

**RESPONSE OF THE UNITED STATES OF AMERICA
TO SUBMISSION ON ENFORCEMENT MATTERS 98-003
MADE BY THE DEPARTMENT OF THE PLANET EARTH, INC., ET AL.
UNDER ARTICLE 14 OF
THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION**

I. INTRODUCTION

This memorandum responds to a request from the Secretariat of the Commission for Environmental Cooperation (“CEC” or “Commission”) that the Government of the United States of America respond to Submission on Enforcement Matters 98-003 by the Department of the Planet Earth, Inc.; Sierra Club of Canada; Friends of the Earth; Washington Toxics Coalition; National Coalition Against the Misuse of Pesticides; WASHPIRG; International Institute of Concern for Public Health; Reach for the Unbleached; and Dr. Joseph Cummins, Ph.D., Professor Emeritus of the University of Western Ontario (“Submitters”), made under Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”), September 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480. Article 14 provides that the Secretariat may consider submissions from non-governmental organizations or persons which assert that Canada, Mexico or the United States (“the Parties”) is failing to effectively enforce its environmental law. *See, id.*, 32 I.L.M. at 1488. If the Secretariat considers that a submission, in light of any response from the Party concerned, warrants development of a factual record, the Secretariat is to so inform the governing Council of the Commission, and provide the reasons why it believes that a factual record is warranted. *See, id.*, art. 15(1), 32 I.L.M. at 1488. The Secretariat shall prepare a factual record with respect to the submission if the Council, by at least a two-thirds vote, instructs it to do so. *See, id.*, art. 15(2), 32 I.L.M. at 1488.

On May 28, 1998, the Submitters made a submission in which they assert that the United States is failing to effectively enforce its environmental law because recent regulatory programs developed by the United States Environmental Protection Agency (“EPA” or “the Agency”) to control emissions of mercury and dioxins/furans¹ (hereinafter referred to as “dioxins”) from municipal solid waste

¹All dioxin and furan compounds, of which there are many, are “related” to each other in that they are all chlorinated benzene ring chemicals. *See*, “Test Methods: Method 23 – Determination of Polychlorinated Dibenzo-P-Dioxins and Polychlorinated Dibenzo Furans from Stationary Sources,” 40 C.F.R. Part 60, Appendix A (1998)(describing in greater detail the relationship among dioxin and furan

combustors and medical waste incinerators violate sections 101(c), 115(a) and (b), and 129(a)(2) of the Federal Air Pollution Prevention and Control Act² (“Clean Air Act” or “CAA” or “Act”), as amended, and the Pollution Prevention Act of 1990.³ In addition, the Submitters assert that the same regulatory programs constitute a failure by the U. S. to enforce its environmental law because the programs do not address the “virtual elimination of persistent toxic substances” and “zero emission” requirements of the United States-Canada Great Lakes Water Quality Agreement,⁴ and violate the Agreement Between the Government of Canada and the Government of the United States of America

compounds). *See also*, EPA Air and Radiation Docket A-98-08, Items II-A-005, IV-B-10 and IV-B-11; Docket A-90-45, Items II-B-23 and IV-B-5. Since dioxin and furan compounds are related, they are often referred to as “dioxins/furans.” EPA has adopted a convention of referring to “dioxins/furans” as “dioxins,” and this memorandum also uses that convention.

²42 U.S.C. § 7401 et. seq.

³42 U.S.C. § 13101 et. seq.

⁴Great Lakes Water Quality Agreement, 1978, as amended by the 1983 and 1987 Protocols, Nov. 22, 1987, Can.-U.S., 30 U.S.T. 1303, T.I.A.S. No. 9257, as amended on Oct. 16, 1983, T.I.A.S. No. 10798, and Nov. 18, 1987, T.I.A.S. No. 11551.

Concerning Transboundary Movement of Hazardous Waste.⁵ *See*, “NGO Petition” Department of the Planet Earth, Inc., et al., May 28, 1998, at 8-9 [hereinafter the “Original Submission”].

⁵Agreement Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, Can.-U.S., T.I.A.S. No. 11099.

The Secretariat reviewed the Original Submission in light of the criteria set forth in Article 14(1) of the NAAEC and concluded that the Article 14(1) process is not an appropriate forum for the issues raised because the assertion that EPA's regulations allow hazardous air pollutant emissions in excess of what is required by domestic statutes or international agreements relates to a form of standard-setting activity, rather than to a form of enforcement activity. *See*, "Determination Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation," Secretariat of the CEC, December 14, 1998, at 3-4 [hereinafter "Secretariat's Original Submission Determination"]. Therefore, the Secretariat concluded that assertions in the Original Submission fell outside of the scope of Article 14(1) of the Agreement, and terminated the Article 14 process with respect to that Submission, unless the Submitters were to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) within thirty days of receipt of the Secretariat's determination.⁶ *See, id.* at 6.

The Submitters presented a letter to the Secretariat on January 4, 1999, which they requested the Secretariat to consider, together with the Original Submission and its supporting materials, to be a

⁶The Guidelines that implement Articles 14 and 15 of the NAAEC allow the Submitter "30 days to provide the Secretariat with a Submission that conforms to the criteria of Article 14(1) of the Agreement . . .", after receipt of notification from the Secretariat that the original submission made by the submitters does not conform to those criteria. *See*, "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation," Guidelines 6.1 and 6.2.

new and amended submission. *See*, “Amended NGO Petition to the North American Commission for Environmental Cooperation for an Investigation and Creation of a Factual Record Under Articles 14 and 15,” Department of the Planet Earth, Inc., et al., January 4, 1999, at 2 [hereinafter “the Amended Submission”]. In the Amended Submission the Submitters reasserted many of the issues raised in the Original Submission, and added at least one new allegation of failure by the U.S. to effectively enforce its environmental law.

The Secretariat, in a communication issued on September 8, 1999, concluded that assertions in the Amended Submission relating to obligations in international agreements fall outside the scope of the Article 14 process because such agreements are not “environmental law” within the meaning assigned to that term by Article 45(2) of the NAAEC. *See*, “Determination Pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation,” Secretariat of the CEC, September 8, 1999, at 4-5 [hereinafter “Secretariat’s Amended Submission Determination”]. It also concluded that the assertion that EPA had failed to comply with a general legislative directive regarding pollution prevention is not a ground for an Article 14 submission because the directive is not oriented toward enforcement of environmental law. *See, id.* at 8. However, the Secretariat determined that two of the allegations in the Amended Submission met the criteria of Article 14(1) of the Agreement. *See, id.* at 5-7. After reviewing these two allegations in light of the considerations of Article 14(2) of the NAAEC, the Secretariat asked the United States to respond to the allegations. *See, id.* at 9.

These allegations, to which the United States must respond in accordance with Article 14(3)⁷ of the NAAEC, are: (1) that the United States is failing to effectively enforce its environmental law

⁷This article requires the Party concerned to “advise the Secretariat” of certain information “within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request” from the Secretariat for a response to the assertions in the submission, including “any . . . information the Party wishes to submit . . .” *See*, NAAEC, art. 14(3) and 14(3)(b), 32 I.L.M. at 1488. The Secretariat is required to forward a copy of the submission and any supporting information provided with the submission to the Party at the time the Secretariat requests a response from that Party to the assertions in the submission. *See, id.*, art. 14(2)(d), 32 I.L.M. at 1488.

because, under its Federal regulatory programs, it does not adequately inspect and monitor mercury and dioxins emissions from municipal waste combustors and medical waste incinerators; and (2) the United States is failing to fulfill requirements of section 115 of the Clean Air Act. With respect to the second allegation, the Submitters claim that the U.S. government has not adhered to section 115 because, although the EPA Administrator has received reports from “duly constituted international agencies” stating that hazardous air pollutants from the United States may be “reasonably anticipated to endanger public health or welfare” in a foreign country (i.e., Canada), the Administrator has failed to so notify the Governors of the U. S. states from which the pollutants are emitted, thereby failing in turn to trigger a legal requirement that those states modify their CAA State Implementation Plans to the extent that they are “inadequate to prevent or eliminate the endangerment.” *See*, Amended Submission at 10-11.

The United States Government believes that the Article 14 process is an important component of the cooperative environmental protection efforts among the Parties to the NAAEC. The United States has been and continues to be a firm supporter of the process established by Articles 14 and 15. Nevertheless, as the CEC Secretariat has recognized, certain types of assertions are not properly the subject of a factual record. In the case of the two allegations to which the Secretariat has asked that the U.S. government respond, preparation of a factual record on the Submitters’ claims would not be, for the following reasons, a wise use of the CEC’s resources, nor would it significantly advance the goals of the NAAEC. First, the Submitters’ allegation concerning EPA’s inspection and monitoring activities does not meet the requirements of the NAAEC for submissions on enforcement matters. Second, the United States is not failing to effectively enforce its environmental law relating to the inspection and compliance monitoring of mercury and dioxins emissions from municipal waste combustors and medical waste incinerators. Third, the Submitters’ assertion concerning section 115 of the Clean Air Act misstates the requirements of the law, which, in any event, the United States is not failing to effectively enforce. Finally, the United States is taking significant action to reduce atmospheric deposition of dioxins and mercury from municipal waste combustors and medical waste incinerators, including deposition to the Great Lakes ecosystem. For all of these reasons the United States believes the Secretariat should not determine that preparation of a factual record on the Submitters’ allegations is warranted.

II. BACKGROUND

A. Clean Air Act Provisions Relevant to Municipal Waste Combustor and Medical Waste Incinerator Standards and Monitoring Requirements

1. Section 112 Maximum Achievable Control Technology and Residual Risk Standards

Pursuant to the Clean Air Act, EPA is required to regulate sources of 188 listed hazardous air pollutants (“HAPs”), including mercury and dioxins. Section 112 of the Act establishes the primary framework by which EPA identifies HAPs, and then develops performance standards for the control of emissions from stationary sources of HAPs. EPA lists air pollutants as HAPs pursuant to the criteria and procedures set forth in section 112(b) of the Act, 42 U.S.C. § 7412(b), and then lists categories of sources of HAP emissions under CAA section 112(c), 42 U.S.C. § 7412(c). After EPA lists HAP source categories, the Agency undertakes standard-setting rulemaking actions to establish technology-based emission standards and other requirements, including monitoring requirements, under section 112(d), 42 U.S.C. § 7412(d). For major sources and, at EPA’s discretion, for smaller “area” sources, these standards are called Maximum Achievable Control Technology (“MACT”) standards.

The Act provides that MACT standards “shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts

and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which— (A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications, (B) enclose systems or processes to eliminate emissions, (C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point, (D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or (E) are a combination of the above.” 42 U.S.C. § 7412(d)(2).

The 1990 Amendments to the Clean Air Act provided EPA with a 10-year schedule for promulgating MACT standards under section 112. This schedule is set forth in section 112(e), 42 U.S.C. § 7412(e). Once EPA adopts a MACT standard for a specific source category, new and reconstructed sources in the category are generally required to immediately comply with the MACT standard. 42 U.S.C. § 7412(i)(1) and (2). Existing sources generally have up to 3 years to comply after EPA adopts a MACT standard. 42 U.S.C. § 7412(i)(3). The Act at section 112(f) also directs EPA to later adjust MACT standards as needed “in order to provide an ample margin-of safety to protect public health . . . or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect.” 42 U.S.C. § 7412(f)(2)(A). These “residual risk” standards are generally required to be adopted no later than 8 years after promulgation of the relevant MACT standard. 42 U.S.C. § 7412(f)(2)(C).

