

**Governmental Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation**

April 24, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Dear Governor Whitman:

The Governmental Advisory Committee (GAC) to the U.S. Representative to the Commission for Environmental Cooperation (CEC) has received a request from the Joint Public Advisory Committee (JPAC) to respond to its call for comment for a public review—through the JPAC process of “Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15”—on the issue of providing Parties an opportunity to comment on factual record work plans developed by the Secretariat. We welcome the opportunity to provide our input into the JPAC process while conforming to the appropriate protocol, given our primary responsibility to provide advice to you and Judith Ayres, the Assistant Administrator of the Office of International Activities, for consideration in your work with the JPAC and the CEC.

As you can conclude from a review of our past advice letters, the GAC has been a staunch and ardent supporter of the Articles 14 and 15 submission process. This support is largely due to the process’ uniqueness as the first mechanism of its type in any international treaty. The GAC believes that it is a cornerstone of the North American Agreement on Environmental Cooperation (NAAEC) and provides an extraordinary measure of transparency which benefits all of the citizens of the North American continent. Any action that would impede the efficacy of this process would not only undermine public support for North American Free Trade Agreement (NAFTA), but could thwart any

active expansion of NAFTA or the possible adoption of a Free Trade Agreement of the Americas (FTAA).

In several recent votes by the Council regarding the Secretariat's preparation of factual records on several pending submissions, the Council has directed the Secretariat to proceed with these factual records, but with new limitations. One such limitation has required that the Secretariat submit its workplan associated with the development of these factual records to the Parties for their review and comment. Among those submissions which are constrained in this manner is the one pertaining to the *Migratory Bird Treaty Act* submission, which is the first submission against the U.S. that has successfully reached this point in the process. As you know, it alleges that the U.S. has failed to effectively enforce U.S. environmental laws by historically failing to pursue any criminal prosecutions of the Migratory Bird Treaty Act for non-threatened or non-endangered species. As indicated in our October 19, 2002 advice letter, the GAC remains very concerned about such a limitation and views it as one of the more troubling aspects of the Council's decision for reasons which I will articulate at this time.

The purpose of the workplan is to guide the Secretariat's staff on the nature and scope of the work associated with the development of a particular factual record. It is akin to an independent fact finder laying out the illustrative roadmap and, in some instances, the substantive approaches that will be used in proceeding with its investigative task. The GAC is concerned that, by allowing a Party targeted in a submission to review and comment upon the scope of a workplan, the independence historically exercised by the Secretariat in this process will be severely compromised. Such an approach would undoubtedly infringe upon the Secretariat's independent factual investigation in the following manner.

It gives the Party which has the most at stake in the process the opportunity to control the development of the factual record and, as a result, the outcome. Even assuming that it is theoretically possible to have this level of Party oversight without affecting the substantive outcome of the factual record, the appearance of influence and bias which is created is profound and unmistakable. Plainly speaking, it provides the impression that the Party with the most to lose has the ability to undermine the process by delving into and controlling the structure and nature of the investigative process. The fox in the henhouse analogy would certainly seem to apply in this instance.

Beyond the serious conflict of interest that such an approach would involve, there is no clear mechanism to resolve issues that may arise between the Secretariat and the Parties involving the comments provided on a particular workplan. It may constrain the Secretariat's ability to expeditiously move forward by creating uncertainty as to what steps must be taken to resolve such disagreements. If the Secretariat's independence is undercut in this manner, there will be little or no future credibility to the submission process on the North American continent.

The GAC remains adamantly opposed to the Parties' involvement in commenting upon the Secretariat workplan. And despite the U.S. assurances to the contrary, the GAC strongly believes that this approach will set a dangerous precedent for constraining the development of future factual records. The U. S. has historically been a strong defender and ardent protector of the Articles 14 and 15 process. The GAC would encourage you to continue in that important role as the JPAC proceeds with its public review of this very important issue. We look forward to meeting with Assistant Administrator Ayres in Washington, D.C. during our May 2nd and 3rd meeting this year and remain available to you in any capacity which would be helpful to bring closure and consensus on this and any other issue associated with your work as the United States Representative to the CEC.

Sincerely,

(Original signed)

Denise Ferguson-Southard
Chair
Governmental Advisory Committee

cc: Judith Ayres, Assistant Administrator for International Activities
Adam B. Greene, Acting Chair, U.S. National Advisory Committee
Jonathan Plaut, Chair, Joint Public Advisory Committee
Stewart Elgie, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. Governmental Advisory Committee