



07 AVR. 2011

Dr. Irasema Coronado
JPAC Chair
Commission for Environmental Cooperation
393, St-Jacques Street West, Suite 200
Montreal, Quebec
H2Y 1N9

Dear Dr. Coronado:

On behalf of Council of the Commission for Environmental Cooperation (CEC), the Alternate Representatives would like to thank the members of the Joint Public Advisory Committee for examining the governance of the Commission for Environmental Cooperation. It is our aim to ensure current practices are not an obstacle to delivering on our vision of a renewed, revitalized, and refocused organization that remains effective and relevant in accordance with the North American Agreement on Environmental Cooperation. Herewith we provide our response to the recommendations concerning CEC governance that are contained in JPAC Advice to Council 10-04 (attached as Annex I).

In line with Council's commitment to provide new executive directors with clear direction through a mandate letter at the beginning of their term, Council delivered the Governance Proposal to the current Executive Director when he took office. We are pleased to note that Mr. Lloyd has already begun several initiatives to improve governance as per Council's proposal. A copy of his interim report was provided to your committee on December 17, 2010.

Having received JPAC's considered views on governance, we now feel that it is an appropriate time to make the Governance Proposal, as delivered to Mr. Lloyd in May 2010, publicly available and have instructed the Secretariat to take the necessary steps to do so. In line with CEC practice with respect to JPAC Advice and corresponding Council Responses, this letter will also be part of the public record.

Once again, I wish to express Council's gratitude and appreciation for the continued efforts of the JPAC in ensuring the CEC better serves the environment and citizens of the three countries.



Sincerely,

A handwritten signature in black ink, appearing to read 'D. McGovern', followed by a long horizontal flourish.

David McGovern
Alternate Representative for Canada

cc: Michelle DePass, Alternate Representative for the United States of
America
Enrique Lendo, Alternate Representative for Mexico
Evan Lloyd, CEC Executive Director
Marcela Orozco, JPAC Liaison Officer

ANNEX I

- 1.1 *JPAC recommends that the governance proposal look at a broader set of governance matters, including governance related to Council and JPAC in addition to the Secretariat, which is the focus of the current draft.*

The Governance Proposal reflects Council's commitment to renew, revitalize and refocus the Commission, including its three constituent parts – Council, the JPAC and the Secretariat. Indeed, the proposal focuses first on the governance of the Secretariat, reflecting its critical role across the entire organization. The second section, however, addresses governance areas for the Council and the JPAC, including the citizen submission process, dispute resolutions, and guidance to the Executive Director. In our view, the proposal is sufficiently comprehensive.

In addition with respect to the JPAC, the Governance Proposal also includes a review of the JPAC Rules of Procedure. The Council, responsible for approving any changes to JPAC Rules, would be open to considering amendments that would adapt the rules to the new strategic direction established by Council.

- 2.1 *JPAC recommends that the governance document lay out comprehensive performance standards, with timelines, for the Council (sitting as the Council members, the Alternative Representatives or the General Standing Committee) in regard to the efficacy and effectiveness of the overall governance, strategic direction, organization effectiveness and due diligence of the processes and structures prescribed by the NAAEC. JPAC commends the inclusion of efforts to reinvigorate negotiation of an agreement on transboundary environmental impact assessment, as called for under Article 10(7), which is one of the many mandates that should be included in these performance standards.*

The NAAEC requires timely Council action in a number of areas, which Council members take very seriously. In other areas, the NAAEC provides Council members with greater flexibility. We recognize, however, that there is always scope for improvement which is why, under the Governance Proposal, steps will be taken to modernize the citizen submission process, and could include additional recommended timelines for all decision-makers.

- 2.2 *JPAC is concerned about the accumulation of budget surpluses in recent years, which appears to be due in significant part to delays in developing and approving planning documents. Noting that the governance proposal addresses this matter, JPAC supports the development of an improved procedure for the Secretariat to submit (pursuant to NAAEC Article 11(6)) the annual program and budget for Council approval, taking the views of the public into consideration, as rendered by JPAC review of the document.*

Council fully supports improving the efficiency of the budget and operational plan development process, which is one reason why we have moved to a two-year planning process. These and other changes laid out in the Governance Proposal (e.g. organizational realignment) and the new 2010-2015 Strategic Plan should foster further efficiencies.

Council would like to point out, however, a CEC Secretariat assessment of the reasons for recent budget surpluses, conducted in 2009 at the request of the Parties in 2009, indicated that CEC surpluses were due to a variety of factors, including among others: variations in citizen submissions activity; unstaffed Secretariat positions; and fluctuations in exchange rates.