2. Municipal Waste Combustor and Medical Waste Incinerator Clean Air Act Section 111 and 129 Performance Standards and Monitoring Requirements

Prior to 1990 U.S. law did not require EPA to take actions to reduce dioxins and mercury emissions from municipal waste combustors (“MWCs”) and medical waste incinerators (“MWIs”). The 1990 Clean Air Act amendments included new legislation directing EPA to establish regulations to limit emissions of several HAPs, including mercury and dioxins, from solid waste incineration units (e.g., MWCs and MWIs). *See*, Pub. L. 101-549, section 305 (Nov. 15, 1990), 104 Stat. 2577, codified at 42 U.S.C. § 7429.⁸ EPA sets standards for these solid

⁸Access to the text of the Clean Air Act and other U.S. environmental laws and regulations is available

waste incineration units under sections 111 and 129 of the Act, instead of section 112 of the Act. The performance standards applied to these sources under section 129(a)(2) are MACT standards and, as required by the Act, must include numerical emissions limitations for several listed pollutants, including mercury and dioxins. 42 U.S.C. § 7429(a)(2)-(4). For new incineration units performance standards are known as new source performance standards (“NSPS”).⁹ For existing incineration units, these standards are called “emissions guidelines” (“EGs”),¹⁰ and the Act directs U.S. states to submit plans to

through the Internet at <http://www.epa.gov/epahome/rules.html>.

⁹New MWCs and MWIs are those constructed after the performance standards were proposed. A NSPS is a U.S. Federal standard and is enforceable directly by the Federal government and by citizen suit under the Act. 42 U.S.C. § 7604(a)(1). States may assume primary implementation and enforcement responsibilities for a NSPS by seeking delegation of implementation and enforcement authority from the Federal government under CAA section 111(c)(1). 42 U.S.C. § 7411(c)(1).

¹⁰An EG is not enforceable until it is reflected in a state or Federal plan. 42 U.S.C. § 7429(f)(2). If a

EPA regarding their implementation and enforcement.¹¹ 42 U.S.C. § 7429(b)(2). State plans must

state fails to submit an approvable plan, EPA must enforce a Federal plan in the state. 42 U.S.C. § 7429(b)(3).

¹¹With regard to MWCs, no new MWCs have been constructed since the most recent NSPS for MWCs were proposed in 1994. Implementation of the MWC regulations has therefore focused on existing MWCs. Currently there are 172 existing MWC units located at 68 MWC plants, which are in turn located in 25 U.S. states. Most MWC plants have two or three existing units to allow operational flexibility when one unit must be removed for maintenance. All of these MWCs are currently subject to regulation, either through a state plan or through the Federal plan (i.e., if a state does not have an approved plan). *See*, 40 C.F.R. § 62.14102; Internet site

provide for compliance by existing sources with the EGs no later than 5 years after EPA adopts the standards. As with MACT standards under section 112, section 129(h)(3) of the Act directs EPA to subject standards promulgated under section 129(a) to the residual risk program under section 112(f), if necessary to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. 42 U.S.C. § 7429(h)(3).

As part of each standard-setting rulemaking EPA undertakes for MWCs and MWIs under sections 111 and 129, CAA section 129(c) requires EPA to also adopt monitoring regulations “requiring the owner or operator of each solid waste incineration unit -- (1) to monitor emissions from the unit at the point at which such emissions are emitted into the ambient air (or within the stack, combustion chamber or pollution control equipment, as appropriate) and at such other points as necessary to protect public health and the environment; (2) to monitor such other parameters relating to the operation of the units and its pollution control technology as the Administrator determines are appropriate; and (3) to report the results of such monitoring.” 42 U.S.C. § 7429(c)(1)-(3). The subsection further provides that “[s]uch regulations shall contain provisions regarding the frequency of monitoring, test methods and procedures validated on solid waste incineration units, and the form and frequency of reports containing the results of monitoring and shall require that any monitoring reports or test results indicating an exceedance of any standard under this section shall be reported separately and in a manner that facilitates review for purposes of enforcement actions.” 42 U.S.C. § 7429(c). In addition, “[s]uch regulations shall require that copies of the results of such monitoring be maintained on file at the facility concerned and that copies shall be made available for inspection and copying by interested members of the public during business hours.” *Id.*

In addition to the CAA section 129(c) monitoring requirements, MWCs and MWIs that are “major sources” under the Act are subject to the provisions of section 114(a)(3) requiring “enhanced monitoring and submission of compliance certifications.” 42 U.S.C. § 7414(a)(3). This provision of the Act directs EPA to establish guidance on implementing this requirement through rulemaking, and provides: “Compliance certifications shall include (A) identification of the applicable requirement that is

<http://www.epa.gov/ttn/uatw/129/mwc/planstat.html>.

the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require.” *Id.* Moreover, since MWCs and MWIs regulated under section 129 are required to obtain comprehensive operating permits under title V of the Act which assure compliance with all CAA requirements applicable to the sources, 42 U.S.C. § 7429(e), these sources are also subject to the specific compliance certification, monitoring and inspection requirements of title V. Under CAA section 503(b), MWC and MWI owners or operators must submit compliance plans describing how sources will comply with applicable CAA requirements, and such plans must include schedules of compliance and require periodic progress reports. 42 U.S.C. § 7661b(b)(1). EPA’s regulations governing the title V program must also require the facility operator to periodically certify compliance and to report any deviations from permit requirements. 42 U.S.C. § 7661b(b)(2). Under CAA section 504, each permit must require the source to submit reports of required monitoring at least every 6 months, 42 U.S.C. § 7661c(a), and “shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.” 42 U.S.C. § 7661c(c). If EPA has exercised its discretion to adopt regulations prescribing procedures and methods for determining compliance and for monitoring and analysis of pollutants under section 504(b) of the Act, each permit’s monitoring provisions must conform to those requirements. *Id.*

3. Clean Air Act Provisions on Standard-Setting Procedures and Judicial Review of EPA Actions

EPA promulgates standards and other requirements for MWCs and MWIs under the procedures set forth in section 307(d) of the Act. 42 U.S.C. § 7607(d)(1)(D). These procedures require EPA to first publish notices of proposed rulemaking in the *Federal Register*, and to provide for an opportunity for the public to submit written comments and participate in a public hearing on the proposal. 42 U.S.C. § 7607(d)(3)-(5). EPA’s final rule must be accompanied by a response to each of the significant comments, criticisms and new data submitted in written or oral presentations during the comment period. 42 U.S.C. § 7607(d)(6)(B). Under section 307(d)(9), in a judicial challenge to EPA’s regulations adopted under section 307(d) the court may reverse any EPA action found to be “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law,” if certain conditions are met. *See*, 42 U.S.C. § 7607(d)(9)(A)-(D). However, CAA section 307(b) provides that a petition for review challenging EPA’s adoption of a NSPS under section 111 (and

therefore any standard under section 129), any standard under 112, or any other nationally applicable regulation or final action, may be filed only in the United States Court of Appeals for the District of Columbia Circuit, and only within 60 days from the date that the notice of EPA's action appears in the *Federal Register*, unless new grounds arise. 42 U.S.C. § 7607(b)(1).

While CAA section 307(b) establishes the exclusive means by which to judicially challenge all EPA CAA final actions, including all standard-setting actions, section 304 allows any person to commence a civil action in U.S. District Court to compel EPA to take action in cases where EPA fails to timely perform a nondiscretionary duty. Specifically, under section 304(a)(2) a person may sue EPA “where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator,” provided the plaintiff has given EPA at least 60 days notice of intent to sue under section 304(b)(2). 42 U.S.C. § 7604(a)(2) and (b)(2). These lawsuits are commonly called “deadline suits,” and involve cases where EPA allegedly has not taken a specifically required final action pursuant to a specified statutory deadline. In addition, the U.S. district courts have jurisdiction to compel Agency action that is “unreasonably delayed,” provided the plaintiff has given EPA at least 180 days notice of intent to sue. 42 U.S.C. § 7604(a).

B. EPA's Implementation of Clean Air Act Municipal Waste Combustor and Medical Waste Incinerator Requirements, and Related Litigation

1. EPA's New Source Performance Standards, Emissions Guidelines, and Monitoring Requirements for Municipal Waste Combustors

EPA's most recent set of regulations setting NSPS and EGs, which include monitoring, record keeping and reporting requirements for MWCs, were adopted under CAA sections 111 and 129, and promulgated on December 19, 1995 (60 Fed. Reg. 65,387, codified at 40 C.F.R. part 60, subparts Eb and Cb, respectively).¹² The NSPS and EGs apply to MWCs with the capacity to combust greater

¹²EPA initially proposed performance standards applicable to MWCs in December, 1989, and promulgated them on February 11, 1991 (56 Fed. Reg. 5507). Those standards apply to MWCs with a capacity to combust greater than 250 tons per day of municipal solid waste for which construction is commenced after December 20, 1989, and on or before September 20, 1994, or for which modification or reconstruction is commenced after December 20, 1989, and on or before June 19, 1996. 40 C.F.R. § 60.50a(a)(1) and (2). The standards impose a dioxins emission limit of 30

than 250 tons per day of municipal solid waste (“large MWCs”). The NSPS apply to large MWCs for which construction is commenced after September 20, 1994, and to existing units for which modification or reconstruction is commenced after June 19, 1996. 40 C.F.R. § 60.50b(a). The EGs apply to large MWCs for which construction was commenced on or before September 20, 1994. 40 C.F.R. § 60.32b(a). Both the NSPS and the EG establish a mercury emission limit of 0.080 milligrams per dry standard cubic meter or 15 percent of the potential mercury emission concentration (85-percent reduction by weight), corrected to 7 percent oxygen, whichever is less stringent. 40 C.F.R. § 60.52b(a)(5). The dioxins limitations imposed by the NSPS differ from those imposed by the EG, and the NSPS and EG each contain two different dioxins limitations. First, the NSPS limit is dependent on when construction, modification or reconstruction of the unit commences. Units for which construction, modification or reconstruction commences between June 19, 1996 and November 20, 1997 are subject to a limit of 30 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen, for the first 3 years following the date of initial startup and to a limit of 13 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen thereafter. 40 C.F.R. § 60.52b(c)(1). Units for which construction, modification or reconstruction commences after November 20, 1997 are subject to a limit of 13 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen. 40 C.F.R. § 60.52b(c)(2). Next, with respect to the EG, it establishes a limit of 60 nanograms per dry standard cubic meter, corrected to 7 percent oxygen, for units that employ an electrostatic

nanograms per dry standard cubic meter (12 grains per billion dry standard cubic feet), corrected to 7 percent oxygen (dry basis) and require the owner/operator to conduct annual compliance tests and to submit the results of those tests to EPA. 40 C.F.R. §§ 60.53a, 60.58a(b) and 60.59a(g). EPA is not aware of any information indicating that MWCs subject to these requirements are not in compliance with them. There are very few (less than six) MWC plants subject to these requirements.

precipitator-based emission control system, and a limit of 30 nanograms per dry standard cubic meter, corrected to 7 percent oxygen, for units that do not employ an electrostatic precipitator-based emission control system. 40 C.F.R. § 60.33b(c)(1)(i) and (ii). All of the dioxins limits presented above are calculated on a total mass dioxin basis and not on a toxic equivalent quantity (TEQ) basis. *See*, Docket A-90-45, Item IV-B-5.¹³

In addition to establishing numerical emission limits for mercury and dioxins as required by section 129 of the Clean Air Act, the NSPS and EGs also include detailed inspection, performance testing, monitoring, record keeping and reporting requirements. The requirements in the EGs, which will be implemented either through state plans approved by EPA or through a Federal plan promulgated by EPA, are codified at 40 C.F.R. §§ 60.38b and 60.39b, and generally cross-reference and incorporate the requirements in the NSPS. The owner or operator must conduct an initial performance test, employing specified EPA reference test methods, to confirm compliance with the applicable mercury and dioxins emission limits within a specified period of time. 40 C.F.R. §§ 60.38b, 60.39b and 60.58b(d)(2) and (g). Following the initial performance test for mercury, the owner or operator must conduct a performance test for mercury emissions on an annual basis (no more than 12 calendar months from the previous performance test). 40 C.F.R. §§ 60.38b and 60.58b(d)(2). Performance tests must

¹³The EPA dockets referred to in this memorandum are available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, except for U.S. Federal holidays, at the following address: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center (Mail Code 6102), Room M-1500, 401 M Street, S.W., Washington, D.C. 20460 (Telephone number: (202) 260-7548). Upon request, the United States will provide the Secretariat with copies of any specific docket items referred to in this memorandum in which the Secretariat might be interested.

also be conducted annually for dioxins emissions, unless the owner or operator requests and qualifies for an alternative testing schedule. 40 C.F.R. §§ 60.38 and 60.58b(g).

