



**UNIDAD COORDINADORA DE
ASUNTOS INTERNACIONALES**

UCAI/2505/04

México, D. F., a 3 de junio de 2004

**SECRETARIA DE MEDIO AMBIENTE
Y RECURSOS NATURALES**

**Ms. Donna Tingley
JPAC Chair for 2004
Commission for Environmental Cooperation
393, rue St-Jacques ouest, bureau 200
Montréal (Québec) H2Y 1N9**

Re: JPAC Advice 03-05

Dear Ms. Tingley:

On behalf of the Council, the Alternate Representatives thank the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) for its recent Advice 03-05 with respect to the public submission process under Articles 14 and 15 of the North American Agreement for Environmental Cooperation (NAAEC).

Your advice addresses three matters concerning the operation of the public submission process:

- The manner in which the scope of a factual record is defined
- What constitutes sufficient information,
- The review of Council Resolution 00-09.

Having carefully considered the JPAC's advice, the Council offers the following response.

The public submission process of the NAAEC is a unique feature of the Agreement. It has been a process of learning by doing for all concerned: the public, the Secretariat, the Council, and the JPAC. To date, only nine factual records have been completed on which to draw judgments about the process.

The Council commends the Secretariat for the high quality research that has gone into the preparation of the factual records, and the extensive information provided in their reports. The professionalism and thoroughness of the Secretariat's work are critical to achieving the purpose of a factual record which is to present, in an objective manner, facts related to an alleged failure of a Party to effectively enforce its environmental legislation.

Scope of a Factual Record

The Council deliberates carefully each time it is presented with a Secretariat's recommendation that a factual record is warranted for a submission, and it is only after thorough consideration of all of the facts and circumstances at issue with respect to the submission that the Council votes on the determination. It is important to note that although the Council often defers to the Secretariat in the context of the submissions process, it has determined in some instances to be necessary and appropriate for the Council to issue a



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factual record decision that varies from the Secretariat's recommendation. In such cases, the Council has endeavored to clearly present its reasoning within the text of the relevant Council Resolution.

The Council would draw to JPAC's attention Council decisions that provide for broad reviews of enforcement activities. Among others, these include the approval of the preparation of a factual record, after receiving the necessary sufficient information, regarding the assertion that Canada is failing to effectively enforce the Migratory Birds Act Regulations during logging activities across the province of Ontario. Another example is the earlier approval of the preparation of a factual record regarding the assertion that Mexico is failing to effectively enforce environmental law with respect to the citizen complaint process, alleged environmental crimes and other alleged violations with respect to forest resources and the environment, in the cases presented by indigenous peoples and communities of the Sierra Tarahumara. In both these instances, and in many others, the CEC Secretariat's recommendations were within the scope of what is set out in Article 14 and 15. Both factual records will undoubtedly provide the public and Parties with a comprehensive recounting of how enforcement policies are implemented in practice within a sector and across large geographic areas. The breadth of the factual review that the Secretariat will undertake should provide the readers with enough detailed information to determine if, in their view, a Party has failed to effectively enforce its environmental law.

The Council, however, certainly recognizes the concerns of the JPAC as expressed in Advice 03-05 and, with these in mind, commits to continue giving each submission the careful and thorough consideration it is due.

Sufficient Information

As is the case with many of the terms and phrases used in the NAAEC, the term "sufficient information" is not defined in the NAAEC nor is it defined in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC* (the "Guidelines"). This being the case, the submitters and the Secretariat must make a judgment regarding the term's meaning. However, although Article 14(1) calls on the Secretariat to determine whether a submission satisfies the Article 14(1) criteria, it is ultimately the responsibility of the Council, as the governing body of the CEC, to interpret the NAAEC (see Article 10(1)(d)).

The Council is mindful that submitters have to bring forward allegations that are grounded in actual events and specific enough that the Secretariat can meaningfully research the relevant facts and that Parties can meaningfully provide detailed information about what enforcement activities did or did not take place. However, we also recognize that the process is not intended to be overly burdensome. With these points in mind, we believe there is a reasonable balance that can be achieved by the submitters.



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Although the Council has generally deferred to the Secretariat's judgment regarding what constitutes "sufficient information", it did not do so with respect to the Ontario Logging submission (SEM-02-001). This is the only occasion for which Council determined that the requisite "sufficient information" had not been provided given that the original submission was primarily based on a theoretical model of what might have happened should the submitters' assumptions about migratory flight patterns, and logging and enforcement activities be correct. The Council, however, wanted to keep the submissions process active with respect to this submission and, therefore, requested that the submitters provide additional information in support of their allegations. The supplemental information was provided and the Council authorized the preparation of a factual record.

Council Resolution 00-09

As you are aware, the review of CR 00-09 is now under preparation, and the JPAC and the Secretariat have been asked to provide us with their perspectives and views. We thank the JPAC for its quick response to our request (Re: Request to CEC Alternate Representatives Letter on the review of the operation of Council Resolution 00-09, dated 28 April 2004). Additionally, both the Secretariat and the JPAC will have the opportunity to comment on our draft report. It is our intention that the Council's review will be available to the public prior to the Council meeting this coming June.

Although the Council recognizes the JPAC's frustration in waiting to conduct the public review of the "scope" issue until the four factual records in question were released, the Council continues to believe that waiting for the completion of these records was the most appropriate course of action. It was and is the Council's view that only after the relevant factual records were completed would the JPAC have the necessary additional information to conduct a public review that would be most useful. It is for this same reason that Council chose not to proceed with its review of Resolution 00-09 at an earlier date.

The JPAC is concerned that the original purpose of the submission process is not being fulfilled; that factual records are not successfully bringing enforcement issues to light and making a difference in how Parties make enforcement decisions. The Council does not share this view. In fact, we believe the process has succeeded in drawing a great deal of attention to a number of important enforcement issues in the three countries. While it is still early, with no more than four factual records having been prepared to date for any one Party, the Council would like to assure you that the factual records are being studied very carefully and are being taken into consideration on an ongoing basis as enforcement decisions are made. We believe the factual record process is robust in this regard.

The Council is, however, extremely concerned by the continuing difference of opinions between the JPAC and the Council regarding the implementation of the Articles 14 and 15 submissions process. The Council recognizes the vital role of the JPAC in providing the Council with advice on this matter. The Council will continue working to strengthen



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communications between the JPAC and the Council, in order to achieve our shared commitment to a strong public submissions process.

Your advice also raises concern regarding a Party's potential conflict of interest under Articles 14 and 15 as a member of the Council and as an individual Party. The Council understands you will be analyzing this matter more fully in the future. Should you indeed decide it to be necessary to analyze this matter more fully in the future, it will be important to bear in mind that the Parties have a duty and an obligation to carry out their responsibilities as set out in the NAAEC. The Council is very cognizant of the challenge presented by its decision-making roles in the public submission process and for this reason it takes great care to exercise its various responsibilities in strict accordance with the agreement.

Sincerely,



José Manuel Bulas Montoro
Alternate Representative for México

cc: Norine Smith, Alternate Representative for Canada
Judith Ayres, Alternate Representative for the United States of America
JPAC Members
William Kennedy, CEC Executive Director