



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 8, 2013

The Honorable Bob Perciasepe
 Acting Administrator
 U.S. Environmental Protection Agency
 1200 Pennsylvania Avenue, N.W.
 Washington, D.C. 20460

Dear Acting Administrator Perciasepe:

The National Advisory Committee (NAC) and Governmental Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its thirty-ninth meeting on April 25, 2013 via a teleconference call. Both NAC and GAC members wish to communicate our enthusiasm and commitment to advancing the mission and strategies of the CEC, despite the obstacles presented to our efforts by the recent budget reductions caused by the federal sequestration process.

We wish to extend our thanks to EPA's Office of International and Tribal Affairs (OITA) and the Office of Federal Advisory Committee Management and Outreach (OFACMO), the teams responsible for organizing our meeting and supporting the work of the committees. We also appreciate the presentations by CEC Executive Director Irasema Coronado, JPAC Chair David Angus, and Jocelyn Adkins, Sylvia Correa and Laura Coughlan from EPA.

Thank you for your consideration of the attached joint responses by the NAC and GAC to the Charge Questions regarding the Submissions on Enforcement Matters process. We hope our advice is useful to you in your capacity as a Party to the North American Agreement on Environmental Cooperation.

Cordially,

Octaviana V. Trujillo, GAC Chair

Brian L. Houseal, NAC Chair

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

**Advice 2013-1 (May 8, 2013):
Comments on the Submissions on Enforcement Matters (SEM) Process**

The U.S. National Advisory Committee (NAC) and the Governmental Advisory Committee (GAC) are pleased to provide this Advice in connection with the Submissions on Enforcement Matters (SEM) process. In its Charge Questions, the United States indicated that it would welcome thoughts from the NAC and GAC regarding four SEM subjects in particular:

- Longer-term Monitoring & Assessment (M&A): Provide input on possible options for longer-term SEM process implementation M&A.
- SEM Online Portal: Review and provide any comments on the draft version of the SEM portal.
- Public Outreach: Provide input on the development and implementation of a long-term SEM public outreach strategy and;
- Guiding Principles for Factual Records: Provide input on development of overarching guiding principles designed to improve the quality, accessibility, and value of Factual Records.

In its Advice, the NAC and GAC focus primarily on the charge question involving monitoring and assessment of SEM process implementation and we begin with that charge. We then turn to the other charge questions – the SEM online portal, public outreach, and guiding principles for development of factual records.

Charge Question: Longer-term Monitoring & Assessment (M&A):

The NAC and GAC strongly support the idea of monitoring and assessment of the SEM process. The NAC and GAC have expressed significant concerns in the past about implementation of the SEM process (*see e.g.*, Advice 2011-04, noting that “[i]n a series of Advice letters over the past several years, the NAC has expressed its view that there are very significant problems with the implementation of the SEM process. . . .”) Thus, the NAC and GAC believe it is very important to monitor the SEM process to assess progress in addressing these problems.

Criticisms of the SEM process have focused primarily on three issues: 1) delays that have led the process to take far too long; 2) concerns that the Council’s actions have “eroded public confidence” in the process and led many submitters and others to question the fairness and neutrality of the process; and 3) the need for follow-up to Factual Records in order to increase transparency and accountability, and to enable the public (including submitters) to understand whether the process has, as a practical matter, motivated Parties to better enforce their environmental laws, which is the primary purpose of the process. See for example, NAC Advice 2011-2, NAC and GAC May 16, 2012 letter to Administrator Jackson, and JPAC Advice to

Council 11-04. Thus, monitoring and assessment of the SEM process should focus special attention on these three long-standing concerns.

The time frames in the revised Guidelines adopted during the 2012 Council meeting, if adhered to, have the potential to improve timeliness. On the other hand, as the NAC and GAC noted in our May 16, 2012 letter, “significant gaps between the timetables and actual performance are likely to undermine confidence in the process rather than enhance it.” Monitoring will be needed to assess the extent to which the Guidelines lead to hoped-for improvements in the timeliness of handling submissions.

The revised Guidelines are not likely to rebuild public confidence in the process. For example, the revised Guidelines do not address the frequently-voiced criticism that the Council has eroded public confidence by “narrowing the scope of factual records so that the factual record the Council authorizes bears little resemblance to the submission itself or to the Secretariat recommendation.” (See the NAC’s May 16, 2011 Advice). More generally, as the JPAC put it in its Advice to Council 12-01, “it is essential to eliminate any concern that the Parties and Council are managing the process so as to protect themselves from rigorous, independent review by the Secretariat. Unless this is done, public confidence in the process is likely to remain low.” The NAC recommends several specific types of monitoring as especially important in assessing whether future Council and Party actions allay or exacerbate public distrust.

Finally, monitoring is needed to assess the extent to which submissions lead to improved government enforcement. The primary purpose of the SEM process is to motivate the Parties to improve domestic enforcement; it is essential to monitor the extent to which this objective is being achieved.

