

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

Advice 2003-13: The Article 14/15 Citizen Submissions Procedure

We note that the Joint Public Advisory Committee (JPAC) has held a workshop and is taking public comments on issues concerning the procedure, particularly with respect to the potential scope of factual records under the procedure and the related issue of what might be called the “standard of proof” – that is, what information is sufficient to justify a factual record.

The JPAC is proceeding according to the terms of Council Resolution 00-09, adopted in June 2000, in which the Council recognized “the need for transparency and public participation before decisions are made concerning implementation of the public submission process under Articles 14 and 15,” and agreed to refer issues concerning the implementation and further elaboration of Articles 14 and 15 to the JPAC so that it may conduct a public review of those issues with a view to providing advice to the Council as to how the issues might be addressed. We believe that it is necessary and important for the Council to act consistently with that resolution as well – specifically, with its provision that the Council “shall consider the JPAC’s advice in making decisions concerning the issues in question relating to Articles 14 and 15 of the Agreement and shall make public its reasons for such decisions, bringing the process to conclusion.”

We continue to believe, as we stated in May 2003, that a Council interpretation necessarily limiting the scope of inquiry under Articles 14 and 15 to individual cases and excluding broader allegations of failure to effectively enforce would be problematic. First, continually focusing on individual instances of failures to effectively enforce, rather than broader patterns illustrated by those instances, would lead to an inefficient use of the Secretariat’s resources. Second, a routine overruling of the Secretariat’s recommendations for factual records would be contrary to the strong presumption of legitimacy that should attach to those recommendations. The 14-15 procedure is designed to produce impartial reports on whether a Party has failed to effectively enforce its own law, so the Council will always have something of a conflict of interest in passing on the validity of further investigating those submissions. The Council should therefore normally refrain from overruling the Secretariat’s recommendations, even if they are not the recommendations the Council would have preferred.

We recognize that in order to warrant preparation of factual records, submissions must adequately support their allegations of failure to effectively enforce environmental laws (including, as appropriate, through identification of actual cases of non-enforcement as illustrative of larger patterns of non-enforcement appropriately addressed under the Article 14/15 process). But we also believe that the standard should not be set so high that a submitter must prepare a factual record in order to justify preparation of a factual record. The procedure was intended to be used by ordinary people without the resources to undertake expensive, time-consuming investigations. Indeed, the point of the

procedure is that the investigations are to be undertaken by the Secretariat, not the submitters.

For the CEC to work efficiently and effectively, it must ensure that it follows up its reports or indicate what other entity will do so. Now that it is starting to produce on a regular basis factual records under Article 15, the importance of following up those reports is highlighted. In this respect, we made two recommendations in our May 2003 letter: that the U.S. government should establish a systematic procedure for taking into account any factual records concerning allegations of U.S. non-enforcement, beginning with the Migratory Bird Treaty Act (MBTA) factual record; and that U.S. government encourage the CEC to follow up its factual records in a cooperative setting such as the Enforcement Working Group.

We were very disappointed to hear that the U.S. government appears not to have made any formal follow-up to the MBTA factual record. We continue to believe that such a follow-up is highly important, and that it help to set a useful precedent with respect to the other member governments.

On the other hand, we were pleased to learn that U.S. government officials had made efforts to convince their counterparts on the CEC Enforcement Working Group to explore a mechanism to follow up factual records. We understand the concerns of Canada and Mexico that led them to reject that suggestion. But even in the absence of a formal mechanism, we encourage the members of the EWG to look in the factual records for ideas that might be usefully incorporated into the work of the EWG.