

## 20 Years of NAFTA and the NAAEC

### *Summary of contributions in response to JPAC's call for information and comments*

#### **Introduction**

January 2014 will mark 20 years since the NAFTA and its environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), went into effect. To mark this important milestone, and with a view to providing constructive input for future CEC plans, the Joint Public Advisory Committee (JPAC) of the CEC is conducting a public review of the first 20 years of NAFTA and the NAAEC.

On 25 April 2013, JPAC issued a call for information and comments from the North American public about their experiences, insights, opinions and perspectives. We have received 602 written contributions from indigenous groups, conservationists, anti-pollution activists, researchers, industry and more. Five hundred sixty-two comments have come from Canada, 20 from Mexico, 19 from the US, and one jointly from Mexico and the US. The comments from Canada include 546 endorsements of a statement regarding Canada's observance of the NAAEC, which is further described below. This document summarizes these contributions.

#### *A note on the limitations of this summary*

The information and comments received vary widely, reflecting the many different experiences, levels of engagement, interests and perspectives of the North American public with the NAAEC, the NAFTA and the CEC. This summary aims to provide an overview of the praise, criticism and suggestions received so far, as a starting point for discussion and as an incentive for the reader to consult the contributions directly. This summary roughly organizes the input around the guiding questions posed in the call for comments, in order to facilitate their consideration. As a summary, this document cannot do full justice to the information received. Readers are encouraged to review the commentary directly, which is available on the [CEC Website](#).

#### **What are the environmental successes of the NAAEC and NAFTA?**

Several comments recalled the fact that the NAFTA/NAAEC package was innovative in integrating environment and trade into the same framework. The CEC is broadly recognized as the only organization that provides a continental view of the North American environment. Commentators specifically mentioned the following as successes:

- Better practices for managing chemicals
- The creation of Mexico's pollutant release and transfer registry, *RETC*
- The North American Bird Conservation Initiative (NABCI)
- Better practices to address links between trade, economy and environment
- Bringing institutions together
- Identification of priorities and clear goals
- Availability of mechanisms for cooperation, dialogue and communication
- Implementation of the strategy for 2010-2015: Healthy Communities and Ecosystems; Climate Change – Low-Carbon Economy; and, Greening the Economy in North America
- Ample provision of substantial information by the CEC
- In the area of capacity building, generation of numerous mechanisms facilitating collaboration among the countries, non-governmental organizations and industry, notably the tri-national biodiversity conservation programme and the addition of Mexico's *RETC*

Commentators also highlighted the following as successes of the NAFTA/NAAEC that specifically relate to Mexico:

- Over the last decade, air quality has generally improved.
- Patents for some environmental technologies and renewable energies have increased.
- PROFEPA has given greatest priority to self-regulation and environmental audits.
- Infrastructure for hazardous waste treatment was developed and treatment capacity more than tripled from 5.2 million tonnes in 2000 to 16.7 million tonnes in 2011.
- Electricity generation from non-fossil fuels increased to 35%.
- Mexico has enacted several laws to strengthen environmental protection (Wildlife, Sustainable Forestry, Climate Change, Environmental Liability).
- The Border Environmental Cooperation Commission (BECC) and the North American Development Bank (NADBank) have supported 35 infrastructure projects and 450 environmental projects along the Mexico-US border.

Commentators from academia suggest the CEC is at least a partial template for building environmental protection into free trade agreements in the hemisphere. They note there is near consensus that some environmental provisions should be incorporated in all future trade agreements, but that NAFTA could be improved upon. Among the aspects of the CEC "most worthy of emulation," these authors cite:

- The CEC's comprehensive mandate for advancing environmental protection and sustainable development
- Transparency and public participation
- The relative independence of the Secretariat

- The Submissions on Enforcement Matters (SEM) process in NAAEC Articles 14 and 15
- The independence of JPAC
- The ability to capitalize on a small budget

### Where have the provisions of the NAFTA and the NAAEC fallen short?

The information received reflects some concern that the NAAEC has not allowed for significant progress in terms of tangible and quantifiable improvements to environmental quality in North America, and that important disparities remain among the environmental laws of Canada, Mexico and the US.