The number of submissions continues to decline, with only two submissions filed in 2012 and a single submission filed this year. The last submission involving the United States was filed in 2004 (the Coal-Fired Power Plant submission). The public’s “voting with its feet” by reducing use of the process reinforces that there continues to be significant cause for concern about how the process is being implemented. Meaningful monitoring and assessment has the potential to demonstrate that the process can be implemented in a timely way, in a way that restores public confidence, and in a way that helps the public understand whether the process is leading to improved enforcement. Ineffectual monitoring and assessment, and lack of progress in addressing the problems with implementation identified above, is likely to lead to further public disaffection with the process. Thus, the stakes are high. The NAC and GAC elaborate below on each of the three central deficiencies in operation of the SEM process and provide specific recommendations for monitoring each.

1) Monitoring timeliness

The deadlines in the revised Guidelines adopted in the summer of 2012, if adhered to, have the potential to enhance confidence in the SEM process. Based on our review of the CEC Registry of Submissions, the results in meeting deadlines appears to be mixed. For example, the Coal-Fired Power Plants factual record has not yet been released almost five years after the Council authorized its development in June 2008. The Secretariat is well past the sixty working day deadline in deciding whether to request a Party response for BC Salmon Farms, SEM-12-001

(filed on February 10, 2012). In addition, the Secretariat action is past the six-month deadline in determining whether to recommend a factual record for two submissions – the response in Iona Wastewater (SEM-10-003) was received in February 2012, more than one year ago; the response in Wetlands in Manzanillo (SEM-09-002) was received in October 2010, 2 ½ years ago. It is important to monitor adherence to the time frames in the NAAEC and Guidelines to evaluate whether delays are continuing.

In monitoring timeliness, it will be worthwhile for the Council to consider whether the Secretariat experiences delays in completing its work because of the translation responsibilities included in the revised Guidelines. The NAC and JPAC both expressed the concern that the revised Guidelines might contribute to Secretariat delays.

Recommendations:

- (1) The United States should urge the Council to monitor whether treatment of submissions is consistent with the time frames for action contained in the NAAEC and Guidelines.***
- (2) The United States should urge the Council to ensure that the public can easily evaluate whether time frames for action in the NAAEC and Guidelines are being met.***
- (3) The United States should urge the Council to monitor whether the Secretariat experiences delays in completing its work because of the translation responsibilities included in the revised Guidelines.***

2) Monitoring whether the Council is providing appropriate deference to the Secretariat's independent recommendations and interpretations

Many commentators have observed that the Council has substantially undermined the value of the SEM process by significantly narrowing the scope of Secretariat recommendations for preparation of factual records. In a recent example, the submitter for the Species at Risk submission (SEM-06-005) withdrew its submission after the Council narrowed the scope of the investigation to the point where the submitter thought that the Council's restrictions would "frustrate objective evaluation of Canada's failure to enforce" its law (the Canadian law on the protection of endangered species). Monitoring and assessment should focus on the extent to which the Council interferes with the preparation of factual records, including through efforts to narrow the scope of such records.

Several provisions in the revised Guidelines should be monitored to evaluate whether they discourage submissions and/or lead to dismissal of submissions when the NAAEC itself would not require dismissal. The NAC and GAC, among others, have previously highlighted the possibility that the revised Guidelines may lead to submissions being handled in ways that are inconsistent with the NAAEC. For example, § 7.5 of the revised Guidelines provides that the Secretariat is to be "guided by whether . . . reasonable actions have been taken by the Submitter to pursue private remedies." The NAAEC itself, in § 14(2)(c), provides that the Secretariat is to be guided by whether "private remedies available under the Party's law have been pursued."

The revised Guidelines note that they “do not modify the Agreement [NAAEC] and, therefore, at all times, should be interpreted in a manner consistent with the Agreement.” (Guidelines § 18.1). It is important to monitor the Secretariat’s interpretation of the NAAEC and Guidelines to ensure that the Secretariat applies the language of the NAAEC and Guidelines in a way that is consistent with the NAAEC itself. In short, in exercising its responsibilities under § 14(2), the Secretariat should be guided by whether private remedies available under domestic law have been pursued generally (the language in § 14(2)(c)), rather than focus on whether the submitter itself has pursued private remedies, as the Guidelines seem to suggest.

The Guidelines also have the potential to revise the NAAEC in the implementation of NAAEC § 45(1). The NAAEC itself leaves it to the Secretariat’s discretion to decide whether to recommend a factual record when a Party notifies the Secretariat that the action or inaction in question “reflects a reasonable exercise of discretion” or “results from *bona fide* decisions to allocate resources to higher environmental enforcement priorities.” (NAAEC § 45(1)). The Guidelines have the potential to limit the Secretariat’s discretion in a way that is inconsistent with the NAAEC. In particular, the revised Guidelines provide that “[i]f the Secretariat considers that the Party response does not provide sufficient information, the Secretariat may determine that the submission warrants the development of a factual record.” (Guidelines § 9.5). Again, it is important to monitor the Secretariat’s interpretation of the NAAEC and Guidelines to ensure that the Secretariat makes decisions that are consistent with the NAAEC itself. Here that means that the Secretariat has discretion to decide whether to recommend a factual record for submissions for which a Party has claimed that its action or inaction is the result of its reasonable exercise of discretion or results from *bona fide* decisions to allocate resources to higher environmental enforcement priorities as provided in NAAEC § 45(1).

