



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

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Texas

Octaviana Trujillo
Pascua Yaqui Tribe

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Blackfeet Tribe

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

Dear Administrator Jackson:

The Government Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its thirty-seventh meeting on April 26-27th in Washington, DC. This letter represents our full advice resulting from that meeting. We have previously transmitted our advice pertaining to the Submission on Enforcement Matters (SEM) draft revised guidelines under separate cover in order to meet the comments deadline, but have included that advice once again here.

During our meeting Michelle DePass, Assistant Administrator for the Office of Tribal and International Affairs (OITA), discussed the upcoming Council Session in July and responded to questions about the committees' charge for this meeting and EPA's response to advice offered following our previous meeting. Her attendance and contribution are much appreciated. We also thank Jane Nishida, Director of the Office of Regional and Bilateral Affairs, for her valuable participation in our meeting, and Sylvia Correa, Senior Advisor for North American Programs in the Office of International and Tribal Affairs (OITA) for attending the meeting to provide updates on NAPECA grants and for being on hand to answer questions.

The GAC also wishes to thank Acting Director Cynthia Jones-Jackson, Associate Director Mark Joyce and NAC/GAC Designated Federal Officer Oscar Carrillo and all of the Office of Federal Advisory Committee Management and Outreach (OFACMO) staff for their excellent support work, before, during and after the meeting. Special thanks are also deserved for their administration and management of our joint public conference call on May 16th.

Special mention must also be made for the tireless efforts of Jocelyn Adkins, legal counsel (EPA - OITA) and chair of the SEM trilateral Task Force, who attended both days of our meeting in April and participated in multiple conference calls to assist the committees in our understanding of the process and the Task Force recommendations.

JoAnn Chase, Director of the American Indian Environmental Office, attended a breakfast meeting for chairs and tribal representatives of both the NAC and GAC in the Woodrow Wilson Center prior to the first day. Ms. Chase's contribution helped resolve an

outstanding issue relating to earlier GAC advice and is reflected in the attached advice under GAC Advice 2012-2.


Evan Lloyd, Executive Director of the CEC, provided us an update via phone on the Article 13 report currently in progress that will address spent lead-acid batteries (SLABs). Mr. Lloyd's briefings are always appreciated and the subject of this Article 13 report is of great interest to the committee. We also thank Dolores Wesson, CEC Director of Programs, for joining us in person and providing an update on the CEC Operational Plan projects.

We also thank Martín Gutiérrez Lacayo, Chair of the Joint Public Advisory Committee (JPAC), for attending our meeting and sharing the results of JPAC's public comment sessions on the SEM Task Force review and commenting on JPAC interaction with the Task Force. His participation, especially in regard to recent public comments on the draft, helped the committees formulate our SEM advice.

On a personal note, this is the last advice letter I will sign as my term expires on August second. It has been an honor and privilege to serve as GAC chair for the last four years. My gratitude for this opportunity is exceeded only by my appreciation for the commitment and dedication of the EPA staff it has been our good fortune to know and work with.

The GAC deeply appreciates EPA's continued support of our role in advising the United States Government on the enhancement of environmental conditions throughout North America.

Sincerely,



Jeffrey Wennberg, Chair
Governmental Advisory Committee

cc: Michelle DePass, Assistant Administrator, EPA, Office of International & Tribal Affairs
Jane Nishida, Director, Office of Regional and Bilateral Affairs
Cynthia Jones-Jackson, Acting-Director, Office of Federal Advisory Committee Management & Outreach
Oscar Carrillo, Designated Federal Officer
Martin Gutierrez Lacayo, Chair, Joint Public Advisory Committee
Evan Lloyd, Executive Director, CEC
Maria Dolores Wesson, Director of Programs, CEC
Members of the U.S. National and Governmental Advisory Committees

Governmental Advisory Committee (GAC)
to the U.S. Representative to the
Commission for Environmental Cooperation (CEC)

**Advice 2012-1:
General Advice on the SEM Trilateral Review Taskforce Draft Recommendations**

The charge question for advice pursuant to the April 26-27, 2012 meeting of the Governmental Advisory Committee (GAC) was as follows:

SEM Trilateral Review Taskforce

In May, 2011 the Council created the trilateral Submissions on Enforcement Matters (SEM) Review Taskforce. SEM Taskforce 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.

a. In furtherance of this effort, please provide advice on the SEM taskforce written proposals provided to the NAC and GAC.

