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COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA

Joint Public Advisory Committee Public Meeting on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC)

**2 October 2003
Montreal, Canada**

Summary Record¹

The Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) of North America held a public meeting on 2 October on Articles 14 and 15 of the of the North American Agreement on Environmental Cooperation (NAAEC) in Montreal, specifically to discuss the matter of limiting the scope of factual records, including what is evolving with recent decisions into interpreting what constitutes ‘sufficient’ information to support an allegation of failure to enforce, and review implementation of Council Resolution 00-09.

This Summary Record reports on the discussion. [See Annex A for the agenda, Annex B for the list of participants and for the draft report, entitled “Report for JPAC Public Meeting: Issues Related to Articles 14 and 15 of the NAAEC,” prepared by the Environmental Law Institute (ELI) and the public comments received on the CEC web site at: http://www.cec.org/who_we_are/jpac/Art14-15/index.cfm?varlan=english

Welcome

The Chair of JPAC welcomed the participants and introduced the consultants from the ELI in Washington, DC, and the Secretariat staff from the Submissions on Enforcement Matters Unit. He then provided an overview of JPAC’s history with the Articles 14 and 15 process and reaffirmed JPAC’s continuing support. He noted that while governments had been invited both to participate in interviews during the preparation of the draft report and to participate in this session, they had declined. However, representatives from the United States and Canada are attending as observers. He concluded by encouraging an open and frank discussion of these important matters.

Status report from the Submissions on Enforcement Matters Unit

¹ DISCLAIMER: Although this summary was prepared with care, readers should be advised that while JPAC members have approved it, it has not been reviewed nor approved by the intervenors and therefore may not accurately reflect their statements.

The Director of the SEM Unit provided introductory remarks, noting particularly that broad allegations of failure to enforce arose in the Migratory Birds submission (SEM-99-002) and resurfaced in BC Mining (SEM-98-004), BC Logging (SEM-00-004) and Oldman River II

(SEM-97-006). He noted that the role of the Secretariat is not as an advocate but as administrators of the process with an obligation to address issues that are raised in the context of submissions. He also noted that the Secretariat has not received a submission regarding the United States since 2000.

The legal officer from the SEM Unit then provided an overview of active submissions. Details can be found on the CEC's web site at www.cec.org.

Comments from JPAC and the participants included:

- Out of the 42 submissions to date, have any been from citizens against a country other than their own?
- You will never get a factual record if you expect information from the government of Mexico.
- It is important to explore the reasons why there have not been submissions regarding the United States over the past three years. Could it be that there is more opportunity for domestic relief in the United States than Canada or Mexico?
- The public is losing interest because the process is much too lengthy.
- New legislation in Mexico on access to information might assist in making the process more efficient.

Replies:

- Several submissions have been brought by citizens of other countries but in the form of joint submissions with citizens of the country involved.
- The government of Mexico has provided required information in the past. Tarahumara (SEM-00-006) was given as an example.
- The Unit has taken several steps to make the process more efficient and minimize the time it takes the Secretariat to do its part of the work. The intention is to make the first determination within four weeks of receipt. Then, after receiving a response, the goal is to decide whether to recommend a factual record within three months. For preparation of a factual record following instructions to prepare one, the goal is one year. Adhering to these timeframes depends, however, on the complexity of the submission.
- The issue of confidentiality of business information is common to all three countries in varying degrees.

Introduction of the issues (ELI)

The JPAC Chair then asked ELI to present an overview of their preliminary observations and findings. A very detailed presentation was provided.

Participants' input:

- Attention was drawn to the definition of "effectively enforce its environmental law" found in Article 45(1) of the NAAEC. These are domestic responsibilities. These two circumstances are not written into the Article 14 and 15 process. To what degree are these provisions being used by the Parties to frustrate submissions?
- The public is losing confidence in this process. Rather than 'helping' citizens protect the environment, it is having the opposite effect. It is the role of the Secretariat to determine the

scope of a submission. The Secretariat needs more resources to expedite these submissions and to make site visits, for example, to reassure the submitters and affected populations that their submissions are being taken seriously.

