

September 22, 2000

Regina Barba
Chair, Joint Public Advisory Committee
393 St. Jacques West, Suite 200
Montreal, Quebec

Dear Ms. Barba:

I have attached my comments (in Word and WordPerfect) with respect to the JPAC's review of the history of the Article 14/15 submissions procedure. My comments are based upon my experience with the procedure, which I will describe briefly in this cover letter.

In 1993, I participated in the negotiation of the North American Agreement on Environmental Cooperation as an attorney-adviser with the U.S. Department of State. After leaving the State Department in 1994 to work for a private law firm, I helped the Environmental Defense Fund prepare comments in 1995 on the 14/15 guidelines, and I later worked as a consultant for the CEC on several issues, including an issue of interpretation concerning the submissions procedure.

In 1998, I left private practice and took a position as an assistant professor of law at Pennsylvania State University. The same year, I joined the National Advisory Committee (NAC) to the U.S. Representative to the CEC.

Since September 1999, I have been chair of the NAC. While on the committee, I have participated in the preparation of several advice letters from the NAC to the U.S. government concerning the submissions procedure. In January 1999, I attended the JPAC workshop on the submissions procedure as the representative of the NAC.

I have written an article on the submissions procedure, «A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the Commission for Environmental Cooperation» which is to be published this winter in the Ecology Law Quarterly, and from which many of the conclusions and suggestions in these comments are taken.

The U.S. NAC decided at its most recent meeting not to make collective comments to the JPAC. I am submitting these comments in my individual capacity and not on behalf of the other members of the NAC.

Very truly yours,

John H. Knox

September 22, 2000

COMMENTS ON LESSONS LEARNED FROM
THE HISTORY OF THE 14/15 SUBMISSIONS PROCEDURE
submitted by John H. Knox

The submissions procedure created by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is unique in international environmental law. No other procedure allows individuals to complain to a body of independent experts about governments' failure to effectively enforce their domestic environmental laws. Indeed, very few other international procedures of any kind allow individuals to request independent review of government behavior.

So it is not surprising that the 14/15 submissions procedure has occasionally been controversial. What has been perhaps more surprising is how well the procedure has worked. As intended, the procedure has allowed individuals to focus attention on potential problems in environmental enforcement and compliance – problems that might otherwise be overlooked.

Nevertheless, the first five years of experience with the procedure show that the procedure faces challenges. The procedure can only be successful if the Secretariat, the public, and the Parties all carry out their respective functions in ways that meet certain basic conditions:

1. The Secretariat must function neutrally, independently, and expeditiously, and consistently with the terms of the NAAEC.
2. Interested members of the public must bring appropriate submissions to the procedure and pay attention to its operation and results.
3. The Parties must provide adequate support for the procedure and must not undermine the procedure by, for example, trying to micromanage the Secretariat.

To date, most of those conditions have been met most of the time. Recent events have called into question, however, the nature of the Parties' support for the procedure. In the last two years, the Council: has amended the 14/15 guidelines to prevent publication of Secretariat's requests for factual records until after the Council has acted upon them; has rejected one Secretariat request for a factual record without explanation and postponed another request indefinitely; and has considered creating a governmental working group to oversee the Secretariat's work in the 14/15 procedure, including in particular its preparation of factual records.

Council Resolution 00-09 does not fully address the concerns raised by these actions, but by providing a key role to the Joint Public Advisory Committee, Resolution 00-09 does assure those interested in the procedure that the Council will take the views of the JPAC into account as it considers issues related to Articles 14 and 15. These comments are therefore intended to assist the JPAC in providing that advice. The comments are organized according to the roles played by the Secretariat, the public, and the Parties.

1. The Secretariat.

For the 14/15 procedure to be effective, the Secretariat must meet several conditions in carrying out its functions with respect to the procedure:

- a. The Secretariat must work neutrally, without bias towards or against submitters or Parties.
- b. The Secretariat must work independently, without looking for guidance to the Parties (beyond the decisions committed to the Council by Articles 15).
- c. The Secretariat's decisions and factual records must be carefully reasoned and in accordance with the terms of the NAAEC.
- d. The Secretariat must carry out its work expeditiously.

