

December 31, 2010

<b>Committee Members</b>	
Karen Chapman <i>Ohio</i>	The Honorable Lisa P. Jackson Administrator U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460
Timothy Bent <i>Tennessee</i>	
Diana Bustamante <i>New Mexico</i>	Dear Administrator Jackson,
Michael Dorsey <i>New Hampshire</i>	The National Advisory Committee (NAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) held its thirty fourth meeting on November 17 <sup>th</sup> , 2010, in New Orleans Louisiana.
Barry Featherman <i>Washington, DC</i>	The NAC members are grateful for the assistance your staff provided to prepare for this meeting and wish to recognize Cynthia Jones-Jackson, Oscar Carrillo, Stephanie McCoy, Lois Williams and Mark Joyce of the Office of Federal Advisory Committee Management and Outreach (OFACMO) for organizing and arranging logistics for our meeting. The NAC is also grateful to Jeff Wennberg, Chair of the Government Advisory Committee (GAC), for helping structure the agenda. The NAC acknowledges the unprecedented nature of this meeting, as it was our first time conducting a meeting in conjunction with the meeting of the Joint Public Advisory Committee (JPAC). Your staff was unflagging in their assistance preparing for such a meeting and extremely helpful arranging for our time spent together around the deliberations of the JPAC.
Kevin Gallagher <i>Massachusetts</i>	
Brian Houseal <i>New York</i>	
Raymond Lozano <i>Michigan</i>	
David Markell <i>Florida</i>	The NAC also wishes to extend our utmost gratitude to Glenn Wright, JPAC chair, as well as all the members of the JPAC, for welcoming the NAC and GAC members to their meeting. Not only was this the first meeting where JPAC, NAC and GAC members met together, it was also the first meeting for most of the NAC and GAC, almost all of whom are new members beginning a term of service.
Cecilia Martinez <i>Delaware</i>	
Robert Pastor <i>Washington, DC</i>	The NAC members expressed great appreciation for the excellent presentations arranged for the JPAC meeting. Stewart Elgie's wonderful overview in the morning helped set the stage for discussions on Greening the Economy, Dinah Bear provided an excellent history and background on the Transboundary Environmental Impact Assessment (TEIA), and the projects discussed by Alejandro Romay of JUMEX, Linda Stone of Global Green USA, and David Abasz with Agricultural and Natural Resource Sciences at the University of Minnesota were innovative and enlightening, providing wonderful "real-world" examples of the goals set forth for the CEC by the Council.
Ana Romero-Lizana <i>Missouri</i>	
Gail Small <i>Montana</i>	The NAC also wishes to sincerely thank CEC Executive Director Evan Lloyd for his comprehensive presentation to the committees, and Sylvia Correa for sharing her unique perspective with regard to the role of the NAC and CEC operations, and the relationship between NAC and your office.

The NAC is also very grateful to Assistant Administrator Michelle DePass for providing a response letter dated September 14, 2010, to the NAC advice letter of October 26, 2009. Several of the NAC members expressed a desire to comment on certain points made in that letter regarding the Submissions on Enforcement Matters, and we have included those comments in our advice letter.

We understand the pressing nature of the commitments that you and your staff face, but urge that whenever possible you or Ms. DePass make every attempt to meet with us in person, as it is our mandate to advise you and there is really no substitute for face to face interaction.

I would like to add as a personal aside that I so very much enjoyed meeting both you and Michelle DePass in Guanajuato, and look forward to seeing both of you again during Council Session, and whenever it might be possible for you to attend the NAC meetings.

We extend our comments and advice to you in an attachment to this letter in hopes that you will find it useful and relevant in your deliberations and work – both as a member of the Council to the North American Agreement on Environmental Cooperation and as you interact with other federal agencies and the public. The NAC members strive to provide timely and useful advice that will aid in supporting the Commission for Environmental Cooperation and its mission and goals.

Thank you in advance for your consideration of our advice.