In addition to conducting the annual performance tests, owners or operators who use activated carbon injection¹⁴ to comply with the mercury and/or dioxins emission limits must follow specified procedures for measuring and calculating carbon usage. 40 C.F.R. §§ 60.38b and 60.58b(d)(2) and (g). During each performance test for dioxins and mercury, as applicable, the owner or operator must estimate an average carbon mass feed rate, in kilograms per hour or pounds per hour, based on carbon injection system operating parameters. 40 C.F.R. §§ 60.38b and 60.58b(m)(1). During operation of the unit, the carbon injection system operating parameter(s) that are the primary indicator(s) of the carbon mass feed rate must equal or exceed the level(s) documented during the most recent performance test(s). 40 C.F.R. §§ 60.38b and 60.58b(m)(2). The owner or operator must estimate the total carbon usage of the plant for each calendar quarter by two independent methods according to specified procedures. 40 C.F.R. §§ 60.38b and 60.58b(m)(3).

The owner or operator is required to maintain records of the following information concerning compliance with applicable dioxins and mercury emission limits, or parameters related thereto, for a period of at least five years: (i) for units that apply activated carbon for mercury or dioxins control, the average carbon mass feed rate estimated during performance tests, the average carbon mass feed rate estimated for each hour of operation (with supporting calculations), the total carbon usage for each

¹⁴To meet the dioxins and mercury emission limits in the MWC regulations, it will be necessary for almost all MWCs to install and operate activated carbon injection systems. The exceptions are those few MWC plants (approximately 20) which burn refuse derived fuel (RDF). MWCs burning RDF should be able to meet the dioxins and mercury emission limits without the need for activated carbon injection.

calendar quarter (with supporting calculations) and carbon injection system operating parameter data for the parameter(s) that are the primary indicators of carbon feed rate; (ii) test reports documenting the results of the initial performance tests and all annual performance tests conducted to determine compliance with the mercury and dioxins emission limits; (iii) for units that apply activated carbon for mercury or dioxins control, identification of the calendar dates when recorded average carbon mass feed rates were less than the hourly carbon feed rates estimated during performance tests; and, (iv) for units that apply activated carbon for mercury or dioxins control, identification of the calendar dates when the carbon injection system operating parameter(s) that are the primary indicator(s) of carbon mass feed rate are below the level(s) estimated during performance tests, with reasons for such occurrences and a description of corrective actions taken. 40 C.F.R. §§ 60.39b and 60.59b(d). The owner or operator must submit reports on the initial performance tests used to establish compliance with applicable mercury and dioxins emission limits to EPA. 40 C.F.R. §§ 60.39b and 60.59b(f). For units that apply activated carbon injection for mercury or dioxins control, the reports must include the average carbon mass feed rate. *Id.* Following submission of the initial performance test reports, the owner or operator must submit an annual report, no later than February 1 of each year following the year in which the data were collected, which includes a list of the mercury and dioxins emission levels achieved during the most recent performance tests. 40 C.F.R. §§ 60.39b and 60.59b(g). Finally, the owner or operator must submit a semiannual report that includes specified information for any recorded pollutant or parameter that does not comply with the specified pollutant or parameter limit. 40 C.F.R. §§ 60.39b and 60.59b(h). If any test report documents any mercury or dioxins emission levels above the applicable limits, the semiannual report must include a copy of the test report documenting the emission levels and the corrective actions taken. *Id.* The semiannual report must also include information on carbon injection system operating parameters that are the primary indicator(s) of carbon mass feed rate and carbon feed rate data for each date for which operating parameter data is submitted. *Id.*

EPA's regulations implementing CAA section 114(a)(3) exempt emission limitations or standards proposed pursuant to section 111 or 112 of the Act after November 15, 1990. 40 C.F.R. § 64.2(b)(1). This is because in EPA's rulemakings adopted after the 1990 amendments to the Act, the Agency has focused on including methods for directly determining continuous compliance where such methods are feasible. *See*, preamble to 40 C.F.R. part 64, 62 Fed. Reg. 54,900, 54,915 (October 22, 1997). Federal CAA rulemakings adopted after November 15, 1990, including NSPS rulemakings, satisfy the monitoring requirements of the 1990 CAA amendments, and there must be no gaps in their monitoring provisions. *Id.* As a result, the testing, monitoring, record keeping and reporting requirements that apply to MWC units under the MWC regulations satisfy the requirements of section

114(a)(3).

Finally, EPA's regulations implementing title V, which apply to MWC units, 42 U.S.C. § 129(e), contain specific requirements for permit applications to include compliance plans and compliance certifications, and for permits to include monitoring and related record keeping requirements. 40 C.F.R. §§ 70.5(c)(8)-(9), 71.5(c)(8)-(9), 70.6(a)(3), 71.6(a)(3), 70.6(c) and 71.6(c). These include, among other things, a requirement that where an existing applicable requirement under the CAA does not require periodic testing or instrumental or noninstrumental monitoring, permits must provide for periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit. 40 C.F.R. §§ 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). Such monitoring requirements must assure use of terms, test methods, units, averaging methods, and other statistical conventions consistent with the underlying applicable requirement. *Id.*

Each state with one or more MWCs must submit a state plan to EPA for approval. State plans must contain the following nine elements: (1) an inventory of MWCs in the state, (2) an inventory of dioxins and mercury emissions from MWCs in the state, (3) a state regulation containing mercury/dioxins limitations no less stringent than those in the EG, (4) compliance schedules for the alteration or retrofitting of each solid waste incineration unit to bring it into compliance with the state regulation, (5) monitoring and reporting requirements, (6) a public hearing and a document summarizing the comments made at the hearing and the state's response to those comments, (7) state progress reports to EPA, (8) identification of the legal mechanism to enforce the state plan, and (9) a demonstration of state legal authority to implement the plan. Docket A-90-45, Item VII-B-1.

Three dates are of primary importance in implementing an EG for dioxins and mercury emissions from MWCs. They are the first year, second year and fifth year following the adoption of the EG by EPA. *See*, 42 U.S.C. § 7429(b)(2) and (3). EPA adopted the EGs for dioxins and mercury emissions from MWCs in 1995. *See*, 60 Fed. Reg. 65,414 (December 19, 1995). By the end of the first year (December, 1996), each state with MWCs was required to submit to EPA for approval a plan to implement and enforce the EGs ("state plans"). 42 U.S.C. § 7429(b)(2). EPA was required to develop, implement and enforce a plan covering MWCs located in any state which had not submitted an approvable state plan by the end of the second year (December, 1997) ("the Federal plan"). 42 U.S.C. § 7429(b)(3). The Federal plan acts as a gap-filling measure until state plans are completed. *See*, Internet site <http://www.epa.gov/ttn/uatw/129/mwc/planstat.html>; Docket A-90-45, Item IV-B-10. As of November 10, 1999, 18 of the 25 states with MWCs have submitted state plans. *Id.* The

Federal plan was adopted in 1998 (63 Fed. Reg. 63,202 (November 12, 1998)) and applies to all MWCs in states that do not have an EPA-approved and currently effective state plan. Finally, all approved state plans, as well as the Federal plan, must require that all MWCs are in compliance with the applicable plan or cease operation by the end of the fifth year (December, 2000). 42 U.S.C. §§ 7429(b)(2) and (3).

2. EPA's New Source Performance Standards, Emissions Guidelines, and Monitoring Requirements for Medical Waste Incinerators

Pursuant to CAA sections 111 and 129, EPA promulgated NSPS, EGs, and monitoring, record keeping and reporting requirements for MWI sources on September 15, 1997 (62 Fed. Reg. 48,348, codified at 40 C.F.R. part 60, subparts Ce and Ec). The performance standards, subpart Ec, apply to MWI units for which construction is commenced after June 20, 1996, and to existing units that commence modification after March 16, 1998. 40 C.F.R. §§ 60.17 and 60.50c-60.58c. The EGs, subpart Ce, apply to MWI units constructed on or before June 20, 1996. 40 C.F.R. §§ 60.30 and 60.30e-60.39e. Under section 307(d) of the Act, EPA had first published a notice of proposed rulemaking regarding these standards on February 27, 1995 (60 Fed. Reg. 10,654). The proposal was the result of several years of reviewing available information, and during the public comment period EPA received over 700 letters, including much new information that led the Agency to re-propose the rules on June 20, 1996 (61 Fed. Reg. 31,736). Following an additional public comment period, EPA published its final rule.

The NSPS establish a mercury emission limit of 0.55 milligrams per dry standard cubic meter or 15 percent of the potential mercury emission concentration (85-percent reduction by weight), corrected to 7 percent oxygen, whichever is less stringent. 40 C.F.R. § 60.52c(a). The dioxins limit imposed by the NSPS is dependent on the size of the MWI. Units that combust greater than 200 pounds per hour are subject to a limit of 25 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen, and units that combust less than 200 pounds per hour are subject to a limit of 125 nanograms per dry standard cubic meter (total mass), corrected to 7 percent oxygen. *Id.*

The dioxins and mercury emission limits imposed by the EGs are dependent on the size and location of the MWI. The EGs establish a mercury emission limit of 7.5 milligrams per dry standard cubic meter and a total mass dioxins emission limit of 800 nanograms per dry standard cubic meter, corrected to 7 percent oxygen, for existing MWIs that combust less than 200 pounds per hour and which are located more than 50 miles from the boundary of the nearest Standard Metropolitan

Statistical Area.¹⁵ 40 C.F.R. § 60.33e(b). For all other existing MWIs, the EGs establish a mercury emission limit of 0.55 milligrams per dry standard cubic meter or 15 percent of the potential mercury emission concentration (85-percent reduction by weight), whichever is less stringent, and a total mass dioxins limit of 125 nanograms per dry standard cubic meter, corrected to 7 percent oxygen. 40 C.F.R. § 60.33e(a).

As part of the MWI standard-setting regulations, EPA adopted detailed inspection, performance testing, monitoring, record keeping and reporting requirements. For existing MWI units, the requirements are codified at 40 C.F.R. §§ 60.36e, 60.37e, and 60.38e. These requirements for existing MWI units will be implemented through state plans approved by EPA. For the most part, these sections include provisions for new MWI units, which are codified at 40 C.F.R. §§ 60.56c, 60.57c, and 60.58c. Operators must conduct initial performance tests to determine compliance with emissions standards, consisting of a minimum of three test runs and using specified EPA Reference Methods. 40 C.F.R. § 60.56c(b)(1)-(12). The rules also contain specific requirements for establishing and operating pursuant to maximum and minimum operating parameters. 40 C.F.R. § 60.56c(d)(1)-(2). The rules set forth requirements for measuring and recording values for operating parameters that require either continuous or hourly data measurement and hourly or minute-by-minute data recording. 40 C.F.R. § 60.57c(a). Operators must also install, calibrate and operate methods for measuring the use of bypass stacks, operate equipment necessary to monitor site-specific operating parameters, and obtain monitoring data at all times during operation except during malfunction, calibration or repair. 40 C.F.R. § 60.57c(b)-(d). The MWI regulations require facility operators to submit detailed notifications, and specific information prior to construction and startup. 40 C.F.R. § 60.58c(a). Operators must also maintain detailed records regarding combustion activities and emissions of pollutants, and must submit reports regarding performance tests and other factors according to a specified schedule. 40 C.F.R. § 60.58c(b)-(f). Moreover, as is the case for MWCs, the MWI rules satisfy the requirements of CAA section 114(a)(3). MWIs are subject to the same CAA Title V monitoring requirements discussed above with respect to MWCs.

¹⁵Standard Metropolitan Statistical Areas are listed in U.S. Office of Management and Budget Bulletin Number 93-17.