During the course of the one and one-half day meeting Jocelyn Adkins, Trilateral SEM Review Task Force chair, representing OITA, met twice with the two committees in plenary session. It was decided that specific advice on the Task Force's draft recommendations would not be possible given the limited time available for presentation, exploration, discussion and deliberation. The committees decided instead to offer general advice in our letters and convene a working group made up of volunteers from both committees to work by email and teleconference on specific comments on the SEM Task Force draft. The working group met and prepared a draft, and then reported back to the NAC and GAC, providing an opportunity for committee member comment and edits. A single supplemental document containing specific advice from both committees was prepared and submitted separately.

This advice represents the general advice of the GAC as described above.

The first question the GAC addressed was whether the SEM process could be repaired or whether it should be discontinued and the funds redirected. In the plenary meeting there were a number of highly critical comments and some discussion of whether the structure of the process, with the Council members serving multiple roles, could be successfully reformed. The GAC concluded that while under the SEM process one of the Parties is the "accused" and the full Council serves as the "judge," the SEM process was not beyond repair. Indeed, while the frequency of unsatisfactory processes is much too high the SEM process has had notable

successes.¹ Experience demonstrates that the SEM process can work and fulfill the purpose for which it was created under the NAAEC.

The GAC also observed that at the North American level the SEM process, for all of its limitations is the only venue or process beyond those afforded within each nation through which aggrieved parties may press the national governments to enforce environmental statutes. The absence of an international alternative is seen by the GAC as a highly compelling reason to recommend reform of the SEM process rather than abandonment.

Furthermore, the GAC reviewed the SEM Task Force goals and agrees that if the four key improvements can be successfully implemented the process will regain public confidence and increase effectiveness. The GAC also compared the Task Force goals with the recommendations John Knox and David Markell put forward in their recent article, “*Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*,” (Texas International Law Journal, vol. 47/505, December, 2011). While some of the specific recommendations contained in the Task Force draft and this article are not in alignment, the assessment of the current process’ failings and goals for reform are in close agreement.

Knox and Markell stated that their goals are essentially improving the procedure’s timeliness, fairness, and effectiveness. The SEM Task Force expressed them as follows:

- Modernization – to update the process to reflect technological developments and the intended, practical current-day implementation
- Clarification – to provide clarity regarding the interpretation of the NAAEC and SEM Guidelines
- Timeliness – to increase the speed, efficiency, predictability, and relevance of the process
- Transparency & Accessibility – to improve the understandability and accessibility of the process

The GAC supports these goals but notes that while improving fairness is implied in the Task Force review it is not explicitly stated as a goal. The GAC believes that enhancing the perception of fairness within the process is a key consideration that should be explicitly stated as a goal and addressed within the Task Force recommendations.

One particular concern for process fairness was discussed at length in the plenary session. That is the point at which the Secretariat has concluded their review of a submission and makes a recommendation to prepare a factual record to the Council. The Council must authorize the factual record before the Secretariat may proceed, but on occasion has also modified the Secretariat’s proposal and redefined the scope of the factual record before authorization. This has led to frustration on the part of submitters, including the withdrawal of petitions.

¹ Jonathan Graubart studied all submissions filed before 2003 and followed their development through 2006. Of the 10 factual records published to that point, he found that 7 had resulted in “significant” success, which he defined as “actual policy changes.” The other 3 had had “modest” success, defined as “formal advancement of the cause onto the government’s agenda.” See, Jonathan Graubart, *Legalizing Transnational Activism: The Struggle to Gain Social Change From NAFTA’s Citizen Petitions* (2008).

