



SEP 14 2010

Office of  
International and Tribal Affairs

Ms. Karen M. Chapman  
Chairwoman  
U.S. National Advisory Committee  
223 North Union Street  
Delaware, Ohio 43015

Dear Ms. Chapman:

On behalf of Administrator Lisa P. Jackson, I would like to thank you for the National Advisory Committee's (NAC) letter of advice of October 26, 2009 reporting on the October 14-15, 2009 meeting of the NAC and GAC in Burlington, Vermont. We appreciate the valuable recommendations provided on the governance of the CEC, as well as on further implementation of the North American Agreement on Environmental Cooperation (NAAEC) related to transboundary Environmental Impact Assessment, Part V Model Rules, the Articles 14 and 15 citizen submissions process, and other pertinent topics.

I would also like to say what a pleasure it was for the Administrator and I to meet you personally in Guanajuato. I know that this response comes almost a year after the initial advice letter was received from your predecessor, due in part to the many adjustments in the Secretariat and on NAC representation, but I would like to assure you that we take the NAC's recommendations seriously and that the actions that the Council has taken since your recommendations were received have and will continue to reflect your valuable input to the process.

As you know, Council set a new path forward at the June 24, 2009 Denver Council Session with its plan to renew, revitalize and refocus the CEC as an effective organization. Through a coherent agenda with measurable objectives and interim targets shaped by the Parties, we expect to start achieving more concrete environmental results with the new 2010-2015 Strategic Plan. We plan renewal and revitalization of the Secretariat to support and implement the priorities of the Parties. Your observation that the Governance Proposal and the Secretariat's first draft of the 2010 Operational Plan were prepared concurrently is correct, although the Secretariat was aware of the Parties' focus on the Council mandate. Nevertheless, once the Parties and the Secretariat were both able to focus more directly on the Operational Plan, greater integration was achieved. As you know, 2010 has been a transition year that has required difficult decisions to end some of the projects carried out previously. We are glad to note that the 2010-2015 Strategic Plan is based on the new priorities that were agreed to last year in Denver and more recently renewed in Guanajuato.

We also appreciate the recommendation on benchmarking other convention secretariats, trade associations and NGO's. The reference to Hammer and Champy's book on reengineering has been particularly helpful in providing alternative approaches to the current functional structure. As we have said before, the U.S. is not wedded to any one organizational model as long as the CEC is able to fulfill the NAAEC mandates, and as long as it can accomplish its work with full transparency and accountability in all segments of the CEC structure. We agree with your proposal that the Executive Director should be provided with clear performance objectives at the beginning of his/her term. You will be happy to know that the three Parties have committed to this goal and we will endeavor to review the performance of the Executive Director on an annual basis, while at the same time understanding that concrete environmental changes take time.

The U.S. is also committed to the establishment of sunset assessments for projects, as well as clear project selection criteria and we hope to continue to advance those positions in our trilateral discussions.

We appreciate your support to reinstate a grant program (previously the NAFEC) and no one is happier than Administrator Jackson to have reached agreement on the new 5-year grant program agreed to in Guanajuato, the North American Partnership for Environment and Community Action.

I trust that following the most recent Council Session, it is clear that Article 13 responsibilities and the Article 14 and 15 citizen's submissions process, remain an important aspect of the work that the Secretariat does, and continues to have the full support of all three North American countries. As the new governance approach is implemented, we expect to gain resources and credibility for these continued efforts through better management practices and a refocus on the three thematic priorities of the new Strategic Plan.

Thank you also for your views and recommendations related to the citizen Submissions on Enforcement Matters, or SEM, process. We have recommitted to, and remain fully and unequivocally supportive of the SEM process. Under the NAAEC and existing U.S. policy, we stand by conformity to a vision of the SEM process that is supported by the history of the negotiations and to the plain language of the Agreement.

The NAC makes three recommendations in its October 2009 letter regarding the SEM process:

1. First Recommendation: The U.S. persuade the other Parties to agree to the establishment of a "rule" (i.e., a Council Resolution) committing the Council to vote on Secretariat recommendations to prepare a FR within 90 days from receipt of such a recommendation.

