



Advice to Council No: 12-01

Re: SEM Task Force Proposals for Changes to the Guidelines for Submissions on Enforcement Matters (SEM)

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America:

IN ACCORDANCE with Article 16(4) of the North American Agreement on Environmental Cooperation (NAAEC), which states that JPAC “may provide advice to Council on any matter within the scope of this agreement (...) and on the implementation and further elaboration of this agreement, and may perform such functions as the Council may direct”;

HAVING conducted a public forum in El Paso, Texas, United States on 7 November 2011, on the theme “Submissions on Enforcement Matters (SEM) under NAAEC Articles 14 and 15”;

HAVING reviewed the responses to a questionnaire on Submitters’ Experiences with the Citizen Submission Process under NAAEC Articles 14 and 15;

HAVING received briefs on the SEM Modernization Initiative from the SEM Task Force in November 2011, January 2012, and March 2012;

HAVING conducted a public forum in Toronto, Ontario, Canada, on 18 April 2012, in which the SEM Task Force proposed changes to the Guidelines for the SEM process;

HAVING encouraged and supported the 2011 CEC Ministerial Statement, which expressed a commitment to modernize and improve the submission process “to ensure that submissions are considered efficiently, effectively, and serve the interests of all stakeholders”;

RECALLING its Advice 11-04 that stated, in part: “JPAC is in strong agreement with the public that the Council must focus its efforts, through the SEM Modernization Task Force, on restoring the credibility of, and public confidence in, the SEM process. To this end, JPAC advises the Council that its focus, through the SEM Modernization Task Force, should be on the timeliness and accessibility of the process, on giving more deference to the Secretariat’s independent recommendations and interpretations in the process, and on follow-up to factual records”; and

HAVING considered the SEM Task Force’s proposed changes to the Guidelines for Submissions on Enforcement Matters, in light of public comments made at the public forum of 18 April and received during a public comment period on the proposals from 17 April to 17 May 2012;

SUBMITS the following observations and recommendations for Council’s consideration:

General comments and recommendations: As JPAC noted in its Advice 11-04, the SEM process has the potential to significantly impact serious, unresolved environmental health and justice problems by holding governments to account for their environmental enforcement practices. JPAC remains committed to helping ensure that the SEM process reaches its potential as an effective and independent accountability mechanism. To that end, JPAC makes the following general comments and recommendations regarding the SEM Task Force’s proposed changes to the Guidelines for the SEM process:

1. JPAC appreciates Council’s commitment to improving the SEM process, which has been demonstrated by the allocation of significant resources and the establishment of the SEM Task Force—a trilateral, cooperative effort. The SEM Task Force has underscored the importance of ensuring that the public’s expectations regarding the process are consistent with its purposes and the terms of the NAAEC. Some members of the public have expressed concern over the years, including during this SEM modernization process, that the process does not allow submitters to respond to Party responses to submissions or comment on draft factual records and does not lead to legal findings of weak enforcement or concrete remedies. JPAC agrees that it is important for the public to understand that the SEM process does not allow for the imposition of a monetary fine or an action-forcing remedy. Further, the public should understand that factual records provide only factual information and do not include legal conclusions or policy recommendations. Indeed, the absence of these remedies, along with inherent limitations in the NAAEC on submitters’ ability to provide information during the processing of submissions, makes it all the more important to ensure that the public’s reasonable expectation that the SEM process will provide rigorous, independent factual review of assertions that a Party has failed to effectively enforce its environmental law is fully met.
2. JPAC commends the SEM Task Force members for their hard work and openness in developing their proposals. The proposals include several changes that should help restore public confidence in the SEM Process. In particular, JPAC commends the proposals in Section 19 of the Guidelines, which establish clear timeframes for each step of the process and include the requirement of written justification of delays. As well, the proposals for modernizing the ways in which a submission may be filed are worthy of adoption. Several other proposals provide helpful clarifications. JPAC also appreciated the SEM Task Force’s clarification at the public consultation of 18 April 2012, that the Guidelines remain non-binding and are not intended to, and do not, amend or supersede the text of the NAAEC. JPAC has specific recommendations below to ensure that this is the case.
3. With the twentieth anniversary of the 1992 Earth Summit in Rio approaching, lack of progress in implementing the Rio Principles and achieving sustainable development remains an enormous challenge in North America and beyond. Along with other elements of the NAAEC (adopted the year following Rio 1992), the SEM process resonates with the core commitment in the Rio Principles to public participation, access to justice and information, and government accountability. The lack of progress on sustainable development in North America and elsewhere, along with new information

since 1992 on environmental challenges involving climate change, biodiversity loss, excessive ecological footprints and more, underscore the importance of ensuring that the SEM process is a robust and effective tool for the North American public.

