



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**

Proposed Additions/Enhancements to the CEC Governance Proposal

Note: CEC governance falls into three organizational areas:

- Council
- Secretariat
- JPAC

The following proposed edits to the Governance Proposal document address key additional governance and accountability areas for each group.

COMMISSION FOR ENVIRONMENTAL COOPERATION PROPOSAL TO EXAMINE THE GOVERNANCE OF THE CEC AND THE IMPLEMENTATION OF THE NAAEC

Introduction

On June 24, 2009, the Council of the Commission for Environmental Cooperation (CEC) met in Denver, Colorado for its annual Regular Session. This Council Session marked the 15th anniversary of the *North American Agreement on Environmental Cooperation* (NAAEC) and served as an important milestone to reflect on the progress the Parties have achieved on environmental cooperation under the NAAEC.

In doing so, Council committed to renew, revitalize and refocus the CEC to better serve the environment and citizens of the three countries. The new policy direction set by Council will ensure the CEC is focused on the key environmental priorities of North America, namely:

1. Healthy Communities and Ecosystems
2. Climate Change–Low-Carbon Economy
3. Greening the Economy in North America

Council also tasked officials to return with a proposal to examine the governance of the CEC with a view to enhance accountability, improve transparency of the Secretariat's activities, ensure alignment with the Council priorities, and set clear performance goals. Council also agreed to operational changes to the CEC, and associated these changes to the objectives of transparency, accountability, effectiveness, and relevance.

Council has taken this opportunity to set up new environmental priorities that will govern the work of the CEC through the 2010–2015 Strategic Plan and to conduct an unprecedented review and renewal of the governance and operations of the Secretariat, in order to better equip it to deliver on the new priorities, to better respond to the current environmental challenges, and to be more effective and efficient in the face of the global economic crisis. Therefore, the proposal places emphasis on examining and adjusting the structure and functional model of the Secretariat, in order to deliver on the priorities agreed to by Council.

Council Performance and Accountability

Objective

- To ensure that Council is accountable for the effectiveness and efficacy of overall governance, strategic direction, organizational effectiveness and due diligence of the processes and structures prescribed by the NAAEC.

Rationale and authority

- Under Article 10(1), Council is the governing body of the CEC and oversees implementation of the NAAEC and its further elaboration.

Description of areas to be addressed

- The Secretariat will develop and JPAC will comment on a set of measurement indicators for the Council to use in the assessment of its performance with respect to the above-mentioned objective.
- The Council will regularly assess and monitor these indicators [e.g., the Council will approve Strategic and Operational Plans in a timely manner and will report on whether plans were approved and finalized on time].
- The Council will review and approve Secretariat proposals to enhance the SEM process by the first quarter of 2011.

JPAC Planning and Reporting

- JPAC will develop plans and report annually to the Council on the three key North American environmental initiatives:
 1. Healthy Communities and Ecosystems
 2. Climate Change–Low-Carbon Economy
 3. Greening the Economy in North America

The Secretariat's Functional Model and Structure: Accountability, Transparency, Alignment and Performance

Objective

- To adapt the Secretariat into one that delivers on the new environmental priorities established by Council, by strengthening the Secretariat's support and coordination function, with streamlined operational costs, a reallocated budget to increase cooperative programs, a flexible structure that is responsive to emerging issues, and a five-year projection of the structure.

Rationale and authority

- Examining and adjusting the functional model and structure will enhance alignment with the new environmental priorities established by Council, will be conducive to reprioritizing its expenditures, and in addition, the process will generate information about operational practices and proposals to adjust them, enhancing transparency and accountability.
- Authority based on Denver Ministerial Statement, and Articles 9(5)c, 10(1)c, and 11 (5) of the NAAEC.