Each state with one or more MWIs must submit a state plan to EPA for approval. State plans must contain the following nine elements: (1) an inventory of MWIs in the state, (2) an inventory of dioxins and mercury emissions from MWIs in the state, (3) a state regulation containing mercury/dioxins limitations no less stringent than those in the EG, (4) compliance schedules for the alteration or retrofitting of each MWI to bring it into compliance with the state regulation, (5) monitoring and reporting requirements, (6) a public hearing and a document summarizing the comments made at the hearing and the state's responses to those comments, (7) state progress reports to EPA, (8) identification of the legal mechanism to enforce the state plan, and (9) a demonstration of state legal authority to implement the plan. "Hospital, Medical and Infectious Waste Incinerators Emission Guidelines: Summary of the Requirements for Section 111(d)/129 State Plans," EPA-456R-97-007, November, 1997.

Three dates are of primary importance in implementing an EG for dioxins and mercury emissions from MWIs. They are the first year, the second year and the fifth year following the adoption of the EG by EPA. 42 U.S.C. § 7429(b)(2) and (3). In September 1997, EPA adopted the EGs for dioxins and mercury emissions from MWIs. 62 Fed. Reg. 48,348 (September 15, 1997). By the end of the first year (September 1998), states with MWIs were required to submit a state plan or they would be subject to the Federal plan prepared by EPA. 42 U.S.C. § 7429(b)(2). By the end of the second year (September 1999), EPA was to approve state plans and approve a Federal plan for those states whose plans were not approved or did not complete a state plan. 42 U.S.C. § 7429(b)(3). The Federal plan acts as a gap-filling measure until state plans are completed. To date, 28 of the states with MWIs have submitted state plans. In addition, three states and the District of Columbia have determined they have no MWIs and, as a result, have no need to submit a state plan. The Federal plan was proposed in July 1999, 64 Fed. Reg. 36,426, and after promulgation (anticipated to occur in March, 2000) will apply to all MWIs in states that do not have approved state plans. Finally, by the end of the fifth year (September, 2002) all MWIs are required to comply with the applicable plan or cease operation. 42 U.S.C. § 7429(b)(2) and (3).

3. Litigation of EPA's Municipal Waste Combustor, Medical Waste Incinerator, and Compliance Assurance Monitoring Rules

Both of EPA's sets of regulations under sections 111 and 129 for MWCs and MWIs have been the subject of litigation in the U.S. Court of Appeals for the District of Columbia Circuit, pursuant to CAA section 307(b)(1)'s exclusive review opportunity for challenging final EPA CAA actions. First, EPA's MWC rules were challenged for their use of aggregate plant municipal solid waste capacity

rather than unit municipal solid waste capacity in creating categories of MWC units for MACT purposes. *See, Davis County Solid Waste Management and Energy Recovery Special Service District v. EPA*, 101 F.3d 1395 (D.C. Cir. 1996), *modified*, 108 F.3d 1454 (D.C. Cir. 1997). In that case, the court held that EPA had exceeded its statutory authority in taking this approach. *Davis County*, 101 F.3d at 1411. However, no one timely challenged the adequacy of the performance testing, monitoring, record keeping or reporting requirements adopted in the MWC rule. Pursuant to section 307(b)(1), any such challenge would had to have been lodged within 60 days of EPA's publication of the final MWC rules in the *Federal Register*. It is therefore too late, at this point, to obtain review of the adequacy of EPA's MWC monitoring requirements.

EPA's MWI rules were also challenged in the D.C. Circuit under section 307(b)(1), and while the petitioners initially raised the issue of the adequacy of the rules' monitoring requirements under sections 129 and 114 (*see*, Petitioners' Nonbinding Statement of Issues, No. 97-1686, Dec. 18, 1997), they did not pursue the issue in their briefs or arguments before the court. Rather, the challenge involved EPA's methodology in setting the minimum stringency levels of the MACT standards (the MACT "floors") and EPA's decisions regarding whether to mandate certain pollution prevention measures in the rules. *See, Sierra Club v. EPA*, 167 F.3d 658 (D.C. Cir. 1999). As with the challenge to the MWC rules, the single opportunity for anyone to have objected to the adequacy of EPA's MWI performance testing, monitoring, record-keeping and reporting requirements was during the 60-day period following publication of the MWI rules in the *Federal Register* as provided for by CAA section 307(b)(1). Since no such challenge was fully pursued during this opportunity, none may be pursued now.

EPA's "Compliance Assurance Monitoring" (CAM) rule implementing CAA section 114(a)(3) was recently upheld, in relevant part, by the U.S. Court of Appeals for the District of Columbia Circuit. *See, NRDC v. EPA*, (No. 97-1727, and consolidated case) (Oct. 29, 1999, D.C. Cir.). Petitioners in that case objected to EPA's exemption of sources subject to post-1990 section 111 standards from the CAM rule's regulatory requirements. *See* Pet's brief at 43, note 33. However, the court upheld EPA's approach to fulfilling the "enhanced monitoring" requirement of section 114(a)(3), and favorably noted that "[s]pecifically, EPA demonstrated that many of the major stationary sources exempt from CAM are subject to other specific rules[.]" Slip Op. at 8. Consequently, in the only appropriate forum for seeking review of EPA's CAM rule requirements, the D.C. Circuit refused to find that EPA's exemption from CAM for post-1990 standards, such as the MWC and MWI rules, was unlawful.

C. Clean Air Act Section 115 Provisions on International Air Pollution

Section 115 of the CAA provides that “whenever the Administrator, 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 of State requests him to do so with respect to such pollution which the Secretary of State alleges is of such nature, the Administrator shall give formal notification thereof to the Governor of the state in which such emissions originate.” 42 U.S.C. § 7415(a). Under section 115(b), the notice to the Governor of the state in which such emissions originate is deemed to be a finding that its State Implementation Plan (“SIP”) under the Act is inadequate and must be revised to the extent necessary “to prevent or eliminate the endangerment.” 42 U.S.C. § 7415(b). These requirements apply only with respect to “a foreign country which the Administrator determines has given the United States essentially the same rights” concerning “the prevention or control of air pollution occurring in that country as is given that country by” the U.S. under CAA section 115. 42 U.S.C. § 7415(c).

Under the CAA, two possible routes of judicial review of EPA’s implementation of section 115 are available, at different stages of the process. First, if a request is submitted to EPA for action under section 115 and EPA has not responded to the request after a reasonable period of time, a plaintiff might be able to file suit in U.S. District Court to compel Agency action unreasonably delayed pursuant to CAA section 304(a), after giving EPA 180 days notice of intent to sue.¹⁶ 42 U.S.C. § 7604(a). Second, once EPA acts on a section 115 petition through notice-and-comment rulemaking, that final action is exclusively reviewable under CAA section 307(b) in the U.S. Court of Appeals. 42 U.S.C. § 7607(b)(1).

¹⁶EPA’s actions under section 115 are not subject to a specified statutory deadline, so a challenge under section 304(a)(2) to compel EPA to perform a nondiscretionary duty is not available. Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987).

III. DISCUSSION

A. Compliance Monitoring and Inspection

In its Determination on the Amended Submission, the CEC Secretariat asked the United States to respond to the Submitters' allegation that the U.S. fails to adequately inspect and monitor incinerator emissions. The Submitters allege that the United States has an "incredibly poor incinerator monitoring program." Amended Submission at 12. Their allegation has the following main thrusts: (1) twenty-six percent of municipal solid waste burned has never been tested for dioxins emissions, (2) the plants accounting for most of the rest of the municipal solid waste burned have been tested only once during startup, and (3) there has been a documented concerted effort to test plants under the most ideal circumstances rather than under normal operating conditions. *Id.* To support these allegations the Submitters rely primarily on an article entitled "Dioxins Emission Inventories and Trends: the Importance of Large Point Sources," by Thomas Webster and Paul Connett. *See, Chemosphere*, Vol. 37, Nos. 9-12, at 2105-2118 [hereinafter "Webster and Connett article"]. A copy of the Webster and Connett article is attached to this memorandum (Attachment 1).

Thus, the Submitters' concerns relating to this allegation appear to focus exclusively on testing and compliance monitoring of emissions, rather than on other forms of enforcement activity. Furthermore, a careful analysis of the Submitters' concerns demonstrates that, although the Submitters' allegation is initially stated broadly (i.e., they allege the U.S. is failing to adequately inspect and monitor incinerator emissions), the specific claims they raise and the article on which they rely to support those claims relate exclusively to dioxins emissions from MWCs, not to mercury emissions from MWCs or to HAP emissions from MWIs. Consequently, the United States' response in this memorandum discusses testing and compliance monitoring activities. The response also focuses mainly on dioxins emissions from MWCs. However, given that the Submitters' allegation is initially stated broadly, and the issue as framed by the Secretariat for response from the U.S. is similarly stated in broad terms, the response includes information about mercury emissions from MWCs, and about both mercury and dioxins emissions from MWIs.

The U.S. response to the allegation about testing and compliance monitoring consists of two main components. One is that the Submitters do not conform to the requirements of Article 14 of the NAAEC as those requirements apply to their allegation. The other is that the Submitters' allegation is inaccurate, and that the United States is not failing to enforce its environmental law relating to testing and compliance monitoring of dioxins and mercury emissions from MWCs and MWIs.

- 1. The Submitters' Allegation About Testing and Compliance Monitoring is Inconsistent with the Requirements of the NAAEC for Submissions on Enforcement Matters**
 - a. The Submitters' Allegation Concerning Testing and Compliance Monitoring is not an Assertion of Failure to Effectively Enforce Environmental Law because the Submitters do not Identify which Law the United States is Failing to Enforce**

Article 14(1) of the NAAEC states that the Secretariat of the CEC “may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law” 32 I.L.M. at 1488. The Submitters’ allegation of inadequate testing and compliance monitoring practices by EPA, even if it were accurate, does not constitute an assertion that the Government of the United States of America is failing to enforce its environmental law. Their allegation is not an assertion within the meaning of Article 14(1) of the Agreement because the Submitters do not identify the environmental law that the U.S. government is supposedly failing to effectively enforce by engaging in those practices. The Submitters do not identify the law(s) or regulation(s) which they believe impose a requirement that EPA test dioxins or mercury emissions from MWCs and MWIs more than once or under less than ideal conditions, nor do they identify what law(s) or regulation(s) the U.S. government is failing to enforce against non-complying MWCs or MWIs as a result of the alleged monitoring and inspection inadequacies. The Submitters also do not mention any of the statutory or regulatory provisions regarding testing and monitoring of MWC and MWI emissions that are discussed above in the Background section of this memorandum.

Article 14(1) authorizes the Secretariat to consider submissions asserting that a Party’s environmental law is not being enforced. The Secretariat is not authorized under Article 14 to consider allegations that have nothing to do with whether a Party is failing to enforce a specific environmental law or laws. Furthermore, the Guidelines for Submissions on Enforcement Matters Under Article 14 and 15 of the North American Agreement on Environmental Cooperation, which were adopted by the CEC Council to implement Articles 14 and 15 of the NAAEC, state that for the Secretariat to determine that an assertion in a submission meets the criteria of Article 14(1), the “submission must identify the applicable statute or regulation, or provision thereof, as defined in Article 45(2) of the Agreement.” *See*, “Guidelines for Submissions on Enforcement Matters Under Article 14 and 15 of the North

American Agreement on Environmental Cooperation,” Guideline 5.2 [hereinafter “the Guidelines”].¹⁷ The Guidelines were adopted by the CEC Council,¹⁸ which is the governing body of the CEC and which has the authority to direct the activities of the Secretariat in a manner consistent with the requirements of the NAAEC. *See*, NAAEC, art. 10(1) and 10(1)(C), 32 I.L.M. at 1485. The Guidelines are therefore binding upon the Commission and all of its components, including the Secretariat.

Without reference to the environmental law that the United States is supposedly failing to enforce, the Submitters’ allegation about inadequate testing and monitoring is basically a “wish list” and a simple complaint to the effect that they do not like what they allege the government is doing in terms of testing and monitoring MWCs and MWIs for dioxins and mercury emissions. Certainly, without reference to an environmental law that the alleged testing and monitoring practices supposedly violate, regardless of whatever else the allegation may be, it does not constitute an Article 14 assertion, and for that reason it is not properly the subject a request for a response from the Party concerned or properly the subject of a factual record.

