



U.S. National Advisory Committee
*Independent Federal Advisors on the
North American Agreement on Environmental Cooperation*

U.S. Governmental Advisory Committee
*Independent Federal Advisors on the
North American Agreement on Environmental Cooperation*

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May 16, 2012

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

The National and Governmental Advisory Committees to the U.S. Representative to the Commission for Environmental Cooperation met in Washington, D.C. on April 26 and 27. The charge question posed by EPA seeking advice from the committees was as follows:

Submissions on Enforcement Matters (SEM) Trilateral Review Task Force

Last year the Council created the trilateral SEM Review Task Force. SEM Task Force efforts are intended to culminate at the July 2012 Council Session, with the Council adoption of revised SEM guidelines, and any other definitive action deemed appropriate to address SEM issues of concern.

- *In furtherance of this effort, please provide advice on the SEM Task Force written proposals provided to the NAC and GAC.*

In order to respond to the question as fully as possible and meet the May 17, 2012 deadline for comments on the draft, the NAC and GAC agreed to provide general advice in the traditional form of separate letters, supplemented by a joint letter offering specific section by section advice on the draft recommendation of the trilateral SEM Review Task Force. This letter contains that specific advice.

The NAC and GAC strongly support the Council's decision to review the SEM process in order to respond to a long history of public concerns, as well as concerns expressed repeatedly in NAC and GAC advice letters and in the Joint Public Advisory Committee's (JPAC) advice to Council.

The NAC and GAC recognize the extensive and time-consuming work that EPA has contributed while negotiating the draft proposals with Mexican and Canadian counterparts and the difficulty of reconciling three governments' positions related to SEM. We thank EPA for including our committees in the review process and requesting feedback. We respectfully offer our recommendations to the EPA understanding fully that the SEM Task Force approached its work professionally and with the utmost regard for improving the SEM process. We urge that our recommendations be incorporated into the Task Force negotiations immediately and that the EPA as a strong party to the North American Agreement on Environmental Cooperation (NAAEC) endorses and promotes these recommendations to the fullest extent possible.

We believe that the draft proposals (as they stood when our committees reviewed them on April 26 and 27) if unmodified from the version we reviewed, will not restore public confidence in the SEM process, and may actually create further obstacles to citizens considering submissions and will erode the Commission for Environmental Cooperation (CEC) Secretariat's ability to act effectively with regard to submissions.

We do support certain provisions designed to reduce the time it takes for the SEM process to unfold; this has been a continuing concern and we are pleased that the SEM Task Force is taking this concern seriously. In JPAC's most recent advice to Council, issued in December 2011 (JPAC Advice 11-04), the committee noted that it is in "strong agreement with the public that the Council must focus its efforts . . . on restoring the credibility of, and public confidence in, the SEM process." The JPAC recommended that the Council pay special attention to three specific public concerns: "the timeliness and accessibility of the process . . . giving more deference to the Secretariat's independent recommendations and interpretations in the process, and . . . follow-up to factual records."

The NAC and GAC believe that it is critical to consider this JPAC list of public concerns in evaluating the Task Force's proposed revisions. A fundamental goal of the revisions should be to restore the credibility of the SEM process and rebuild public confidence by responding to these concerns. The proposals language to correct timeliness is, therefore, appreciated. On other fronts, however, the proposals fall short. In addition, a primary purpose of the final Guidelines should be to explain the SEM process to prospective submitters and make it easier for prospective submitters to use the process and follow its progress.

The Task Force's stated purpose was "to provide clarity regarding the interpretation of the NAAEC and SEM Guidelines." (as stated in EPA's PowerPoint presentation to the NAC/GAC on April 26, 2012 in Washington DC). The NAC and GAC confirm that in our dialogue with EPA concerning the negotiations on the text of the Draft Guidelines we understood that negotiators approached their task with that purpose in mind.

In our view, however, the Task Force's "clarifications" will be perceived as almost uniformly providing interpretations of the NAAEC that give the Parties and Council more control over the SEM process, and give less discretion to the Secretariat and less voice to the submitters. By highlighting areas of conflict without responding to public concerns, the Task Force proposals represent an important opportunity lost. The guidelines should be framed to improve upon past performance, which will build confidence in the SEM process and persuade the public of the Council's commitment to that process.

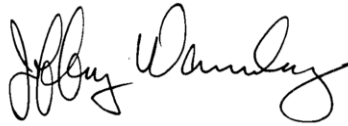
In addition, while the SEM is, as we know, not an adversarial procedure through which parties are "judged", the NAC and GAC's view is that the draft guidelines will be viewed as further driving the SEM process toward one in which submitters will almost certainly have to retain legal counsel or pursue legal remedies in order to utilize the process, which was certainly not the original nor should it be the current intent of the SEM.