Description of issues to be examined

- The NAAEC establishes that the Secretariat's primary functions regarding the cooperative work of the Parties is to provide technical, administrative and operational support to the Council, to committees and groups established by Council, and such other support as the Council may direct. Under Article 11(6), the Executive Director is also responsible for developing and submitting for approval the annual program and budget of the Commission.
- The NAAEC does not establish a particular structure for the Secretariat, except that it will be headed by an Executive Director, who shall appoint and supervise the staff of the Secretariat, regulate their powers and duties and fix their remuneration in accordance with general standards established by the Council.
- These general standards have not been revised since their adoption and a review and adjustment would be timely.
- In coordination with the Executive Director, this review could include an assessment of the current organization ~~organizational chart~~ of the Secretariat and the development of a transitional plan to achieve a leaner, more flexible, less costly structure. More specifically, such a review could include, *inter alia*:
 - Determining an objective goal, according to international standards, of the appropriate ratio between operational costs and resources dedicated to programs;
 - ~~Redefining and/or strengthening, as appropriate, the roles and performance goals of staff to facilitate cooperation, through support functions, rather than management of, engagement in, or expert advice for the programs; and,~~
 - Defining with more precision the NAAEC prescription of the Secretariat's "technical, administrative and operational support" responsibilities to the Council and its committees and groups.
 - Assess the number and functions of external permanent and *ad-hoc* consultants, review rules and procedures for hiring external consultants, and explore mechanisms to draw expertise from, and promote the involvement of North American universities.

Preliminary Assessment

Currently, the Secretariat is ~~comprised~~ composed of 59 employees, of which 30

support specific programs and working groups, five 5-administer the citizen submission process, three 3-support the Joint Public Advisory Committee and Council, and 21 provide general support to the Secretariat, including in the areas of Executive Office and administration, publications, and conference services.

A new structural model could be developed and would represent an opportunity to move away from the Secretariat managing the various projects, towards a staff better equipped to support and facilitate the work of the Parties Council in accordance with the Secretariat's stated NAAEC mandate to "provide technical, administrative and operational support" to Council.

Related Issues

Once the review of the functional model and structure of the Secretariat is completed, the Parties Council could, in coordination with the Executive Director, examine and clarify the following issues as part of the work to develop the 2010-2015 Strategic Plan:

Define appropriate performance goals

- Define appropriate performance goals for CEC staff consistent with the new priorities, and the renewed functional model and structure. The Secretariat should be accountable to clear, measurable outcomes for both the Strategic Plan and the annual Operational Plans. The process to evaluate the performance goals should also be defined along with a schedule for periodic review.

Performance goals for the Executive Director would be set by the Parties Council.

[Performance goals (and performance measurement) of Secretariat staff would be the responsibility of the Executive Director.]

Rules of operation

Review existing CEC rules (both written and verbal) to ensure they are still appropriate for today's context, and ensure they are all in written form in order to strengthen operational transparency. For example, currently Article 11 (2) and 11 (3) of the NAAEC is construed as requiring Council approval only for new *staff* appointments, but not for renewal of contracts.

This should also include a review of the *rules of operation of JPAC*, in order to:

- adapt them to the new strategic direction established by Council, such as recommending that JPAC develop annual objectives and performance measures with respect to the overall themes in the Strategic Plan.
- improve outreach and communication, with a focus on the following constituents:
 - State, provincial and municipal governments
 - First Nations, tribal governments and indigenous communities
 - Industry

- NGOs
 - Impacted communities and individuals
 - Subject matter experts (universities, think tanks, etc.)
 - Public policy groups
 - Applicable research community
- ensure transparency and accountability of expenditures, and
 - strengthen mechanisms regarding the relevance and timeliness of advice sought and received by Council.

Additional Changes to Strengthen CEC and NAAEC

The Denver Statement

The Denver Statement enumerated other operational changes associated with the objectives of transparency, accountability, effectiveness, and relevance. The sections below provide details on what these changes could encompass.