¹⁷This provision of the Guidelines was in the original text of those Guidelines adopted by the CEC Council during its 1995 Regular Session held at Oaxaca, Mexico. It remained in the Guidelines unchanged when revisions to the Guidelines were adopted by the Council at its Regular Session held at Banff, Canada.

¹⁸*See*, Council Resolution 95-10, “Approval of Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation,” Oaxaca, Mexico, October 13, 1995; Council Resolution 99-06, “Adoption of the Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation,” Banff, Canada, June 28, 1999.

b. The Original and Amended Submissions Do Not Satisfy Article 14(1)(e) of the Agreement with Respect to the Testing and Compliance Monitoring Allegation

In addition to making no reference to the law that the U.S. is supposedly failing to effectively enforce, the Submitters did not satisfy one of the mandatory criteria of Article 14 with respect to their allegation about testing and compliance monitoring. The Agreement states that the Secretariat “may consider the submission . . . if the Secretariat finds that the submission . . . indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any.” *See*, NAAEC, art. 14(1)(e), 32 I.L.M. at 1488. This criterion about communicating the matter in writing to the relevant authorities of the Party, and giving the Party an opportunity to respond, is one of several mandatory criteria that the Secretariat must find have been met before it has authority under the Agreement to consider the submission. The term “matter” in subparagraph (e) of Article 14(1) refers back to the assertion of failure to effectively enforce the law in the chapeau of the Article. Thus, the Agreement requires that the Submitters indicate in their submission that they already communicated the assertions in writing to the relevant authorities of the Party concerned before they submitted those assertions to the CEC under Article 14 of the Agreement. The reason the Agreement requires prior communication by the Submitters of the matters raised in the submission with the relevant authorities of the Party concerned is to ensure that the Party has notice of those matters and an opportunity to respond to them before they are brought before the CEC to potentially become the subject of a factual record.

The Guidelines set forth the manner in which submitters must indicate that their assertions have been communicated in writing to the relevant authorities for those assertions to be considered by the Secretariat. Guideline 5.5 reads as follows:

The submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question and indicate the Party’s response, if any. The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question.¹⁹

¹⁹This Guideline was adopted by the Council in 1995 as a provision of the original text of the Guidelines and remained in the Guidelines unmodified after they were revised by the Council in 1999.

The Submitters state in the May 28, 1998, letter transmitting their Original Submission to the Secretariat that “[o]n July 5, 1997, we petitioned Administrator Carol Browner of the US Environmental Protection Agency to undertake a program to phase out solid waste and medical incinerators, and 106 sources of air pollution that were responsible for 86 percent of airborne dioxins discharges to the Great Lakes.” A copy of the May 28 letter is attached to this memorandum (Attachment 2). The Submitters also state in the May 28 letter that they enclosed a copy of the petition with the Original Submission. Moreover, in a document entitled “Meeting the Requirements of CEC for Private Submissions - A Checklist,” which was included among the materials supporting the Original Submission, the Submitters discuss, as follows, the requirement of NAAEC Article 14(1)(e) to communicate the matter to the Party concerned:

4) Communication to Party: Enclosed is a copy of the September 20, 1996 letter to Administrator Carol Browner of the US Environmental Protection Agency, in which we first outlined our concern about the incinerator based transboundary and Great Lakes air pollution problem Enclosed is a copy of the petition to the US Environmental Protection Agency of July 5, 1997, on the same issue.

A copy of the September 20, 1996, letter from the Submitters is attached to this memorandum (Attachment 3) as is a copy of the July 5, 1997, petition (Attachment 4).

In their May 28, 1998, letter of transmittal the Submitters claim that they received no response from EPA to their July 5, 1997, petition. However, the Secretariat, in its Amended Submission Determination, discusses a July 14, 1998, letter from the Submitters in which the Submitters notified that the Secretariat that they had received a copy of a letter from EPA dated June 18, 1998, in response to the concerns raised in the petition. *See*, Secretariat’s Amended Submission Determination at 4, note 7. A copy of the June 18, 1998, letter from EPA was provided to the United States by the Secretariat and is attached to this memorandum (Attachment 5). The letter, signed by Gary Gulezian, Director of EPA’s Great Lakes National Policy Office, states that it responds to a copy provided to EPA of the May 28, 1998, letter from the Submitters transmitting their Original Submission to the CEC. The United States searched its correspondence files and identified a June 23, 1998, letter from Erik Jansson, Executive Director of Department of the Planet Earth, responding to EPA’s June 18, 1998 letter. A copy of the June 23, 1998, letter from Mr. Jansson is also attached to this memorandum (Attachment 6).

The United States has carefully reviewed the September 20, 1996, letter to the EPA Administrator, the July 5, 1997, petition to EPA, the May 28, 1998, transmittal letter, and the June 23, 1998, letter from Erik Jansson to Gary Gulezian of EPA. Although a host of issues relating to atmospheric deposition of HAPs from MWCs and MWIs are discussed in these letters, there is no mention in them of the testing and compliance monitoring allegation raised by the Submitters in the Amended Submission. The United States has also carefully reviewed the Original Submission, the Amended Submission, and the materials supporting them that were provided to the United States by the Secretariat. The U.S. found no correspondence that raises with EPA the allegation that EPA is failing to enforce U.S. law due to inadequate inspection and compliance monitoring of MWCs or MWIs.²⁰ Thus, it appears that none of the letters or other documents provided to the Secretariat in conjunction with the Original or Amended Submissions raises the testing and monitoring allegation with relevant U.S. authorities, yet Article 14(1) of the Agreement and the Guidelines which implement it require that the Secretariat receive information from the Submitters that indicates that the Submitters' assertions have

²⁰The only mention the United States could find of the issue of inspection and compliance monitoring of MWCs or MWIs in correspondence from the Submitters is one short paragraph in a December 11, 1998, letter addressed to the EPA Document Control Officer for the Office of Pesticides, Pollution Prevention, and Toxic Substances. That paragraph reads as follows: "Astonishingly MSW plants accounting for 26 percent of total combusted solid waste in the United States have never been tested for their dioxin emissions. Most of the remaining facilities have only been tested once." "December 11, 1998, Letter from Department of the Planet Earth to OPPT Document Control Officer," at 2, attached to the Amended Submission. This paragraph is presented as one of six points raised by Thomas Webster and Paul Connett in a recent report on dioxins emissions trends in the United States. The Webster and Connett report discussion is included in the letter as part of a larger discussion under the heading "Dioxin and Furan Air Pollution Control Strategies Need to be Moved Substantially Towards The Approach Taken for Mercury." *See, id.* at 1. Department of the Planet Earth does not mention anywhere in that letter that it views the testing and compliance monitoring practices, as described in the paragraph on page 2 of the letter, as a failure by the United States to implement or to effectively enforce its domestic environmental law. Therefore, it cannot be construed as meeting the requirement of the NAAEC that the matter (i.e., the assertion of failure to effectively enforce the law) be communicated to the relevant authorities of the Party in writing, nor construed as providing notice to the United States Government of such an assertion prior to inclusion of that assertion in an Article 14 submission to the CEC.

been made to the relevant authorities prior to making their submission. The Guidelines specify the manner in which submitters are to indicate that they have corresponded with the relevant authorities about the matter in question. Pursuant to Guideline 5.5, a copy of the correspondence must be included with the submission. No such correspondence was provided.

The U.S. was given no opportunity by the Submitters to respond to or address the testing and monitoring allegations raised in the Amended Submission. The Agreement therefore precludes consideration by the Secretariat of the Submitters' monitoring allegations, let alone preparation of an Article 15 factual record concerning those allegations.

3. The Submitters Did Not Pursue Available Domestic Remedies with Regard to Their Concerns About EPA's Testing and Compliance Monitoring Programs for Dioxins and Mercury Emissions from MWCs and MWIs

Not only did the Submitters fail to inform the United States of their allegations relating to monitoring before those allegations were raised in the Amended Submission, the Submitters also failed to pursue private remedies available to them under U.S. domestic law for redress of their concerns about EPA's testing and compliance monitoring programs for MWCs and MWIs. The NAAEC does not require the Submitter to pursue or exhaust private remedies. The Agreement does, however, provide that the Secretariat shall "be guided" by whether "private remedies available under the Party's law have been pursued" when deciding whether to request a response from the Party concerned. *See*, NAAEC, art. 14(2)(c), 32 I.L.M. at 1488.

Both the Article 14(1)(e) requirement that the Submitters indicate that they have communicated the matter to the Party concerned, and the 14(2)(c) requirement that the Secretariat be guided by considerations of whether submitters have pursued private remedies, reflect the Parties' decision that the Article 14 and 15 process was not to replace existing domestic processes for resolving disputes between the Parties and the public relating to enforcement of environmental law.

With regard to the testing and monitoring allegation in the Amended Submission, the Submitters made no efforts to address their concerns through the mechanisms that were available under U.S. domestic law. The testing and monitoring programs for dioxins and mercury emissions from MWCs and MWIs were the subject of notice and comment rulemaking in the United States. The proposed

rules governing those programs were published in the *Federal Register*, the official publication for proposed and final U.S. regulations. Pursuant to CAA section 307(d) members of the public were invited to provide their comments on the proposed rules. 59 Fed. Reg. 48,198 (September 20, 1994); 59 Fed. Reg. 48,228 (September 20, 1994), 60 Fed. Reg. 10,654 (February 27, 1995); 61 Fed. Reg. 31,736 (June 20, 1996). As required by law, these comments were considered when EPA formulated the corresponding final rules. EPA also responded to the most significant of the comments received as required by CAA section 307(d)(6)(B). *See*, 42 U.S.C. § 7607(d)(6)(B). The fact that EPA received over 500 separate comments from non-governmental organizations and other members of the public relating to the proposed MWC rules, and approximately 700 such separate comments relating to the proposed MWI rules, demonstrates that there was significant public interest and debate about the content of those rules. There appears to be no record that the Submitters offered any comments on the proposed rules which encompassed the testing and compliance monitoring requirements for mercury and dioxins emissions from MWCs. *See*, Docket A-90-45, Item V-B-1. One of the Submitters, the Washington Toxics Coalition, supplied comments on the MWI rules but chose not to provide any comments on the testing and compliance monitoring aspects of those rules. *See*, “An Obsolete Solution to A Clear and Present Danger – 52 Groups Comment on Proposed Standards and Guidelines for Medical Waste Incinerators,” (August 8, 1996), Docket A-91-61, Item IV-D-787 (included as Attachment 7 to this memorandum). Under these circumstances, if the Secretariat were to recommend preparation of a factual record in response to the Submitters’ allegation despite the Submitters’ failure to raise that issue through existing domestic mechanisms, it could undermine the mechanisms for formulating the rules and procedures through which domestic law is implemented.

After publication of the final rules of which the testing and monitoring programs for MWCs and MWIs are a part, another remedy was available to the Submitters under U.S. domestic law. Clean Air Act section 307(b) provides the means by which to judicially challenge all final EPA actions under the CAA, including final rules. The opportunities to challenge the final rules encompassing testing and monitoring of MWCs and MWIs for dioxins and mercury emissions were during the sixty-day periods following publication of each of those rules. *See*, 42 U.S.C. § 7607(b)(1). None of the Submitters availed themselves of these opportunities to raise their concerns about the legality of the testing and compliance monitoring programs. In the two judicial challenges to EPA’s MWC and MWI rules, the petitioners in those cases pursued objections only to EPA’s methodology in classifying source categories and setting the emission limitations themselves. *See*, Davis County, 101 F.3d 1395 (D.C.

Cir. 1996); Sierra Club, 167 F.3d 658 (D.C. Cir. 1999).²¹ Congress chose to make section 307(b) the exclusive means of challenging final EPA actions under the Clean Air Act. *See, e.g., Commonwealth of Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996) (“Congress wanted speedy review of EPA’s rules and final actions in a single court”). This is significant because, if any of the Submitters chose to bring a law suit in the United States challenging the MWC or MWI testing or monitoring programs, they could do so only as allowed by section 307(b). *Id.*, at 522.

