



ADVICE TO COUNCIL NO: 04-02

Re: Future Directions for the North American Agreement on Environmental Cooperation

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 other functions as the Council may direct”;

HAVING received the independent report of the Ten-year Review and Assessment Committee – Ten Years of North American Environmental Cooperation (the TRAC report);

BENEFITING from the substantive and thoughtful comments from the public during a JPAC organized workshop on the future directions of the NAAEC, held on 21 June in Puebla, Mexico;

HAVING reviewed the conclusions and recommendations of the TRAC report;

CONCLUDING that the report is very helpful in identifying what the CEC has done well in the past, what needs to be improved, the continuing challenges and emerging issues for the future;

URGES that high priority be placed on the following recommendations¹:

Recommendation 1: A Renewed Commitment to the CEC as an Innovative Institution

This recommendation characterizes the CEC as Council’s “institution of choice” and calls for Council’s renewed commitment to it. We are in full support of this recommendation and are very heartened to see this renewed commitment clearly expressed in the Puebla Declaration.

Recommendation 3: Advancing Our Knowledge of Trade and Environment Linkages

JPAC strongly supports this recommendation, having several times advised Council to work with “NAFTA working groups addressing issues at the interface between trade and environment” and we see this as the core of the CEC’s mandate. We now hope that, based on the Puebla Declaration, Council “will enhance the positive working relationship that has been developed with our trade counterparts to ensure that trade and environment policies and decisions are mutually supportive” and that concrete actions will soon be implemented—including the environment and trade ministerial meeting. The Council can be assured of full JPAC cooperation in the development of the strategic plan on trade and environment.

¹ The main TRAC recommendations for JPAC are attached.

Recommendation 4: Building Capacity for Stronger Environmental Partnerships

JPAC fully supports an increased focus on capacity building to assist our three countries in strengthening their implementation of environmental laws and policies by “knowledgeable environmental officials and experts inside and outside government, including in the academic and business sectors.” We are pleased to note that Council decided to focus on institutional capacity building in the Puebla Declaration. Further, as pointed out in this recommendation, the North American Fund for Environmental Cooperation (NAFEC) was a very effective capacity building mechanism and should be reinstated.

Recommendation 5: Getting the Relationships Right—Effective Governance in the CEC

JPAC strongly supports this recommendation. As a partner in this institution, we look forward to working with the Council and the Secretariat to implement this recommendation and ensure that these good governance principles are a prominent feature in the day-to-day work of the institution.

Recommendation 9: Ensuring and Leveraging Sustainable Funding for the CEC

JPAC strongly supports this recommendation and, as expressed during our recent annual in-camera session with Council, feels that the current budget situation is simply not sustainable. During our sessions in Puebla, the public repeatedly raised the issue of funding and its ramifications for the ability of the CEC to meet its obligations and implement the work program during our sessions in Puebla. While it was suggested to us that JPAC was not being helpful by continuing to insist that the Parties demonstrate their commitment to the institution by addressing the budget situation, we reiterate that a long-term solution is required in order to effectively implement the strategic and operational plans.

Recommendation 13: Building the CEC Constituency

JPAC stands ready to continue its work with the Secretariat to further implement this recommendation. JPAC has already provided its views on how to better involve indigenous peoples (Advice to Council 04-01) and will be addressing the topic of involving the private sector and business community in the coming year.

Recommendation 14: Implementing the Recommendations of this Report

JPAC is in full agreement with this recommendation—understanding that accountability is a crucial element for the credibility of our institution. JPAC will be pleased to work with Council in developing the report on implementation and follow-up for the 2006 annual session.

On the other hand, JPAC has some reservations about two recommendations.

Recommendation 10: Ensuring Effective Implementation of the Citizen Submission Process (Articles 14 and 15)

While JPAC fully supports the main thrust of this recommendation, we have some concerns about the development of a mediation step to facilitate the resolution of enforcement matters. Mediation tends to be a closed-door process that may conflict with the broader goals of Articles 14 and 15 to shed light on the facts in a fully transparent process.

