

June 14, 2002

Jonathan Plaut  
JPAC Chair for 2002  
c/o CEC Secretariat  
393, rue St-Jacques ouest, bureau 200  
Montreal, Quebec H2Y 1N9

Dear Mr. Plaut,

We would like to thank you for your letter of April 22<sup>nd</sup> 2002, concerning the revised recommendation on the factual record follow-up issue. We would like to address this particular recommendation as well as the recommendation on confidential information, as agreed to by the Alternate Representatives during their March 2002 meeting.

We have reviewed your revised recommendation on the issue of factual record follow-up. As we indicated in our March 6<sup>th</sup> letter to you, we are of the view that the Articles 14 and 15 process terminates with the development and potential release of the final factual record, and that any follow-up which a Party may choose to undertake is a domestic policy matter.

We agree with you that in some cases a factual record may set forth facts warranting attention by a Party. In such cases, we would support a decision by a Party to provide follow-up information to a Submitter in a manner that is compatible with its domestic practices.

With regard to the confidentiality recommendation, we note that we originally believed that this issue had been addressed during the 2001 Guadalajara Council Session when Mexico amended its position on its confidentiality claims of certain information related to the Metales y Derivados submission. However, during our discussion with JPAC this past March in Mexico City, we learned that this issue was still open.

In addressing this issue, we first note that there are three provisions in the NAAEC that are relevant to the confidentiality issue: (1) Article 21 - Provision of Information; (2) Article 39 - Protection of Information; and, (3) Article 42 - National Security (the JPAC Lessons Learned Report referred only to Article 39). Having made this clarification, Council emphasizes that it views transparency as a priority and believes that a Party should not withhold information unless it is consistent with the relevant provisions of the NAAEC. Council expects a Party to provide requested information to the Secretariat, in accordance with the provisions of the NAAEC and to the extent possible and appropriate. For example, if a particular document requested by the Secretariat contains confidential information, a Party

should redact only those portions of the document for which protection from disclosure is asserted and allow the remaining portions to be made publicly available.

Additionally, during the 2001 Council Session, Council asked the Secretariat to provide a report summarizing the laws and regulations of the three Parties relating to government held confidential information. The request was made to assist in dealing with any related confidentiality issue that might arise. This summary, is intended to serve as an updated version of a report first published in 1999 by the CEC in the North American Environmental Law and Policy series. Parties are currently reviewing the report and providing the CEC Secretariat with comments on its accuracy. We look forward to reviewing the final document.

We hope that the above comments will serve to clarify Council's position on JPAC's recommendations regarding issues of factual record follow-up and confidentiality of information.

Sincerely,

[Original signed]

Norine Smith  
Alternate Representative for Canada  
Assistant Deputy Minister  
Policy and Communications  
Environment Canada

c.c. Olga Ojeda  
Judith Ayres  
Janine Ferretti

## **JPAC Recommendations Related to Factual Record Follow-Up and Confidentiality of Information**

### **FACTUAL RECORD FOLLOW-UP**

Revised recommendation provided by JPAC and delivered to Council on April 22nd:

"While it is understood that the Articles 14 and 15 process formally ends with the release of a factual record, public confidence in the usefulness of citizen submissions would be greatly enhanced by some form of follow-up, where appropriate, on the matters set forth in the factual record. Although a factual record does not contain a conclusion regarding whether a Party has failed to effectively enforce its environmental laws, in some cases a factual record may set forth facts warranting attention by the Party. In such cases, the Party should be encouraged to provide a written briefing to the CEC within a reasonable period of time (for example, within 12 months) after the release of a factual record, discussing any developments that may have occurred affecting the matters set forth in the factual record and any actions the Party itself may have taken. The written briefing should be made public in the next CEC annual report, after an opportunity for JPAC members to review and provide comments through the draft CEC annual report in accordance with Article 16(6) of the NAAEC."

#### Original Text:

"To respond to the concern regarding monitoring, one option would be for the Party involved to report to the CEC within a reasonable period of time (for example, not exceeding 12 months) after the release of a factual record pursuant to Council authorization on the actions, if any, that it has taken to address the matters set forth in that factual record. Such a report should be made public in the next CEC annual report, after an opportunity for JPAC members to review and provide comments, through the draft CEC annual report in accordance with the Article 16(6) of the NAAEC."

### **CONFIDENTIALITY OF INFORMATION**

"With respect to (...) [confidential information], we believe that a Party's right to invoke that defense against disclosure should be narrowly construed and should be limited to those circumstances in which it is expressly authorized by Art. 39 of the NAAEC . . . ."