



ADVICE TO COUNCIL NO: 03-05

Re: Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to 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), 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”;

RECOGNIZING that the citizen submissions process under Articles 14 and 15 of the NAAEC plays a unique and indispensable role in fostering vigorous environmental enforcement;

RECALLING JPAC’s Lessons Learned Report to Council recommending that this process must be more timely, open, equitable, accountable and effective;

CONCERNED that the citizen submissions process is continuing to lose relevance, placing the CEC’s credibility at risk;

RECALLING JPAC’s Advice to Council 01-07, dated 23 October 2001, and Advice 01-09, dated 30 November 2001, concerning JPAC’s request that Council authorize a public review, in conformity with Council Resolution 00-09, on the matter of limiting the scope of factual records and the requirement for the Secretariat to provide the Parties with its work plan and the opportunity to comment on it;

FURTHER RECALLING that Council’s response to these Advice from JPAC was to postpone any public review of the matter of limiting the scope of factual records until the relevant factual records (SEM-99-002 on Migratory Birds, SEM 97-006 on Oldman River II, SEM-98-004 on BC Mining, and SEM-00-004 on BC Logging) were completed;

MINDFUL OF JPAC’s Advice to Council 02-03 recommending that Council reverse this decision and Council’s refusal to do so;

RECALLING that upon completion of these factual records, JPAC notified Council of its intent to conduct a public review;

FURTHER RECALLING that Council Resolution 00-09 committed Council to reviewing the operation of the Resolution after two years;

NOTING that in preparation for this review, JPAC commissioned the Environmental Law Institute (ELI) to develop a background report on two matters:

1. Limiting the scope of factual records and, adding to this original topic, the issue of what is evolving with Council's decision on SEM-02-001 on Ontario Logging into interpreting what constitutes 'sufficient' information to support an allegation of failure to enforce; and
2. Review of Council Resolution 00-09.

FURTHER NOTING that JPAC called for written comments on these matters on 21 July 2003, and held a public meeting on 2 October 2003, in Montreal (the comments received during this public meeting, along with JPAC's analysis, were used by ELI to produce a final report, which is attached, together with the Summary Record from the public meeting);

THEREFORE, on the matter of limiting the scope of factual records, JPAC strongly recommends that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat.

JPAC supports this recommendation with the following reasons:

- By intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process.
- Interference by Council with the scope of a submission creates a situation where factual records no longer address the matters raised by the submitters, rendering the process less relevant.
- Such action jeopardizes the ability of those records to fully expose the controversy at issue.
- The factual records were not able to address evidence of widespread enforcement failures, cumulative effects that stem from such widespread patterns, or the broader concerns of submitters about implementation of enforcement policies.
- Restricting factual records to exploration of specific instances may also make it easier for the Parties to invoke other exceptions within the Agreement, such as Article 14(3) (excluding from the factual record matters subject to pending judicial or administrative proceedings), which are more readily invoked with respect to specific instances of nonenforcement than to allegations of widespread, systemic patterns of ineffective enforcement.
- Defining the scope of factual records to require citizens' groups to detail every specific violation to be included in the Secretariat's investigations potentially increases the financial and human resources burdens placed on these groups.

Related to this matter is the issue of what constitutes 'sufficient' information to support an allegation of failure to enforce. Council Resolution 03-05 relating to the Ontario Logging submission stated that this case "does not contain the sufficient information required to proceed with the development of a factual record at this time." With the benefit of input from the public and having been informed by the ELI report, JPAC concluded that:

- Such a decision adds to the existing “pleading” requirements of the NAAEC, a new and higher evidentiary threshold for the sufficiency of information necessary to support allegations of nonenforcement;
- While some evidentiary threshold is necessary to avoid frivolous or speculative allegations from submitters, according to the Article 14(1)(c) the Secretariat has the mandate, authority, and expertise to determine where this bar should be set; and
- In setting the bar for “sufficient information” too high, the Council may render it prohibitively difficult for citizens to participate in the process.

Further related to this matter is an emerging perception of Council being in conflict of interest. This was most recently clearly stated in the public meeting where it was noted that “Council is having a hard time differentiating their role—when they are acting as a Council and when they are acting individually as Parties.” JPAC was specifically asked by the public to raise this issue with Council.

During its regular session, held on 4 December 2003, JPAC discussed this complex issue. While this may indeed reflect a structural challenge within the NAAEC itself, with regards specifically to the citizen submission process, JPAC is concerned that the influence of the Parties is being reflected in Council decisions. JPAC considers this to be of sufficient concern as to warrant further analysis. Following this analysis, JPAC will develop an opinion on how best to proceed to address this matter and will advise Council accordingly.

Concerning Council Resolution 00-09, it is JPAC’s considered opinion that Council’s resolutions limiting the scope of factual records and rulings on the sufficiency of information provided in submissions, in conjunction with the Council’s decision to delay public review of its decision to define the scope of factual records and subsequent delays in conducting a review of this resolution appear to:

- Jeopardize the commitment, expressed in Council Resolution 00-09, to increase transparency and public participation in the citizen submissions process; and
- Violate the object and purpose, or “spirit,” of Council Resolution 00-09, which as we all recall was a hard-fought compromise designed to allow the process to move forward and re-establish public confidence.

JPAC also wishes to go clearly on record as stating that, under its own authority and as set out in Article 16 of the NAAEC, it can choose to conduct a public review on any matter related to the implementation of Articles 14 and 15. By agreeing to operate under the rules established by Council Resolution 00-09, JPAC has not ceded this authority.

JPAC looks forward to Council’s response and written, publicly available explanation, as called for in Council Resolution 00-09. Please note that JPAC will also address the entire history surrounding the implementation of Articles 14 and 15 in the context of the Ten-year Review of the NAAEC, and Council’s response to this Advice will be a necessary element.

Approved by JPAC
17 December 2003