Recommendation 11: Reaching Agreement on Dispute Resolution under Part Five

One of the main purposes of the NAAEC is to allow Council to look at environmental issues from a continental perspective. If the opportunity for the Parties to interact is removed, this may have the undesired effect of removing a key tool for environmental protection.

In conclusion, several members of the public suggested that amendments to the NAAEC aimed at reform of key areas that are considered troublesome should be considered. JPAC discussed this and concluded that it is premature to take a position in support of reforms.

JPAC urges Council to act immediately and begin to implement these priority recommendations.

Finally, as we engage in the strategic planning process to develop the CEC's new priorities, JPAC may have further thoughts on matters other than those considered in the TRAC report.

Approved by JPAC
11 August 2004

Main TRAC recommendations for JPAC

Recommendation 1: A Renewed Commitment to the CEC as an Innovative Institution

The North American Agreement on Environmental Cooperation is a unique agreement that promotes environmental cooperation in the context of closer trade relations. Through its Council of Ministers, Secretariat and Joint Public Advisory Committee, the Commission for Environmental Cooperation has achieved much in just 10 years. It has added substantially to our knowledge of the North American environment and the linkages between NAFTA and the environment; it has taken trilateral action on key environmental issues and strengthened the capacity of public institutions to manage environmental issues and to enforce laws and regulations; it has also promoted transparency and public participation.

The Ten-year Review and Assessment Committee calls upon the Mexican Secretary of Semarnat, the US Administrator of the EPA and the Canadian Minister of Environment to strengthen and renew publicly the commitment of their governments and themselves to the CEC as their institution of choice for trilateral environmental cooperation and for assessing the linkages between NAFTA and the environment.

Recommendation 3: Advancing Our Knowledge of Trade and Environment Linkages

The CEC has played a catalytic role in building knowledge of trade and environment links, and in convening experts and interests to study the environmental effects of NAFTA in North America. It has also played a positive, if limited, role in creating markets for green goods and services.

While we conclude that it was and continues to be unrealistic for the CEC to play a significant role in NAFTA implementation and dispute resolution, the CEC has a potentially constructive role to play in implementing other provisions of Article 10.6 of the NAAEC and in otherwise promoting cooperation at the interface between environmental protection and economic development in North America. We welcome the recent efforts of the Alt Reps and their trade counterparts in the three countries to develop a work program on trade and environment linkages.

We recommend that the CEC continue its research program on trade and environment linkages, and that it facilitate and inform the work of CEC and NAFTA working groups addressing issues at the interface between trade and environment.

We recommend that the CEC establish a web-based North American Clearinghouse on Trade and Environment Linkages to integrate and disseminate the results of research, seminars, conferences and dialogues.

We recommend that the CEC continue to support and encourage efforts to build markets for green trade, an area of work for which it is uniquely well-positioned.

We further recommend that the CEC pursue the development and promotion of market-based approaches addressing environmental issues, including such instruments as emissions trading.

Recommendation 4: Building Capacity for Stronger Environmental Partnerships

The CEC efforts to build the capacities of government officials and agencies, environmental and community NGOs and industry, while modest, have shown encouraging results. These efforts have benefited all three countries. They have also strengthened relationships among Canadian, Mexican and US NGOs, industry and governments.

The North American Fund for Environmental Cooperation (NAFEC) has proven to be an effective mechanism for building local environmental capacities.

The CEC's efforts can be strengthened through a more systematic approach aimed at creating long-term institutional capacities for governments and organizations outside government in all three countries, while being more responsive to Mexican needs.

We recommend that the CEC direct its capacity building efforts to helping build institutional capacities, and a new generation of knowledgeable environmental officials and experts inside and outside government, including in the academic and business sectors.

In order to achieve this goal, we recommend that the CEC systematically integrate capacity building into most of its programs, with an emphasis on: 1) supporting Mexican government institutions and private organizations to strengthen the implementation of environmental laws and policies; and 2) building effective relationships among like-minded environmental organizations in all three countries.