### Is the problem in the agreements themselves?

Commentators considered the following to be shortcomings in the agreements:

- The formula for funding the CEC is inadequate.
- The exclusion of aboriginal harvesting from the definition of 'environmental law' (NAAEC Art 45) limits the value of the SEM process to indigenous peoples, such that the Parties should amend NAAEC Article 45 to delete this exclusion, or issue an interpretation directive to the Secretariat to allow complaints regarding aboriginal uses to proceed through the SEM process.
- There are governance challenges, particularly regarding the SEM process.
- The Parties should make the SEM process more accessible by reducing admissibility requirements.
- The NAFTA/NAAEC haven't properly balanced trade and the environment: they offer a stronger recourse to investment interests (NAFTA Chapter 11) than to environmental interests (NAAEC Article 14); commercial interests prevail over the environment. Ultimately there's a need for a stronger outcome for the environment, similar to that of the Chapter 11 arbitration process.
- The Parties could agree on a more effective process for arbitration and enforcement and broader jurisdiction over the Parties' environmentally unsound measures.
- It is offensive that Quebec was sued because of wanting to study environmental and health risks of fracking [in November 2012, Lone Pine Resources Inc. filed a NAFTA Chapter 11 claim against Canada upon losing its permit due to the St. Lawrence River moratorium of May 2011].

### Is the problem in the implementation of the agreements?

The following paraphrases some of commentators' criticism of the implementation of the agreement:

- Insufficient funding and lack of support from the Parties has resulted in weak, or in some areas, no implementation of the NAAEC: the Parties should provide the CEC with proper funding (about \$14,200,000 simply to adjust for nineteen years of inflation) and a willingness to cooperate in the CEC's responses to citizen submissions rather than to thwart them.
- The CEC has failed to effectively implement the NAAEC given the lack of Part V model rules, providing an advantage to commercial interests over the environment.
- There has been weak implementation regarding cooperation on enforcement of environmental laws, and there is a need to improve intelligence sharing and to ensure the actual implementation of existing operational plans.
- While the CEC was created to fill a very visible hole in the North American environmental regime, it has been relegated to an institutional purgatory by the governments since its inception.
- Just as the CEC has backed away from earlier programme commitments in regional environmental cooperation, it has likewise retreated from earlier enforcement ambitions.
- The CEC's work on environment and trade remains controversial. According to some scholars, supporters believe the CEC has been a critical asset in dealing with specific environmental problems related to economic integration of NAFTA. Critics suggest the CEC has been ineffective mainly because the CEC is subordinated to the economic elements of NAFTA. Some suggest the CEC has indirectly legitimized the environmental deficiencies embedded in NAFTA's trade and investment clauses, and that it has failed to establish a real commitment to the environment and sustainable development.
- The online tools for the SEM process to make the process more accessible are welcome, but questions about whether implementation of the new guidelines will make the process more transparent remain.
- A review of the SEM process by two legal scholars concluded that at least some submitters believe the CEC process is reasonably accessible, though there have been complaints about the amount of information required and other steps expected of submitters. The scholars note that the perceived value depends on a variety of factors, including timeliness, expected outcomes, and available alternatives. Submitters appear to perceive the value of the process differently for different countries, in part because of differences in domestic legal tools. The SEM process has done some good to date. At the same time, significant shortcomings in the operation of the process have undermined its effectiveness and the credibility of the countries (timeliness, fairness, follow-up). These commentators believe that there are readily available strategies to address these shortcomings and that implementing them would enable the process to be much more effective in the future than it has been thus far.
- A commentator urged the governments to give the CEC the freedom of action to investigate and report on North American environmental issues.

- Indigenous peoples, business organizations and academia should have more prominence as stakeholder groups.
- In addition, 546 critics in Canada believe that NAAEC has failed to address Canada's "gutting" of environmental laws. They indicate that changes to the Canadian Environmental Assessment Act and proposed changes to other laws and funding cuts to environmental research are contrary to Canada's commitment in the NAAEC to high levels of environmental protection and to ensuring public participation. They request that the CEC "notify the Canadian government that bringing into force its recent amendments to the Fisheries Act and the Navigable Waters Protection Act may be inconsistent with the NAAEC."