The Task Force proposes to clarify this authority in their draft revisions to Guideline 10.4 as follows (highlighting added):

10.4 The Secretariat will prepare a factual record if the Council, by a two-thirds vote, instructs it to do so. If, *after considering the Secretariat's notification that a factual record is warranted*, the Council votes to instruct the Secretariat not to prepare a factual record *or to prepare a factual record that varies from the Secretariat's notification*, *the Council will provide its reasons for doing so. Where the Council instructs the Secretariat not to prepare a factual record or to prepare a factual record that varies from the Secretariat's notification*, the Secretariat will ~~so~~ inform *the Party and* the Submitter ~~and will inform the Submitter that the process regarding said submission process, in whole or in part, is terminated.~~ Unless the Council decides otherwise, any such decision will be noted in the registry and in the public file described in these guidelines.

The GAC believes that clarifying this authority within the guidelines will not address the underlying problem with this practice. Indeed, it may very well discourage future submissions as potential submitters weigh the significant effort required to complete a submission and respond to Secretariat inquiries against the possibility that the Council may revise the scope of the proposed factual record such that the resulting report is of little or no benefit.

In furtherance of the goal of improved fairness the GAC recommends that the practice of modifying Secretariat recommendations for factual records be stopped. The GAC has no objection with continuing the practice of Council approval (by 2/3 vote) before a factual record may proceed, but believes this should be an up-or-down vote on the Secretariat's recommendation. In the event of a denial, the Council should explain its reasoning, as recommended by the Task Force. This will provide guidance to the Secretariat and the submitter should either desire to modify the recommendation or submission and resubmit.

The best way to assure submitters that scopes will not be modified is for the Council to enact a self-limiting resolution. This could be done by simply approving the SEM Task Force recommendations, assuming the final recommendations include this provision.

As stated above, the NAC-GAC joint committees have offered additional and more detailed advice on the Task Force draft. It is critical in the opinion of the GAC that certain key reforms, such as the one discussed above, be embraced by the Council. If the SEM process is to serve its unique purpose, fairness, timeliness, transparency and accessibility must be demonstrably improved. If the Council is unable or unwilling to adopt key reforms furthering these goals then the continued use of the SEM process should be reevaluated.

Governmental Advisory Committee (GAC)
to the U.S. Representative to the
Commission for Environmental Cooperation (CEC)

**Advice 2012-2:
Briefing on the Status of Indigenous Peoples across North America**

In our advice 2011-6, the GAC requested a briefing on the long-standing challenges confronting tribal nations on both sides of the borders resulting from the difference in their legal status between the U.S. and Mexico, and the U.S. and Canada. In her response, Assistant Administrator Michelle DePass expressed concern for representatives of the U.S. EPA reporting out on the legal and historical relationships between indigenous peoples and governments other than the United States.

During the April 26-27, 2012 meeting NAC and GAC tribal members and the NAC and GAC chairs discussed the situation with EPA representatives and agreed that EPA would request a briefing for the committees from a recognized expert on these matters, possibly from academia. The expert would not speak for or represent the U.S. government.

Finally, given that the U.S. and Canada have recently joined Mexico as signatures on the United Nations Declaration on the Rights of Indigenous Peoples, the briefing might also include information about the Declaration and how it might relate to the NAAEC.

The GAC appreciates the opportunity to resolve the concerns of the U.S. government and supports this approach. If possible the briefing should be part of the October, 2012 meeting agenda.

On a related note, the NAC offered to help OITA “elevate tribal issues on a substantive level within EPA and the Office of International and Tribal Affairs” in their advice letter dated December 12, 2011. It is our understanding that NAC member Gail Small offered to work with OITA toward this goal and to offer assistance on tribal issues that arise among the three parties to the NAAEC. The GAC appreciates this offer and wants to support the effort by making one of our tribal representatives available to work with Ms. Small and OITA as well.