The design of this cross-cutting program should include:

- **Developing a broad definition of capacity building which includes sharing of best practices and investing in local capacity;**
- **Setting clear goals and objectives, with measurable indicators of progress and monitoring of results achieved; and**
- **Facilitating direct partnerships involving Canadian or US business and private foundations with Mexican organizations, which then can carry out capacity building activities in the country.**

We further recommend that the CEC maintain its support for NAFEC, as an element of its capacity building efforts, and as a means of continuing to broaden the CEC's constituency base.

Recommendation 5: Getting the Relationships Right—Effective Governance in the CEC

The heart of the CEC is its institutions—the Council of Ministers, the Secretariat and the Joint Public Advisory Committee. These institutions' representatives have actively worked to carry out their mandates over the last ten years. At the same time, the lack of clarity as to their respective roles and accountabilities has become increasingly evident. This is partly the result of the NAAEC itself but more importantly of how the Agreement has been interpreted and implemented over time. Concerted action is needed to bring greater clarity to these roles in order to ensure efficient and effective governance of the CEC.

We recommend that the Council, working with the executive director and JPAC, develop and document a renewed understanding on their respective roles, responsibilities and interactions, building on the NAAEC provisions and the good governance principles of:

- Transparency in decision making;
- Accountability for the discharge of roles and responsibilities;
- Respect for the roles of the other CEC bodies; and
- Efficiency in the use of resources.

More specifically, this understanding should incorporate the following elements:

The Council and the Secretariat

The Council of Ministers, supported by the Alt Reps, should discharge its role by following the model of a Board of Directors for the CEC. To that end:

1. For the Law and Policy Enforcement Cooperation Program, the Council needs to focus its efforts on:

- Setting a long-term vision and strategic priorities for the CEC;
- Approving the annual work program and budget; and
- Overseeing program implementation through an annual review of results.

The Council and the Alt Reps should then entrust to the executive director the implementation of the annual program.

2. For Submissions on Enforcement and Factual Records (Art.14-15), the Council needs to:

- Set out clear ground rules for the Secretariat, consistent with a strict interpretation of NAAEC's intent;
- Entrust the executive director with carrying out his/her functions effectively, as set out in the NAAEC; and
- Implement its own role consistent with a strict interpretation of the NAAEC.

3. The executive director should focus the Secretariat's role on:

- Developing the Commission's annual program and budget for the Council's approval;
- Implementing the Council-approved program;
- Reporting on and being accountable to the Council for the results of this program;
- Carrying out the responsibilities under Articles 13, 14 and 15 under NAAEC; and
- Maintaining direct communication with the ministers, and reporting periodically on implementation progress.

We further recommend that the executive director meet individually with each of the ministers once a year and maintain an "open phone line" dialogue with each of the Alt Reps. Relations with GSC members can be effectively handled by senior and other Secretariat staff.

JPAC and the Council

We recommend that the Council clearly recognize JPAC as one of the three principal bodies of the CEC and recognize the valuable role that it plays as advisor to Council, and as “NAAEC’s conscience.”

We recommend that JPAC continue to provide advice to Council and serve as “NAAEC’s conscience,” working to effectively engage ministers and the Alt Reps while setting realistic expectations for its role in their decision-making.

We recommend that JPAC draw on its expertise and network of contacts to:

- **Engage a broader and deeper set of North American constituencies, including business, community-based interests, indigenous peoples, environmental and socio-economic NGOs and academia/policy research institutes; and**
- **Assist the CEC to identify supplementary sources of funding to strengthen its environmental cooperation program.**

JPAC and the Secretariat

We recommend that the Council provide JPAC with the staffing and financial resources it needs to be effective, separate from the CEC Secretariat and accountable to the JPAC chair. To ensure effective liaison, JPAC staff should be housed within the CEC Secretariat, operating in a manner to avoid any real or perceived conflict of interest in their work.

The executive director should continue to keep JPAC fully informed of the Secretariat’s work, and should facilitate its engagement in the activities of the CEC.

Recommendation 9: Ensuring and Leveraging Sustainable Funding for the CEC

The financial resources available to the CEC have been constant in US\$ but have declined in real terms through inflation and the recent appreciation of the Canadian dollar. We conclude that the erosion in the CEC budget is adversely affecting its ability to meet the NAAEC obligations and the quality of its work. We also conclude that, given its economic conditions, Mexico would benefit from a larger share of CEC program resources.

