joliet 29 ▪ Waukegan ▪ Kincaid ▪ Joliet 9 ▪
Indiana	▪ R M Schahfer ▪
Kentucky	▪ H L Spurlock ▪ Mill Creek ▪ Elmer Smith ▪ R D Green ▪
Michigan	▪ Dan E Karn ▪ Belle River ▪ St. Clair ▪ B C Cobb ▪ J C Weadock ▪
North Carolina	▪ Roxboro ▪ Belews Creek ▪ Marshall ▪ G G Allen ▪ L V Sutton ▪ Asheville ▪ Lee ▪ Riverbend ▪ Cliffside ▪
Ohio	▪ Gen J M Gavin ▪ W H Zimmer ▪
Pennsylvania	▪ Keystone ▪ Homer City ▪ Bruce Mansfield ▪ Conemaugh ▪ Armstrong ▪
Texas	▪ H W Pirkey ▪ Welsh Power Plant ▪
West Virginia	▪ Mount Storm ▪

4. Examples of relevant information

This section provides examples of the kind of factual information that the Secretariat is seeking in connection with the factual record. Information that the Secretariat receives will be considered for inclusion in the factual record. Examples of potentially relevant information include the following:

- (1) *Information category 1:* Factual information regarding whether the relevant NPDES or equivalent permitting authority determined that point source discharges for each coal-fired power plant listed above 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 (CFR) section 122.44(d)(1)(i)). Relevant information could include, but is not limited to:
 - a. information regarding when and how often such determinations were made, and
 - b. Information regarding whether any such determinations are scheduled for review or updating.

- (2) *Information category 2:* Factual information regarding what information was used by the relevant permitting authority to determine that point source discharges for a coal-fired power plant listed above would not have the reasonable potential to cause or contribute to an exceedance of the applicable water quality standard for mercury, where such a determination was made. Relevant information could include, but is not limited to:
 - a. information regarding consideration of the criteria listed in 40 CFR 122.44(d)(1)(ii),
 - b. information regarding consideration of non-point sources of mercury (including air deposition),
 - c. information regarding consideration of the cumulative impact of point and non-point sources of mercury on the quality of receiving water bodies,
 - d. information regarding consideration of knowledge, or lack of knowledge, of the water quality of receiving water bodies,
 - e. information regarding consideration of any existing or pending TMDLs for the receiving water bodies, and
 - f. information regarding consideration of data derived from the Toxics Release Inventory.

- (3) *Information category 3:* Factual information relevant to 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, including decisions related to initial permit issuance, permit review, permit amendment and permit re-issuance, for both new and existing sources. Relevant information could include, but is not limited to:
 - a. information regarding consideration of the criteria listed in 40 CFR 122.44(d)(1)(ii),
 - b. information regarding consideration of non-point sources of mercury (including air deposition),

- c. information regarding consideration of the cumulative impact of point and non-point sources of mercury on the quality of receiving water bodies,
- d. information regarding consideration of knowledge, or lack of knowledge, of the water quality of receiving water bodies, including knowledge related to fish consumption advisories,
- e. information relevant to use of analytical methods used for determining effluent and receiving water quality in making permitting decisions;
- f. information regarding consideration of any existing or pending TMDLs for the receiving water bodies, and
- g. information regarding consideration of data derived from the Toxics Release Inventory.

(4) *Information category 4:* Factual information relevant to which mercury-impaired waterways are included on CWA section 303(d) lists for the ten states listed above. Relevant information could include, but is not limited to:

- a. information regarding when the relevant CWA section 303(d) lists were initially made and subsequently updated, and
- b. information regarding the use of fish consumption advisories, if any, in determining the inclusion or not of a waterway on the relevant CWA section 303(d) lists.

(5) *Information category 5:* Factual information relevant to what the ten states listed above or the EPA have done to account for mercury from air deposition in TMDL calculations established by EPA or by a state, and relevant to examples of TMDL calculations for mercury from air deposition in other US states. Relevant information could include, but is not limited to:

- a. information regarding methodologies available for including mercury from air deposition in TMDL calculations, including i) information on methodologies for accounting for coal-fired power plants (individually or otherwise), and ii) information on how mercury emissions from US coal-fired power plants are considered relative to other US sources of mercury air emissions (e.g., use of information from the EPA National Emissions Inventory and other databases),
- b. information on how the available methodologies have been applied in requesting or establishing state or regional mercury TMDLs, and the results from those applications,
- c. a list of states that have incorporated mercury air deposition considerations in requesting or establishing mercury TMDLs, and a list of EPA-approved mercury TMDLs that take into account mercury deposition from air, and
- d. information regarding of the chronology with which states have taken action to account for mercury from air deposition in TMDL calculations.

(6) *Information category 6:* Factual information relevant to what EPA's response has been to a failure, if any, by any of the US states, including the ten states listed above, to list mercury-impaired waterways in accordance with CWA section 303(d) or to establish TMDLs for such waterways. Relevant information could include, but is not limited to:

- a. information regarding factors EPA considers to determine whether a state has failed to list mercury-impaired waterways in accordance with CWA section 303(d) or to establish TMDLs for such waterways, including factors related to timeliness, and
- b. information regarding EPA's consideration of how the performance of states that have not listed mercury-impaired waterways in accordance with CWA section 303(d) or to establish TMDLs for such waterways, if any, compares with the performance of states that have prepared such CWA section 303(d) lists and/or established such TMDLs.

(7) *Information category 7:* Any other technical, scientific or other information that could be relevant to the matters identified in Council Resolution 08-03.

5. Additional background information

The submission, United States' response, the Secretariat determinations, the Council Resolution 08-03, the overall plan to develop the factual record and other information are available in the Citizen Submissions on Enforcement Matters section of the CEC web site: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

6. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 31 December 2008, by e-mail to dmillan@cec.org or by regular mail to the following address:

Secretariat of the CEC
Submissions on Enforcement Matters Unit (SEM Unit)
393, rue St-Jacques ouest, bureau 200
Montreal, QC H2Y 1N9
Canada
Tel. (514) 350-4300

Please reference SEM-04-005 (*Coal-fired Power Plants*) in all correspondence.

For any questions, please call (514) 350-4300 or send an e-mail to the attention of Paolo Solano, at <dmillan@cec.org>.