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COMMENTS TO JOINT PUBLIC ADVISORY COUNCIL
ON SEM MODERNIZATION TASK FORCE
DRAFT NEGOTIATION TEXT

John H. Knox
Professor of Law
Wake Forest University

Thank you for the opportunity to comment on the SEM Modernization Task Force's Draft Negotiation Text, which would amend the SEM Guidelines. I have followed the CEC and its submissions procedure since its inception, nearly 20 years ago. In 1993, I participated in the negotiation of the North American Agreement on Environmental Cooperation as an attorney at the U.S. Department of State, I chaired the U.S. National Advisory Committee between 1999 and 2005, and I have written articles and co-edited a book on the CEC. These comments are made in my personal capacity.

In its Advice to Council 11-04 (Dec. 7, 2011), the Joint Public Advisory Committee advised that the focus of the Council, "through the SEM Modernization Task Force, should be on the timeliness and accessibility of the process, on giving more deference to the Secretariat's independent recommendations and interpretations in the process, and on follow-up to factual records." These are three highly important goals. The Task Force's Draft Negotiating Text, if adopted, would improve the timeliness of the submissions procedure. However, it would undermine Secretariat independence and it would do nothing to promote follow-up to factual records.

The following sections address each of these areas. Where warranted, they suggest improvements to the proposed text.

I. TIMELINESS

As the JPAC knows, the submissions procedure has become very slow in processing submissions and preparing factual records.¹ Historically, the length of the entire process, from initial submission to final publication of a factual record, has averaged about four and one-half years. As long as that period of time is, recent decisions are causing the average to lengthen even further. All three factual records currently in preparation resulted from submissions filed more than seven years ago. One, *Lake Chapala II*, was filed *nine* years ago.

Much of this delay is due to the Council. From 1996 to 2004, the Council considered 16 recommendations for factual records and took, on average, about five months to decide whether

¹ The following description of the length of time taken by the CEC is taken from John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 48 *Tex. Int'l L. J.* ___ (2012).

to authorize them. Since 2004, the Council has decided whether to approve only five recommendations, and its decisions have come, on average, more than *two years* after the Secretariat recommendations. And the trend is worsening. The three most recent decisions, in *Lake Chapala II* (2008), *Coal-fired Power Plants* (2008), and *Species at Risk* (2010), were made 36, 30, and 39 months after the Secretariat recommendations. And the Council has still not decided whether to authorize preparation of two factual records (*Hermosillo II* and *Ex Hacienda II*) that were recommended by the Secretariat in April 2007 and May 2008, five and four years ago, respectively.

The Council has also taken longer to decide whether to make the final factual record public. Here, as you know, the NAAEC provides a specific guideline: that the Council must decide “normally” within 60 days after the Secretariat submits the report. Except for the decision on the very first factual record, which exceeded that limit by about a month, the Council complied with the 60-day rule for the first ten factual records, through 2004. For the five more recent factual records, the Council has violated the rule every time, averaging more than five months and twice taking seven.

The Secretariat has also contributed to the recent delays. It averaged less than 16 months to prepare each of the first nine factual records, those issued before 2004. The next six, issued from 2004 to 2008, averaged more than 27 months, an increase, on average, of almost a year. Again, the situation has gone from bad to worse: the factual records currently in preparation are going to exceed the previous averages by far. The Secretariat presented one of the three pending reports, *Quebec Autos*, in draft to the Council in March 2011, nearly five years after it was authorized in June 2006. Meanwhile, the Secretariat has spent more than three years each on the other two pending factual records, *Lake Chapala II* and *Coal-fired Power Plants*, without presenting a draft to the Council. The Secretariat’s delays appear to be extending to earlier stages in the submission procedure as well. Since the beginning of the process, it has taken an average of about 4.5 months to decide whether to request a response from a party. For the submissions filed in 2010 and 2011, it has taken an average of over eleven months to decide whether a response is warranted.

The periods of time proposed by the SEM Task Force would shorten these delays enormously, and in general they should be welcomed. I have attached a chart comparing the proposed timeline of the SEM Task Force with three other timelines: (a) the timeline recommended by the JPAC in its “Lessons Learned” report of 2001; (b) the historical average time actually taken by the CEC; and (c) recommendations David Markell and I made in a recent article.² The task force recommendations are generally in line with the JPAC’s 2001 report and our recent suggestions. If they were adopted, the entire time between submission and publication of the factual record would be about 27 months, which is only slightly longer than the JPAC’s

² John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 48 Tex. Int’l L. J. ___ (2012).

2001 recommendation of 24 months.

Some of the new deadlines would be especially valuable. For example, they would indicate that the Council would make its decision on a Secretariat recommendation within 60 working days, or about three months. This is the same period recommended by the JPAC in 2001, and would shorten the process by about two years over the length of time taken in recent years.

