

23 June 2008

COUNCIL RESOLUTION 08-03

Instruction to the Secretariat of the Commission for Environmental Cooperation regarding the Submission on Enforcement Matters SEM-04-005 asserting that the United States of America is failing to effectively enforce provisions of the Clean Air Act and Clean Water Act with regard to mercury from coal-fired power plants

THE COUNCIL:

SUPPORTIVE of the process set forth in Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING CONSIDERED the submission filed by Waterkeeper Alliance, Friends of the Earth Canada, Friends of the Earth – United States, Earth Roots, the Centre for Environmentally Sustainable Development, Great Lakes United, Pollution Probe, and Sierra Club – US and Canada (the “submitters”), on 20 September 2004, as well as the revised submission filed by the submitters on 18 January 2005;

ALSO, HAVING CONSIDERED the response provided by the United States of America on 25 April 2005, as well as the supplemental information provided by the United States on 29 September 2005;

HAVING REVIEWED the Secretariat’s determinations and recommendations in this matter, including the Secretariat’s notification to the Council on 5 December 2005, recommending the development of a factual record on some of the issues raised by the submitters (the “notification”); and

RECOGNIZING that the Secretariat recommended against the preparation of a factual record on other issues raised by the submitters, including all of the Clean Air Act issues, due to, among other things, pending judicial or administrative proceedings;

HEREBY UNANIMOUSLY:

INSTRUCTS the Secretariat to develop a factual record for SEM-04-005, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement*

on Environmental Cooperation, 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, 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?

DIRECTS the Secretariat to provide to the Council, in advance of developing the factual record, the Secretariat's overall work plan for gathering the relevant facts for the factual record, and to provide the Parties to the NAAEC with the opportunity to comment on that work plan; and

FURTHER DIRECTS the Secretariat to consider, in developing the factual record on these six questions, facts relevant to whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively

enforce, relevant facts prior to 1 January 1994, may be included in the factual record.

APPROVED ON BEHALF OF THE COUNCIL:

David McGovern
Government of Canada

Enrique Lendo Fuentes
Government of the United Mexican States

Scott Fulton
Government of the United States of America