On the whole, the Secretariat has met these conditions to the extent possible. Its ability to meet these conditions in the future, however, faces the risk of being limited by two potential problems outside its control: micromanagement by the Parties and insufficient financial support.

The following comments examine each of these conditions more closely, in light of the history of the procedure over the last five years.

a. The Secretariat must work neutrally, without bias towards or against submitters or Parties.

A key requirement for the effectiveness of the procedure is that the Secretariat not be perceived as biased in favor of either submitters or Parties. The history of the procedure to date has shown that the Secretariat has not been biased in either direction.

The Secretariat has not shown any particular deference to states' suggested interpretations of the Agreement. For example, in the *Cozumel Pier* case, the Secretariat rejected Mexican interpretations of the NAAEC concerning retroactivity, harm, and pursuit of local remedies. See Recommendation of the Secretariat to Council for the Development of a Factual Record, SEM 96-01 (June 7, 1996). Similarly, in the *BC Hydro* case, the Secretariat rejected Canada's interpretation of the term "pending judicial or administrative proceeding" under Articles 14(3) and 45(3). See Recommendation of the Secretariat to the Council for the Development of a Factual Record, SEM 97-01 (April 27, 1998).

At the same time, the Secretariat has dismissed submissions by environmental groups that did not meet the requirements for admissibility. For example, the first two submissions received by the CEC, in 1995, alleged that the United States was failing to effectively enforce its environmental laws as the result of Congressional action. They urged the Secretariat to regard a legislative decision to suspend enforcement of environmental laws through withdrawal of

funding as a failure to effectively enforce those laws. The Secretariat rejected the submitters' arguments, concluding:

[T]he enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce on old one.

Determination Pursuant to Articles 14 & 15, SEM 95-02 (Dec. 8, 1995).

Similarly, the Secretariat has not accepted invitations by submitters to push its powers as far as they might extend when doing so would interfere with domestic judicial proceedings. In SEM 96-03 (*Oldman River I*), Canada said that a pending suit in Canadian court involved the same issues raised by the submission and argued that under Article 14(3) of the Agreement, the existence of this "pending judicial . . . proceeding" required the Secretariat to "proceed no further." See Letter from Sergio Marchi to Victor Lichtinger, SEM 96-03 (Jan. 10, 1997). Since the definition of "judicial or administrative proceeding" in Article 45(3)(a) includes only actions "pursued by the Party," the Secretariat correctly decided that Article 14(3) did not require the Secretariat to terminate the submission process. Determination Pursuant to Articles 14 & 15, SEM 96-03 (Apr. 2, 1997). But it also agreed with Canada that the issues being considered in the domestic case closely resembled the matters raised in the submission, and concluded that "the preparation of a factual record at this time presents a substantial risk of interfering with the pending litigation" and that the submission therefore did not justify developing a factual record.

In short, the Secretariat's decisions appear to be grounded on carefully reasoned legal interpretations of the Agreement rather than on fear of adverse reactions by, or the desire to curry favor with, either the Parties or the submitters. The result has been a generally high level of belief that the Secretariat is handling submissions appropriately and in accordance with the terms of the Agreement. Joseph DiMento and Pamela Doughman conducted a survey of participants in and observers of the CEC, and stated:

In general, respondents concluded that the response of the Secretariat to each of the submissions was appropriate. This did not mean that respondents were pleased with the Secretariat's response in all cases. Some respondents felt that while results were undesirable from the perspective of environmental protection, the Secretariat was constrained by the terms of the Agreement to process the submissions as it did.

Joseph DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 *Geo. Int'l Env. L. Rev.* 651, 695-96 (1998).¹

¹ The survey was of "members of the Council, the Secretariat, the JPAC, advisory groups in each of the participating countries, observers in each of the countries, business people,

Similarly, the report of the Independent Review Committee established to review the CEC after its first four years of operation concluded that “the decision-making by the Secretariat [in the submissions procedure] has been professional and appropriate.” Report of the Independent Review Committee, at 20 (June 1998).

b. The Secretariat must work independently, without looking for guidance to the Parties (beyond the decisions committed to the Council by Articles 15).