- We need to better understand why governments are making these decisions to limit the scope of the factual records. Is there an answer to be found by looking at Part 5 of the NAAEC and what can ensue if persistent failure to enforce is revealed by a factual record developed under Articles 14 and 15? Is there a structural tension?
- The report begins with conclusions and then goes on to justify them. We need a broader perspective and discussion of the issues. For example, it may not necessarily be more burdensome on a submitter to be more specific. We have to be careful not to be promoting lesser evidentiary requirements—sanctioning governments must be fact-based.
- It would be helpful to have the opinion of all submitters about the utility and outcomes of the process.
- The importance of the record of JPAC advice to Council and Council's responses cannot be overstated. If Council continues to interfere with the process, the public will give up because there will be nothing there for it. Raising concerns about widespread patterns of failure to enforce was part of the bargain with the public. Furthermore, it is an absurdity for government to create a situation where we end up with a factual record that we did not ask for—that it is not what the submitter presented and not what the Secretariat recommended.
- A clear yes or no is what is required. Council is the steward of the NAAEC and should not behave as defendants in the fact-finding process.
- It might be helpful to look at the World Bank Inspection Panel where similar challenges were encountered.
- It is morally dishonest to interfere in this way with the Secretariat.
- We need to hear more from industry.
- The report does not contain sufficient analysis of the Oldman River submission. This is a fine example of how the process produced a factual record that did not relate to the submission. Only the Parties can initiate an action under Article 22. Articles 14 and 15 were for us—the citizens—they are our only access. Further, even in a judicial process, it is not necessary to provide all the evidence in order to begin the process. It should be up to the Secretariat to determine the sufficiency of information. JPAC should be very clear and forceful. If this continues, the process will be nullified.
- The intention was to allow common citizens to file a submission—not to have to hire teams of legal researchers to prepare the materials. This is no longer a citizen process.
- If we could resolve matters domestically, we would not need this process. That is exactly the point. Council is violating the spirit of the NAAEC—if not the letter. Perhaps we should get a clear interpretation from another international body?
- It is a shame that we are having these discussions 10 years after the process came into force. In Mexico, and likely in certain circumstances, in Canada and the United States, people have no access to information at all so it is absurd to ask them to provide additional information. The Secretariat is there to weigh all these factors and make a recommendation.
- We need to find solutions. This will require compromise both from governments and also from the public. Perhaps with JPAC's input, the final report could put forward some options.
- In Mexico, children are dying. People have no money to develop a submission. This is an expensive process. There is no federal enforcement. We need the help of the CEC.

- One of the key provisions is Article 14(2)(b), which looks at whether a submission, alone or in combination with other submissions, raises matters whose further study would advance the goals of the NAAEC. The presumption is not that the submitter has the resources for further study—the onus is on the Secretariat.
- What is the standard of review that should apply to a recommendation by the Secretariat? One extreme is total deference—the Council always says yes. This has problems in the sense that it presumes the Secretariat can never make a mistake. It would be useful for the report to look at standards for deferential review. It is important to understand that is very difficult for governments to give up control, especially for Canada and Mexico. First, this was not their idea and now it is pointed at them every time it is used. US environmental groups have already abandoned the process. JPAC should look at ways to make the process more palatable by making it more proportional with clear benefits or results.
- Part 5 was a mistake. It is a dead end and inconsistent with the objectives of the NAAEC.
- The report should take a closer look at what is driving the Parties' decision and be clear about political sensitivity and embarrassment. Also, it is important to understand that there is a difference between 'widespread' and 'persistent.' In BC Hydro, widespread failure to effectively enforce was alleged and the scope of the factual record was made manageable by working with the submitter. It is wrongheaded for the Parties to limit the scope by unilateral decision.
- Regarding standard of review, in Canada, the test is 'patently unreasonable.' That falls somewhere between total deference and no deference.
- Ordering a factual record for something different than was submitted is not acceptable, even if the outcome is interesting. The final report should describe what could be the consequences of this continuing by looking at the domestic remedies available in the three countries. The likely outcome would be there would be more cases in Mexico and none in the United States.
- This process should operate at the layman's level. Let's be frank—severe environmental impacts typically affect vulnerable populations—those with limited resources or access to legal remedies. They don't generally affect neighborhoods that lawyers live in. This is the world that the Council is supposed to live in—that is what they signed onto. On the other hand, it does not help when submissions are filed dealing with domestic matters and events that predate NAFTA. This is supposed to be about ensuring that a trade agreement does not drive down environmental standards. Council may feel this is a distortion of the spirit of the NAAEC.
- 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 should remind them they need to keep their roles separate.

The ELI representatives thanked the participants for their very useful comments and provided some preliminary observations and responses.

Introduction of Council Resolution 00-09

The JPAC Chair then asked a member each of JPAC and ELI to introduce the topic of Council Resolution 00-09. The JPAC member gave the history of events leading up to the Council Session in Dallas in 2000 and how this Resolution was developed in the spirit of compromise to

address interpretive and procedural issues and assuring public participation. It was noted that within JPAC there is a sense that the Resolution is now being used to reduce transparency and limit JPAC authority. The member also reminded the participants that through NAAEC Article 16(4), JPAC has the authority to provide advice to Council on any matter within the scope of the agreement.