### Is the CEC achieving the goals for which it was created?

Most of the achievements of the CEC highlighted in the commentary received are listed in the first section of this summary regarding the environmental successes of the NAAEC and NAFTA. The CEC's accomplishments have been characterized as "filling a small space in a large niche".

Positive, though at times qualified, comments on the question of whether the CEC is achieving its goals, included:

- The CEC has supported cooperation.
- The CEC has been a catalyst for bringing stakeholders together in broad efforts to facilitate cumulative conservation strategies. The threats and scale of environmental issues have changed since the agreements were implemented. Disruptions of ecological services have far outpaced the investments to restore services, curtail losses, and protect species. Though the CEC has had a strong positive impact, losses continue to accumulate. Habitat degradation, loss of ecosystem services and biodiversity has been driven by commodity prices and market competition.
- The CEC has contributed to communication between governments; it has been a good facilitator, but there is a need to strengthen coordination to ensure commitments are adhered to and concrete results are achieved.
- The Council, the Secretariat and the JPAC have been remarkably accommodating in recognizing and supporting the role of indigenous peoples in the CEC over the past 20 years. However, the continuing exclusion of laws that support sustainable uses from the definition of 'environmental law' in the NAAEC needs to be revisited.
- The Independent Secretariat Report "Hazardous Trade?" demonstrates the important role that the CEC can play in highlighting an important but little understood environmental issue impacting public health in communities across North America. It also demonstrates the importance of the work of the JPAC in providing direction to the CEC in highlighting significant issues of environmental concern and calling for a response.

- The CEC has not done badly given the available resources, but it needs more independence and resources.

On the critical side, commentators noted:

- The CEC has had limited impact on trade practice in North America.
- The CEC's data gathering and information activities may not always influence decision-making processes.
- The recently documented record low in the population of the Monarch Butterfly shows that further work needs to be done in integrating cooperation in areas such as Species at Risk, especially in the light of the current and foreseen impacts of climate change.
- The impact of environmental changes on human health is a topic that remains elusive in the North American environmental agenda. Attempts have been made without too much traction. Misalignments in country-specific health agendas are part of the problem. The CEC initiative on Children's Health and the Environment is one that needs to expand.
- Practical, concrete or tangible activities have been neglected, along with multiyear funding to accomplish them and transparent indicators.
- Reports by government agencies on many important environmental issues (for example, climate change, energy and transportation infrastructure) lack a continental perspective and are addressed instead by three side-by-side national perspectives.
- One commentator offered strong criticism regarding the CEC's performance on many of its goals, pointing to 'failure and corruption' regarding pollution prevention, transparency and public participation in environmental matters, compliance and enforcement of environmental laws and policies, and private access to remedies and procedural guarantees.

### **Are the CEC's goals adequate in face of ongoing environmental challenges in North America?**

One distinguished scholar encouraged JPAC to find time to consider some of the longer term implications of globalization and trade in general, and NAFTA in particular, for ecosystems degradation, resource scarcity and geopolitical instability. Approaching these issues from the perspectives of natural capital and ecosystem carrying capacity, he observed that

“globalization/trade does indeed help to stimulate growth, but in the process generates several ecologically significant impacts beyond relaxed pollution standards. In particular, by exposing increasingly scarce pockets of quality resources to ever-larger, richer markets, unmanaged trade increases consumption (energy and material 'throughput') which, in turn, accelerates natural capital depletion and biodiversity loss (e.g., the collapse of the North Atlantic cod stocks in 1992 was the result of over-fishing largely to satisfy export markets; half of Canada's prairie crops are exported which accounts

for a proportional share of irreversible soil and biodiversity degradation). ...The risk of long-term trade-induced material insecurity may seem fanciful but is an emergent reality. Most of the world's countries now survive largely or in part on food and fibre imported from 'elsewhere', an unprecedented degree of international interdependence made possible by regional and global trade agreements such as NAFTA and the WTO. Again, however, import-dependent nations that have exceeded their long-term domestic carrying capacities are in a state of increasingly perilous 'overshoot' ... Long rejected by economists as irrelevant to humans, the concepts of carrying capacity and resource limits are beginning to influence international relations and long term geopolitics."

