

Memorandum

DATE: 15 February 2002

A / PARA / TO: Jon Plaut, Chair, JPAC

CC: JPAC Members, Alternate Representatives, NAC/GAC Chairs, Janine Ferretti, Manon Pepin

DE / FROM: Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

OBJET / ASUNTO /RE: Request for information on issues in JPAC Advice to Council 01-09

This memorandum responds to your letter to Janine Ferretti of 1 February 2002, requesting information in preparation for the JPAC regular session on 8 March. Specifically, you asked for information regarding “actual experience 1) relating to limiting the scope of submissions; and 2) providing the Parties an opportunity to comment on work plans, including any comments received from the Parties on work plans for the factual records the Secretariat is currently preparing.” We hope the information below will be useful for your upcoming meeting. Noting that the Council recently authorized public reviews in response to JPAC Advice to Council 01-09, we would be happy to provide information relevant to any such public reviews at the appropriate time.

1. Scope of submissions

The Secretariat has recommended factual records for eleven submissions since it began to implement Articles 14 and 15. The Council instructed the Secretariat to prepare factual records for eight of those submissions and voted against preparation of a factual record for one of them. Factual record recommendations are now pending for SEM-97-002 (Rio Magdalena) and SEM-00-005 (Molymex II). The following is a summary of language relating to the scope of factual records in Council Resolutions instructing the Secretariat to prepare factual records.

1.1. Language regarding retroactive application of the NAAEC

First, the Council has always included the following language when it has instructed preparation of factual records: *"TO DIRECT the Secretariat, in developing the factual record, to consider whether the Party concerned 'is failing to effectively enforce its environmental law' since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record."* This instruction apparently stems from concerns regarding retroactive application of the NAAEC.

1.2. Language regarding pending proceedings

Second, in BC Hydro, Council included the following instruction:

TO FURTHER DIRECT the Secretariat, in developing the factual record, not to consider issues that are within the scope of the pending judicial proceeding before the British Columbia Court of Appeal in R. v. British Columbia Hydro and Power Authority, specifically those issues relating to the B.C. Hydro facilities in the Bridge River hydroelectric system, comprising the Lajoie, Terzaghi, and Seton dams and their respective reservoirs.

This instruction stems from the Article 14(3)(a), which requires the Secretariat to proceed no further if the matter raised in a submission is the subject of a pending judicial or administrative proceeding.

1.3. Language instructing factual records on specific cases despite broader allegations

Third, the Council included instructions in Council Resolutions 01-08 (SEM-97-006, Oldman River II), 01-10 (SEM-99-002, Migratory Birds), 01-11 (SEM-98-004, B.C. Mining) and 01-12 (SEM-00-004, B.C. Logging) to prepare factual records regarding specific cases raised in the submissions, but did not include instructions regarding allegations in each of those submissions of widespread failures to effectively enforce environmental laws. For each of those four submissions, the Secretariat had recommended preparing factual records in regard to the widespread allegations of failures to effectively enforce. The Secretariat is currently developing factual records in accordance with the Council's instructions.

The Secretariat's recommendations for those four submissions were based, first, on the Secretariat's conclusion "that Articles 14 and 15 apply both to submissions alleging failures to enforce effectively in regard to particularized incidents and to submissions alleging failures to enforce effectively more broadly or systemically" [SEM-00-004 (BC Logging), *Article 15(1) Notification* (27 July 2001)]. The Secretariat's analysis of the scope of Article 14, made in the Article 15(1) recommendation for SEM-99-002 (Migratory Birds), was as follows:

One possible view is that the citizen submission process is reserved for assertions of particularized failures to effectively enforce. Under this view, a factual record would be warranted only when a submitter asserts that a Party is failing to effectively enforce with respect to one or more particular facilities or projects. This view of the Article 14 process, in short, reads the opening sentence of Article 14(1) to confine the citizen submission process to asserted failures to effectively enforce with respect to particular facilities or projects. Under this view, assertions of a wide-ranging failure to effectively enforce that do not focus on individual facilities or projects would not be subject to review under the citizen submission process.

The text of Article 14 does not appear to support limiting the scope of the citizen submission process in this way. The opening sentence of Article 14 establishes three specific parameters for the citizen submission process. It thereby limits assertions of

failures to effectively enforce to those meeting these three elements. First, the assertions must involve an “environmental law.” Next, they must involve an asserted failure to “effectively enforce” that law (the assertion may not focus on purported deficiencies in the law itself). Third, assertions must meet the temporal requirement of claiming that there is a failure to effectively enforce.

The Parties’ inclusion of these three limitations on the scope of the Article 14 process reflects that they knew how to confine the scope of the process and that they decided to do so in specific ways. The Parties could have limited the species of actionable failures to effectively enforce to either particularized incidents of such, or to asserted failures that are of a broad scope, in the same way that they included the limits referenced above. They did not do so. The fact that the Parties did not limit assertions to either particularized incidents or to widespread failures to effectively enforce provides a strong basis for the view that the Parties intended the citizen submission process to cover both kinds of alleged enforcement failures. Thus, the text of the opening sentence of Article 14(1) supports the view that a submission may warrant preparation of a factual record, regardless of the scope of the alleged enforcement failure, so long as the submission focuses on an asserted failure to effectively enforce an environmental law.