We recommend that the three Parties demonstrate their commitment to the CEC and its three-year Operational Plan by increasing its current core funding, at a minimum to its original level in real terms. In addition, the Parties may wish to adopt a funding formula that reduces the volatility of the CEC budget arising from currency fluctuations.

We recommend that the Council make provision for allocating an increased share of the annual budget to activities benefiting Mexico, for the purposes of specific, agreed programs and for capacity building activities.

We further recommend that the CEC broaden its funding base. This could involve voluntary contributions by the Parties to special projects or non-core programs of the CEC. It could also involve partnerships with other organizations, including multilateral development agencies and institutions and the business sector, in funding specific aspects of programs, co-financing activities and secondments.

Recommendation 10: Ensuring Effective Implementation of the Citizen Submission Process (Articles 14 and 15)

Articles 14 and 15 of NAAEC provide a mechanism that has successfully promoted greater transparency regarding the Parties' environmental enforcement practices. It has also led to some improvements in environmental policy and practices. In order for the citizen submission process to be a credible and effective mechanism, there needs to be greater clarity and comfort among the CEC institutions and the public about how these obligations of the Agreement are implemented; and a willingness by the Parties to address legitimate issues raised through citizen submissions. So as not to be unduly burdensome for submitters, the Secretariat, or the responding government, the process needs to be managed efficiently.

We urge the three CEC Parties, as well as the CEC Secretariat, to be sensitive to perceived conflict of interest, and to protect the integrity of the process in exercising their respective roles under the NAAEC provisions for citizen submissions on enforcement matters.

We recommend that:

- **A clear agreement be reached between the Council of Ministers and the executive director on ground rules for action on these obligations;**
- **The Council of Ministers respect the role and authority of the executive director, in line with a strict interpretation of the Agreement; and**
- **The executive director initiate and maintain an open dialogue with the Alt Reps on actions related to submissions and factual records.**

We also recommend that:

- **The Council, working with the executive director and JPAC, develop a mediation step in the citizen submission process to facilitate the resolution of enforcement matters. Such a step would help manage the demanding resource requirements on submitters, the Secretariat and the Parties in implementing the submission process.**
- **The Parties consider reporting on a voluntary basis on follow-up activities to factual records in their respective jurisdictions. Such follow-up would increase the effectiveness of the process.**

Recommendation 11: Reaching Agreement on Dispute Resolution under Part Five

NAAEC represents a comprehensive framework for trilateral collaboration on environmental issues that overall has served the Parties and their citizens well. However, we conclude that the dispute settlement and sanction provisions in Part Five for ineffective enforcement are in tension with the Agreement's overall spirit of cooperation and may even be counterproductive. The threat of their being invoked, no matter how unlikely given the tacit understanding that doing so could undermine the Agreement, negatively affects the implementation of Articles 14 and 15 on submissions and factual records on enforcement matters.

We recommend that the Parties publicly commit to refrain from invoking Part Five for a period of 10 years.

Recommendation 13: Building the CEC Constituency

In order to fulfill its mandate, the CEC needs strong and broad support from key North American environmental interests. The CEC has built a substantial base of support among NGOs and community groups. While continuing to work with its existing base of support, the CEC can reinforce the effectiveness and legitimacy of its programs through more active engagement of the business community, academics and indigenous groups.

To strengthen links with key constituencies, and to increase its understanding of their needs, we recommend that the Council direct the executive director, with the assistance of JPAC, to ensure the CEC pursues a more systematic and balanced engagement of the business community, indigenous groups, academics, community-based interests and environmental and socioeconomic NGOs in the three countries, across all CEC programs and activities.

We also recommend that the executive director seek secondments of relevant experts from the business community and academic institutions.

Recommendation 14: Implementing the recommendations of this report

We recommend that the Council, with the executive director's assistance and JPAC's advice, report publicly on the implementation of these recommendations, including those which have been fully or partially implemented and those which have not, with the reasons, to the 2006 annual meeting of the Council.