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

October 19, 2001

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Dear Governor Whitman:

It is my pleasure to submit to you the advice and recommendations from the Governmental Advisory Committee (GAC) to the U.S. Representative to the Commission for Environmental Cooperation (CEC) during its most recent meeting, which was held in Washington, DC on October 4-5, 2001. On behalf of the entire Committee, we welcome the opportunity to provide our advice and counsel to you and Judith Ayres, the new Assistant Administrator to the Office of International Activities for your mutual consideration for your work with the CEC.

The GAC discussed a wide range of topics at our recent meeting while focussing our recommendations on the CEC's proposed workplan as well as the Articles 14 and 15 submission process. Due, however, to the limited time between our October meeting and the upcoming Joint Public Advisory Committee meeting, scheduled for October 22-23, 2001 in Montreal, Canada, we've taken the liberty of focusing this initial letter on the Articles14 and 15 submission process, with particular emphasis on U.S. position regarding the development of a factual record for the *Migratory Bird Treaty Act* submission, which is the first submission requiring a substantive response from our federal government.

As you may know from a review of our past advice letters, the GAC has been a staunch and ardent supporter of the Articles 14 and 15 submission process given its uniqueness as the first mechanism of its type in any international treaty. The GAC believes that it is a cornerstone of the North American Agreement on Environmental Cooperation (NAAEC) and provides an extraordinary measure of transparency which benefits the citizens of the North American

continent. Any action that would impede the efficacy of this process would not only undermine public support for North American Free Trade Agreement (NAFTA), but could thwart any active expansion of NAFTA or the possible adoption of a Free Trade Agreement of the Americas (FTAA).

The GAC was briefed on the U.S. decision to provide a partial yes vote supporting the development of a factual record in the *Migratory Birds* submission (SEM-99-002), but not provided any documentation conveying that position. The absence of such a document, which we were informed would not be available prior to the completion of the federal interagency review process, is somewhat problematic and may impact upon the quality and appropriateness of our advice if the U.S. position was not accurately conveyed or understood. Despite that fact, the GAC has striven to provide its best advice based upon our collective understanding of the current position as conveyed during the meeting.

The *Migratory Bird* submission alleges that the U.S. has failed to effectively enforce U.S. environmental laws by historically failing to pursue any criminal prosecutions of the Migratory Bird Treaty Act for non-threatened or non-endangered species. It is our understanding that the U.S intends to vote yes on the Secretariat proceeding with a factual record for this submission, but only if it is limited to a review of the facts associated with the two anecdotal violations identified in the submission. Also, the U.S. would require the to Secretariat submit its workplan associated with developing the *Migratory Bird* factual record to the U.S. for review and approval. In support of its partial yes vote, the U.S. stated that its decisions to forgo the prosecution of cases, relating to migratory bird species that are neither threatened or endangered, is a valid exercise of its prosecutorial discretion and also due to the lack of unavailable resources. In the U.S.' view, these circumstances are excused under the plain language of the NAAEC. Based upon this understanding of the U.S. position, there are several concerns that the GAC would like to raise at this time. To a great extent they support and reflect comments that were articulated not only by GAC members, but also by members of the public who attended our October meeting.

We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat in the submission process will be eviscerated. The U.S. would undercut this independence by limiting the factual record to the two examples provided in the submission, where a broader pattern was adequately alleged. If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process. The current U.S. position affirmatively limiting the factual record development can be distinguished from the limitations imposed in other submissions in which a record's development was circumscribed.

In the *BC Hydro* submission, the decision to limit the scope of the factual record developed was due to the fact that pending litigation addressed a portion of the facts identified in the original submission. The NAAEC clearly recognizes pending litigation as a legitimate reason to forgo the development of a factual record, in whole or in part. There is, however, no

affirmative requirement in the Agreement that a petitioner lists all instances of a Party's failure to effectively enforce an environmental law to consider these events within the scope of a factual record being developed by the Secretariat. And such an interpretation flies in the face of the plain language of the NAAEC, which contemplates a submission where a pattern and practice of ineffective enforcement exists, as opposed to an isolated failure by a Party to the Agreement.

Beyond these concerns, interpreting the NAAEC to place such an onerous burden upon a petitioner will make the process unmanageable and inaccessible to the very individuals and organizations who benefit most directly from the openness and transparency that this process provides in North America. In order to meet this new requirement, a petitioner will have to identify every instance of a failure to effectively enforce the applicable law in order to assure itself that the submission will be fully considered by the Secretariat. This approach increases, substantially, the level of financial and human resources that would be required by a petitioner to make such assurances on their submission, possibly eliminating many citizens from even attempting such an enterprise. Assuming that some may be able to straddle this hurdle, it also burdens the Secretariat, who will have the responsibility to review these new, ever-expanding submissions.

The most troublesome point in the current U.S. position is the requirement that the U.S. be allowed negotiate the Secretariat workplan for development of the *Migratory Bird* factual record. Such an approach would undoubtedly infringe upon the Secretariat's independent factual investigation. It does so by giving the Party which has the most at stake in the process the opportunity to control the development of the factual record and, as a result, the outcome. Even assuming that it is theoretically possible to have this level of Party oversight without affecting the substantive outcome of the factual record, the appearance which is created is troublesome. Beyond the serious conflict of interest that such an approach would involve, there is no clear mechanism to resolve disagreements between the Secretariat and the U.S. involving the factual record workplan. It will thwart the Secretariat's ability to move forward by creating uncertainty as to what steps must be taken to resolve such disagreements.

And despite the U.S. assurances to the contrary, the GAC strongly believes that this approach will set a dangerous precedent for other Parties to the NAAEC to follow. The current U.S. position undermines the submission process in the same manner that was previously attempted by other Parties in the endless negotiations that occurred regarding the Guidelines associated with the submission process. There the ultimate goal was to curtail the Secretariat's independence and limit the transparency of the process. Ironically, in those circumstances the U.S. successfully championed the Secretariat's independence by thwarting those Guideline changes and creating a process, with the JPAC's involvement, to set the process on the correct course. By its current approach, however, the U.S. would fundamentally reverse the progressive steps that have been made in this area.

The U. S. has been the staunchest advocate of Secretariat's independence since the creation of the CEC, which makes the current U.S. position very troubling. The U.S. may maintain that its decision to forgo prosecution of cases involving non-threatened or non-

endangered migratory bird species is a legitimate exercise of prosecutorial discretion, but it's hard to understand the reasonable use of such discretion where not a single case has been successfully initiated or prosecuted. The GAC would never advocate that the U.S. vote no on the development of a factual record, since factual records are essential to the process that was drafted by the Parties in the NAEEC. However, it would be more appropriate for the U.S. to vote and unconditional no than to threaten the independence of the Secretariat and the transparency of the submission process by its partial yes vote.

In closing, we look forward to your response to our advice on this issue and hope that it is not only used within EPA, as it considers finalizing its vote on the *Migratory Bird* submission, but in the interagency discussions which will occur regarding this issue.

Sincerely,

Denise Ferguson-Southard
Chair
Governmental Advisory Committee

cc: Judith Ayres, Assistant Administrator for International Activities
Adam B. Greene, Acting Chair, U.S. National Advisory Committee
Liette Vasseur, Chair, Joint Public Advisory Committee
Stewart Elgie, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. Governmental Advisory Committee