This condition is obviously related to the first condition. The Secretariat – and, more importantly, the procedure as a whole – will not be seen as neutral and objective if the same Parties that are the subject of submissions control the Secretariat’s consideration of them and its preparation of any factual records based on them.

The Secretariat has correctly avoided looking for guidance to the Council or the individual Parties, with the important exceptions of the decisions whether to authorize preparation of a factual record and whether to publish a factual record, which are committed to the Council in Article 15.

The problem here has rather been the Parties’ resistance to allowing the Secretariat to carry out its functions without detailed guidance from the Parties. *See* Section 3 below.

c. The Secretariat’s decisions and factual records must be carefully reasoned and in accordance with the terms of the NAAEC.

The quality of the Secretariat’s procedural decisions and factual records have received generally high marks. For example, after thoroughly analyzing its decisions to dismiss the first two submissions (those concerning the U.S. Congress’ riders suspending application of various environmental laws), Professor Kal Raustiala concluded that the decisions to dismiss the submissions were legally correct. *See* Raustiala, *International “Enforcement of Enforcement” Under the North American Agreement on Environmental Cooperation*, 36 *Virg. J. Int’l L.* 721, 757 (1996).²

Based on a more general review, the Independent Review Committee concluded that:

The record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well-reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the

environmental activists, academics and others (including people who support Commission efforts and performance as well as those who remain skeptical).” *Id.* at 690.

² Not too surprisingly, the submitters disagreed. *See* Tutchton, *The Citizen Petition Process Under NAFTA’s Environmental Side Agreement: It’s Easy to Use, But Does It Work?*, 26 *Env’tl. L. Rep.* 10018 (Jan. 1996).

Secretariat lack proper foundation.

Report of the Independent Review Committee, at 19 (1998).

d. The Secretariat must carry out its work expeditiously.

The 14/15 procedure can only be effective if it resolves submissions without undue delay. The CEC's record to date has been mixed, and there are signs that the Secretariat will need additional resources in order to handle submissions and factual records promptly.

The Secretariat resolved the first six submissions – those filed in 1995 and 1996 -- promptly, usually within a few months of the filing. In SEM 96-01, the one case of the six in which the Secretariat recommended preparation of a factual record, it did so only five months after the submission was filed.

As fourteen more submissions were filed in 1997 and 1998, the pace of processing the submissions slowed considerably, and a large backlog accumulated. Since September 1998, when the Secretariat created a separate unit on submissions, it has taken steps to reduce this backlog. It was assisted by the fact that only two submissions were received in 1999, allowing the Secretariat more time to work on those pending from earlier years. Nevertheless, one of the 1997 and three of the 1998 submissions are still awaiting Secretariat decisions on whether to recommend a factual record (SEM Nos. 97-02, 98-03, 98-04, and 98-05).

Not all of the delay in processing submissions has been due to the Secretariat. The delay in SEM 97-02, for example, appears to be because Mexico has not yet responded to a September 1999 request for further information. The Council did not take action on the Secretariat's requests to the Council to approve preparation of factual records in SEM 97-03 and 97-06 until May 2000, seven and ten months, respectively, after the Secretariat had made the requests.

Nevertheless, it seems clear that the Secretariat's resources are insufficient. Only two staff members in the Secretariat are assigned to the submissions unit. Two people probably cannot promptly dispose of the stream of submissions that will be filed in the next few years if the procedure remains fairly popular, much less the number that will be filed if its popularity grows.

Moreover, the number of requests for factual records, which has lagged far behind the number of submissions, is starting to increase as more submissions make their way through the procedure. The Secretariat recommended that the Council approve preparation of only one factual record in 1996 (SEM 96-01), none in 1997, and one in 1998 (SEM 97-01), but it recommended two in 1999 (SEM 97-03 and 97-06), and it has already recommended two this year (SEM 98-06 and 98-07). No less than *six* submissions are currently awaiting Secretariat determinations as to whether to recommend preparation of factual records (SEM 97-02, 98-03, 98-04, 98-05, 99-02, and 00-04). The one factual record currently being prepared (in SEM 98-07) might therefore be joined in the next year or so by up to seven more (counting SEM 98-07, which is awaiting Council decision on whether to approve preparation of a factual record). It is

likely that some of these submissions will be rejected by either the Secretariat or the Council, but even if only three of the submissions result in a factual record, the Secretariat's resources would be put under great strain.