The Submitters’ allegation about EPA’s MWC and MWI testing and monitoring programs should not be the subject of a Secretariat recommendation for preparation of a factual record. Several U.S. private remedies were available to the Submitters by which they could have raised their concerns about the testing and monitoring programs. They apparently chose not to take advantage of any of those available remedies, and this consideration should weigh in favor of a determination by the Secretariat that a factual record on the testing and compliance monitoring allegation is not warranted.

- 2. The United States is not Failing to Effectively Enforce its Environmental Law relating to Testing and Compliance Monitoring of Dioxins and Mercury Emissions from Municipal Waste Combustors and Medical Waste Incinerators**
 - a. Portions of the Submitters’ Description of EPA’s Monitoring Activities is Inaccurate and Based on Old Data**

²¹EPA is unaware of the extent of affiliation between the Submitter, Sierra Club of Canada, and MWI rule Petitioner, Sierra Club. However, in its brief to the D.C. Circuit in the MWI litigation, Petitioner Sierra Club identified itself as “a national nonprofit organization,” which is “organized and existing under the laws of the State of California,” rather than as an international non-governmental organization. Pet’rs brief at 2. The United States therefore expects that Submitter Sierra Club of Canada is a separate entity and cannot be considered part of the MWI case. But even if Sierra Club of Canada is considered to have participated, the United States stresses that the complaint regarding EPA’s testing and compliance monitoring requirements was not timely pursued in the forum available for challenging EPA regulations under CAA section 307(b). In fact, the Sierra Club’s decision not to pursue that challenge in the MWI case, after having raised it as a possible issue in its Statement of Nonbinding Issues, could further argue against Submitters’ being allowed to resurrect an issue that they had abandoned while pursuing remedies under domestic law.

One of the Submitters' claims about EPA's testing and monitoring activities is that 26% percent of "municipal solid waste burned" in the United States has never been tested for dioxins emissions. Amended Submission at 10. This claim relies for its support on the Webster and Connett article referred to earlier which states at one point that "[a]n astonishing number of U.S. MSW incinerators have either been tested for [dioxins] only once or never tested at all." *See*, Webster and Connett article at 2115. However, a closer review of the Webster and Connett article demonstrates that this claim by the Submitters is based on the following statements on page 2110 of the article:

The upper line in Figure 2 shows our estimate of total MSW incineration capacity for facilities with capacity over 100 tons per day. The lower line shows the capacity of plants with measurements. On average, measured plants account for 74 % of total combusted MSW; the low value is 69% in 1985. Coverage is less in terms of numbers because many small plants were never tested, particularly in the 1980s.

In Figure 2, the authors present a graph of MSW incineration capacity for which emission data is available and for which it is not, covering the years 1985 through 1995. *See*, Webster and Connett article at 2110. Thus, the claim by the Submitters is based on the availability of dioxins emission tests at MWCs from 1985 through 1995.

The regulations that apply to the vast majority of MWCs were not adopted by EPA until December, 1995. Consequently, other than the 1991 NSPS which apply to very small number of MWC units, there were simply no Federal legal provisions which would have required a dioxins emission test at an MWC during that period of time. It is not surprising, therefore, that dioxins emission tests do not exist for some MWCs in the time frame from 1985 to 1995. As discussed earlier, MWCs do not have to comply with the MWC regulations until December, 2000. Thus, the claims by the submitters are based on "old" data, which merely reflects the regulatory situation for MWCs as it existed from four to fourteen years ago. The claim clearly does not reflect the situation as it exists today or will exist within another year.

Close to three-quarters of MWCs subject to the MWC regulations have already completed retrofits to achieve compliance with the MWC regulations and they have undertaken dioxins emission tests to determine if they will be able to comply with the MWC regulations when they are required to do so. *See*, Docket A-90-45, Item VIII-I-1. To the best of EPA's knowledge, in every instance these tests have shown the MWC to be in compliance with the dioxins emission limits in the regulations. *See*,

Docket A-90-45 (the results of the emission tests for these facilities are located throughout the docket). Those MWCs which have not completed their retrofits at this point are on schedule to complete them by the end of 2000 and, in light of the success achieved by those MWCs which have completed their retrofits and already undertaken dioxins emission tests, there is every reason to believe that the remaining MWCs will be in compliance with the dioxins emission limits as well by the end of 2000.

The lack of dioxins emission data from 1985 to 1995 is seen by the Submitters as evidence of failure on the part of the U.S. to enforce its environmental law. However, aside from the 1991 NSPS that apply to very few MWC units, prior to 1995 there was no Federal legal requirement limiting dioxins emissions from MWCs. Thus, there were no Federal dioxins limitations to enforce, and the lack of dioxins emission data from MWCs during time period should not be surprising. Furthermore, the absence of testing and monitoring data from 1985 to 1995 says nothing about whether the United States is currently failing to effectively enforce its laws relating to dioxins emissions from MWCs.

As outlined above, EPA adopted regulations to reduce dioxins emissions from MWCs in 1995 and these regulations are being implemented. These regulations 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. *Id.* at Item VIII-B-1. These calculations of dioxins emission reductions are based on post-1990 dioxins emission test data from MWCs, which is abundant -- particularly since 1995 -- compared to the amount of data available in earlier years.

b. There is no Statutory Requirement Under the Clean Air Act that Mercury and Dioxins Emissions from MWCs and MWIs be Tested or Monitored in a Particular Way

Even if the Submitters' objections to EPA's testing and monitoring programs for MWC and MWI emissions were completely accurate and appropriate for consideration under Article 14 of the NAAEC, their allegation that the United States is failing to effectively enforce its environmental law relating to such programs is unfounded. First, the CAA does not require that MWC and MWI emissions be monitored in any specific way, and Submitters do not identify any specific statutory requirement that EPA's regulatory requirements for testing and compliance monitoring of mercury and dioxins emissions from MWCs and MWIs fails to meet. CAA section 129(c) vests substantial discretion in EPA to determine what kinds of testing and monitoring requirements are necessary for MWC and MWI units. For example, section 129(c)(1) simply directs EPA to adopt rules requiring

monitoring of emissions from emissions points “and at such other points as necessary to protect public health and the environment.” 42 U.S.C. § 7429(c)(1). Next, section 129(c)(2) requires monitoring of other parameters “as the Administrator determines are appropriate.” 42 U.S.C. § 7429(c)(2). At no point does the Act prescribe the exact methodology required.

c. EPA’s Monitoring Programs for Dioxins and Mercury Emissions from MWCs and MWIs Meet the Requirements of Applicable U.S. Law and Enable the U.S. to Determine whether MWCs and MWIs are in Compliance with Applicable Emission Requirements

EPA’s regulations regarding MWC and MWI testing and monitoring meet the applicable CAA requirements. For MWC dioxins emissions, for example, the regulations require collection of a representative sample of gases from the stack, and the use of specific sampling techniques and analytical techniques to ensure that the sample is representative of the gases in the stack at the MWC on a day-to-day basis and that the analysis of the sample yields valid and accurate results. 40 C.F.R. § 60.58b(g). The rules also require annual dioxins testing and continuous monitoring of a number of parameters (surrogates) to ensure that dioxins emissions remain below the emissions limitations and that air pollution control equipment is operated at the same high-efficiency levels noted during the annual stack test. *Id.* One group of these parameters are measured during the annual dioxins test and the levels measured during the test “self-define” the level that cannot be exceeded during subsequent MWC operation without leading to a violation of the regulation and possible enforcement action, while the other group of parameters must be monitored continuously and also cannot be exceeded without leading to a violation. 40 C.F.R. §§ 60.51b, 60.52b(b)(1), 60.53.b, and 60.58b(g). The monitoring requirements for mercury from MWCs similarly require an annual emission test to determine compliance with the mercury emission limitations, combined with continuous monitoring of air pollution control equipment operating parameters. 60 C.F.R. §§ 60.53b(c) and 60.53(d)(2). Violations of these parameters is a violation of the regulations and may lead to enforcement action.

The regulations that set specific limits for dioxins emissions from MWCs include provisions to ensure that EPA and the states will be able to monitor and enforce compliance with the dioxins emission limits. To begin with, the regulations require each MWC to perform an annual dioxins test. 40 C.F.R. § 60.58b(g)(4). The Submitters assert that most “plants” are “tested only once during startup.” Actually, 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. *See*, 40 C.F.R. § 60.58b(g)(5). As stated earlier, all of those facilities must be in compliance with the limitations as of December, 2000, or cease operation. *See*, 42 U.S.C. §§ 7429(b)(2) and (3). Continuous emissions monitoring of dioxins emissions are not required in part because equipment for the continuous monitoring of the dioxins emissions from MWCs does not exist. The only way to measure dioxins emissions from a MWC is to collect a representative sample of the gases from the stack at the MWC and then send the sample to a laboratory for analysis of its dioxins content.

The regulations require annual collection of the representative sample of gases from the stack. 40 C.F.R. § 60.58b(g)(5). More frequent dioxins emissions testing is not required because such testing is very costly. In 1994 and 1995, when EPA adopted its regulations for MWCs, a dioxins emissions test often cost U.S. \$60,000 or more for a single MWC unit, depending on the complexities and difficulties encountered. Today, the cost of a dioxins emissions test is more likely to be in the range of U.S. \$30,000 for a single unit. However, as mentioned earlier, most MWC plants consist of two or three MWC units. Thus, the cost of dioxins testing of the MWC units at a facility can easily range from U.S. \$60,000 to U.S. \$90,000. This may be less than such testing cost several years ago, but it is still expensive enough to impose a significant financial burden. As a result, the regulations require annual testing. However, the regulations also require the use of specific sampling techniques and analytical techniques to ensure that the annual sample is representative of the gases in the stack at the MWC on a day-to-day basis and that the analysis of the sample yields valid and accurate results. *Id.* In particular, while the results from the annual dioxins test determines the compliance status of the MWC at the time of the test, to ensure that the MWC remains in compliance, the regulations include provisions requiring continuous monitoring of a number of surrogate parameters. *See*, 40 C.F.R. §§ 60.51b, 60.52b(b)(1), 60.53b and 60.58b(g)(7). These parameters ensure dioxins emissions remain below the emissions limits in the regulations and that the air pollution control equipment is operated at the same high-efficiency levels noted during the annual stack test.

The surrogate parameters fall into two groups: (1) self-defined operating parameters and (2) regulatory parameters. The self-defined parameters include MWC operating load (4-hour average), flue gas quench temperature (cooling) at the scrubber discharge (4-hour average), and activated carbon injection rate (8-hour average). 40 C.F.R. §§ 60.51b, 60.53b(b) and (c), 60.58b(g)(7). All of these parameters are measured during the annual dioxins test and the levels measured during the test “self-define” the level that cannot be exceeded during subsequent MWC operation without leading to a

violation of the regulation and enforcement action. *Id.* For the second group of parameters, regulatory parameters, the regulations include specific limitations. These include emission limits for sulfur dioxide (24-hour average) and carbon monoxide (4-hour or 24-hour average), which also cannot be exceeded without leading to a violation of the regulation and the possibility of enforcement action. *See*, 40 C.F.R. §§ 60.52b(b)(1) and 60.53b(a).

All of these parameters must be monitored continuously. 40 C.F.R. § 60.58b(b). Together, they ensure that the MWC itself, as well as the air pollution control equipment at the MWC, is properly operated between the annual dioxins emission tests to maintain dioxins emissions below the emission limits in the regulations. As mentioned, a violation of any of these parameters is a violation of the regulation and subjects the facility to possible enforcement action, whether it is a self-defined parameter or regulatory parameter.

The situation with the testing and monitoring of mercury emissions from MWCs mirrors that of the testing and monitoring program for dioxins emissions from MWCs. *See*, 40 C.F.R. §§ 60.51b, 60.52b(b)(1), 60.53b(c) and 60.58b(d)(2). There are currently no continuous emission monitors for mercury which have been demonstrated to reliably and accurately measure all the different species or forms of mercury which is emitted by MWCs. A number of monitors are under development and EPA is following the progress of their development closely.