Further, the NAC and GAC believe that some of the proposed guidelines will be viewed as an effort to amend the NAAEC without use of proper procedures. Adopting self-limiting guidelines, as we propose below, would address this concern. The proposed revised guidelines should be scrutinized carefully for provisions that deviate materially from the NAAEC's text. The NAC and GAC identify examples in the proposed revisions that raise these concerns, and recommend that any such modifications of the text be deleted.

Attached to this letter are more specific comments on the draft SEM Task Force recommendations.

The NAC and GAC want to thank EPA once again for providing us the opportunity to offer these comments. Special thanks also go to EPA's management and staff of the Office of International and Tribal Affairs and the Office of Federal Advisory Committee Management and Outreach for their encouragement and support prior to and during our meeting and deliberations on these recommendations. Finally, both committees deeply appreciate the work and attention of Jocelyn Adkins, chair of the trilateral SEM Task Force, for her briefing during our meeting and many hours of follow-up by conference calls to help us better understand the SEM Task Force process and recommendations and as a result, hopefully make the advice offered here of greater value.

Sincerely,



Jeffrey N. Wennberg, GAC Chair



Karen M. Chapman, NAC Chair

cc: Michelle DePass, Assistant Administrator, EPA, Office of International & Tribal Affairs

Jane Nishida, Director, Office of Regional and Bilateral Affairs

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Members of the U.S. National and Governmental Advisory Committees

**National and Governmental Advisory Committee (NAC/GAC)
to the U.S. Representative to the
Commission for Environmental Cooperation (CEC)**

Specific Comments and Recommendations

1. Speeding up the SEM Process

Many of the assessments of the SEM process have raised concerns about the slow pace of the process, which has become even slower in recent years. Others have chronicled these delays in considerable detail. The NAC and GAC generally endorse the Task Force's proposals to speed up the SEM process and believe that, if implemented, these proposals will improve the responsiveness of the process to citizen concerns and thereby strengthen the process.

The NAC and GAC make two observations about initiatives to expedite the process. First, EPA should carefully consider the additional responsibilities the Task Force proposals impose on the Secretariat, which will slow down the Secretariat and increase its costs, and be sure that any timeframes incorporated into the revised guidelines are achievable in light of the Secretariat's workload, personnel and fiscal resources. Ambitious timeframes may motivate improved timeliness, but significant gaps between the timetables and actual performance are likely to undermine confidence in the process rather than enhance it. Further, in addition to setting deadlines for future decisions, EPA should advocate expedited treatment of currently pending submissions in order to build public confidence in the process.

Recommendation: To address worsening delays in the SEM process, the NAC and GAC support creation of target timeframes that will speed up the process. The NAC and GAC believe that it is important that these target timeframes be practicable and recommend that the several Task Force proposals that impose new duties on the Secretariat be evaluated with the target timeframes so that the Council fully understands the effect of any such new responsibilities on the Secretariat's ability to meet the new deadlines.

Recommendation: EPA should encourage the Council to make its decision before the 2012 Council Session about development of a factual record for two submissions (Hermosillo and Ex Hacienda) that the Secretariat recommended be developed five and four years ago, respectively (in April 2007 and May 2008). Further, EPA should encourage completion of three factual records that are currently being prepared related to submissions filed more than seven years ago (Quebec Automobiles, Lake Chapala II, and Coal-Fired Power Plants).

2. Strengthening the public's perception that the SEM process is operated fairly and impartially

In our view, the current draft of the revised guidelines is likely to undermine public confidence rather than restore it. Much of the language included in the current draft proposals creates the perception that - relative to the text of the NAAEC - the Council is increasing the power of the Council and Parties, and limiting the discretion of the Secretariat and the value of the process to submitters. The purpose of the revised guidelines should be to persuade interested citizens of the Council's commitment to a fair and impartial process that will be of value to citizens seeking to shine a spotlight on enforcement policies and practices that citizens believe are ineffective.

Recommendation: The proposed guidelines should have the goal of increasing public confidence in the SEM process. The guidelines should not create the perception that the Council is giving more power to the Council and/or the Parties than is clearly provided in the text of the NAAEC; or that the Council is limiting the discretion of the Secretariat beyond the limits contained in the NAAEC; or that the Council is limiting the value of the process to submitters compared to the text of the Agreement.