Streamlining the cooperative work program

The cooperative work program (i.e., Operational Plan), which the Secretariat is required to develop and submit for approval each year, represents the projects the Parties agree to undertake trilaterally on an annual basis. Each year, the working groups along with the Secretariat, develop projects that aim to address environmental issues that concern our region. The new environmental priorities for the CEC established by Council and the process of renewing the structure and functional model of the Secretariat require streamlining the next cooperative work program (2010) accordingly.

In addition, the Parties-Council could incorporate the trilaterally-approved project selection criteria into the Strategic Plan to ensure individual projects are more results-focused and relevant to the three countries. It is understood that the existing project selection criteria (created in 2008) may be revised to reflect current Party considerations and to reflect the outcomes of the Denver Council Session.

In addition, the Parties-Council and the Executive Director should ensure the development of more effective Operational Plans with greater impact by:

- focusing efforts on fewer and interrelated projects with more significant results;
- changing the work program and budget planning cycle from annual to biennial to increase program efficiency and reduce the transactional costs associated with its development; and,
- implementing a performance measurement framework.

With respect to this latter recommendation, it is worth noting the Secretariat hired an outside consultant—Eastern Research Group—to look at various issues, including how the CEC can improve its performance measurement framework. ERG noted that while the CEC has been successful at meeting its stated outcomes, it noted that: (1) in many cases, the CEC's outcomes do not link well to performance indicators;

(2) in many cases, the CEC's performance indicators are not based on objective data; (3) the CEC's outcome statements are often vague and open to interpretation; and (4) some of the CEC's outcome statements are not challenging and the bar should be set higher. The final ERG report could provide important insight on setting clear performance goals.

North American Fund for Environmental Cooperation

[The JPAC notes the Council has already moved to adopt the new NAPECA grant program and the following item should be edited accordingly.]

In 1995, the ~~Parties~~ Council created the North American Fund for Environmental Cooperation (NAFEC) as a means to fund community-based projects in Canada, Mexico and the United States that promoted the goals and objectives of the CEC. From 1995 to 2003, NAFEC awarded 196 grants for a total of C\$9.36 million and leveraged an additional \$5 million contribution from other sources. NAFEC projects funded a wide range of activities, including some related to biodiversity, green goods and services, energy, human health and air quality. The CEC terminated the NAFEC in 2003 "as a result of budget constraints." An internal review of NAFEC in June 2000 concluded that NAFEC was achieving specific and substantial results and was making a significant contribution to the CEC's goals. The NAFEC played an important role in capacity development, promoting grassroots community participation, particularly in Mexico, and in expanding the CEC's constituency.

Council members should reinstate the NAFEC.

Modernizing the Submissions on Enforcement Matters (SEM process)

One of the key mechanisms under the NAAEC meant to enhance compliance with, and enforcement of, environmental laws and regulations is the citizen submission process. Described in Articles 14 and 15 of the Agreement, this process allows any person or nongovernmental organization residing or established in the United States, Canada or Mexico, to make a submission to the Secretariat asserting that one of the Parties is "failing to effectively enforce its environmental law."

This mechanism is designed to hold the governments accountable for the effectiveness of their environmental enforcement and for any deficiencies in enforcement. It is intended to be a non-adversarial process that facilitates understanding of environmental law and the enforcement policies of the Parties, and supports NAAEC objectives to promote effective environmental enforcement and public participation in the domestic enforcement process.

Concerns have been raised that the process takes too long and that the NAAEC, by its terms, terminates the SEM process once a factual record is prepared and made available to the public. In this context, the following actions ~~could~~ will be taken:

- Current technological developments may provide opportunities to modernize and produce a more efficient and timely SEM process within the scope of the NAAEC. The Secretariat will review the process ~~will be reviewed~~ within a specified time frame and deliver proposals to improve, modernize and make it more efficient in a manner consistent with the NAAEC. This approach is consistent with recommendations articulated by the current executive director

in Denver.

- Once the process has been modernized, the Secretariat CEC could then be tasked to launch an outreach campaign to improve the public's understanding of the purpose of the SEM process.
- The Council will vote on Secretariat recommendations to prepare factual records within 120 days of their receipt.
- The Secretariat will develop internal measures to improve the timeliness of its work in the SEM process.