Participants' input

- JPAC is limiting itself. You can't have it both ways.
- The advantage of the process set out in Resolution 00-09 is that when Council does not agree with JPAC's advice, it has to give its reasons in writing. There is no such requirement in Article 16(4).
- When JPAC identifies an issue that merits a public review, Council should automatically agree. That was the spirit of Council Resolution 00-09 and JPAC's role should not be trivialized. JPAC should be overruled only in extraordinary cases.
- Nothing stops JPAC from going forward under its own authority when it chooses to.
- Council Resolution 00-09 was a bargain and Council has not lived up to its end. This should be made very clear in the final report.
- JPAC needs to speak directly to Council on these matters—not deal with junior officials.
- Do the new JPAC members share the same views as previous members concerning the importance of this process?
- There are also new Council members since Dallas—not just new JPAC members. Perhaps we should take it upon ourselves to be better informing the Council and not just leaving things to be handled by the bureaucrats.
- JPAC can use the ELI report to demonstrate how Council has abrogated its part of the bargain. JPAC should consider doing some communications work around releasing this report.
- There is a connection between the earlier discussion on scope and this discussion—JPAC is being trivialized and this should not be permitted. JPAC's role in implementing NAAEC should be made clear and be supported.
- Test the process. Send an advice telling Council squarely that they must refrain from limiting the scope of factual records and ask for a prompt reply.
- In the context of the 10-year review there should be a session involving Council and JPAC concerning these issues and attempting to re-engage Council.

Concluding remarks

In conclusion, the JPAC Chair explained that the comments, opinions and exchanges were very much appreciated. He encouraged those who would wish to make further comments to do so before the 24 October deadline. A final report will then be produced and a draft advice to Council for discussion and approval at the next Regular Session of JPAC on 5 December 2003. He also confirmed that he would bring this matter to the attention of the Ten-year Review and Assessment Committee (TRAC).

Prepared by Lorraine Brooke
17 October 2003



Commission for Environmental Cooperation of North America

**Joint Public Advisory Committee (JPAC) Public Meeting
on issues related Articles 14 and the 15 of
the North American Agreement on Environmental Cooperation**

2 October 2003

**Wyndham Hotel / Complexe Desjardins
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Montreal, Quebec
Phone: (514) 285-1450 • Fax: (514) 841-2037**

Hospitalité Room at the Basiliaire 2

Provisional Agenda

8:00 – 9:00	Registration of participants including coffee and croissants
9:00 – 9:15	Welcoming remarks and overview by Gustavo Alanís-Ortega, JPAC Chair
9:15 – 9:30	Brief introduction of participants
9:30 – 10:00	Status Report of submissions under Articles 14 and 15 by Geoffrey Garver, CEC Director, Submissions on Enforcement Matters Unit
10:00 – 10:30	Introduction of the issue of limiting the scope of factual records including what is evolving with recent decisions into interpreting what constitutes ‘sufficient’ information to support an allegation of failure to enforce by Pooja Seth Parikh, Environmental Law Institute
10:30 – 10:45	Break
10:45 – 12:30	Participants’ input on limiting the scope of factual records including what is evolving with recent decisions into interpreting what constitutes ‘sufficient’ information to support an allegation of failure to enforce
12:30 – 13:45	Lunch (no provided)
13:45 – 14:15	Introduction of the CEC Council Resolution 00-09 by Jessica Troell, Environmental Law Institute and JPAC’s input by Donna Tingley, JPAC member
14:15 – 15:30	Participants’ input on the operation of the CEC Council Resolution 00-09
15:30 – 16:00	Break
16:00 – 16:45	Initial feedback from the JPAC Working Group
16:45 – 16:55	Next Steps by JPAC Chair
16:55 – 17:00	Concluding remarks by JPAC Chair
17:00 – 19:00	Reception hosted by JPAC



Joint Public Advisory Committee (JPAC) Public Meeting
on issues related Articles 14 and the 15 of the NAAEC
and
Joint Public Advisory Committee Regular Session 03-03

Reunión pública del Comité Consultivo Público Conjunto (CCPC)
sobre asuntos relativos a los artículos 14 y 15 del ACAAN
y
Sesión ordinaria del Comité Consultivo Público Conjunto 03-03

Réunion publique du Comité consultatif public mixte (CCPM)
sur des questions relatives aux articles 14 et 15 de l'ANACDE
et
Session du Comité consultatif public mixte no 03-03

2-3 October 2003/ 2 y 3 de octubre de 2003/ 2 et 3 octobre 2003

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as of October 3/ en fecha del 3 de octubre/ en date du 3 octobre

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