Although the Council could seek agreement to a 90-day deadline for decision, it is unlikely that there would be final agreement to such a resolution. Unlike the Secretariat, the Parties do not have access to dedicated resources provided solely for this activity, or staff dedicated only to this purpose, to fully investigate and review allegations made in any one submission. As a result, the Parties must balance their time and efforts to truly

understand the often complex legal issues at hand, and to get to a point where we can make informed decisions regarding the details of a submission, and eventually get to a point that we can cast our vote. It is arguable that a hasty vote or moving forward without adequate understanding of the full scope of a particular submission may actually do more harm to the process. Additionally, the Parties view maintaining a strong cooperative trilateral relationship as critically important to the implementation of the NAAEC and, therefore, we always strive to achieve consensus on factual record decisions despite the sometimes lengthy time required to do so. Moreover, it is important to recognize that a considered approach that may take months or in some cases years, does not constitute a failure to support the process when its purpose is to ensure that the Council has considered all relevant issues and aspects of a submission. Finally, it is not certain that reaching agreement on such a “90-day rule” would or should be enforceable given both the legal ambiguity that would likely be associated with it, as well the Parties’ commitment to working cooperatively with one another in this context.

2. Second Recommendation: Require a vote on the disclosure of factual records at the next CEC-related meeting after the factual record is submitted, citing a concern about Council delay in voting to publish completed factual records.

If the NAC is proposing that the Council commit to voting more quickly on whether to publish completed factual records, it is unclear that such a step is needed. To our knowledge, the Council has only once taken more than the 60 days that are prescribed in the NAAEC to vote on whether to publish a factual record, as described in Article 15.7.

3. Third Recommendation: The SEM process be expanded to include a non-adversarial, cooperative mechanism for the resolution of environmental problems identified by citizens. A process that would allow citizens to approach an independent Secretariat with issues unrelated to enforcement failures . . .”

This recommendation appears to be inconsistent with the fundamental purpose of the SEM process, which is in fact, to look at enforcement issues. This being the case, it is our opinion that to revise the process to allow for consideration of non-enforcement matters would require trilateral agreement, the authority for which goes beyond that provided under Article 10.b.1. That said, if the NAC is contemplating something less than a formal, deliberative process, it is our opinion that the CEC already serves as forum for addressing specific public concerns. For example, it was petitions from the public that resulted in the Secretariat’s Article 13 report on transgenic maize and it is in response to public concern that the Parties often pursue specific project work.

The letter also questions the possible effectiveness of negotiating Part 5, Article 28 Model Rules of Procedure and proposes that Council seek instead to review the Parties’ implementation of Articles 5(2), 6(2) and 7 regarding promoting the enforcement of environmental laws. In this sense it would be helpful to remember that establishing Part V Model Rules of Procedure is an obligation under the Agreement. Additionally, we do not view the negotiation of Part V Model Rules as a potential impediment to the implementation of the SEM process or the reexamination of Party obligations under Articles 5, 6 and 7. Regarding the latter, the Parties do regularly consider and examine

their enforcement obligations under the NAAEC through both the preparation of their Annual Report contributions as well as through their very active participation in the CEC Enforcement Working Group.

Finally, the NAC letter suggests that the U.S. should pursue negotiations to complete a Transboundary Environmental Impact Assessment (TEIA) agreement. At this time, coordination among the three countries with respect to potential transboundary impacts continues. Through the unique partnership created by the NAAEC, our three governments, along with North America's civil society, work together to integrate ecological, economic and social factors affecting the North American environment and pursue goals and objectives that none of us could achieve on our own. As you may already know, pursuant to the NAAEC, we have in the past entered into negotiations with our NAFTA partners on how best to assess possible trans-border environmental impacts of proposed projects along our shared borders. However, differences in governance systems in the three countries have made it difficult to reach a comprehensive agreement. This makes it difficult to consider redirecting limited resources to TEIA negotiations at this time, although the U.S. will certainly continue to be ready to engage on these efforts bilaterally, and trilaterally as our three countries decide this approach is ready for full consideration.

We look forward to our continuing dialogue and your commitment to protecting the North American environment.

Sincerely,

A handwritten signature in cursive script that reads "Michelle DePass".

Michelle DePass  
Assistant Administrator  
EPA Office of International and Tribal Affairs