Recommendations:

- (1) The United States should urge the Council to approve Secretariat recommendations to develop factual records without narrowing the scope of such factual records or otherwise limiting the Secretariat’s discretion.***
- (2) The United States should urge the Council to monitor implementation of the SEM process to ensure that the Guidelines are not interpreted and applied in ways that limit the discretion of the Secretariat in ways inconsistent with the NAAEC.***

3) Follow-up to Factual Records

Finally, any Monitoring and Assessment of the process should evaluate the effects of factual records. Especially if done transparently, such follow-up will increase accountability and enable anyone to understand whether the SEM process has made a difference in the Parties’ respective enforcement policies and practices. Such follow-up will be of great value to the submitters and Parties alike. The JPAC Survey responses indicate that 80 percent of the survey responders believed that the impact of the submission was not consistent with the submitter’s hopes and expectations. Further, 95 percent reported that they expected or wished that the CEC continued to be involved following the conclusion of the SEM process. Follow-up would be especially helpful given these survey responses.

As it has done in the past, the NAC and GAC recommend that the United States, working through the Council, ask JPAC to become actively involved in such follow-up in order to bolster the value of this critical stage. This is likely to be far more timely and credible follow-up than the voluntary Party follow-up efforts that appear to be envisioned.

Recommendations

(1) The NAC and GAC repeat their May 2012 Advice that JPAC should be asked to play a central role in follow-up of factual records:

[B]ecause 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. . . .

Charge Question: SEM ONLINE PORTAL:

The NAC and GAC offer comments concerning two aspects of the development of a portal: the objective of having a portal; and the contents and structure of the portal.

The NAC and GAC support the objective of the portal, which presumably is to make the process more accessible to the North American public. *See Attachment “A” NAC/GAC Comments containing edits on the draft portal printed document.*

In terms of the contents and structure of the portal, the NAC and GAC recommend that the United States seek the North American public’s input in designing the portal so that the portal adds value for the stakeholders it is intended to serve. The JPAC survey responses provide a helpful starting point by identifying information about the process that might be helpful. JPAC, Summary of Responses to the JPAC Questionnaire on Submitters’ Experiences with the Citizen Submission Process under NAAEC Articles 14 and 15, <http://www.cec.org/Storage.aspStorageID=19150>.

According to the JPAC survey of submitters, 95 percent of the respondents answered that it is “easy” to gather information on how to use the SEM process” and the vast majority found this information on the CEC website and/or via the CEC Guidelines. Thus, while improvement is possible, the submitters who participated in the JPAC survey gave high marks to the CEC website and guidelines in terms of providing important information on the SEM process. Any portal that is created should be responsive to unmet needs and avoid creating complexity.

Recommendation:

(1) The NAC and GAC support the creation of a portal that would make the SEM process easier to use and understand. The NAC and GAC recommend that the Council obtain public input and review the previous JPAC survey results in order to ensure that any portal that is created is responsive to the public’s interests.

Charge Question: Provide input on the SEM public outreach strategy.

The NAC and GAC recommend that the Council consider the full array of tools available to it and the Parties to increase awareness of the SEM process, including use of the CEC website, list serves, the Parties' own resources, the Secretariat, and advisory bodies such as the JPAC, NAC and GAC. The NAC and GAC are prepared to designate a subcommittee to assist with such outreach if that would be helpful to the United States.

Charge Question: Overarching Factual Record Guiding Principles:

Provide input on overarching Factual Record guiding principles designed to improve the quality, accessibility, and value of Factual Records.

As reflected above, a major public criticism of the SEM process is that the Council and Parties have interfered with operation of the process in ways that limit the Secretariat's discretion and also limit the value of the process. The Council's development of guidelines for the Secretariat to use in developing factual records has the potential to add to the public's perception of such interference, especially to the extent that the guidelines limit the Secretariat's discretion or are perceived to do so.

The NAC and GAC recommend that the Council assess public perception about the value of factual records in order to: a) assess whether the public is concerned about the value of factual records; and, if so b) identify reasons why the public believes such records are less valuable than they might be (if in fact this is the case). Once the Council understands whether the public has concerns about factual records and the nature of any concerns, the Council will be in position to evaluate whether guidelines would be helpful. The JPAC survey is a useful starting point for this inquiry.

Recommendations:

(1) The NAC and GAC recommend that the Council not adopt "guiding principles" for the Secretariat's development of factual records that limit the discretion of the Secretariat or are perceived to do so. There is a long history of public distrust of the Council's involvement in the SEM process because of perceptions that the Council inappropriately circumscribes the Secretariat's performance of its independent responsibilities under the NAAEC. Especially in light of this history, the Council should avoid adopting "guiding principles" that limit the Secretariat's discretion in ways not clearly set forth in the NAAEC or are perceived to do so.

(2) The NAC and GAC recommend that the Council proceed systematically in considering possible "guiding principles" that are intended to increase the value of factual records to the North American public by seeking the public's input on possible principles, and reviewing the JPAC survey responses that relate to criticisms of the contents and structure of factual records.