



Advice to Council No: 15-02

Re: JPAC Advice and Recommendations Regarding Submissions on Enforcement Matters

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 taken careful note of recent practices by the Parties with respect to the Article 14-15 Submissions on Enforcement Matters (SEM) and the SEM process;

BEARING IN MIND prior JPAC advices on the importance of the SEM process and the independence of the Secretariat, including JPAC Advice 01-07, 02-07, 03-05, 11-04, and 12-01, and the intervention by JPAC regarding the SEM process during the July 2014 CEC In camera Session in Yellowknife, Canada;

COMMITTED to assuring the strength, integrity, and credibility of the SEM process; and

DEDICATED to the cooperative spirit that binds the Parties through the NAAEC and a desire by JPAC to help advance the Parties’ mutual agenda;

SUBMITS respectfully the following advice and recommendations for Council’s consideration:

Pending Proceedings

1. JPAC takes note that requests were made in recent years by a Party to terminate certain citizen submissions because a Party advised the Secretariat, under Article 14(3) of the NAAEC, that the matter was the subject of a pending judicial or administrative proceeding, under circumstances where the Secretariat had determined that no pending proceeding actually existed that would address the substance of the citizen submission or warrant a termination of the submission or where such a determination was not possible on the basis of the information provided.
2. Without commenting on the merits of any particular submission, JPAC believes that the phrase “pending judicial or administrative proceeding” should not be unilaterally interpreted by any one Party to encompass matters that do not fit the definition in Article 45(3)(a): “a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law.”
3. JPAC is convinced that the phrase “pending judicial or administrative proceeding” as defined in Article 45(3)(a) of the NAAEC is meant to focus on relatively formal, transparent proceedings capable of leading to a binding enforcement outcome or to voluntary compliance. Article 45(3) provides a definition: “For purposes of Article 14(3), ‘judicial or administrative proceeding’ means: (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the

process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and (b) an international dispute resolution proceeding to which the Party is party.” Absent such proceedings, there is no basis to believe that a “pending proceeding” will address the issues underlying an Article 14-15 submission and thus no reason to terminate a submission under Article 14(3)(a).

4. A review of past citizen submissions that were terminated under Article 14(3) shows that matters have been terminated, in whole or in part, only where formal, transparent, contested proceedings were pending in courts of law, or where administrative agencies had commenced proceedings capable of leading to a binding enforcement outcome or voluntary compliance. JPAC thus believes that any move to extend the understanding of the phrase “pending judicial or administrative proceeding” beyond these examples would be a departure from precedent.
5. Because the phrase “pending judicial or administrative proceeding” in Article 14(3) of the NAAEC is part of an international agreement, and its interpretation is vital to fulfilling the Parties’ obligations under that agreement, JPAC believes that the phrase could be interpreted and applied in specific cases by the Secretariat pursuant to the agreement among the Parties.

Information Gathering

6. JPAC has learned that the Secretariat has had difficulties gathering information from the Parties in connection with several recent citizen submissions under Articles 14/15 despite the commitment of NAAEC Article 21 regarding the provision of information. In some cases, responsible officials apparently delayed or denied requests for information that the Secretariat considered directly relevant to the investigation of submissions and the preparation of factual records. In some instances, the Secretariat has needed to resort to freedom of information provisions under domestic law to obtain information that could more efficiently have been provided through designated liaisons within the Parties’ governments.
7. JPAC reminds Council that information is critical to any meaningful enforcement process and, by extension, information is critical to any meaningful consideration of submissions regarding effective enforcement. The NAAEC reflects this reality by providing, at Article 21(1)(a):

On request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or the Secretariat may require, including: (a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data; and (b) taking all reasonable steps to make available any other such information requested.

8. JPAC recognizes and understands that there are times when Parties may wish to limit responses to information requests from the Secretariat to protect confidential information or the integrity of enforcement proceedings. But the appropriate manner to respond to requests in such cases is not to delay or complicate matters, nor to increase the costs of information gathering for the Secretariat, and ultimately for the Parties. If a Party deems a request for information from the Secretariat to be “excessive or unduly burdensome,” a procedure exists under Article 21(2) of the NAAEC to notify the Council, which can, by majority vote, impose restrictions on the scope of the request. Outside of the Article 21(2) process, JPAC sees no place for denying or delaying information requests that are consistent with the Parties’ obligations under the NAAEC.

Limiting the Scope of Factual Records

9. JPAC notes a long history of advices to Council objecting to efforts to limit the scope of factual records. For example, in JPAC Advice to Council 01-07, our predecessors on JPAC expressed concern that:

[A] limit on the Secretariat's discretion to determine the scope of a pending submission as a condition for a vote to proceed with the development of the factual record; and [the requirement] that the Secretariat submit a work plan to Council prior to undertaking the development of this factual record ... would:

- Violate Council's reaffirmation in Council Resolution 00-09 of its commitment to improve transparency;
 - Circumvent the process established in Council Resolution 00-09 concerning the implementation and elaboration of the Articles 14 and 15 of the NAAEC;
 - Constitute a constructive amendment to the guidelines and, therefore, should first be submitted to JPAC and public review;
 - Constitute a flagrant disregard for one of the recommendations of JPAC's Lessons Learned Report with respect to supporting the independence of the Secretariat in the Articles 14 and 15 process;
 - Increase the workload of the Secretariat and the burden on the submitters to produce more detailed documentation; and
 - Undermine the credibility of the process by involving an interested Party in the development of the Secretariat's work plan.
10. Two years later, in Advice to Council 03-05, JPAC strongly recommended that Council refrain from limiting the scope of factual records. At the time, our predecessors noted that limiting the scope of records undermines the Secretariat's independence: "By intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process" and "creat[ing] a situation where factual records no longer address the matters raised by the submitters, rendering the process less relevant."
11. Now, ten years later, we find ourselves reiterating the concerns and advices of our predecessors. JPAC urges the Council to allow submissions to proceed, in accordance with the commitments in the NAAEC, and allow the Secretariat to prepare factual records, where warranted, consistent with the Agreement. There are ample provisions within the Agreement to assure the integrity of the SEM process. Submissions may be terminated under the limited terms of the NAAEC Article 14(3) where there is a pending proceeding, and the Parties may decide not to publish factual records that a majority of Parties believe should not be published. But within the confines of the NAAEC process negotiated by the Parties and ratified through their respective constitutional processes, citizen submissions under SEM should be allowed to unfold with the independence and integrity that a process of this nature requires.

Request for Response from Council

12. JPAC respectfully urges Council to take note of the commitments that the Parties made through the NAAEC and to support rather than hinder the SEM process. The SEM process is a unique international commitment that offers important benefits to members of the public throughout North America and deserves respect. JPAC has respectfully raised the ongoing issues addressed in this Advice and Recommendation several times over the past year in a spirit of cooperation and in support of the Parties' commitments under the NAAEC. JPAC asks that Council consider the issues outlined above, and provide a response at your earliest convenience. We hope that we can discuss these matters in more detail when we meet in Boston next July.

**Approved by the JPAC members
8 May 2015**