Reprioritizing and increasing transparency of expenditures

With an annual budget of US \$9 million, the Secretariat-CEC has accrued a surplus of nearly CAD\$3 million. The Parties-Council could work with the Secretariat to analyze the causes for accrual of surpluses and propose the mechanisms to reallocate it systematically in the future. The Parties-Council will work with the Secretariat to reallocate the current surplus as part of the next Operational Plan.

[JPAC notes that the following section is a discussion of management rather than governance principles and recommends that it thus be assigned to an appendix of this document. Such matters could also be addressed in terms of the general rules discussed previously.]

To further strengthen the CEC in this area, the Council could direct the Secretariat to implement actions and policies such as:

- ~~public disclosure (all Secretariat and JPAC travel and hospitality expenses (i.e. quarterly web posting)~~
- ~~limiting Secretariat travel to workplan implementation, Council and JPAC meetings, SEM-related issues and other travel required to carry out essential NAAEC-related duties (e.g. art 13 reports).~~
- ~~limiting JPAC face-to-face meetings to 3 per year, including CEC Council~~
- ~~detailed annual budget forecasting~~
- ~~providing a clearer accounting of project costs~~
- ~~providing quarterly budget reports to working group leads which inform budget allocation]~~

Clear direction to future executive directors at start of term

The Executive Director of the CEC Secretariat plays an integral role in delivering on governance issues and new priorities. As agreed in Denver, clear direction will be provided to future executive directors at the start of their term. This is an opportunity for the Council to highlight areas that require special attention in a particular context. For example, taking steps to address NAAEC Article 11 (2)(c) regarding geographic and gender balance within the Secretariat or following up on the process to renew, revitalize and refocus the CEC, initiated by Council.

Other opportunities - Strengthen the application of the NAAEC

Key provisions of the NAAEC provide for the development of rules and recommendations pertaining to environmental protection and enforcement. With a view to strengthening the application of the NAAEC, Council could direct their officials to:

- Review options for "model rules", in the event of a dispute resolution. A core obligation of the NAAEC is for the Parties to effectively enforce their environmental laws. This obligation is made enforceable through the availability of formal dispute settlement proceedings contained in Part Five of the NAAEC that can lead to penalties or trade sanctions for "a persistent pattern of failure to effectively enforce environmental laws." Under Article 28 of the NAAEC the Parties committed to negotiate model rules of procedure to govern proceedings under this dispute settlement structure. The Parties began negotiation of the model rules in 1997, but those negotiations were suspended in early 2000 and never concluded.
- Develop recommendations regarding transboundary environmental impact assessment, notification, consultation and mitigation. Many transboundary environmental issues have a significant bilateral nature. To this end, Council could direct officials to consider and develop recommendations with respect to the (a) assessment of the environmental impact of projects likely to cause significant adverse transboundary effects; (b) the notification, provision of relevant information and consultation between countries with respect to such projects; and (c) the mitigation of the potential adverse effects of such projects, in accordance with Article 10(7) of the NAAEC.

Timeline

A timeline to undertake work related to this Governance Proposal will be developed by the Executive Director in consultations with the Parties-Council.

APPENDIX I

MANAGEMENT PRACTICES AND PROCEDURES

To further strengthen the CEC in this area, the Council could direct the Secretariat to implement actions and policies such as:

- public disclosure of all Council, Secretariat and JPAC travel and hospitality expenses (i.e., quarterly web posting)
- limiting Secretariat travel to workplan implementation, Council and JPAC meetings, SEM-related issues and other travel required to carry out essential NAAEC-related duties (e.g., Article 13 reports)
- ~~limiting JPAC face-to-face meetings to three per year, including CEC Council~~
- detailed annual budget forecasting
- providing a clearer accounting of project costs
- providing quarterly budget reports to working group leads which inform budget allocation