4. As detailed many times in previous JPAC advice, in public consultations on the process, and in responses to JPAC's SEM questionnaire, the prevailing public perception is that the credibility of this valued opportunity to contribute positively to the North American environment has been seriously eroded, primarily because of untimely action and resistance to full transparency and independent review by the Council and the Parties. The NAAEC places the Parties in the position both as targets of the SEM process, and as its overseers. To respect the public's expectation of rigorous, independent factual review, it is essential to eliminate any concern that the Parties and Council are managing the process so as to protect themselves from this review by the Secretariat.

Specific comments and recommendations: As noted above, JPAC believes that the proposed revisions have potential to improve confidence in the SEM process by clarifying and strengthening the guidance. Several of the changes will promote greater public understanding of the submission process and requirements, which should lead to more successful submissions. However, JPAC has serious concerns that, as currently presented, some of the amendments run counter to that goal. JPAC offers the following recommendations for modification for Council's consideration:

1. **Proposed Guidelines 5.6, 7.3 and 7.5:** JPAC notes that Article 14(2) of the NAAEC unambiguously requires consideration only of whether private remedies have been pursued, not specifically whether the Submitter (as opposed to others) has pursued them. Because the Guidelines are inconsistent with the text of the NAAEC, JPAC recommends the phrase "by the Submitter" be deleted. In addition, the phrase [in 7.5c] "bearing in mind that barriers to the pursuit of such remedies may exist in some cases" should not be removed. This will make it clear that the Secretariat should be able to conclude that a Submitter has taken reasonable actions to pursue private remedies on showing that the Submitter reasonably concluded that, in light of barriers to the pursuit of private remedies or the lack of success by others in pursuing remedies on the same matter, pursuit of private remedies by the Submitter likely would be a waste of time and resources.
2. **Proposed Guidelines 9.4 and 9.7:** The proposed guideline could be perceived as allowing a Party to invoke the exceptions to ineffective enforcement of environment law in Article 45(1) (for reasonable exercises of enforcement and compliance discretion or bona fide allocations of resources to other enforcement matters) without the independent assessment by the Secretariat that is needed to insulate the Parties from being seen as unduly insulating themselves from review under the SEM process. JPAC believes that this concern must be avoided by deleting proposed guideline 9.7.
3. **Proposed Guideline 9.5:** This proposal raises several serious concerns. First, JPAC believes there is no basis in the NAAEC for applying the requirement that the Secretariat terminate submissions for which there is a pending judicial or administrative proceeding, as set out in Article 14(3), at any point in the process other than when a Party responds to

a submission. In particular, JPAC is concerned about the possibility that this provision could be invoked after Council has approved the preparation of a factual record. To avoid a clear inconsistency with the NAAEC, JPAC therefore recommends that this proposal be amended to delete the addition of the phrase: “or at any point in the submission process.” Second, JPAC is concerned about the deletion of the requirement that the Secretariat provide its reasons for terminating a submission as provided for in Article 14(3) and this guideline and recommends that it be restored. The Secretariat’s independent assessment is necessary to avoid a Party being perceived as protecting itself from independent, rigorous review in the SEM process.

4. **Proposed Guideline 9.6:** The proposed guideline appears to limit the Secretariat’s authority to recommend factual records in ways that go beyond what is stated in Article 15(1). JPAC considers it unwise and unnecessary to constrain the Secretariat’s role at this stage of the process, and recommends deletion of the following: “In considering whether it should recommend the preparation of a factual record, the Secretariat is to limit its consideration to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record.” In regard to translation of Party responses, JPAC refers to its concerns regarding the time and resources required to translate additional documents, set out below.
5. **Proposed Guideline 10.4:** The public’s lack of confidence in the Council’s administration of votes on factual record recommendations is at the heart of what needs fixing in the SEM process. The proposed requirement to provide written explanation of votes that reject Secretariat recommendations in whole or part is welcome. However, JPAC is very concerned that some of Council’s past votes that varied from the Secretariat’s recommendations went beyond the authority granted to the Council in Article 15(2). Because of that history, serious concerns remain that Council votes are unduly influenced by a desire to protect the Parties from rigorous, independent factual review, and the proposed changes to this guideline are insufficient to allay them. JPAC urges Council to delete this guideline, except to the extent it calls upon Council to explain its reasons for voting against preparation of a factual record. If this section is retained, it should ensure that Council will give the Secretariat’s independent assessments of the matters needing full development in factual records much more deference than they have been given in the past. To that end, the second sentence could be amended to read: “*If, after considering the Secretariat’s notification that a factual record is warranted, the Council votes to instruct the Secretariat not to prepare a factual record or, where the Secretariat has made separate recommendations regarding discrete, severable assertions in a submission, to instruct the Secretariat to prepare a factual record with respect to some but not all of the Secretariat’s discrete and severable recommendations, the Council will provide its reasons for doing so.*”
6. **Proposed Guidelines 12.1 and 12.2:** These proposals could be interpreted as narrowing the scope of the Secretariat’s responsibilities during the preparation of a factual record as set out in NAAEC Article 15(4). JPAC recommends that Guideline 12.1 be retained unchanged, and that proposed Guideline 12.2 be deleted.