One of the deadlines, however, should be adjusted. As noted, the NAAEC itself states that the final factual record shall be made publicly available by a two-thirds Council vote, “normally within 60 days following its submission.” NAAEC, art. 15(7). The revised guidelines keep the reference to 60 days, but because all of their time periods are expressed in *working* days, the effect is to lengthen the time for the Council to decide whether to publish a factual record to about three months. In practice, the Council never has decided not to publish a factual record, and it never should so decide. It does not need to lengthen the period and, in any event, it cannot lengthen it in this way without a formal amendment to the NAAEC, which does not refer to “working days,” and clearly did not intend its reference to “days” to mean “working days.”

With this exception, the proposed guidelines would greatly improve the timeliness of the procedure, if adopted *and implemented*. It cannot be emphasized too much that the problems of untimeliness in recent years have not been due to unclear language in the Guidelines, but rather to action, or inaction, by the Council and the Secretariat. **The most important step the Council could take to restore faith in a more timely and responsive submissions procedure would be to immediately approve the pending Secretariat requests for factual records. Similarly, the Secretariat should immediately take the actions necessary to submit the pending factual records to the Council.**

II. CONFORMITY TO THE AGREEMENT, AND SECRETARIAT INDEPENDENCE

Unfortunately, most of the proposed changes to the Guidelines are not as helpful as those concerning timeliness. Many would reduce the ability of the Secretariat to use its judgment in making the decisions allocated to it under the NAAEC. The following comments address those proposals in order.

5.6 As it is currently drafted, this section suggests that Submissions “address the factors for consideration identified in Article 14(2) of the Agreement,” and then paraphrases those provisions. It thus responds to the boldface question that heads Section 5 of the Guidelines: **“What criteria must a submission address?”**

The proposed revisions drop the reference to what criteria the submission should address, instead replacing it with: “*Under Article 14(2), the Secretariat is to be guided by . . .*” This change makes the provision redundant with Section 7.3, which already sets out the provisions of Article 14(2).

Far worse, the proposal misrepresents the provisions of NAAEC art. 14(2), which sets out four factors for the Secretariat to consider in deciding whether a submission merits a response from a Party. One of the factors is whether, in the words of the NAAEC, “private remedies available under the Party’s law have been pursued.” Art. 14(2)(c). The proposed revision would add “. . . have been pursued *by the Submitter.*” This is not in the Agreement, and it would impermissibly change the meaning of the Agreement.

A far better amendment to this paragraph would be to leave the initial language (“Thus, the Submission should address”) unchanged, and replace the current paraphrase with the exact words of Article 14(2)(c). Trying to paraphrase them is an endeavor that can only lead to confusion.

7.3 This provision currently simply repeats the exact language of Article 14(2). Again, the proposed revisions would add “*by the Submitter*” after “. . . have been pursued.” Here, the change is even more egregious, since the language as it exists is the language of the Agreement itself.

7.5 Again, the language “*by the Submitter*” is added, and again it should be removed. The other changes to this section would also make it more difficult for submissions to be considered. None is necessary, and they should all be rejected.

9.6 The proposal would instruct the Secretariat “to limit its consideration to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record.” Again, the effect would be to limit the Secretariat’s discretion, and the intent seems to be to try to avoid conclusions that could embarrass the Parties. This is not the intent of the Agreement. The submissions procedure is designed to shed light on potential failures to effectively enforce domestic environmental laws. Trying to prevent the Secretariat from examining the laws at all is practically impossible to reconcile with that purpose. The JPAC should strongly oppose changes like this, which attempt to amend the NAAEC without going through the formal process for doing so, by limiting the Secretariat’s discretion beyond the limits imposed by the NAAEC itself.

9.7 Again, this addition is not guidance to the submitters, but instructions to the Secretariat. Again, this is not the purpose of the Guidelines, and again, the Parties cannot amend the Agreement in this way.

To be clear: this amendment would allow a Party to short-circuit the entire submissions procedure whenever it chooses, merely by informing the Secretariat that its failure to effectively enforce is excused by Article 45(1). This was never the intent of the Agreement. The JPAC should strongly oppose this proposal.

10.4 This revision would refer to the Council's practice of choosing for itself the scope of a factual record, rather than voting up or down on the Secretariat's proposal. This practice has no basis in the NAAEC, and it has been strongly and repeatedly criticized by the JPAC in the past. The JPAC should oppose it again here.

12.1 Currently, the paragraph sets out what is included in a factual record, including "the facts presented by the Secretariat with respect to the matters raised in the submission." The proposed revisions would delete this language. There is no reason to do so – in fact, that is the most important information included in the factual record, as the very next paragraph, which is proposed to be added, recognizes.

12.2 This paragraph would state that factual records "are not to include conclusions regarding whether a Party is failing to effectively enforce its environmental law or recommendations relating to future Party or submitter action." Again: there is no basis in the NAAEC for preventing the Secretariat from making such recommendations. The Parties' fear that they might be shown to have failed to effectively enforce their domestic law is not some undesirable by-product of the procedure – it is the point of the procedure. Again, the JPAC should strongly oppose this language.