Of course, the procedure should result in preparation of multiple factual records at the same time. The CEC has published only two factual records in four years, and one factual record every two or three years is clearly far too low a rate. But it seems highly doubtful that the Secretariat's present resources can handle preparation of the numbers of factual records that should be approved in the future.

Therefore, in the near future the Secretariat will need substantial additional resources to allow it to process submissions and prepare (or hire and oversee consultants that prepare) factual records expeditiously.

2. The Public.

To be successful, the submissions procedure must have public support. Interested members of the public must bring appropriate submissions to the procedure and must pay attention to its operation and results.

To date, the public has filed enough submissions to keep the procedure busy (but not too many to overwhelm it). And the public has shown a strong interest in the procedure, reacting sharply to perceived attempts to weaken the procedure – most recently in the run-up to the June 2000 Council meeting.

This support indicates that interested members of the public have confidence that the procedure is useful and effective enough to be worth using and protecting. Obviously, this confidence will disappear immediately if the procedure begins to be seen as ineffective because the Secretariat or the Council is no longer supporting it. But there is another threat to public support, which may be less obvious. If the procedure is not transparent to the public – that is, if documents and decisions are not publicly available – then the public may lose the knowledge necessary to oversee and support the procedure.

On the whole, the procedure's history to date indicates a very high level of transparency. Submissions, Secretariat procedural decisions, Party responses, and Council decisions have generally been made available to the public promptly, in accordance with the NAAEC and the 14/15 Guidelines. Nevertheless, there are some worrying signs that the procedure is becoming less transparent in important ways.

First, at the June 1999 Council session, the Council adopted revisions to the Guidelines, which included, in § 10.2, a requirement that the Secretariat keep a recommendation as to whether a factual record is warranted confidential until the Council has reached a decision on the recommendation, and that the Secretariat delay even letting the public know it has made such a recommendation until thirty days after it has notified the Council. The effect is to reduce the ability of the public to hear why the Secretariat believes that a factual record is justified until

after the Council has decided the question. The goal appears to be to shield the Parties from potentially embarrassing public scrutiny until the possibility of public pressure being brought to bear on the Council has passed.

Second, Mexico has designated as confidential part or all of its response to some submissions without providing a public explanation under § 17.3 of the Guidelines of the reasons for the confidentiality. *See* SEM 98-05, 98-07. In other cases the Mexican response is not available on the public registry at the CEC website, even though there is no indication that the response is confidential. *See* SEM 97-07, 98-06.

Third, an issue has arisen among the Parties and the Secretariat as to whether information gathered to prepare a draft factual record may be withheld from the public unless and until the Council votes to release the factual record to the public. The suggestion has apparently been made that such information should not be publicly released. In May 1999, the U.S. National Advisory Committee and Governmental Advisory Committee jointly wrote to Bill Nitze, the U.S. Alternate Representative to the Council, stating:

Our conclusion is that the NAAEC does not require the blanket withholding of information collected until the Council votes for the release of the final factual record. There may be circumstances in which it is appropriate for the Secretariat to withhold a limited category of information, such as proprietary information, draft factual records or other documents or portions of documents which set forth the analysis and deliberations of the Secretariat in resolving the issues in the submission. Other types of information, however, should be made available to the public. This conclusion is based upon the fact that there is no express language in the NAAEC which provides for the withholding of information in this manner.

In view of the foundational goals of the NAAEC to promote openness, transparency and public participation in the implementation of the Agreement, withholding information collected for a factual record would only serve to thwart its laudatory purposes. It could possibly have the additional effect of crippling the process by limiting the type of information that can be shared by the Secretariat or its experts with third parties whose input and views are necessary to complete the process. These individuals might not otherwise have access to the relevant information which is necessary for the full and informed input into the process. Only through providing the public with access to the underlying relevant information will the Secretariat be able to fully develop and analyze the issues associated with the factual record.