3. Follow-Up

Follow-up of factual records that provides additional transparency and accountability should occur. The Parties are well aware that follow-up is an indispensable part of credible, effective, and transparent governance. The JPAC has previously volunteered to undertake follow-up of factual records and it outlined an approach for doing so (see JPAC Advice to Council 08-01). Article 16 of the NAAEC authorizes the JPAC 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.” It is clear that effective enforcement, the focus of the factual record process, is within the scope of the NAAEC. The JPAC follow-up would be far more effective, and have much greater credibility with the public, than the very limited, unilateral party follow-up the Task Force proposed in Memorandum 18. The Memorandum contemplates an update by each Party with no outside participation. In contrast, the JPAC proposed follow-up would include outreach to the public.

Further, JPAC has no vested interest in the follow-up – e.g., in showing that a Party’s performance before the factual record was (or was not) effective, that follow-up after a factual record has (or has not) made a difference, that the Secretariat and/or Council’s performance during the factual record process could have been better, etc. The JPAC also has considerable experience engaging the public on matters of importance to the CEC, including the SEM process. As a result, because of its status as an objective observer and its track record and capacity to engage the public, regularized JPAC follow-up is likely to advance the goal of building public confidence and increasing transparency and accountability and should be included in the revised guidelines.

Recommendation: The Guidelines should authorize JPAC follow-up to the SEM process in order to increase transparency and accountability.

4. Specific text changes recommended for Task Force written proposal language

1. Include a new introductory paragraph (model paragraph below):

"The Council is supportive of the Submissions on Enforcement Matters (SEM) process and affirms its commitment to a timely and transparent process. A primary purpose of these Guidelines is to help submitters understand the process and develop submissions, and to ensure that the process operates in a timely way and is of value to citizens concerned about domestic enforcement policies and practices by increasing transparency and accountability."

2. (3.1 and 3.3): The NAC and GAC support the proposed revisions to 3.1 and 3.3 because these revisions will make the process easier for citizens to use. Both sections make it clear that citizens may submit submissions via e-mail as well as by mail.

3. (5.6, 7.3, and 7.5): The NAC and GAC view is that these proposed revisions will be perceived as deviating from the text of NAAEC Article 14(2). Article 14(2) provides that the Secretariat is to be guided by four factors in deciding whether to request a response from a party. The third factor is whether “private remedies available under the Party’s law have been pursued. . . .” (14(2)(c)). The proposed guidelines differ from this language by providing that the Secretariat is to be guided by whether “private remedies, available under the Party’s law have been pursued *by the Submitter*. . . .” (the quoted guideline text is taken from 7.3 – the other proposed guidelines contain similar language). These changes to the language in the NAAEC will be perceived as impermissibly changing the meaning of the NAAEC. For example, they create a perception that the Secretariat should focus on whether the submitter has pursued available private remedies rather than on whether private remedies have been pursued more generally. The question arises as to whether the submitter must also have pursued legal remedies prior to engaging in the SEM process. This effectively restricts the potential universe of submitters, and it is likely to

change the Secretariat's analysis compared to the analysis it would use under the language of the NAAEC. Neither result is a good one. The guidelines should simply use the language in the NAAEC in order to promote consistency and clarity and avoid confusion.

4. (9.1, 9.8, 11.4, 16.1, etc). Several provisions in the proposed guidelines, of which these are examples, impose additional time-consuming and costly translation responsibilities on the Secretariat that raise questions about the Secretariat's ability to meet the proposed new deadlines. Setting timelines will benefit the process in the public's eyes only if they are realistic and achievable. The revised guidelines should be reviewed comprehensively to ensure that they are practicable in terms of the Secretariat's time frames for action.

5. (9.5): The NAC and GAC believe this revision empowers a Party to terminate the process unilaterally at any point. This is another example of a proposed guideline that deviates from the text of the NAAEC (here Article 14(3)(a)) in a way that will be perceived as expanding the Parties' power, limiting the Secretariat's discretion, and reducing the value of the factual record process to submitters. NAAEC Article 14(3) requires that the Secretariat dismiss a submission if a Party, *in its response*, informs the Secretariat that the matter raised in the submission is the subject of a pending judicial or administrative proceeding. The proposed guidelines allow a Party to terminate the process by informing the Secretariat of a pending judicial or administrative proceeding *at any point in the process* (not simply in its response). For example, a Party could inform the Secretariat that the matter is the subject of a pending proceeding after receiving the draft Factual Record and the Secretariat would be required to terminate the process.