Very truly yours,



Karen M. Chapman  
Chair, National Advisory Committee

cc: Michelle DePass, Assistant Administrator, Office of International & Tribal Affairs  
Cynthia Jones-Jackson, Director, Office of Federal Advisory Committee Management and Public Outreach  
Jeff Wennberg, Chair, U.S. Governmental Advisory Committee  
Oscar Carrillo, Designated Federal Officer  
Irasema Coronado, Chair, Joint Public Advisory Committee  
Evan Lloyd, Executive Director, Commission in Environmental Cooperation  
Members of the U.S. National Advisory Committee

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

**Advice 2010-1 (December 21, 2010):  
Response to EPA letter dated September 14<sup>th</sup>, 2010  
Submissions on Enforcement Matters**

The NAC appreciates the EPA September 14, 2010 response letter referenced above. The NAC very much supports the Council's plan to renew, revitalize and refocus the CEC as an effective organization, which EPA references in its letter. The significance of the SEM process in the public's mind makes it even more important that the Council takes steps to improve the process, since lack of confidence in the process likely undermines the reputation and effectiveness of the CEC more generally. Because of the longstanding concerns with how the Council is implementing the SEM process, the need to renew, revitalize, and refocus the SEM process seems indisputable.

Respectfully, the NAC's view is that the September 14, 2010 EPA letter does not truly grapple with the very real concerns about the SEM process that the NAC, JPAC, Independent Review Committees, outside reviewers, and others have highlighted in their assessments of the process over the past several years. At the end of this section we provide six recommendations that we believe are essential to renewing, revitalizing and refocusing the SEM process.

Citizens' declining use of the process to raise concerns about U.S. enforcement policies and practices strongly suggests that citizens have lost confidence in the process, highlighting the need for revitalization. The SEM process has been active since 1995, when the first submission was filed. While citizens used the process relatively actively in its early years to raise concerns about U.S. enforcement, citizen use for this purpose has basically dried up. Six submissions involving the U.S. were filed during the first five years (1995-1999), while three such submissions were filed during the next five years (2000-2004), and only a single such submission has been filed over the past six years (2005-2010). This track record suggests that citizens have effectively abandoned the process as a useful mechanism to raise concerns about the effectiveness of U.S. enforcement practices and policies.

**Dissatisfaction with SEM Process:**

The series of NAC letters of advice, JPAC Advices, and various outside reports have identified several reasons why many citizens have become dissatisfied with the Council's (and the Parties') performance in implementing the SEM process. We focus on two such concerns here. First, the slow pace of the process is a significant impediment to success. The CEC June 1998 Four-Year Review noted that delays "place at risk the public credibility of the process" (p. 21). The Lessons Learned report, issued in June 2001, noted that "[t]o be credible with the public and to increase its effectiveness, the citizen submission process must . . . be timely (p. 14), and JPAC Advice to Council No. 08-01 stated that "[t]he procedure is too slow."

Unfortunately, the process has slowed down even more since those reports were prepared and the JPAC Advice was given. Thus, calls to speed up the process are even more timely and compelling now than when they have been made previously. While there are opportunities to speed up each stage of the process, the NAC focuses in this advice on two ways in which the

Council could dramatically expedite the process through its own actions, as well as on establishing an overall time frame for the process.

The Council has two “decision points” in the process - to decide whether to: 1) approve a Secretariat Recommendation to prepare a factual record, and 2) release a final factual record. The Council is now taking much longer to make each decision than it did during earlier years of the process. It has been **more than three years**, and counting, since the Council received Secretariat recommendations to prepare factual records for Hermosillo II, SEM-05-003 (Recommendation submitted to Council on April 4, 2007), and Species at Risk, SEM-06-005 (Recommendation submitted to Council on September 10, 2007). A third Secretariat Recommendation is still awaiting Council action even though it has been pending for more than two years, Ex Hacienda II and III, SEM-06-003 (Recommendation submitted to Council on May 12, 2008). The Council has moved extremely slowly to make decisions on other Secretariat recommendations as well, such as SEM-04-005 on Coal-Fired Power Plants. In that case the Secretariat Recommendation was made December 5, 2005, with a Council Vote on June 23, 2008, or over 2 ½ years. In the case of Lake Chapala II, SEM-03-003, the Secretariat Recommendation was made on May 18, 2005, with Council Vote on May 30, 2008, or more than 3 years. In short, Council delays in making decisions about Secretariat recommendations to prepare factual records guarantee the process will take many years to complete.

