



Advice to Council No: 11-04

Re: Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America

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 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 themes “Submissions on Enforcement Matters (SEM) under NAAEC Articles 14 and 15,” and “Cross Border Movements of Chemicals in North America,” a summary of which will be posted on the JPAC page of the CEC website; and

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

HAVING received an overview on the SEM Modernization Initiative from the SEM Task Force, on 8 November 2011, at a meeting in El Paso, Texas, United States;

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

Submissions on Enforcement Matters (SEM): The SEM process has the potential to significantly impact serious yet unresolved environmental health and justice problems, and to hold governments to account for their environmental enforcement practices. In many instances, the SEM is the only option available for citizens to redress environmental issues and genuine threats to the public’s health. A rigorous and healthy SEM process benefits not only the public, but also the North American governments, who had the courage to create it. A more effective SEM process would provide Council, the Parties, submitters and the public with timely analysis and factual clarity that will help solve difficult North American environmental challenges and contribute to the sense of fairness and transparency that are at the heart of the NAAEC. JPAC is committed to helping ensure that the SEM process reaches its potential as an effective and independent accountability mechanism.

The JPAC questionnaire, which was sent to all the submitters who have used the SEM process since the CEC was established, was an unprecedented survey of this important CEC constituency. The responses, representing about one-third of the 76 submissions received to date, as well as the comments of three North Americans who have used the process and other members

of the public at the El Paso Public Forum, were professional and insightful. JPAC also appreciated the participation in El Paso of representatives of the North American Consortium of Legal Education (NACLE), who provided a briefing on their valuable research related to the SEM process, which aims to enhance understanding of its role and effectiveness.

Citizens who have taken part in SEM submissions overwhelmingly voiced concern that the SEM process is not being administered consistent with the spirit and intent of the NAAEC. 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. Much less concern was expressed about the Secretariat's performance of its duties in the process. Feedback from the El Paso forum strongly suggests that citizens and environmental groups who have tried to put the process to good use are finding it increasingly difficult to justify using the process because the considerable effort required to prepare submissions does not reliably lead to timely and useful information.

It is JPAC's strong opinion that, for the sake of the North American environment and the continuation of the provision of valuable information to the North American public, efforts must take place to restore public confidence in the SEM process. JPAC supports the public's perspective that the SEM process is, for the most part, unduly time-consuming and that the Parties are insufficiently responsive to the information it produces. More than three-quarters of the respondents to the questionnaire believe the processing time for their submission was too long, the outcomes were not consistent with their expectations and the Parties' responses to submissions did not provide the information they were seeking. Most respondents noted that the specific environmental situation that motivated their citizen submission was not resolved through the SEM process. The media coverage or increased awareness that resulted in some instances was not enough to justify the level of effort required to go through the process. Ninety-two percent of the respondents believe that the process needs to be improved.

JPAC realizes that Council is aware of many of these issues and applauds Council for creating the SEM Modernization Task Force. 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. JPAC further recommends that the work of the Task Force be made public as soon as feasible, and looks forward to assisting the Council in seeking public input on the Task Force's proposals for improving the process.

Cross Border Movements of Chemicals in North America: The public appreciated the opportunity to provide comments on the cross border movements of hazardous materials in North America. The El Paso meeting explored information about hazardous materials that are crossing North America's borders, including the impact that the materials are having on the North American environment and the health of citizens in affected communities.

Members of the public commended Council for its inclusion of the PRTR program in the Strategic Plan and were encouraged by the work underway, such as the CEC's *Taking Stock Online* cross-border transfers database and mapping tool and the newly developed hazardous waste and recyclable materials tracking system developed by enforcement officials in the three countries as the result of a CEC cooperative project.

JPAC considers it important to advise Council regarding public concern over an alarming increase in toxic waste and about lead poisoning and other hazardous consequences resulting from the cross-border movement of spent lead-acid batteries to Mexico. Data provided suggest that since 2007 there has been a very significant increase in spent lead-acid batteries crossing the border to Mexico, with a most disturbing increase of 112 percent in 2010 over the previous year alone.

The CEC's December 2007 report on *Practices and Options for Environmentally Sound Management of Spent Lead-acid Batteries within North America* reviewed the legal and regulatory regimes in each country and set out standards and best practices for the environmentally sound management of lead-acid battery recycling. JPAC shares the public's distress that the serious concerns identified in the CEC report appear to have worsened since the report was written and that industry workers and communities adjacent to recycling facilities are regularly exposed to levels of lead toxicity that are extremely dangerous to human health.

It is JPAC's Advice that, in support of the core CEC strategic goal of protecting vulnerable communities (workers, inhabitants and especially children) in North America, the CEC conduct a follow-up to the 2007 CEC report and recommend actions to promote compliance with the environmentally sound management criteria identified in it as part of its current project on "Enhancing Environmental Law Enforcement in North America," starting in early 2012 with a report in time for the July Council Session.

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
7 December 2011**