As with dioxins, the regulations require an annual emission test for mercury emissions to determine compliance with the emission limits in the regulations. *See*, 40 C.F.R. § 60.58b(d)(2). To ensure mercury emissions from MWCs remain in compliance with these emission limits, again -- as with dioxins emissions -- this test is combined with continuous monitoring of MWC and air pollution control equipment operating parameters. 40 C.F.R. §§ 60.51b, 60.52b(b)(1), 60.53b(c) and 60.58b(b) and (d)(2). Violations of these parameters is a violation of the regulations and is subject to possible enforcement action.

The regulatory program established for MWIs closely parallels that outlined above for MWCs, since both the MWC and MWI regulations were adopted by EPA under the authority of section 129 of the CAA. As the Agency explained in its preamble to the final MWI rules, EPA's MWI monitoring requirements meet the provisions of CAA section 129(c) and 114(a)(3) by requiring routine stack testing coupled with continuous monitoring of operating parameters for units equipped with air pollution control devices. 62 Fed. Reg. at 48,361. Where MWIs are not equipped with add-on air pollution

control, monitoring requirements consist of an initial stack test coupled with continuous monitoring of operating parameters and annual inspections. *Id.* After the performance test, monitoring of the operating parameters is the only way to determine, on a continuous basis, whether the source is operating in compliance. *Id.* Operation outside the bounds of an established operating parameter is a violation of an operating parameter limit. *Id.* In addition, under certain conditions, operation outside the bounds of one or more parameter limits constitutes a violation of a specific emission limit. *Id.* The initial and repeat testing requirements will ensure, on a continuous basis, that the air pollution control devices used at MWIs operate properly, that no deterioration in performance occurs, and that no changes are made to the operating system or the type of waste burned. *Id.* Where repeat testing is not required, annual inspections, annual opacity testing, and parameter monitoring will ensure that MWI units are functioning properly. *Id.*

In EPA's Response to Comments Document for the final MWI rule, EPA-453/R-97-006b, Docket A-91-61, Item V-C-1, EPA explained that the purpose of the CAA section 129(c) requirements for monitoring and testing is to allow EPA to determine whether a source is operating in compliance with the regulations. The most direct means to do this, and the first option considered by EPA, is to require the use of continuous emissions monitoring related to specific emission limitations. *Id.*, at 3-51. Other options, such as monitoring of operating parameters, are considered if continuous emissions monitoring are not available or if the impacts of requiring them are unreasonable, though non-continuous emissions monitoring methods cannot usually provide a direct and continuous measurement of emissions. *Id.*, at 3-51, 3-52. However, such methods can provide information used to determine whether MWIs and pollution control equipment are operating properly, thus ensuring that the emissions reductions envisioned by the MACT regulations are being achieved. *Id.* at 3-52. In this standard-setting rulemaking, EPA clearly stated its view that the requirements EPA adopted for continuous monitoring of operating parameters which must remain within specific operating values established during initial performance tests provides an adequate assurance of continuous compliance. *Id.* at 3-55, 3-57, 3-58, 3-65. The MWI rule's reporting requirements provide assurance that facilities report emission or operating parameter exceedances in a timely manner and that they will not operate for extended periods of time in violation of the standards. *Id.*, at 3-67.

d. Implementation of EPA's Rules will Substantially Reduce Emissions of Dioxins and Mercury From MWCs and MWIs

The Submitters have presented no information, either to EPA or to the Secretariat, 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.

In fact, as noted above, EPA estimates that the NSPS and EGs applicable to large MWCs, in combination with various EPA dioxins initiatives and plant closures, have already reduced dioxins emissions from MWCs by slightly over 90% from 1990 levels (1990 emissions from MWCs are calculated as 4,173 grams per year toxic equivalent quantity (TEQ 1998 NATO basis) and 1999 dioxins emissions from MWCs are calculated as 366 grams/year TEQ) and when fully implemented in December, 2000, will reduce dioxins emissions from MWCs by 99% from 1990 levels (dioxins emission levels after December, 2000 are estimated as 41 grams/year TEQ). *See*, Docket A-90-45, Item VIII-B-1. These calculations of dioxins emission reductions are based primarily on post-1990 dioxins emission test data from MWCs. In those few cases (i.e., those which, when combined, constitute less than 10 percent of municipal waste burned in the U.S.) where actual dioxins emission test data was not available, emission factors²² were used to calculate the estimated emission reductions. Required retrofits of air pollution control equipment to meet the MWC rule dioxins emission limits are underway at all MWCs, and in many cases have already been completed, with some three-quarters of operating MWCs expected to be retrofitted by the end of 1999. *See, id.* at Item VIII-I-1. As these retrofits are completed, the MWCs have undertaken dioxins emission testing to determine if they will be in compliance with the regulations when compliance is required by the end of 2000. To the best of EPA's knowledge, all of the MWCs which have completed retrofits have demonstrated they are in compliance with the dioxins emission limits through this testing. *See*, Docket A-90-45 (the results of the emission tests from these facilities are located throughout the docket).

Regarding MWC mercury emissions, EPA estimates that, to date, the NSPS and EGs, together with the other factors previously listed, have reduced mercury emissions from MWCs by 67% from 1990 levels (51.2 tons per year in 1990 as compared to 16.9 tons per year in 1999). By December

²²When an emission test for a particular facility is not available, emissions from that facility are estimated based on its size, the type of equipment it uses, etc. These estimates are referred to as emission factors.

2000, when all of the retrofits for large MWCs are complete, EPA expects to realize an 88% reduction in mercury emissions from 1990 levels (51.2 tons per year in 1990 as compared to 6.1 tons per year after December, 2000). *See, id.* at Item VIII-B-1. To EPA's knowledge, no MWCs are currently in violation of EPA's rules governing mercury emissions from MWCs.

For MWIs, EPA's rules implementing CAA section 129 have achieved similar progress in reducing dioxins and mercury emissions. All existing MWI facilities must either comply with the rules or cease operation by September, 2002. 42 U.S.C. § 7429(b)(2) and (3). Although implementation of the MWI rules is in the early stages, over one-third of existing MWIs have already ceased operation, leading to significant reductions in MWI dioxins and mercury emissions. Docket A-98-24, Item II-B-1. EPA estimates that upwards of three-quarters of existing MWIs will cease operation by September, 2002, with the remaining units achieving compliance with the rule. *See*, 62 Fed. Reg. 48,372 (September 15, 1997). When the MWI rules are fully implemented in 2002, EPA expects they will have achieved reduction of MWI dioxins and mercury emissions by 97% and 95%, respectively. *See, id.*

MWIs are very different from MWCs. The typical MWC may burn 900 tons of waste per day, be as large as a multi-story office building occupying a full city block, and cost upwards of US \$200 million to build. A typical MWI located at a hospital, on the other hand, may only burn a ton of waste a day, be no larger than a full-size pickup truck, and only cost US \$50,000 to build. As a result, the impact of the MWI regulations on MWIs will be quite different from the impact of the MWC regulations on MWCs.

MWCs are spending millions of dollars on retrofits to comply with the regulations and have or are in the final stages of installing air pollution control equipment. Conversely, most hospitals, where the majority of MWIs are currently located, will elect to avoid the costs of installing air pollution control systems to comply with the regulations and simply cease operation of their MWIs. Many will turn to other forms of waste treatment and disposal, such as disinfection by autoclaving or microwaving, followed by shredding and land disposal. Others will turn to commercial medical waste disposal firms.

Commercial medical waste disposal firms, which operate MWIs, must also comply with the MWI regulations. A number of these firms will likely cease to operate their MWIs and also switch to alternative forms of waste treatment and disposal, such as autoclaving, shredding, and land disposal. Other commercial disposal firms, however, will elect to install air pollution control systems and comply

with the regulations.

B. Implementation of Clean Air Act Section 115

In their Original Submission, the Submitters assert that the “regulations and programs developed to control incinerator air pollution” fail to enforce CAA section 115, 42 U.S.C. § 7415. As discussed in the Background section of this memorandum, section 115 deals with endangerment of public health and welfare in foreign countries from pollution emitted in the United States. Appendix 2 of the Original Submission provides clarification about the Submitters’ assertion. *See*, Original Submission, Supporting Appendices and Bibliography, Appendix 2 at 19. It states the following:

There have been numerous reports from the International Joint Commission that have indicated serious Great Lakes pollution problems stemming from dioxins and mercury and specifically from incinerators. The CEC released a report on long-range transport of pollutants in 1997, with similar conclusions.

Yet the Administrator of the Environmental Protection Agency has failed to require state implementation upgrades that could . . . prevent or eliminate the “endangerment” of health and welfare.

A reference to the same issue in Appendix 3 of the Original Submission provides additional specific information about this assertion. In it the Submitters refer to recommendations by the Canada-U.S. International Joint Commission (IJC) in a report entitled “Air Quality in the Detroit-Windsor/Port-Huron Sandusky Region” as one example of an IJC report based upon which the EPA Administrator allegedly failed to take action under CAA section 115. *See*, Original Submission, Supporting Appendices and Bibliography, Appendix 3 at 51.

The Submitters’ Amended Submission essentially echoes the references to this issue in the Original Submission and its appendices. In addition, the Submitters assert that, contrary to the Secretariat’s reasoning in its Original Submission Determination, implementation by the EPA Administrator of section 115 is not a standard-setting exercise. *See*, Amended Submission at 9.

1. The Submitters’ Assertion Concerning Section 115 of the Clean Air Act Misstates the Requirements of the Law

The Submitters’ assertion about section 115 indicates in several ways that they do not fully

understand the requirements of that portion of the Clean Air Act. They seem to assume, for example, that receipt by EPA of any report from an international organization that makes reference to the problem of atmospheric deposition of HAP emissions from MWCs or MWIs automatically triggers the section 115 process. The legislative history of section 115 demonstrates that this was not the intent of Congress when it enacted section 115. Furthermore, the Submitters appear to take the position that once the EPA Administrator has received such a report, the Administrator has no choice but to issue an endangerment finding. In fact, judicial precedent relating to section 115 does not adopt that point of view, rather, U.S. courts are of the opinion that the endangerment finding is discretionary. Finally, the Submitters assume that the Administrator must act immediately or within a relatively short period of time once section 115 is triggered regardless of the complexity of the issue presented. Again, judicial decisions refute such a conceptualization of section 115. For all of these reasons the United States is not failing to effectively enforce section 115 of the Clean Air Act with respect to the atmospheric deposition of dioxins and mercury emissions from MWCs and MWIs in the United States.

a. The EPA Administrator is not Required to Take Any Action Under Section 115(a) Unless and Until the Administrator Receives a Request from a Duly Constituted International Agency or from the U.S. Secretary of State Specifically Asking the Administrator to Undertake Actions Under Section 115

In order to initiate the section 115 process, EPA must first receive a request to take action under section 115. When it enacted section 115, Congress made clear that EPA's authority to act under section 115 is conditioned upon receipt of a request from a duly constituted international agency or a request from the Secretary of State specifically asking the Administrator to take action under section 115. The Conference Report for the 1977 CAA Amendments stated, with respect to section 115: "The House concurs in the Senate amendment with amendments to . . . (2) require a request by a duly constituted international agency as a condition for the Administrator to act; . . .". H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess., 136, reprinted in 1977 U.S. Code Cong. & Admin. News 1502, 1517.

To date, EPA is unaware of ever having received any request from a duly constituted international agency or from the Secretary of State specifically asking EPA to take action under section 115 to address impacts associated with atmospheric deposition of HAPs in the region near the Great Lakes or in Canada. All prior requests under section 115 dealt with impacts associated with deposition of sulfur and nitrogen oxide emissions, not HAPs. Therefore, none of the administrative or judicial routes of appeal regarding this issue of HAP deposition as it relates to section 115 have ever

been pursued, and to the best of EPA's knowledge no event triggering EPA's authority to act pursuant to section 115 to address such impacts from HAP deposition has occurred.

