



Advice to Council No: 10-04

Re: Draft Proposal to Examine the Governance of the CEC and the Implementation of the NAAEC

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America:

IN ACCORDANCE with Article 16(4) of the North American Agreement on Environmental Cooperation (NAAEC), which states that JPAC “may provide advice to Council on any matter within the scope of this agreement (...) and on the implementation and further elaboration of this agreement, and may perform such functions as the Council may direct;”

HAVING reviewed the Draft Proposal to Examine the Governance of the CEC and the Implementation of the NAAEC, dated 29 July 2010;

RECALLING the JPAC Effectiveness Review Report to the Council, dated 18 February 2010, which should be considered in conjunction with the present advice; and

RESPONDING to Council’s invitation to the JPAC at the Council Session in Guanajuato, Mexico in August 2010, to provide specific suggestions for re-drafting the draft governance proposal,

SUBMITS for Council’s consideration the following observations and recommendations along with the attached marked-up copy of the draft governance:

1. Scope of the governance proposal: JPAC recommends that the governance proposal look at a broader set of governance matters, including governance related to the Council and JPAC in addition to the Secretariat, which is the focus of the current draft. Accordingly, the advice below is provided regarding matters that should be addressed with respect to each of the three constituent bodies of the CEC.

2. Council: JPAC recommends that the governance proposal contain a new section with governance matters directed at the Council. The following are specific recommendations for this section:

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.

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 development of an improved procedure for the Secretariat to submit (pursuant to NAAEC Article 11(6), as further noted below) the annual program and budget for Council approval, taking the views of the public into consideration, as rendered by JPAC review of the document.

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.

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.

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.

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.

3 JPAC

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.

4 Secretariat

- 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.
- 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.
- 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.

5 Other matters

- 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.

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.

JPAC is unanimous in supporting this Advice to Council.

**Approved by the JPAC members
30 November 2010**