

From the Call for Public Comments:

**Public Review of Issues Concerning the Requirement for
Work Plans related to Submissions under Articles 14
and 15 of the North American Agreement on
Environmental Cooperation**

2 May 2002

Issue: TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan.

1. Independence of the Secretariat (real and perceived-which speaks to credibility and public confidence)

- Council should be aware of the existing perception of undue influence by the Parties in the activities of the Secretariat regarding the citizen submission process and use of the JPAC review process, developed pursuant to Council Resolution 00-09, to address this perception.
- By allowing a Party targeted in a submission to review and comment upon the scope of a work plan, the independence historically exercised by the Secretariat will be severely compromised.
- [This requirement] provides the impression that the Party with the most to lose has the ability to undermine the process by delving into and controlling the structure and nature of the investigative process.
- The requirement is a clear infringement on the independence of the Secretariat and, further, creates an opportunity for the Parties to attempt placing restrictions on areas of inquiry.
- The requirement may also have the effect of denying the Secretariat the latitude to pursue potentially fruitful areas of investigation that were not anticipated at the outset.
- Requiring a work plan to be submitted for comment could be used to develop strategies for frustrating the Secretariat's efforts.
- Express and unilateral input by an individual Party into the process of drafting a work plan tends to undermine both the appearance and actuality of independence-an attribute that is fundamental to the integrity of the process.
- In an extreme case, a single Party could unilaterally confine the scope of a factual record through this channel.
- The requirement reduces the independence of the Secretariat.
- This history and experience regarding Council's actions in relation to the process raises the concern that the current work plan requirement may be misused for further delay and the creation of unwarranted obstacles to fact finding.
- If the Secretariat's independence is undercut, there will be little or no future credibility to the submission process.
- To the extent that the Secretariat is not required to accept or act on comments by the Parties on the draft work plans, independence does not appear to be adversely affected.
- The Secretariat is not bound to accept the comments by the Parties or make changes to the work plans to reflect such comments.

2. Timeliness

- In the absence of a clear mechanism to resolve issues that may arise between the Secretariat and the Parties involving the comments provided on a particular work plan, the Secretariat's ability to expeditiously move forward may be constrained.
- This additional requirement will add further delay to a process that the public and all Parties agree is already too slow.
- The possibility of conflicting comments from different Parties invites unproductive disagreement.

3. Transparency

- If a work plan is made available to one or more Parties, it must also be made available to the public at the same time-understanding, however, that so doing may subject the Secretariat to unwarranted pressures.

4. Other Considerations

- This approach will set a dangerous precedent for constraining the development of future factual records.
- Such an approach involves a serious conflict of interest.
- The requirement creates a conflict of interest for the Parties, who are members both of the Council and also the subjects of the factual records, re: Article 11(4) of the NAAEC.
- Unilateral input by any one of the Parties into the content of a work plan appears to be contrary to the text of the NAAEC, Article 11(4).
- While the NAAEC does not expressly authorize the practice of commenting on draft work plans, not does it expressly forbid the practice-indeed, the Agreement makes no mention of work plans at all.
- The performance of the citizen submissions process has hemispheric implications.
- Any action that would impede the efficacy of this process would not only undermine public support for NAFTA, but could also thwart any active expansion of NAFTA or the possible adoption of a Free Trade Area of the Americas.
- The cumulative effect of Council's recent approach [including limiting the scope of factual records] may produce long-term damage to the process and have ramifications for the successful integration of trade and environment policies throughout the hemisphere in the near future.
- The excessive limitations on the development of a factual record in the Council's work plan requirement will erode public confidence in the NAFTA Parties' commitment to ensuring that trade liberalization is accompanied by environmental safeguards.

Prepared by Lorraine Brooke