The Council’s record in deciding whether to release final factual records is similarly disappointing and has become more so over time. The Council’s record in meeting the NAAEC 60-day time frame for voting to release factual records was very good in the early years of the process. In contrast, the Council has taken far longer than 60 days to vote on factual record publication for four of the last five votes. The Article 15(7) vote on the Tarahumara factual record took 5 months (July 2005 - December 2005); the Pulp and Paper and Ontario Logging factual records votes took 7 months (June 2006 - January 2007); and the Alca Iztapalapa II factual record vote took over 6 months (November 2007 - May 2008).

Further, it is of considerable concern to the NAC that EPA’s September 2010 letter to the NAC incorrectly suggests that the Council virtually always meets the 60-day deadline contained in the NAAEC:

“If the NAC is proposing that the Council commit to voting more quickly on whether to publish completed factual records, it is unclear that such a step is needed. To our knowledge, the Council has only once taken more than the 60 days that are prescribed in the NAAEC to vote on whether to publish a factual record, as described in Article 15.7.”

From the published statements of U.S. submitters, Council’s failure to act in a reasonably timely way is an important reason for the loss of confidence in the SEM process that has led citizens to abandon using it to raise concerns about U.S. enforcement. The NAC would hope and expect that EPA is as alarmed as the NAC by the much longer time periods it is taking the Council to act and by the message citizens are getting from these delays. EPA’s response in its September 2010 letter, however, was not to express concern about the delays and a commitment to encourage its counterparts on the Council to do better. Instead, EPA noted that “a hasty vote... may actually do more harm to the process” and that “it is important to recognize that a considered approach that may take months or in some cases years does not constitute a failure to support the process. . .” Respectfully, the NAC believes that the Council is doing a great disservice to the process through its long delays and that EPA should be proactively seeking to address this significant flaw in current implementation of the SEM process rather than excuse it.

The NAC offers recommendations for EPA to proceed proactively in this way. The JPAC Lessons Learned report (p. 15) concluded that the Council “should be able to authorize (or decline to authorize) the development of a factual record within 90 days” except in exceptional circumstances. The NAC endorses this recommendation and urges EPA to make best efforts to persuade the Council to make decisions within this target time frame. Further, the NAC recommends that EPA urge the Council to meet the 60-day deadline in the NAAEC for releasing final factual records, a goal the Council met during the early years of the process but which it routinely has failed to meet in recent years.

The NAC respectfully requests that EPA reconsider its September 2010 letter with respect to both of these issues (Council decisions on Secretariat recommendations and on releases of final factual records) and that EPA embrace the role of encouraging Council to act in a more timely way as a concrete strategy to renew, revitalize, and refocus the SEM process.

More generally, the NAC believes that it is important to speed up the SEM process as a whole. The Lessons Learned report concluded (at p. 15) that two years from the filing of a submission is an appropriate time frame. The Lessons Learned report pointed out that “it is important to attempt to complete factual records while the conditions that prompted their development are still current and when the available policy options have not been narrowed by the passage of time.” (p. 15). The NAC endorses the report’s conclusions and supports EPA’s encouraging the Council to establish a time frame of two years for completion of the process for each submission.

In short, as a party to the NAAEC, the United States could at the very least press the Council to take three steps to respond to delays that have played an important role in diminishing citizen interest in using the process to raise concerns about U.S. enforcement: 1) significantly reduce Council delays in voting on Secretariat recommendations to prepare factual records; 2) adhere to the NAAEC 60-day requirement to vote on publishing factual records; and 3) establish a clear time frame for the process as a whole.

#### **Limited Accountability of the SEM Process:**

Limits in the accountability of the SEM process represent a second significant shortcoming. President Obama and Administrator Jackson have both emphasized the importance of improving accountability of government. In the SEM process, the lack of any follow-up to a factual record significantly reduces government accountability concerning the issues raised in the submission and covered in the factual record.

There have been many calls for follow-up to factual records to improve accountability (see e.g., Lessons Learned 2001, at 12, 16-17, suggesting that JPAC “encourage the Council to consider ways in which an institutionalized system of cooperation . . . could be used to follow up on factual records;” TRAC at 54; NAC Advice 2003-08, which includes excellent ideas for how to conduct such follow-up). While the Council has not welcomed such proposals in the past (see e.g., David McGovern, Alternate Representative for Canada to Jane Gardner - August 14, 2008, and Letter from Council dated June 14, 2002), the NAC urges EPA to try to persuade the Council to include a degree of follow-up in the SEM process to enhance its accountability.

