

Council Resolution 00-09

Matters Related to Articles 14 and
15 of the Agreement

October 2, 2003

ISSUES ADDRESSED IN PRESENTATION

Council Resolution 00-09 in the context of the need for transparency and public participation

- The centrality of public participation and transparency in the NAAEC
- Events leading to the adoption of the Resolution
- Interpreting the Resolution
- Actions taken pursuant to the Resolution
- Analysis of Council's recent decisions as related to the Resolution
- Comments received regarding effects of Council's perceived failure to engage the Resolution

Council Resolution 00-09 in Context: Public Participation and the NAAEC

- Emphasis on role of public in environmental governance throughout Agreement

Preamble: emphasizing the “importance of public participation in conserving, protecting and enhancing the environment”

Art. 1: objectives include “promoting transparency and public participation in the development of environmental laws, regulations and policies...”

JPAC: created to ensure that the public’s views are taken into account

Framework for Public Participation: PP should be approached in “broadest sense” in all CEC activities

Council Resolution 00-09 in Context: Public Participation and the NAAEC

- Most innovative and substantial mechanism for public participation in the NAAEC is the Arts 14 and 15 process

Allows citizens to directly access and participate in decisionmaking in an international context

Engages “court of public opinion” and lets citizens shine spotlight on specific non-enforcement issues through fact-finding process - increases transparency and accountability

COUNCIL RESOLUTION 00-09 IN CONTEXT

Scope of Authority in Articles 14 and 15 process:

- Centrality of defining roles:
 - The Public – broad authority to guide the process
 - The Secretariat – neutral and independent forum for evaluating and fact-finding
 - The Council - dual and inherently conflicting role as custodians of the process and potential targets of specific submissions
- Tensions regarding the appropriate role of the Council focus on revisions to Guidelines on Submissions for Enforcement Matters

Events leading to adoption of Council Resolution 00-09

- Despite recommendations via both a public review process and an independent review committee not to revise the Guidelines to the submissions process, Council adopts revisions and Parties continue discussions regarding further revisions without public review or input, triggering public outcry
- June 2000 - Council adopts Council Resolution 00-09

Interpreting the Resolution: The Language

- Affirms importance of role of Secretariat in submissions process; recognizes “need for transparency and public participation before decisions are made concerning implementation of the public submission process” under Articles 14 and 15
- Preserves Council’s discretion regarding whether to refer these issues to JPAC for public review of its own volition (Council “may refer”...)
- If the Council is approached regarding an issue it is in the process of, or is proposing to address, the Council stated its intention always to hold a public review through JPAC on the matter (Council “shall refer”...)
- Increased transparency - augments Article 16(4) process by guaranteeing that any decision taken by the Council pursuant to the 00-09 process shall be explained in writing to the JPAC and the public
- Review of operation of 00-09 to be conducted after 2 years; Part of present public review process

Actions Taken Pursuant to Council Resolution 00-09: *Lessons Learned* Report

- JPAC completed review of submissions process and published findings in the *Lessons Learned* report in June 2001
 - Reaffirmed the vital role of the process and stressed that the professional independence of the Secretariat is “indispensable”
 - Concludes with a series of recommendations for several specific changes including:
 - Expedited review
 - Disclosure of the Council’s reasoning in determining that a factual record should not be developed in a submission
 - Increased financial and human resources for the Secretariat to administer the process more effectively

Responses to *Lessons Learned*

- Council Resolution 01-06 – Council adopted one of the recommendations in the report, agreeing to make the reasoning underlying any decision to recommend the development of a factual record public
- Council “committed” to making its reasoning public when the decision was not to recommend the development of a factual record and to make “best efforts” to ensure timely processing of submissions
- Interviewees and Commentators expressed concern regarding Council’s “lack of receptiveness” to recommendations

Council Resolution 00-09 in the Context of Recent Council Decisions

- Both decisions are matters “concerning the implementation and further elaboration” of the citizen submissions process and therefore within the purview of Council Resolution 00-09
- JPAC Advice to Council 01-07; 01-09
- Council consented to immediate public review of the work plan issue; Delayed review of the scoping issue until the factual records in question were completed, thereby basing the review on “actual experience”
- Advice to Council 02-03 – requested a re-opening of the issue; Delay of public review would effectively eliminate any meaningful opportunity for public input on the matter

Council Resolution 00-09 in the Context of Recent Council Decisions cont'd

- Council has authority not to refer issues *sua sponte*
- Text provides little guidance regarding delay, however
 - 00-09 recognizes need for increased public participation and transparency *before* decisions are made and prospective connotation of such issues as Council “proposes to address”
 - Public cannot influence decisions in these submissions; value added only in future cases

Summary of Comments on the Effects of Council's Perceived Failure to Engage Council Resolution 00-09

- By delaying public review, the Council is attempting to avoid having their actions questioned in any meaningful way with regard to the specific submissions in question and this undermines the Council's credibility as a disinterested body
- Council appears to be revoking its commitment to maintaining high levels of transparency and participation in the Articles 14 and 15 processes
- Council is attempting to achieve ad hoc what it would not have the political support to achieve through a formal process to revise the Guidelines with public review; this raises the same substantive concerns that gave rise to the adoption of Council Resolution in the first place
- Undermines Council's credibility

Conclusion

- The Resolution as drafted preserved Council's discretion
- However, in context of:
 - The strong commitment to public participation and transparency evidenced throughout the NAAEC
 - The purpose of the submissions process to function as “sunshine” mechanism
 - The history of Council Resolution 00-09

Council's actions contravened intent and spirit of NAAEC and Council Resolution 00-09