2.3 *Noting that JPAC and other groups, such as the US NAC and GAC, have all raised concern that the three-year term for the Secretariat's Executive Director is too short to be effective, and that NAAEC Article 11(1) states that the Executive Director "shall be chosen by the Council for a three-year term, which may be renewed by the Council for one additional three-year term," JPAC recommends more openness by the Council to renewing Executive Directors for second terms, contingent on satisfactory performance.*

We recognize that NAAEC Article 11(1) provides Council the option to renew the Executive Director's term if we so choose. Council has taken to support the effectiveness of the ED through a clearly articulated mandate letter. Council members also remain open and sensitive to the provisions of the NAAEC with respect to Executive Director appointments, including both the three-year term and the need to rotate among nationals of the three Parties. Furthermore, the US NAC and GAC does not provide advice to Council.

2.4 *JPAC advises the Council to ensure through the governance document that all CEC bodies are adequately represented in meetings of the Council (i.e., meetings where the NAAEC Parties discuss CEC business) and that the transparency of discussions be increased by having the Secretariat keep formal records of discussions and post them on the CEC website.*

Council is committed to implement the provisions of the NAAEC and supports the participation of the various CEC bodies in meetings, including the Secretariat, in order to prepare and make publicly available the records of decisions, to the extent provided for under the NAAEC. However, in many instances, modern diplomacy and government-to-government discussions require frank discussions among the participants and this necessitates the need for privacy; much like the in-camera meetings between JPAC and Council. Council supports increased transparency within the CEC and we have taken a number of steps in this direction with the Governance Proposal.

- 2.5 *JPAC reiterates its concern regarding the delays in Council votes on factual record recommendations under NAAEC Article 15(2). These delays reflect an unnecessary lack of deference to the independent appraisals of the Secretariat in recommending factual records. JPAC advises the Council to commit in the governance document to voting on factual record recommendations within 120 days.*

Council remains committed, as per Council Resolution 01-06, to “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.” Council is also committed to paying due regard and consider all aspects of the Secretariat’s appraisals, taking the time needed to contemplate and evaluate increasingly complex issues that involve a range of authorities and make up the citizen submission process.

However, committing to a specific deadline where the NAAEC is silent raises complex and important legal issues of Treaty interpretation that in any case need to be evaluated and discussed by a larger array of authorities of the Parties. Rather than acting on a specific proposal in isolation, and following on Council’s direction contained in the Governance Proposal, government officials will work with the Secretariat to conduct before next Council session, a comprehensive review of the entire SEM process to improve, modernize and make it more efficient.

- 2.6 *JPAC recommends that the document commit the Council to responding to JPAC advices and similar communications from JPAC or other bodies within 90 days.*

During the 2010 Council Session, we expressed our intention for increased communications with the JPAC through Council or their designees, in line with JPAC’s own preferences, and we will be taking steps to ensure our responses are timelier. However, by its very nature, reaching consensus on a thoroughly-considered Council response among three cabinet-level officials from three different countries often requires a significant amount of time.

- 3.1 *To better meet our collective mandate to promote transparency and public participation, JPAC recommends that the governance document outline a plan for broader community outreach by the CEC bodies.*

A unique hallmark of the NAAEC is the extent of public participation. The new course set by Council at the 2009 Denver meeting, and confirmed in Guanajuato, is to renew efforts to involve and partner with communities, indigenous peoples, civil society and the private sector. We expect that the work pursued under NAPECA and the partnerships with the private sector under the Greening the

Economy priority, will provide the type of concrete results that could be used subsequently as part of an outreach/public awareness campaign.

Council has directed the Secretariat to work with the GSC to update and expand a communications strategy that will promote public awareness of the work of the CEC. Council further directed that in the development of the communications strategy, the Secretariat identify innovative and cost-effective means of building public awareness that could be considered by Council.

4.1 *JPAC notes further that Article 11(6) calls upon the Secretariat to “submit for the approval of the Council the annual program and budget of the [CEC]” which clearly mandates a substantive, active role for the Secretariat in developing and implementing the CEC operational plan and programs. The CEC was most efficient and effective in its early years, when the Secretariat took the lead in presenting a program. Of course, the Secretariat must develop the operational plan consistent with Council direction in the Strategic Plan and must consult with the Parties, working groups and others to develop the program and budget. JPAC advises the Council to re-confirm that it is the Secretariat, not the Parties, that has the primary responsibility under the NAAEC to develop the operation plan and budget.*

The NAAEC stipulates that the Executive Director is to submit to Council the annual program and budget for approval and it provides for cooperative activities between the Parties (see for example articles 10(1)(f), 10(4)(c), 11(6) NAAEC). As such, and considering Council Resolution 95-01, Council is of the view that the development and implementation of the annual program and budget is an iterative process between the Secretariat and the Parties, via the efforts of the General Standing Committee, the Alternate Representatives and the Council-established working groups. Moreover, the TRAC report criticized the Council for weak leadership in simply ratifying the work program initiated by the Secretariat. Finally, as Council noted in the 2009 Ministerial Statement, the environmental challenges today, our understanding of them, and the tools to deal with them, are not the same as they were fifteen, ten or even five years ago. Council's commitment to revitalize the CEC, as expressed in that same Ministerial Statement, is premised on a renewed active involvement of the Parties in the planning and conduct of their cooperative work that is to be supported by the Secretariat.