The NAC also recommends that the United States create its own follow-up strategy for submissions involving U.S. enforcement. To reiterate the NAC’s suggestion in Advice 03-08:

“The U.S. government should . . . establish a systematic procedure for considering any factual records concerning allegations of [U.S. failures to enforce effectively]. . . Such procedures should insure interagency consideration and consultation concerning the findings of factual records, and should result in publicly available consultations as to how the Executive Branch intends to respond to them.”

The NAC believes that follow-up is essential to the credibility of virtually any government procedure. It further believes that a U.S. commitment to pursue such follow-up would be the type of concrete gesture that would help to persuade U.S. citizens that the United States government is committed to the effective implementation of the SEM process. The NAC is willing to conduct such follow-up itself of factual records involving the United States if that would a useful role for the NAC to play.

***Recommendations:***

- 1) ***The United States should support the development of factual records concerning enforcement efforts of the United States consistent with E.O. 12915 and take a vote to approve the development of such factual records at the first alt reps meeting following the publication of the recommendation from the Secretariat to prepare a factual record.***
- 2) ***The United States should propose a Resolution, to be adopted by Council, which directs Council to vote on a recommendation of the Secretariat to prepare factual records within 90 days of the recommendation.***
- 3) ***The United States should urge Council to reiterate its commitment to meeting the NAAEC deadline for Council to make decisions about the release of a final factual record within 60 days.***
- 4) ***The United States should recommend that the Council adopt a timeline that will ensure completion of each submission in no more than two years from the time of submission.***
- 5) ***The United States should work with its Council partners to devise and implement an approach to make the CEC SEM process more accountable by following up on issues raised in factual records.***
- 6) ***EPA should establish a systematic procedure for following up on any factual records involving U.S. enforcement, with the involvement and assistance of the NAC members if appropriate and if so desired.***

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

**Advice 2010-2 (December 21, 2010):  
Response to EPA's request for advice regarding the  
CEC 2010 – 2015 Strategic Plan and Future Projects**

The NAC had insufficient time to deliberate fully as a committee regarding the Charge Questions we received for this meeting; nevertheless NAC members had several concrete recommendations regarding the Strategic Plan as well as future projects the CEC could develop. With regard to the other Charge Questions, we did not have a copy of the Operational Plan for 2011 and understand that an alternative procedure for plan development and approval is underway, therefore we spent no time on this question. The NAC felt that Charge Question #4, on Greening the Economy, was also relevant to Charge Question #1, therefore the bulk of our time in the committee was devoted to a discussion of Charge Question #1.

NAC members noted that between the three priorities listed in the Strategic Plan of Greening the Economy, Healthy Communities and Ecosystems, and Climate Change, a unifying theme that would help lend synergy to the three areas could include emphasis on reduction of private sector reliance on fossil fuels.

Related to reducing fossil fuels, several members noted that the North American Atlas is a very useful tool for adding layers that would enhance and highlight the CEC's priorities. For example, the map could track North American energy infrastructure, including areas of possible concern or interest such as Tar Sands, off-shore oil rigs, and coal deposits, and include, in conjunction with that, communities of particular vulnerability to energy development – again, the Tar Sands were specifically mentioned.

Another suggestion related to the North American Atlas was to map emissions, emissions sources, and their potential impacts on the different areas of Canada, the US and Mexico, with an eye toward developing over time a picture that would aid in the development of climate change scenarios.

NAC members also mentioned that an interesting and useful mapping exercise could include North American species migrations and indigenous communities.

In addition, several members thought that another appropriate sector to focus on which crosses all sectors in North America and which relates to the three priority areas is the *automotive sector*. The suggestion was made that an Article 13 report on the Automotive Sector could focus on supply chains related to auto production, as well as harmonizing fuel efficiency standards for automobiles.

It was noted that data harmonization across North America – particularly with regard to Public Registry of Toxic Releases (PRTR) and Greenhouse Gases (GHG) would make that data much more useful to industry leaders, but that a concerted effort would need to be made to bring leaders to the table, perhaps in partnership with universities, to determine a common methodology.