- 7. Proposed Guideline 15.1:** This paragraph sets out the information that the Secretariat includes in the public registry. The revisions delete the information that “the final factual record has been provided to the Council.” Without this information, the public will not be able to track the timeframes for action in the proposed guidelines. To better enable public monitoring of the timeliness of the process, JPAC recommends that the guidelines provide for a public notice in the registry for when the Secretariat presents Council with the draft factual record and then final factual record.
- 8. Proposed Guideline 16.1:** JPAC commends the SEM Task Force’s intention to promote accessibility of the SEM process by requiring translation of more SEM documents. However, JPAC is concerned that the proposal to make all of the documents in the SEM registry available in all three official languages of the CEC will unintentionally delay the process and incur significant costs. JPAC recommends that the language “to the extent practicable” be included in the guideline to allow the Secretariat staff to use their discretion to determine which documents should be translated. JPAC further recommends that the Council make a firm, long-term commitment that any increases in translation costs will not be at the expense of other budget lines in the CEC budget.
- 9. Proposed Guideline 16.2:** In view of the considerable length of some past Party responses to submissions, which has likely contributed to delays in the process, JPAC recommends that this guideline be applied to the Parties in addition to the Secretariat.
- 10. Proposed Guidelines 19.5 and 19.9:** In regard to Guideline 19.5, JPAC notes that the 180-day timeframe for drafting factual records makes it all the more important for the Parties and others to be particularly diligent and thorough in responding to the Secretariat’s requests for information. Typically, this responsibility will fall most heavily on the Party, which likely will have the most relevant information. In regard to Guideline 19.9, JPAC recommends that the written explanations of delays and revised deadlines for completing actions be made public in the SEM registry or elsewhere on the SEM section of the CEC website.
- 11. Proposed Guideline 19.8:** The numerous revisions in the guidelines to tighten the timelines and require compliance and explanation from both the Secretariat and the Parties is the cornerstone of the SEM improvements. The final step, publishing the final factual record, should not be subject to delay, as they regularly have been recently. JPAC recommends amending the guideline as follows: *In accordance with Article 15(7), Council may vote on making the final factual record publicly available, normally within 60 working days following delivery of the final factual record and a version of the final factual record that makes apparent any changes. If the Council does not vote within the time period provided, the Secretariat will publish the final factual record.*
- 12. Factual record follow-up:** JPAC welcomes the SEM Task Force’s proposal regarding follow up to submissions that go beyond the Party response stage, including factual records, and believes it could be strengthened. JPAC believes updates could be provided one year following the conclusion of a submission process, to ensure that the matters at

issue are still relevant. In addition, JPAC believes it is important to include a mechanism for making these updates available to the public, and not only to JPAC members. JPAC notes that, in response to the public's comments, it will consider the role that JPAC may play in promoting the development of information regarding follow-up to factual records.

13. Working days instead of calendar days: JPAC does not have a significant concern about using working days for several of the timeframes set forth in Articles 14 and 15, despite the additional time this will add to the process. JPAC urges Council to ensure that the additional time will lead to better information and documentation regarding issues raised in submissions. Further, JPAC believes more clarity is needed as to what "working days" means in the different countries. For example, in the 45-day period for reviewing a draft factual record under Article 15(5), clarity is needed regarding whether those working days would be different for the different countries if, for example, the holidays that fell within that 45-day period were not the same.

Other matters related to the SEM process: JPAC understands that the SEM Task Force's assignment was focused on proposing changes to the SEM Guidelines and did not cover all issues relevant to the SEM process. JPAC believes the CEC can do more to assist the North American public to understand how the SEM process or other avenues of relief may help them to resolve environmental issues that affect them. This is especially important in communities in which limited resources, heightened environmental risks, or other barriers or challenges make access to information or to justice more difficult. JPAC recommends that Council follow up the SEM Task Force's work in revising the SEM Guidelines with efforts to provide this kind of assistance to members of the North American public.

JPAC is confident that the recommendations contained herein are highly relevant in terms of the CEC Councils' strategic priorities and is unanimous in supporting this Advice to Council.

**Approved by the JPAC members
23 May 2012**