



ADVICE TO COUNCIL: NO. 02-07

Re: Work plan issue related to Submissions under Articles 14 and 15 of 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), that JPAC “may provide advice to the 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”;

RECALLING that JPAC, in its Advice to Council 01-09 dated 30 November 2001, requested that Council authorize a public review of two issues:

1. the matter of limiting the scope of factual records; and
2. the requirement for the Secretariat to provide the parties with its work plan and the opportunity to comment on it.

FURTHER RECALLING Council’s reply dated 11 February 2002 authorizing a public review on the first issue only after completion of the relevant factual records (SEM-97-006, SEM-98-004, SEM-99-002, and SEM-00-004) and authorizing a public review on the second issue;

HAVING notified Council of its intention to conduct a public review on the issue of directing 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, in accordance with the JPAC Public Review Process;

UNDERSCORING that this public review is thus the first in a two-part review;

NOTING that the public comment period terminated on 30 April 2002 and that JPAC has analyzed the public comments (see attached a Summary of Comments Received);

JPAC, therefore, recommends that Council refrain, in the future, from including a requirement that the Secretariat provide the Parties with the opportunity to comment on the overall work plans. This does not prevent the Secretariat from providing work plans to the Parties for information purposes at the same time as they are provided to the public.

JPAC supports this recommendation with the following reasons drawn from analysis of the public comments and JPAC’s past advice:

Effects on the Independence of the Secretariat

- There is an existing perception of undue influence by the Parties in the activities of the Secretariat regarding the citizen submission process.
- 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. The 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 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.

Potential for Effecting 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.

Transparency

- A work plan must be made available to the public at the same time as it is provided to the Parties.

Other Considerations

- The requirement creates a conflict of interest for the Parties who are both members of the Council and the subjects of the factual records. Article 11(4) of the NAAEC makes it clear that the Parties shall not seek to influence the Secretariat in the discharge of its responsibilities.
- 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.

JPAC urges Council to render its written decision expeditiously.

APPROVED BY THE JPAC MEMBERS

10 May 2002



Summary of Comments Received

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

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, nor 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

2 May 2002