***Recommendations:***

- 1. The NAC recommends that the United States support a unifying theme of reduced reliance on fossil fuels in order to build synergy among the three priorities of the CEC.***
- 2. The NAC recommends that the United States propose that the CEC undertake mapping of energy infrastructure, energy sources, and communities vulnerable to energy development – such as Tar Sands – as a project for the North American Atlas.***
- 3. The NAC would like to see data harmonization among the three North American countries be a priority of the United States with regard to PRTR and GHG.***
- 4. The NAC feels that an appropriate sector to concentrate on for a future Article 13 report is the automotive sector, and that the report could include information related to supply chains and fuel efficiency standards.***

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

**Advice 2010-3 (December 21, 2010)**  
**Transboundary Environmental Impact Assessment (TEIA)**

The NAC members support renewing Transboundary Environmental Impact Assessment (TEIA) discussions as a priority for the parties. The EPA response letter of September 14<sup>th</sup>, 2010 references the difficulty of reaching a comprehensive agreement among the three countries due to differences in governance systems. The NAC recognizes that there is a long history of unsuccessful negotiations on TEIA, and that there are limited resources available to renew such negotiations at this time. Insofar as such negotiations might be possible, we reiterate our support for undertaking renewal of negotiations on TEIA. We note also that the TEIA was a requirement of the initial NAAEC, and that failure to successfully reach agreement on TEIA constitutes a failure to fully implement the NAAEC.

A renewed commitment to a North American approach to the environment should begin with a new initiative to reach agreement on a TEIA with both Canada and Mexico. We recognize this has proven very difficult, but we would like to suggest an approach that might bring the three governments to an agreement. Perhaps, a new agreement should focus on drafting analytical environmental impact assessments rather than on assessments that include references to enforcement. If the three governments could agree on the parameters and questions that should be incorporated or answered in an Impact Assessment, then the separate issue of enforcement could be addressed later.

The NAC notes that the Good Neighbor Environmental Board (GNEB), in its latest report entitled *Blueprint for Action on the US-Mexico Border (June 2010)*, states in its recommendations section (p 65, paragraph 3): *Improved cooperation across the border*, that “a serious institutional gap is the lack of a transborder environmental impact assessment process between Mexico and the United States, and this needs to be addressed as a high priority.” The GNEB is an independent US Presidential advisory committee providing non-partisan advice on US-Mexico border environment and infrastructure.

The NAC also notes recent support from government officials in Mexico for renewing TEIA negotiations. Dr. Eduardo Peters of Mexico’s Instituto Nacional de Ecología, during a keynote address at the Binational Conference on Restoring Rivers in the Southwestern US and Northern Mexico (December 7 – 9, 2010), stated it was his belief that both the US and Mexico had matured sufficiently to approach negotiations on TEIA again, and that an agreement on TEIA might serve to bring agencies and groups to the table under a formalized process to confront some of the very serious ecological issues faced in water-stressed binational basins, specifically the Colorado and Rio Grande.

***Recommendation:***

- 1. The NAC recommends that the United States take the initiative in encouraging a renewed negotiation with Canada and Mexico to complete the TEIA.***

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

**Advice 2010-4 (December 21, 2010)**  
**Response to Charge Question #3:**  
**North American Partnership for Environmental Community Action**  
**(NAPECA)**  
**Project Selection Criteria and Community Groups**

As noted above, the NAC had insufficient time to deliberate Charge Question #3 related to NAPECA grants, but would like to thank you for your support of this important program. The NAC is very excited that the CEC community grants program will be reinstated in the form of NAPECA. As you know, our past advice has clearly supported reinstating this program, as we felt that it greatly increased awareness of the CEC and built more solid relationships with communities in pursuit of common goals.

The NAC notes that when issuing Requests for Proposals (RFP's) under the NAPECA, the CEC might consider very carefully targeting the RFP so that proposals are submitted that specifically address themes identified within the three priority areas, as well as current priorities identified by the Council. The current criteria for project selection appear to be well-positioned to adhere to CEC priorities, and the RFP should also reflect this emphasis.

The NAC did not have time to deliberate on or suggest a list of innovative community groups that might benefit from a CEC NAPECA grant. A potential, important niche that the NAPECA grants could seek to fill is already listed in the proposal criteria – “build long-term partnerships to improve environmental conditions...” The NAC notes that there is limited funding to build partnerships among groups, but that in such cases outcomes from the partnership-building efforts should be clearly identified and measurable.

***Recommendation:***

- 1. The NAPECA Request for Proposals should include criteria that closely reflect the themes of the three priority areas set by Council and implemented by the CEC.***