While EPA has conceded and the courts have agreed that the IJC is a "duly constituted international agency" for purposes of section 115(a), Thomas v. State of New York, 802 F.2d 1443, 1445 (D.C. Cir. 1986); Her Majesty the Queen in Right of Ontario v. EPA, 912 F.2d 1525, 1529 (D.C. Cir. 1990), EPA is not aware that it has received a specific request from the IJC, any other duly constituted international agency or the Secretary of State asking EPA to undertake section 115 rulemaking and notification proceedings regarding HAPs. The one IJC report specifically identified by the Submitters contains no such request, and certainly the act of Submitters attaching an IJC report which does not make such a request to their own submission cannot be considered to trigger EPA's section 115 authority, since Submitters themselves are not a duly constituted international agency.

b. Submitters are Unable to Demonstrate that the United States is Failing to Enforce the Provisions of Section 115

Even if the Submitters' attempt to transform an IJC report into a section 115 request were at all cognizable, the Submitters do not demonstrate, and indeed at this point could not demonstrate, that EPA's is failing to enforce the provisions of section 115. First, if EPA were in receipt of a petition from a duly constituted international agency or from the Secretary of State specifically requesting that the Administrator issue a section 115(a) endangerment finding, the Administrator would still retain discretion concerning whether or not to issue that finding. In Her Majesty the Queen, the Court of Appeals reasoned that the words "whenever" the Administrator "has reason to believe" in section 115(a) imply that there is a degree of discretion underlying the endangerment finding.²³ 912 F.2d at 1533.

²³EPA has long-regarded the discretionary endangerment finding under section 115(a) as inextricably linked to the requirement that it notify the states whose SIPs must be revised under section 115(b); in other words, EPA need not make an endangerment finding until it is able to identify the sources of the pollutants. *See, e.g.*, Letter from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to James M. Hecker (October 14, 1988), at 3 (the letter is attached to this memorandum as Attachment 8). Otherwise, EPA will not be able to give the required notification. *Id.* The D.C. Circuit has upheld EPA's reading of section 115. Her Majesty the Queen, 912 F.2d at 1533. In ruling on Ontario's challenge to EPA's statutory interpretation of section 115, the court agreed with EPA that "if there is insufficient information to enable the Administrator to implement [the SIP revision] remedies, the promulgation of an endangerment finding alone would be largely pointless." The court continued its

Moreover, the U.S. Court of Appeals for the District of Columbia held that for EPA to move forward with an endangerment finding under section 115 it must proceed through notice and comment rulemaking. State of New York, 802 F.2d at 1447. Only in the context of that process may EPA make the prerequisite endangerment finding under section 115, and order the SIP revision. In making its ruling the Court of Appeals noted that if the Administrator's "findings left no alternative but to issue SIP notices ultimately causing the termination or restriction of the operations of many utilities and manufacturers – if they forced the EPA to take direct and substantial regulatory actions – they could not be promulgated without notice-and-comment procedures." *Id.* (emphasis in the original).

Second, EPA cannot be viewed as having been in receipt of any section 115 "request" regarding HAP deposition for any period of time remotely long enough to constitute "unreasonable delay" under CAA section 304(a). In Her Majesty the Queen, the court recognized that nine years had passed since EPA had made preliminary findings of endangerment without taking formal action under section 115, but the court believed that "such a delay is understandable" due to the "unusual complexity of the factors facing the agency in determining effects of acid rain and in tracing pollutants from the point of deposition back to their sources." 912 F2d at 1534. In the current matter involving atmospheric deposition of dioxins and mercury, the factors are no less complex, and an extremely rapid response to any section 115 request, if ever submitted, could not be possible and would not be responsible.

Third, the Submitters have not provided EPA with the requisite notice under CAA section 304(a) in order to claim EPA is unreasonably delaying action in response to a section 115 request, let alone filed suit in U.S. district court. The CAA provides a specific mechanism for any person to advance such a claim, of which Submitters have not availed themselves (and indeed likely could not at this point, since it is EPA's position that the necessary triggering event for section 115 action – submission of a request –has not yet occurred). Moreover, Submitters can identify no Court of Appeals ruling under CAA section 307(b) finding fault with EPA's implementation of section 115.

analysis by concluding that "the EPA's view that the Administrator must have sufficient evidence correlating the endangerment to sources of pollution within a particular State before he can exercise his discretion to make endangerment findings is both reasonable and consistent with the statute." *Id.*

Rather, the most relevant judicial precedents and the legislative history reinforce EPA's views regarding the discretionary nature of EPA's judgments in response to a section 115 request, and regarding the Agency's view that it is not appropriate to take section 115 action until EPA is able to identify the sources of air pollution contributing to an endangerment that would need to be further controlled. *Id.* at 1533.

Finally, if EPA were to receive a request from a duly constituted international agency or from the Secretary of State relating to CAA section 115 and impacts from HAP emissions, EPA would seriously and carefully evaluate the petition and its supporting materials in exercising the Agency's discretion to find whether such HAP emissions in the U.S. cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country. While such a hypothetical analysis of a possible future request might reasonably take significant time, *see, id.* at 1534, it is unreasonable to assume that EPA would, if presented with a request, fail to timely implement its section 115 authority, for purposes of either CAA section 304(a) or Article 14 of the NAAEC. In the meantime, fault cannot be found with EPA under Article 14 for not having been presented with such a request and not having made such a finding at this point in time, since the triggering event for EPA to take discretionary action under section 115 – submission of a request – has not yet occurred.

2. The United States of America is Engaged in Significant Bilateral and Unilateral Action in Response to Mercury and Dioxins Emissions to the Great Lakes Ecosystem

Preparation of a factual record on the CAA section 115 issue would be of limited utility and would not significantly advance the goals of the NAAEC because the United States is already engaged in significant action concerning mercury and dioxins emissions to the Great Lakes ecosystem. It has been recognized since the early 1980's that atmospheric deposition can act as major contributor of toxic pollutants to the Great Lakes. The United States and Canadian Federal governments work together on a regular basis, including with the IJC, with members of the public and the with private sector under several binational frameworks which address monitoring and reducing mercury and dioxins loading in the Great Lakes region. These binational frameworks 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) and other cooperation among the governments and the IJC on persistent toxic pollution which also address issues of dioxins and mercury air pollution. The IJC assists in GLWQA work, and it assists with other US-Canada work on atmospheric deposition of HAPs in the Great Lakes region.

Monitoring to determine the impact of atmospheric deposition to the Great Lakes is conducted under the Integrated Atmospheric Deposition Network (IADN). *See*, GLWQA, 1978, as amended by the 1983 and 1987 Protocols, Nov. 22, 1987, Can.-U.S., 30 U.S.T. 1303, T.I.A.S. No. 9257, as amended on Oct. 16, 1983, T.I.A.S. No. 10798, and Nov. 18, 1987, T.I.A.S. No. 11551 at Annex 15, Section 4. IADN includes five master stations, one per lake, which have been collecting wet and dry toxic deposition samples since 1992. Mercury data has been collected, and dioxins may be added as a parameter. In addition, under the Great Waters Program, projects focus on developing estimates of atmospheric deposition to the Great Lakes and creating a predictive mass balance model to assess the effect of toxic reduction efforts. These studies are in support of the Lake Michigan Mass Balance Study.

To better address emissions, deposition and control of dioxins in the Great Lakes ecosystem, the U.S. uses modeling techniques. Models are important elements of U.S.-Canada-IJC cooperation to establish information to work toward important goals of the GLWQA on persistent air toxics. For example, U.S. government experts in cooperation with the IJC and others, presented and released at an IJC public meeting on September 24, 1999, the IJC report entitled “Linking Canada and United States Sources and Source Regions of Selected Persistent Toxic Substances to Deposition in the Great Lakes Basin: A Progress Report.” This 1999 IJC report includes detailed information on dioxins emissions modeling and source-receptor issues.

To accelerate action toward reducing and eliminating Great Lakes air toxics of concern, the Great Lakes Binational Toxics Strategy for persistent toxic substances, including mercury and dioxins, is being implemented. The Strategy sets target reduction levels for persistent toxic substances and has received broad-based support from Great Lakes stakeholders. The dialogues opened through the Strategy have already produced positive results. For example, in a letter to EPA dated September 19, 1996, the chlor-alkali industry committed to a 50% reduction in mercury emissions over a ten-year period. In addition, a BNS-sponsored incineration workshop is planned for Spring 2000. The attached EPA/Environment Canada Draft Progress Report/Fact Sheet dated September 24, 1999, on the GLWQA BNS effort is available to the public. *See*, Attachment 9. It includes status reports on dioxins, mercury, and other BNS pollutants of concern.

The US coordinates with Canada and the IJC on a regular basis, including by providing documents to the IJC responding to the IJC’s biennial GLWQA reports and recommendations. These

US biennial responses to the IJC's biennial GLWQA recommendations are available to the public through the U.S. Government (EPA and the Department of State), the IJC, and the Internet.²⁴ Regarding other IJC reports and IJC letters, e.g., on air quality protection, the U.S. engages in governmental consultations with the IJC.

From a unilateral U.S. perspective, section 303(c)(2)(B) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA") requires all states to adopt numerical water quality criteria for toxic pollutants at levels sufficient to protect the designated uses of the receiving waters. *See*, 33 U.S.C. § 1313(c)(2)(B). In 1992, EPA promulgated numerical water quality criteria for toxic pollutants for states that had failed to do so, including Michigan. The water quality standards for toxics become the basis for assessment and regulation under the CWA. For example, point source dischargers of pollutants are subject to water quality-based effluent limitations for toxic pollutants if there is a reasonable potential that their discharge will cause or contribute to an exceedance of the applicable water quality standards for toxic and other pollutants. *See*, 33 U.S.C. §§ 1311(b)(1)(C) and 1342(a); 40 C.F.R. §122.44(d)(1). Those effluent limitations are contained in National Pollutant Discharge Elimination System ("NPDES") permits, which may be issued either by EPA or by authorized states. (All Great Lakes states are authorized to administer the NPDES permit program).

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).

²⁴The U.S. 9th Biennial Response to the IJC under the GLWQA was completed in September, 1999, and is available on the Internet at <http://www.epa.gov/glnpo/glwqa/ijc9th/index.htm>.

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, 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.

IV. CONCLUSIONS

The United States believes that the Secretariat should not request authorization from the Council to develop a factual record on the Submitters' allegations of failure by the U.S. to effectively enforce its environmental law because preparation of a factual record on those allegations would not be a wise use of the CEC's resources and would not significantly advance the goals of the North American Agreement on Environmental Cooperation. The allegation concerning EPA's testing and compliance monitoring programs for dioxins and mercury emissions from municipal waste combustors and medical waste incinerators does not meet the requirements of the NAAEC for submissions on enforcement matters. It is also without merit because the U.S. is not failing to effectively enforce its environmental law relating such testing and compliance monitoring. Portions of the allegation are simply inaccurate and based on old data. The testing and compliance monitoring programs meet the requirements of U.S. law and will enable the U.S. to determine whether MWCs and MWIs in the United States are in compliance with applicable dioxins and mercury emissions limitations. Moreover, the regulatory programs for MWCs and MWIs will substantially reduce emissions of dioxins and mercury from those sources, and consequently the atmospheric deposition of such emissions to the Great Lakes ecosystem and other ecosystems.

The assertion of failure to implement section 115 of the CAA misstates the requirements of that statute. The U.S. is not failing to implement that statutory provision. There has been no request from a duly constituted international agency or from the U.S. Secretary of State that would initiate its implementation by EPA. Even if there were such a request, the EPA Administrator retains discretion in terms of whether or not to make a finding of endangerment, and Submitters would have a remedy under domestic law to challenge an unreasonable delay on EPA's part in responding to such a request. More importantly, however, the U.S. is already engaged in significant cooperation with Canada and the IJC and in significant unilateral activities to reduce persistent toxic pollution in the Great Lakes Basin, including such pollution due to atmospheric deposition of dioxins and mercury. The United States remains willing to discuss the issue of atmospheric deposition of dioxins and mercury to the Great Lakes ecosystem, including the relationship among international agreements, the reports and recommendations of international organizations, and U.S. efforts to reduce such pollution, with any interested stakeholders.