

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

**NAC Advice No. 2001-2: The Citizen Submissions Procedure**

Our advice on the citizen submissions procedure concerns two topics: the draft “Lessons Learned” report prepared by the Joint Public Advisory Committee (JPAC) and the pending requests by the Secretariat that the Council approve three factual records.

**1. Draft “Lessons Learned” Report.**

In general, we support the JPAC’s draft report on lessons learned from the CEC experience with the Article 14-15 submissions procedure. We strongly agree with its conclusions that citizen submissions play a unique and indispensable role in fostering vigorous environmental enforcement and that an independent Secretariat is an essential component of the process. We urge the U.S. Government to act with the other parties to adopt all of its specific recommendations for reforming the procedure to make it more timely, open, accountable, and effective. (Although in the past we opposed efforts to revise the Guidelines until more experience had been gained with the procedure, we support the limited revisions, if any, necessary to implement these recommendations, since they are based on the experience and public input that had been previously lacking.)

However, we believe that the report should have addressed three areas in more detail.

First, the report’s discussion of the independence of the Secretariat (p. 14) should have mentioned that in addition to the duties the Secretariat is given under Articles 14 and 15, which provide it independence even from the Council in certain important respects, the Secretariat must always act independently of control by parties acting outside the Council. Under Article 11(4) of the NAAEC, the members of the Secretariat “shall not seek or receive instructions from any government or any other authority external to the Council,” and each party must “not seek to influence them in the discharge of their responsibilities.” As a result, each party should refrain from *ex parte* attempts to influence the Secretariat as it carries out its duties under Articles 14 and 15. The JPAC might have usefully recommended that if a party or a submitter does seek to influence the Secretariat through *ex parte* contacts, the Secretariat should treat the written or oral communication as a supplement to the submission or response. That would entail the Secretariat’s posting either the communication itself (if the communication is written) or a written record containing a detailed description of the communication (if it is oral) in the submissions registry and giving the other party an opportunity to respond.

Second, we believe that the draft report’s recommendation with respect to Guideline § 10.2 does not go far enough. Section 10.2 provides that if the Secretariat recommends to the Council that it approve preparation of a factual record, the Secretariat must wait 30 days to make public a notice of its recommendation, and must wait until after the Council has acted on its recommendation to make its reasoning public. Section 10.2 was added in the 1999 revisions to the Guidelines, which we opposed. The JPAC draft report (p. 16) recommends that the 30-day “blackout” period either be abolished or reduced (to allow the responding party to become aware of the recommendation before press inquiries). We believe that the period should be abolished. But if

it is left in place, it should be reduced to no more than two or three days. More important, the report is silent on the longer “blackout” period that prevents publication of the Secretariat’s reasoning until after the Council has acted. As we have said in the past, “There is no legitimate reason for delaying publication of recommendations. Doing so decreases the transparency of the process, increases its delay, and undermines public confidence in it.” (NAC Letter of June 1, 2000.) We strongly recommend that the longer “blackout” period be abolished entirely.

Third, we are disappointed that the JPAC report contains no specific recommendations with respect to follow-up of factual records. We repeat our advice from last year on the importance of following up factual records, and of doing so in a cooperative rather than a confrontational way: “We believe that factual records would be more useful, and far more palatable to the Parties, if the Parties discussed and institutionalized ways in which they would lead to increased cooperation, rather than the potential (even if remote) for greater confrontation. We note that the Parties already have established extensive institutional cooperation in enforcement matters under CEC auspices, on which such discussions could build. We strongly encourage the U.S. government to pursue such discussions with the other Parties.” (Advice No. 2000-2, May 2000.)

If all of the recommendations are adopted, the series of debates over the citizen submissions procedure may and should be put to rest. We have consistently said that for the procedure to work well, it must be allowed to work – that is, it must be free from continual attempts to revise the Guidelines. We believe that with these changes, the procedure should be free from efforts to revise it for the foreseeable future.

## **2. Pending Recommendations for Factual Records**

The Council has three Secretariat recommendations for factual records before it: *Oldman River* (SEM 97-006), which the Council deferred in May 2000; *Aquanova* (SEM 98-006), which the Secretariat recommended in August 2000; and *Migratory Birds* (SEM 99-002), which the Secretariat recommended in December 2000.

The *Migratory Birds* submission is the first Secretariat recommendation for a factual record concerning the United States. By contrast, Canada and Mexico have been the subject of three recommendations each (and have been the subject of one completed factual record each). Apart from the decision to defer *Oldman River*, the Council has voted on four recommendations, two concerning Canada and two concerning Mexico. In each of these cases, the United States voted in favor of preparing the factual record, even when it was the only party to do so. These positions have been consistent with the U.S. position, expressed in Executive Order 12,915, that: “To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record.”

We do not take a position on the merits of the *Migratory Birds* submission. But we strongly recommend that the U.S. government continue to hold to its long-standing position with respect to supporting preparation of factual records “to the greatest extent practicable” when the Secretariat has informed the Council that a factual record is warranted. We believe that it is very important that the United States apply the same standard to the first factual record concerning it that it has applied to previous requests for factual records concerning Canada and Mexico.