15.1 This paragraph sets out the information that the Secretariat includes in the public registry. The revisions delete the information that "the final factual record has been provided to the Council." There is no good reason not to inform the public of this information. Without it, the public will not be able to tell whether the Secretariat has met the suggested time period discussed above, or whether delays are the result of the Secretariat or the Council. In addition to opposing this change, the JPAC should suggest that the registry should also include notification of the provision by the Secretariat of the *draft* factual record.

III. FOLLOWING UP FACTUAL RECORDS

Together with the proposed revisions to the Guidelines, the Task Force included a set of "Memos on Proposed Changes to the Guidelines." Most of the memos put forward particular changes. Memorandum 18, on "Follow-up on Concluded Submissions," purports to address recent JPAC advice that recommends following up factual records.

Memorandum 18 states that each Council member “as necessary, would provide one update” on enforcement actions on any submission that concluded at or beyond the party response stage, at the first Council session two years after such conclusion (or earlier if the Council member so chooses), and to use the joint *in camera* session of the annual Council session to allow each Council member to provide an update to the JPAC.

It is hard to imagine a weaker form of follow-up. The Council member would quietly report on its own enforcement. No other participation, from the submitters or others affected by the alleged failure to effectively enforced, is contemplated. It is noteworthy that even this follow-up, as weak as it is, has previously been suggested by Council but never implemented. In its 2005-2010 Strategic Plan, the Council committed to “exploring ways for each Party to communicate how matters raised in factual records may be addressed over time.”

It should be obvious why follow-up cannot be left to this type of unilateral reporting. Although each government does have the resources and the responsibility to ensure that their laws are effectively enforced, and they are well-placed to explain what they did (or did not do) in response to a factual record, they may find it difficult to be objective in evaluating how successful their response was at addressing the problems, if any, identified by the report. And the same considerations that cause them to resist authorizing and publishing potentially embarrassing factual records in the first place will lead them to avoid critical reviews of their response to submissions and factual records.

The appropriate CEC organ to follow up factual records is the JPAC itself. The JPAC is experienced in facilitating public engagement; it is objective, with no stake in whether a particular factual record is embarrassing to a government or whether it reveals flaws in the Secretariat’s or the Council’s handling of the submissions procedure; and it can and already does provide recommendations to the Council and the Secretariat that are taken seriously.

In the article cited above, David Markell and I recommended that the JPAC should institute a procedure for following up factual records. (The following paragraphs are taken from that article.) In 2008, the JPAC approved a plan to undertake just such a procedure. Specifically, it stated that it would:

begin this ongoing, yearly initiative by selecting, at minimum, one factual record each year and soliciting the views of interested parties (NGOs, citizens, government, etc.) concerning:

- o steps taken by a Party and relevant others regarding the enforcement of environmental laws following the publication of the factual record;
- o progress made in addressing the enforcement issues identified in the factual record

- within a certain period of time after the publication of the factual record; and
- o improvement in the general underlying environmental conditions and concerns that led to the submission.

The Council responded that “any such action would be beyond the scope of the NAAEC.” It stated that the factual record is the last step in the submissions procedure “as described in Articles 14 and 15” and “any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC.” This response misunderstands the issue. The question is not whether the NAAEC requires the parties to follow up factual records, but whether it authorizes the JPAC to examine their effects. It clearly does. Article 16 of the NAAEC authorizes the JPAC to “provide advice to the Council on any matter within the scope of this Agreement . . . and on the implementation and further elaboration of this Agreement.” Effective enforcement of environmental laws is indisputably within the scope of the agreement. Indeed, that is what the agreement is (almost) all about. It is indisputable that factual records are relevant to the effective enforcement of environmental laws. Indeed, that is what factual records are (almost) all about.

After the Council’s 2008 letter, the JPAC has not pursued its plan to follow up factual records. It should reverse course, inform the Council that it respectfully disagrees with the Council’s views, and proceed to choose three factual records to review, one for each country.

CEC Submissions Procedure Timelines

	<u>JPAC Rec.</u> months	<u>Historical Average</u> months	<u>SEM Task Force</u> working days/months		<u>Knox/Markell</u> months
Secretariat Determination	2	5 11 ('10-11)	60	3	2 or 3
Party Response	2	2-3	30/60	1.5/3	2 or 3
15(1) Determination	1 or 2	11	120	6	8 or 12
Council Decision	3	5 ('96-04) over 24 ('05-present)	60	3	3
Draft FR	13	16 ('96-03) over 36 ('04-present)	180	9	12 or 18
Party Comments			45	2	
Final			30	1.5	
Publication	2	2 ('96-04) 5 ('05-present)	60	3	2
Total	24	54 33 ('97-02) 60 ('03-08) 95 and counting (current)	585	27	29 to 41