Another contributor suggested that while the goals of the CEC are adequate, there is a need for an international legal instrument to protect the human right to a healthy environment.

Other new challenges identified include:

- Climate Change - need to reduce GHG emissions, establish a carbon market, share experiences
- Sustainable urban development
- Markets for waste recycling
- Renewable energy

### **Have the NAAEC and the environmental provisions of NAFTA adequately addressed environmental concerns related to free trade in North America?**

The positive, though qualified, feedback on this question noted:

- The issue of chemicals has been adequately addressed (SMOC) but there has been lack of follow-up on Mexico's chemicals management projects; they have not been harmonized or attained a level playing field with Canada and the US.
- The CEC plays an important role by providing information on effective enforcement and on how the governments are complying with their environmental commitments, but the Agreement should be integrated into the local laws of each of the Parties.

Negative issues raised include:

- Land degradation has resulted in Mexico as a result of efforts to compete with US exports, while the US is exporting subsidized crops.
- Population growth is one of the main problems, so we need more holistic development.

- With increased trade have come environmental issues that are not being addressed effectively, like air pollution due to increased transport and inadequate disposal of hazardous waste.

Reflecting on the NAFTA and NAAEC's 10<sup>th</sup> anniversary, a scholar with in-depth experience of the CEC, identified the following recommendations—which he considers still relevant today—regarding integrating environmental concerns into new trade agreements:

- Countries must adopt environmental and social safety nets and safeguards before domestic policies are constrained by the disciplines of free trade;
- Countries should focus on establishing sustainable economies for resources that are difficult or impossible to recover once they are lost, such as biodiversity (as per the formula *Technology + Global Access/Demand + Inadequate Environmental Infrastructure = Non-Renewable Resources Are Gone in Record Time*);
- Developing countries can sequence trade liberalization to ensure that safety nets and transitional policies are in place before global demand is brought to bear on key resources. This includes linking liberalization measures to key sustainability indicators and benchmarks for selected areas sensitive to international trade; and
- Sanctions for failure to enforce environmental law should be eliminated in favor of a mechanism empowering citizens to allege that a party is failing to effectively enforce environmental law or that a trade measure is adversely impacting general health or the environment.

### How could implementation of the NAAEC and the environmental provisions of the NAFTA be improved?

- Funding for the CEC should be increased.
- More resources should be allocated to actions and less into research.
- Parties should report to the Council how they are implementing Article 3 of the NAAEC (Obligations) on an annual basis, and invite comments on such reports from the public, through the JPAC.
- Environmental concerns should be integrated into economic decisions; for example, tax rates are not linked to the environmental performance of vehicles.
- Subsidies with harmful environmental effects should be eliminated.
- Environmental criteria should be standardized, and environmental laws should be strengthened and compulsory.
- The CEC's watchdog role should be strengthened; regional governance is needed to ensure strengthening and harmonization of environmental laws with greater powers and autonomy to the CEC.
- NAAEC should be applied in the context of other international law, including human rights law and Principle 22 of the Rio Declaration.



- Further efforts are needed to improve public participation in environmental decision-making.
- Participation of the industrial sector should increase.
- Innovative responses are needed to address the fact that Mexico has the least research and development (R&D)-intensive economy in the OECD and one of the lowest private sector shares in gross expenditure on R&D.
- Adequate resources for SMOC are needed in Mexico; the North American Regional Action Plan (NARAP) on monitoring is a huge challenge for Mexico because of insufficient infrastructure, trained staff and material resources.
- JPAC nominations by the Parties should be based on candidates proposed by the Secretariat.
- A permanent independent results evaluation committee should be established.
- The CEC should have greater powers on air quality.
- The Parties should support a move towards a World Environment Organization.
- The CEC should establish committees on recurring themes (air pollution, shale oil and gas).
- The CEC should have a broader mandate to provide for arbitration and conciliation of interests among the three Parties.
- The SEM guidelines on timelines are good, but making public all reasons for decisions should be a general rule.
- There is a need to raise awareness about the SEM process and collaborate more with universities.
- The CEC should follow up on the recent Article 13 report on lead batteries by creating a task force, assisting Mexico to close gaps on reporting of lead emissions, and monitoring community exposures and environmental contamination.
- There has been a good start on the North American Pollutant Release and Transfer Register (PRTR), but there is a need to strengthen the Secretariat's ability to obtain data. Also, awareness of the registry should be promoted and annual PRTR reports should focus on current transnational issues like shale oil and gas.