6. (9.6): The NAC and GAC point out that each draft provision, such as this one, which contains language that specifically "limits" the Secretariat, when those limits do not appear in the NAAEC, is likely to be perceived as limiting the Secretariat's discretion and undermining the fairness, impartiality, and value of the process. Further, the guideline is likely to increase confusion rather than clarify how the process should be implemented.

7. (9.7): The NAC and GAC believe this proposed revision will create the perception that the guidelines give more power to the Parties to terminate the SEM process unilaterally, and less authority to the Secretariat, than does the text of the NAAEC. As noted above, if a primary purpose of the revisions is to bolster public confidence in the SEM process by persuading the public that the revisions increase the fairness and impartiality of the process, revisions such as these, which appear to give greater power to the Parties and less to the Secretariat, would have the opposite effect.

8. (10.4): The NAC and GAC strongly urge EPA to reject this proposed revision, which allows the Council to define the scope of a factual record, rather than vote up or down on the Secretariat's recommendation. As is the case for many of the proposed revisions, there is no clear basis for this provision in the NAAEC itself. Further, this guideline will be perceived as increasing the Council's power and limiting the Secretariat's discretion. It will also be perceived as reducing the value of the factual record process to submitters. This is clear from the reactions to the Council's Migratory Bird Resolution, which approved a factual record for that submission but in doing so dramatically narrowed the scope of the factual record compared to what the submitters wanted and what the Secretariat recommended. The attorney for the submitters characterized the resulting factual record as the factual record that no one wanted. Similarly, the Council's recent narrowing of a factual record in connection with the Species at Risk submission led the submitters to ask that the submission be withdrawn because they believed that the Council's action in narrowing the scope of the factual record eviscerated the value of the submission. The purpose of the SEM process is to empower citizens to identify enforcement concerns so that information can be developed about these concerns. It is not intended to showcase enforcement practices or policies that the Parties or Council would like to feature. The Council's practice of narrowing the scope of factual records has been criticized frequently. Including this provision would undermine confidence in the SEM process and the Council's commitment to it.

9. (11.4): In addition to this provision's raising practicability issues because of the additional work it imposes on the Secretariat (noted above), the purpose of the guideline's using different language than is contained in the NAAEC (Article 15(6)) is unclear and likely to cause confusion.
10. (12.1): The NAC and GAC believe this proposed revision is likely to be perceived as preventing the Secretariat from presenting facts in a factual record. While the reasons for the proposed changes are not particularly clear, the proposed changes may create a perception that the guidelines limit the Secretariat's discretion in developing a factual record in ways that are not embodied in the NAAEC.
11. (12.2): The NAC and GAC view this proposed revision as likely to be perceived as limiting the Secretariat's discretion and the value of factual records. It is also likely to create considerable confusion as efforts are made to implement it. For example, there is ambiguity in what might be considered "fact" and what might be considered "opinion," particularly if experts are consulted in the course of gathering information for a Factual Record. While the intent of this revision might be to establish objective metrics in the development of Factual Records, the revision may actually have the opposite effect and may be difficult to implement.
12. (14.2): The NAC and GAC view is that this proposed revision appears to allow a Party to require the Secretariat to continue to consider a submission even if the Submitter wants to withdraw it. The NAC and GAC believe it would be appropriate for a Party to submit a response to a submission even if the submitter requests withdrawal of the submission and for the Party's response and the submission to be placed on the Registry. But if the submitter has decided to withdraw the submission before a Party has had a chance to respond, the NAC and GAC believe the process should end following the submission of a Party response. This provision is another example of the proposed guidelines' creating the perception that they give the Parties and Council control over the focus of the SEM process rather than give submitters the ability to identify the enforcement concerns that receive attention under the process. Further, EPA should consider whether this proposed guideline is consistent with NAAEC Article 11(4), which prohibits the Secretariat from receiving instructions from an individual Party.
13. (14.3): The NAC and GAC do not support this proposed revision, which directs the Secretariat to continue to develop a factual record once it has been authorized to do so by the Council, even if the submitter wishes to withdraw the submission. As for 10.4, 14.2, and other draft Task Force guidelines, this provision is likely to be viewed as limiting the value of the process to submitters.
14. (15.1): The NAC and GAC believe that in order to promote transparency and accountability, the Registry should include notifications when the Secretariat has submitted a draft factual record to the Parties, and when the Secretariat has provided the final factual record to the Council. Providing this information will enhance transparency and accountability generally, and also enable the public to monitor the extent to which the Secretariat and Council are adhering to the recommended deadlines in the guidelines.