



ADVICE TO COUNCIL NO: 08-01

Re: "Submissions on Enforcement Matters: From Lessons Learned to Following up Factual Records"

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 other functions as the Council may direct";

RECOGNIZING THAT

1. The citizen submissions process under Articles 14 and 15 of the NAAEC plays a unique—and indispensable—role in fostering effective environmental decision-making by the three Parties to the NAAEC and ensuring effective enforcement of the environmental laws of each Party.
2. Articles 14 and 15 are a critical process to shed light on enforcement issues that may be arising through expanded free trade under NAFTA.
3. The CEC procedure has attracted over 60 submissions in the last 13 years, averaging slightly fewer than five per year, which suggests that the effective enforcement of environmental laws is a sustained and growing concern throughout North America.
4. The Secretariat has showed its objectivity and competence in applying the criteria that have to be met before preparation of a factual record can be recommended and in preparing the factual records themselves. It has often rejected, and accepted, both governments' and environmental groups' arguments, without demonstrating bias.
5. The Council has approved 16 of the 18 recommendations for factual records considered.
6. The enforcement issues that have been highlighted through factual records have **not** been followed up by the CEC, by decision of the Council dated June 14, 2002. This has meant that the CEC, after the release of factual records, has not been able to:
 - a. engage those affected by a failure of a Party to effectively enforce its environmental law to determine the impact of preparation of a factual record on ongoing enforcement,
 - b. ascertain any improvements in a Party's approach to protecting and restoring the health and integrity of the environment through improved enforcement of its environmental laws; or
 - c. suggest improvements to the implementation of the Article 14/15 process through analysis of that process in specific situations involving the preparation and release of a factual record.
7. JPAC has been essential throughout the history of implementing the process in providing Advice to Council that have raised various concerns both about the implementation and about proposed strategies to address these issues. JPAC, in

providing this Advice, continues to perform and maintain its essential responsibility as monitor and steward of the process.

HAVING conducted its Regular Session 07-04 in San Antonio, Texas, United States, on the CEC Submissions on Enforcement Matters process which featured panel discussions on lessons learned, follow-up and future outlook, with academics, submitters, government agencies, nongovernmental organizations and institutions from Canada, Mexico and the United States;

PROVIDES the following comments and recommendations for consideration by Council:

Improvements in Timeliness

- The procedure is too slow. In 2001, the JPAC said in its "Lessons Learned" report that the entire process should not take more than two years, from the time a submission is filed to the publication of the factual record. Delays due to insufficient resources to produce factual records more quickly are understandable but delays in the Council's two key points in the decision making process (1. whether to approve the recommendation for a factual record, and 2. whether to publish a factual record when it is finished) are not. In fact, one submission marked its second anniversary on 5 December 2007, of the Secretariat's recommendation for a factual record (SEM-04-005). Such delays seriously undermine the credibility and usefulness of the CEC. JPAC has called for the Council to make decisions to direct the Secretariat to develop Factual Records within 90 days (JPAC's Lessons Learned Report, 6 June 2001). The NAAEC calls for the Council to make the decision to release completed Factual Records normally within 60 days. Given the importance of timeliness to the credibility of the process, JPAC respectfully reminds Council of these procedural requirements and requests renewed commitment by the Council to adhere to these timelines.

Visibility, Transparency and Outreach

- There is a need to enhance the visibility of the CEC and its submission process. Public awareness of the SEM process is low in all three countries. The CEC needs to undertake greater outreach to the public to provide information on both the work of the CEC, in general, and the citizen submission process, in particular. Active outreach on the citizen submission process, for example, would entail that the CEC develop an outreach program which would include the creation of plain-language materials setting out: 1) criteria for submitting an Article 14/15 submission; 2) explanation regarding the Secretariat's and Council's decision-making factors used when screening out or redirecting submissions; 3) types of information relied upon in preparation of a factual record that are considered confidential and therefore are not made public. The feedback JPAC has received is that the submission process is poorly understood, it is time consuming to prepare, confusing to those new to the process and costly, in terms of legal assistance, to prepare. JPAC recommends that: 1) funds be allocated to trination-wide regional workshops directed at groups/persons not presently engaged in the process to promote the Article 14/15 submission process; 2) additional guidelines be developed for laypersons; and 3) funds be allocated for a CEC public information officer.

Decision-Making

- The independence of the Secretariat is critical to the Article 14/15 process. The Secretariat is, and must continue to be allowed to be, a neutral third party in the process. The ability of the Secretariat to maintain neutrality is critical to its credibility. The Secretariat, to date has received high marks from virtually all reviewers for the quality of its work. Its performance has helped the citizen submissions process gain credibility among NGOs and scholars. The Special Legal Advisors (SLA's) are an invaluable source of advice and feedback. The SLA's do this on a **voluntary** basis. These individuals are very highly regarded legal experts/scholars. The special legal advisor/SEM Unit relationship is part of the citizen submission process that works and has been very effective according to past directors of the SEM Unit. JPAC fully supports the existence of such a distinguished group as a body to which the Secretariat's SEM unit and JPAC may consult as is deemed appropriate.

Follow-up

- A basic precept of governance is that a process must include an evaluative step so that the effectiveness of a process can be reviewed and lessons can be learned about how well the process is working. Such evaluations can help identify possible ways to strengthen the process and help increase confidence in the process by engaging citizens who are most directly affected. How would one undertake such follow-up? JPAC is uniquely positioned to perform this role because of its role as a liaison with the North American public. In fact, engaging the public in an effort to understand citizens' views of the citizen submission process fits well into JPAC's mandate (Article 16(4) of the NAAEC, to "provide advice to the Council on any matter within the scope of this Agreement...and on the implementation and further elaboration of this Agreement"). JPAC has developed a strong reputation as an advocate for the public and has demonstrated that it is committed to meaningful citizen outreach. It also has considerable credibility as an appropriate body within the CEC institution to undertake such an effort.
- JPAC will begin this ongoing, yearly initiative by selecting, at minimum, one factual record each year and soliciting the views of interested parties (NGOs, citizens, government, etc.) concerning:
 - steps taken by a Party and relevant others regarding the enforcement of environmental laws following the publication of the factual record;
 - progress made in addressing the enforcement issues identified in the factual record within a certain period of time after the publication of the factual record; and
 - improvement in the general underlying environmental conditions and concerns that led to the submission.
- JPAC strongly believes that this type of outreach will enhance public confidence in the process and will give the CEC and others a better sense of the efficacy of the process. Moreover, it can lead to concrete improvements in the process by giving the CEC the chance to learn from past experiences and to use such insights to implement the process more effectively in the future.

Council Resolution 00-09

- In 2004, JPAC notified Council (JPAC Advice 04-03 “**Review of the Operation of Council Resolution 00-09 on Matters related to Articles 14 and 15 of the Agreement**”) that it planned to conduct a review of Resolution 00-09. As this is in conformity with JPAC’s working principles of transparency, outreach and engagement (JPAC’s Strategic Plan 2006–2011), JPAC proposes to undertake such a review to compile a list of the issues identified, inventory the “fixes” that have been identified and implemented, and update the status of the concerns raised.

**Approved by the JPAC members
27 February 2008**