### Are there important topics the CEC has failed to tackle over the past 20 years?

One of the gaps noted is a comprehensive *North American Environmental Law* treatise to assist practitioners and courts in understanding how the laws of the three Parties operate and interact, as well as to support ongoing consideration by decision makers on ways to improve North American environmental law.

Another gap is the particular situation of cross-border indigenous groups regarding environmental issues. The CEC should assess how cross-border indigenous

communities are able to address environmental issues, what challenges they face and how they can be overcome when working within multiple jurisdictions.

Other topics noted were:

- Agroecology
- Green chemistry
- Sustainable production and consumption
- A regional vision for integrated management of coasts and seas

### **In light of the past 20 years, on what priorities should the CEC focus in the next 10 years and beyond?**

The following is a broad and diverse list of some suggestions contained in the information received:

- Climate change
  - One commentator noted that “Global warming from CO<sub>2</sub> and other gases and resultant climate change are the biggest environmental issues of this century. The CEC Ministers and the public will reward the CEC and JPAC with a badge of relevance if the CEC accomplishes a program of cooperation in this critical area.”
  - Another commentator suggested the CEC should advocate for the creation of an international framework to establish a worldwide rationing system of all fossil fuel products (including inputs for petrochemicals), based on the vital needs of individual countries. The system should include: obligations for any country receiving or using fossil fuels products to convert to renewable alternative energy/products within a certain timeframe; establishment of research programs for the elimination of petrochemical products (plastics); and an international court to resolve disputes and ensure compliance, with penalties provided for governments, corporations and/or individuals. This critic noted that governments should overcome the opposition from the fossil fuel industry, redirect their attention and investment into a new economic paradigm (based on renewable energy and smart systems), and recognize that the alternative energy sector provides the opportunity for major employment, tax revenues for governments and profits for industry.

In particular, more action was recommended on:

- Reducing GHG emissions
- Climate change adaptation in indigenous communities
- Climate change preparedness
- Regional climate change vulnerability studies, integrating results into planning and for adaptation

- Indigenous communities - Commentators recommended action to address:
  - Greater vulnerability to environmental impacts
  - Transport of hazardous materials through their territories and communities
  - Indigenous communities' right-to-know about environmental exposures and risks, for example through improvement to PRTR provisions
  - Better risk assessment and management of chemicals
  - Capacity to address climate change impacts and adaptations
- Green economy
- Economy, trade and environment work should be the priority and central focus for the CEC, including by continuing the Symposia on Assessing the Environmental Effects of Trade, and continuing to assess the environmental effects of NAFTA.
- The environment and trade linkages program should be broadened, institutionalized and strengthened to carry out independent public studies on key trade and environment relationships brought to light by the public, governments, or CEC work itself; and to follow up on select issues, providing warning capabilities for resource managers, environmental regulators, and others working to protect key ecosystems or resources.
- Address environmental impact of roads and ports (transport for trade).
- Engaging and incentivizing private industry to "green" the increasingly global logistics supply chain (NAFTANEXT Conference in Chicago in April 2014).
- Sustainable urban planning
- Energy efficiency
- Solar power
- The CEC should move beyond a watchdog role towards: common external tariff, labour mobility, standard and regulatory harmonization and/or mutual recognition
- SMOC and PRTR – Greater focus on the "grey agenda," in particular traceability of chemicals and hazardous wastes; the SMOC and PRTR programs have been vital for Mexico so far and continued support is needed if Mexico's RETC is to achieve comparability and public access to information.
- Bring back the focus on Children's Health and the Environment.
- Need an express CEC commitment to the Rotterdam Convention (on pesticides and industrial chemicals that have been banned or severely restricted for health or environmental reasons) and the Cartagena Protocol on Biosafety.
- Waste and contaminated sites
- Sound Management of Spent Lead-Acid Batteries – involve JPAC; hold a workshop on air emissions issues common in the recycling industry in North America.
- Island restoration, conservation and sustainable use