Letter of Sanford Gaines and Robert Varney to William Nitze (May 21, 1999).

Fourth, the Council gave no reasons for its decision in May 2000 to deny the Secretariat's recommendation to prepare a factual record in SEM 97-03 (Res. 00-01), and provided only minimal reasons for deferring SEM 97-06 (Res. 00-01). The transparency that is so important

throughout the implementation of the Agreement is crucial here. The Council must explain its decisions to overrule the Secretariat's judgment so that the public can understand and debate the merits of the decisions. Without such explanations, the Council's decisions will necessarily be perceived as arbitrary and biased, since Council members are inherently interested parties.

3. The Parties.

For the procedure to be successful, the Parties, acting through the Council, must support the procedure without trying to control it. The necessary support includes not only financial support – although obviously that it is important – but also what might be called *moral* support. The Parties must work with the procedure not in a grudging or half-hearted way that tries to comply only with the narrowest possible reading of the NAAEC, but rather in a way that is in accord with the spirit of the Agreement.

More often than not, the Parties have supported the procedure according to the spirit of the Agreement. But the history of the procedure indicates that the pressure to withdraw or limit that support increases as the procedure attracts more submissions and produces more requests for factual records. Filing a response based on an unreasonably narrow interpretation of the Agreement (for example, that a domestic action pursued by a private party falls within the Article 14(3) exception for actions “pursued by the [state] Party”) is an example of failing to comply with the spirit of the Agreement, as is designating an entire response confidential without providing an explanation under § 17.3 of the Guidelines.

As the number of submissions and Secretariat requests for factual records increases, the incentive also increases for the Parties to take control of the procedure away from the Secretariat by micromanaging the Secretariat's discretion in considering submissions and preparing factual records. The JPAC is familiar with the discussions among the Parties in the last two years, which culminated in the proposal to establish a working group to oversee Secretariat preparation of factual records. The JPAC is also familiar with the strong resistance to this proposal and the strong support for Secretariat independence expressed by members of the public before and during the June 2000 Council/JPAC session.

Nevertheless, it may be useful to reiterate the respective roles of the Secretariat and the Council in reviewing submissions and preparing factual records, to help to explain why micromanagement of the Secretariat by the Parties is contrary to the letter and spirit of the NAAEC.³

The Agreement clearly provides the Secretariat and the Council alternating roles in the submissions procedure. The Secretariat is responsible for administering the threshold requirements in Article 14(1) and weighing the factors in Article 14(2) in deciding whether to request a Party response; under Article 14(3), the individual Party concerned is responsible for responding; under Article 15(1), the Secretariat is responsible for deciding whether to

³ The following comments borrow heavily from the advice provided in May 2000 by the U.S. National Advisory Committee to the U.S. Representative to the CEC.

recommend the development of a factual record; under Article 15(2), the Council is responsible for deciding whether to instruct the Secretariat to do so; the Secretariat is responsible for preparing the factual record and submitting a draft factual record to the Council under Articles 15(4) and 15(5); under Article 15(5), the Parties are responsible for providing comments on the draft; the Secretariat is responsible for incorporating such comments as it deems appropriate under Article 15(6); and the Council is responsible for deciding whether to make the final factual record publicly available under Article 15(7).

The complex procedure detailed in the Agreement delineates the respective responsibilities of the Secretariat and the Council. The Agreement's text and structure make clear, for example, that it is for the Secretariat, and not for the Council, to decide how best to prepare a factual record within the requirements of the Agreement. It was therefore deeply troubling that the Parties considered creating a working group that could oversee, among other aspects of the submissions procedure, preparation of factual records. The Parties seemed oblivious to the inherent conflict of interest they would have in overseeing preparation of factual records concerning the effective enforcement of their own environmental laws.