4.2 *Regarding the SEM process, JPAC recommends that the governance document direct the Secretariat to develop internal measures to improve the timeliness of its work in the process. Further, JPAC recommends that references to the SEM process should note that, in addition to providing information on enforcement practice, it is also intended to foster review of the effectiveness of the Parties' environmental enforcement and any deficiencies in enforcement.*

As Council states in the Governance Proposal, we are committed to improve, modernize and make more efficient the Submission on Enforcement Matters (SEM) process.

Council supports the SEM process as provided for under the NAAEC. The SEM process is a means by which one of our citizens may bring to light the facts concerning an alleged failure to enforce our environmental legislation. In some cases, the process concludes with a factual record that provides information regarding enforcement practices. The SEM process is not intended to evaluate or review the effectiveness of our legislation.

4.3 *JPAC advises against extending the Council's current role under NAAEC Article 11(3), by which it can reject new appointments to the Secretariat staff by a majority vote, to renewals of staff appointments. There is no apparent reason for this proposed change in the draft governance document. Contract renewals should be at the sole discretion of the Executive Director, consistent with his or her assessment against "general standards to be established by the Council" as stated in NAAEC Article 11(2). Once someone has worked at the Secretariat, it is the Executive Director, as advised by senior managers within the Secretariat, who is in the best position to assess that person's performance and to make a decision on renewing the appointment. However, if the Parties are drawn into a review of the decision to renew Secretariat employees, there is no accountability provision requiring a Party to explain its vote to reject renewal, and no effective means for appealing the decision. In practice, the Parties can vote for any reason whatsoever, and hence there is a danger of political interference with Secretariat staff. Making renewals reviewable by Council also could invite problems under Article 11(4), which forbids Secretariat staff from seeking or taking direction from any entity outside of the Council, including an individual government. If Secretariat employees will be subject to a vote by the governments to have their contracts renewed, the temptation to be loose with Article 11(4) in order to curry favor will increase. Finally, subjecting renewals to Council approval will have a very bad effect on Secretariat morale. For all of these reasons, we urge this proposal to be dropped from the governance document.*

The Council appreciates the JPAC's views on this issue. Council considers that while neither the NAAEC nor the CEC Rules of Employment address "re-appointments" as a specific subject, these documents provide the clearest guidance on what the role of the Council is meant to be with respect to staff appointments, generally. As appointment renewals are initiated through a formal offer and completed through a new appointment contract, it is Council's view that a review of appointment renewals falls within the established powers of the Council set out in Article 11(3), whereby the Council may reject "any"

appointment by a two-thirds vote. The CEC Rules of Employment further support Article 11(3) by stating in Rule 15 the Council's powers of oversight with respect to staff appointments by the Executive Director. The Council therefore views its oversight of staff appointment renewals by the Executive Director not as an extension of powers, but as way to discharge its established responsibility for its obligations and powers under the NAAEC, including in particular Article 10 of the NAAEC establishing the Council as the governing body of the Commission and overseeing the Secretariat.

Council has no concerns regarding issues of "political interference" in any process related to CEC activities and is confident that all CEC bodies act in strict adherence with the Agreement provisions and Standards established by Council, including the General Standards in the Rules of Employment.

5.1 *JPAC is concerned about the confusion in the draft between the Parties and Council, a concern we expressed in regard to the draft strategic plan as well. A good example is where the proposal states that, "Performance goals for the Executive Director would be set by the Parties." It should say "Council" instead of "Parties," consistent with the language used throughout NAAEC Article 11.*

After reviewing the CEC Rules of Employment, we agree that the example of the Governance Proposal you raise above should have cited Council, not the Parties, in setting performance goals.

5.2 *JPAC notes that the section on expenditures on page 7 of the draft would be more appropriate as an appendix or as a separate document, with the amendments proposed in the attached marked-up draft, because it concerns management issues rather than governance.*

Council takes note of the advice and emphasizes that in developing the Governance Proposal, Council gave careful consideration to the issues it addresses, including those of transparency. Council feels strongly that such section is appropriately placed within the document.