- Prevention of the use of GMOs
- Forest fires
- Biodiversity conservation and ecosystem services
- Wildlife protection in border areas
- Grasslands conservation
- Conservation of transboundary lands and wildlife populations
- International Peace Park in the Big Bend area (need new international steering committee)
- Potable water availability in Mexico
- Turtle conservation
- Regional projects promoting efficient resource use and providing incentives for social participation in conservation
- Effective enforcement of environmental law in border areas
- Transboundary Environmental Impact Assessment
- A more timely SEM process
- CEC visibility and outreach
- Increased NGO participation at meetings, and NGO representation on JPAC.
- Increased participation by academics and increased awareness of the CEC in the academic community and in general
- Involvement of multinational companies
- The CEC should become a reliable source of harmonized statistical information from the three countries, on economic growth, social aspects and environmental performance.
- The CEC should continue as a space that facilitates regional understanding.

### Other comments

As noted earlier, 546 people have endorsed a statement regarding Canada's changes to its environmental laws and the resulting alleged violation of the NAAEC. Comments related to this matter also included:

- A plea for NAAEC to ensure that Canadian governments that fail to live up to the commitments made in NAAEC will be held to account for their lack of effective governance.
- In 1994 Canadians were worried that NAFTA could see our country become a "pollution haven", and to address those concerns Canada signed on to the NAAEC. Twenty years later we are facing the very fate we took action to prevent.
- Under the NAAEC, Parties are required to continuously improve environmental legislation. In implementation of its Responsible Resource Development Plan, and through other budgetary measures, Canada has substantially weakened protection of the environment.

- The Canadian government's attacks on environmental laws are a subsidy to the oil and gas and other industries and, as a result, we have failed to live up to our international commitments.
- In the last few years the Canadian Government has undermined if not eliminated many of the most important legal protection to the Canadian environment. This was done for one and only one reason: "to enhance the trade/sale of Canadian raw-resources in the interest of international corporations".

Additional comments touched on diverse topics, as follows:

- During meetings organized by the CEC, there should be more interaction among participants and less presentations.
- Bravo to the Secretariat for their work, publications, online and e-tools, and social media.
- The CEC is not present or visible (comment from El Paso).
- The America's WETLAND Foundation (AWF) released "Beyond Unintended Consequences: Adaptation for Gulf Coast Resiliency and Sustainability" in late 2012. The Report offers 30 recommendations for Gulf Coast sustainability based on research and testimony from a series of leadership forums held in 11 communities from Texas to Florida during a 14-month period in 2011 and 2012. A copy of the report is available at: [http://www.futureofthegulfcoast.org/AmericasWETLANDFoundation\\_Beyond.pdf](http://www.futureofthegulfcoast.org/AmericasWETLANDFoundation_Beyond.pdf)
- "All free trade agreements should be abolished! The only ones who benefit are large corporations. Industry is leaving the US and Canada for cheap labour and lack of environmental oversight elsewhere, which hurts us all. Industry controls governments while the populations become slaves to the elite! It is not sustainable! Every country would be better off if they were as self sufficient as possible!"
- There needs to be a focus on Indigenous Rights, Practices and Inherent Ancestral Laws. The Parties must be seeking agreements with individual Indigenous Nations; they have a responsibility as duty bearers to work on a Nation-to-Nation basis with Indigenous Peoples. Continuous efforts have been made by States to ignore Indigenous Nations' rights to withhold consent and to avoid accommodating their rights. There are still many concerns about weak environmental standards and assessments.