At the risk of repeating the obvious, Article 15 specifically states that it is the Secretariat that "shall prepare a factual record" if the Council instructs it to do so, and Article 15 specifically provides the Secretariat authority to consider *any* relevant information submitted by the public or the JPAC or developed by the Secretariat or independent experts. Article 21(1) *requires* each Party to provide such information as the Secretariat "may require, including: (a) promptly making available any information in its possession required for the preparation of a . . . factual record, . . . and (b) taking all reasonable steps to make available any other such information requested." It is impossible to read into these provisions a role for the Council in overseeing preparation of factual records. More fundamentally, such a role would be inconsistent with the object and purpose of the submissions procedure. The procedure is designed to produce impartial reports on highly sensitive topics – whether a Party has failed to effectively enforce its own law. By their nature, the Parties will always be interested parties with respect to the submissions procedure, since it is their enforcement practices that the procedure scrutinizes. They therefore cannot oversee the Secretariat's preparation of factual records without undermining the procedure's credibility and effectiveness.

That the Secretariat prepares factual records without detailed Council oversight may cause the Council some discomfort. But to the extent that the discomfort results from the fear that the Secretariat may prepare embarrassing reports, it is exactly what the Agreement contemplates will result from the Article 14-15 procedure. That kind of discomfort cannot legitimately provide a basis for the Council to impose checks on the Secretariat's discretion.

The Council may instead believe that it must provide some oversight over the Secretariat in order to avoid the possibility that the Secretariat may abuse its discretion or even act contrary to the Agreement. Such a belief would not justify overseeing the preparation of factual records (or any other element of the procedure committed to Secretariat discretion) for two reasons.

First, there is no reason to believe that the Secretariat has acted inappropriately, much

less contrary to the letter or spirit of the Agreement.

Second, any fears of Secretariat abuse of discretion may be addressed through methods less draconian than ongoing Party oversight of the Secretariat. In particular, the Agreement provides recourse for the Council should the Secretariat abuse its role. For example, Article 21(2) provides a way for a Party that “considers that a request for information from the Secretariat is excessive or otherwise unduly burdensome” to seek a decision from the Council limiting the scope of the request. Moreover, if the Council believes that the Secretariat has overstepped its bounds in its treatment of a submission, it has the discretion under Article 15(2) not to approve the Secretariat’s request to prepare a factual record. If a Party believes that the Secretariat’s preparation of a factual record has been improper in some respect, it has the ability to provide comments on the draft factual record before it is submitted to the Council. Finally, under Article 15(7), the Council has the ability to decide not to publish a factual record, or to publish it with whatever accompanying remarks that it sees fit to make. The Council’s judicious exercise of these powers, combined with public communication of the reasons for its decisions, would go further in addressing any legitimate concerns regarding abuse of discretion by the Secretariat than would the process under consideration by the Parties.

More generally, the Parties could usefully consider ways to increase the cooperative, rather than the confrontational, aspects of the 14/15 procedure. In this respect, the difference between Article 13 reports and Article 15 factual records is instructive. Article 13 reports concern topics that are no less sensitive than those addressed by Article 15 factual records. They have proved far less controversial, however. One key difference has been that Article 13 reports have been undertaken with a view toward identifying not only problems but also ways that the Parties can cooperatively address them, as the Silva Reservoir and San Pedro River reports illustrate.

Article 15, by contrast, has sometimes been seen as providing a potential basis for complaints under Part Five of the NAAEC, which could lead to confrontation and even sanctions rather than cooperative solutions. But nothing in Article 15 or the Agreement as a whole establishes a fixed connection between Article 15 factual records and Part Five dispute resolution. Factual records would be more useful, and should be 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. The Parties already have established extensive institutional cooperation in enforcement matters under CEC auspices (e.g., the Enforcement Working Group) on which such discussions could build.

One important lesson from the first five years of the CEC is that the threat of Part Five sanctions is not only useless, it may be worse than useless, as a way to support an effective submissions procedure. The JPAC should consider and should encourage the Council to consider ways in which an institutionalized system of cooperation, rather than confrontation, could be used to follow up factual records. The result might be to reduce Parties’ concern over the recommendation and preparation of factual records.