

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

April 30, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, D.C. 20460

Dear Governor Whitman:

I am writing to express a minority viewpoint of the National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) with respect to the NAC letter of April 29 on the Articles 14-15 citizen submission process.

It should be noted that the NAC has always developed advice to the U.S. Representative by consensus, and that it is not the usual or preferred practice of the Committee to develop majority and minority positions. The decision to present a minority view in this case was based on: 1) an unreasonably short notice of a deadline for comments that precluded all views from being incorporated into the NAC letter; and 2) a fundamental disagreement with the majority NAC position.

With regard to process used to develop the NAC letter, the original process envisioned was reasonable and workable: a draft letter was distributed to the NAC for comment on April 24 in order to complete the letter by the JPAC deadline of the close of business on April 30. What is at issue is a notice sent at 8:00pm on Sunday, April 28 that the NAC comment period would be closed at 11:00am on Monday, April 29. It was unreasonable to expect that all members of the Committee would receive the notice in time to meet a new deadline for comment a mere 15 hours away, of which only three were regular business hours. Further, the accelerated deadline for comments on the NAC letter was itself unnecessary given the fact that it preceded the JPAC deadline by a full day and half. These decisions unnecessarily limited the time available to comment on the NAC letter.

With regard to the substance of the NAC letter of April 29, I have four main areas of disagreement with the majority NAC position:

First, the NAC letter states that the Council decision directing the Secretariat to provide copies of its work plans to the Parties for comment was “a new development in

the Council's practice." This statement may be contradicted by the precedent of Council Resolution 00-03 on the *Metales y Derivados* submission. That decision included a sentence in the preamble stating: "Noting that the Secretariat will give the Parties advance notice of its overall plan for gathering relevant facts." The difference between that decision and those taken on November 16, 2001 is that the relevant language was moved into the body of the decision and the opportunity for comment, implied in the *Metales* decision, is stated explicitly.

Further, the NAC letter makes the argument that the Council practice of commenting on draft work plans is "not expressly authorized by the [agreement]." This argument is moot as the agreement does not expressly forbid the practice, either. Indeed, the agreement makes no mention of work plans at all.

Second, the NAC letter argues against comments by the Parties based on an absolutist and unworkable reading of Article 11(4). In practice, the Parties convey independent comments to the Secretariat on a continuous and ongoing basis, covering all aspects of the CEC operations and activities. To make all such communications a violation of Article 11(4) would cripple the normal functioning of the Secretariat and the CEC as a whole.

Third, the NAC letter states that "a single Party could unilaterally confine the scope of a factual record through [comments on a work plan]." This assertion seems wholly unfounded and contrary to the facts. In practice, the Secretariat is not bound to accept the comments by the Parties or make any changes to the work plans to reflect such comments. Of the comments by the Parties related to current submissions, the Secretariat has accepted some and rejected others.

Fourth, the majority NAC position that the Council has acted "contrary to both the letter and spirit" of the agreement is not supported by the facts. While there are legitimate concerns regarding the process used to modify Article 14-15 procedures and the predictability of the submission process due to recent Council decisions, none of what has transpired warrants a charge that the Parties have breached the agreement.

Beyond the areas of concern with the majority NAC position, I would like to make the following points regarding the ongoing integrity, stability and transparency of the citizen submission process:

First, the Council should commit to utilize the process developed under Council Resolution 00-09 where any changes to the Art. 14-15 procedures are envisioned. The NAC supported the development of the JPAC review process as a reasonable way to allow for appropriate changes to the procedures while allowing for transparency and stability.

Second, the degree of involvement by the Parties in the activities of the Secretariat must be differentiated between the program activities and the management of the citizen submission process. The integrity of the process requires a much greater

degree of independence for the Secretariat on the citizen submission process than in other activities of the CEC, and the Parties must clearly support the ability of the Secretariat to carry out its functions without pressure or influence. To the extent that the Secretariat is not required to accept or act on comments by the Parties on the draft work plans, as is currently the case, this independence does not appear to be adversely affected.

In summary, it clear that the primary cause for concern regarding the citizen submission process is the perception of undue influence by the Parties in the activities of the Secretariat. Regardless of the ongoing debate about that influence, the perception needs to be addressed. While these concerns have always existed, they abated significantly with the development of the JPAC review process under Council Resolution 00-09. The Council should recognize this existing solution and employ that process to address the renewed perception of interference with the independence of the Secretariat.

In addition to transmitting this letter to the JPAC, we appreciate it if you were to forward this letter to other agencies involved in the interagency process regarding the Article 14/15 process.

Cordially,

A handwritten signature in black ink, appearing to read "Adam B. Greene", with a long horizontal line extending to the right.

Adam B. Greene
Member
National Advisory Committee

cc: Judith Ayers, Assistant Administrator for International Activities
Denise Ferguson-Southard, Chair, U.S. Governmental Advisory Committee
Jonathan Plaut, Chair, Joint Public Advisory Committee
Jean Perras, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. National Advisory Committee