Article 14(1)(a)-(f), which establishes additional limits on the types of submissions subject to review under the Article 14 process, similarly does not reflect an intent to limit submissions to asserted failures to effectively enforce that focus exclusively either on particularized incidents or on asserted failures that are broad in scope. These provisions create certain threshold requirements that appear equally applicable to a submission focused on either type of asserted failure to effectively enforce (particularized incidents or widespread failures). For example, either type of submission must be in writing in an appropriate language (Article 14(1)(a)), clearly identify the submitter(s) (Article 14(1)(b)), and have been filed by an eligible entity (Article 14(1)(f)). Similarly, the requirement that a submitter provide sufficient information for the Secretariat to review the submission (Article 14(1)(c)) and that the submission appear to be aimed at promoting enforcement rather than at harassing industry (Article 14(1)(d)) are potentially relevant both to an alleged particularized failure and to an alleged widespread enforcement failure. Finally, the submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicate the Party’s response, if any (Article 14(1)(e)). None of these requirements reflects a direct, or even an indirect, intent to exclude submissions that focus on alleged failures to effectively enforce involving particularized incidents or submissions that focus on alleged failures to effectively enforce that are broad in scope.

Moreover, in deciding whether to request a response from a Party, Article 14(2) of the NAAEC directs the Secretariat to be guided by whether a submission “raises matters whose further study in this process would advance the goals” of the Agreement. The goals of the NAAEC are ambitious and broad in scope. These goals include, for example, “foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations,” as well as “enhanc[ing] compliance with, and enforcement of, environmental laws and regulations.”

Assertions that there is a failure to enforce with respect to a single incident or project may raise matters whose further study would advance these goals. Indeed, the Secretariat has concluded that such assertions merit developing a factual record in several instances and the Council has concurred. But also, assertions that the failure to enforce extends beyond a single facility or project portend, at least potentially, a more extensive or broad-based issue concerning the effectiveness of a Party's efforts to enforce its environmental laws and regulations. In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat declines to adopt a reading of the Agreement that would yield such a result.

SEM-99-002 (Migratory Birds), *Article 15(1) Notification* (15 December 2000).

The factual record recommendations for the Oldman River II, B.C. Mining, Migratory Birds and B.C. Logging submissions also reflect, among other factors, the Secretariat's conclusion in each case that, consistent with Article 14(c), the submitters had provided "sufficient information to allow the Secretariat to review the submission."

2. Opportunity to comment on overall work plans

Council Resolutions 01-08, 01-09, 01-10, 01-11 and 01-12, all dated 16 November 2001, all contain the following instruction: "*TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan.*"

None of the three previous Council resolutions instructing the Secretariat to prepare factual records (i.e., for the Cozumel, B.C. Hydro and Metales y Derivados submissions) contained such an instruction. However, Council Resolution 00-03 (May 2000), regarding the Metales y Derivados submission, contained the following preambular language: "*NOTING that the Secretariat will give the Parties advance notice of its overall plan for gathering relevant facts.*"

Neither the NAAEC nor Articles 14 and 15 Guidelines directly discuss preparation of work plans or opportunities to comment on them. Nonetheless, in implementing the 16 November resolutions, the Secretariat took note of other relevant NAAEC provisions. For example, at a later stage in the factual record process, Article 15(5) requires the Secretariat to submit draft factual records to Council so that the Parties may comment on their accuracy. Article 15(4) states: "*In preparing a factual record, the Secretariat shall consider any information furnished by a Party...*" Article 11(4) states: "*In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the*

responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.”

Further, in following the Council’s instructions, the Secretariat took into account its prior practice in preparing overall workplans. The Secretariat’s prior practice had been to prepare overall work plans for factual records, and in the case of Metales y Derivados, the Secretariat provided the work plan to the Parties prior to executing it.

Finally, the Secretariat was cognizant of Council Resolution 01-06, which states that the Council “*COMMITTS to making best efforts, and to encourage the Secretariat to make best efforts, to ensure that submissions are processed in as timely a manner as is practicable, such that ordinarily the submission process will be completed in no more than two years following the Secretariat’s receipt of a submission.*”

Accordingly, in implementation of the 16 November resolutions, the Secretariat prepared work plans for each of the five factual records, using the work plan for the Metales y Derivados factual record as a general model. All five overall work plans were completed, provided to the Parties and posted on the CEC web site by 15 December 2001. Each plan noted that implementation of the work plan would begin no earlier than 15 January 2002. This one-month period provided the Parties and others an opportunity to comment on the work plans prior to their execution.

The Secretariat received comments from Canada on 14 January 2002, and from the United States on 28 January 2002. As you requested, these comments are attached. Consistent with Article 15(4) and Guideline 11.1, the Secretariat has considered, and will continue to consider, these comments as it proceeds with the factual record process.