

Governmental Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation

May 17, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, D.C. 20460

Dear Governor Whitman:

As you may know, the Government Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) met in Washington, D.C. during May 2nd and 3rd of this year. One of the highlights of our meeting was a briefing from Assistant Administrator Judith Ayres, who, for the first time, met with our Committee during our most recent deliberations. We greatly appreciated the opportunity to hear her views on the activities of the CEC, as well as her perspective on areas of advice that would be most beneficial to this trilateral work and the upcoming Annual Ministerial Meeting, which is currently scheduled for June 18 - 19, 2002 in Ottawa, Canada. We look forward to continuing our direct interaction with you and Assistant Administrator Ayres at the upcoming Ministerial Meeting, as well as during the term of this Administration.

The following letter details our latest advice to you on this most important work of the CEC and reflects the dialogue that took place at our May meeting among the Committee members and senior advisors who represented various entities within the federal government who advised us regarding the status of their work with the CEC. We respectfully request that you consider and use our advice in your deliberations associated with the upcoming Ottawa meeting. Before getting into the specific issues associated with that meeting, however, we would like to provide our general perspective which should place our specific comments which follow in the appropriate context.

Continued Strong Support for the CEC

On the broadest level, we encourage the U.S. to reiterate its strong support for the work of the CEC, expedient action to carry out the organization's mission and an open, fair and inclusive process which is transparent for its constituency throughout North America. Generally, we believe that in order to achieve these goals and extend the continued vitality and development of the CEC as the unique trilateral body it is, this Administration must select an esteemed staff of the highest caliber, who can effectively demonstrate an ability to execute the work of the organization through prompt action, which is unquestionably supported by the United States. We have commented on numerous occasions regarding the

importance of the Article 14 and 15 process to the public acceptance of the CEC and of NAFTA. It is vital that these processes remain available to the public, transparent, supported, based upon fact and sound science and that the CEC continue to have the ability to exercise independent judgment and action.

We understand that two pivotal positions, those of the Executive Director, Janine Ferreti and Program Director, Greg Block, will be vacated only days prior to the upcoming Ottawa meeting. It is imperative that these most important positions be filled promptly but appropriately with individuals who share the intelligence, integrity and enthusiasm for the work of this esteemed organization akin to those skillfully displayed by Ms. Ferreti and Mr. Block. We cannot over-emphasize the need for deliberate and expeditious action to fill these positions quickly in order to sustain the morale of the Secretariat, to continue the activities of the CEC and to communicate to the world that the United States is still committed to the principles upon which the CEC was founded. We remain available to you to review the qualifications for the Executive Director and to provide any other type of advice that assures a process where only the best and brightest candidates are considered and selected.

There also are vacancies that have remained for a prolonged period of time on both our Committee and the National Advisory Committee. Although a new interagency process is being utilized, which may explain part of the delay, we are well into the second year of this Administration. Our request is that you make it the highest priority to fill our vacancies so that we can provide the very best advice from the broadest perspective and with a complete complement of members. As with the GAC and the NAC, it is important that the Joint Public Advisory Committee be a vibrant and full participant in the work of the CEC. This Administration's support in assuring a robust and active presence among those members appointed would certainly go a long way in fulfilling this requirement.

Along with the enunciation of the clear victories which have occurred through this organization, this Administration must also look to the future of the CEC. There is a need to recognize that the financial support for CEC must grow because the initial allocation of nine million dollars (\$9,000,000.00) is not sustainable for this work over time. As a practical matter, the annual allocation of money has lost value over the past ten years, due to inflation and other factors which impact upon monetary value. And as the organization's mission, demands and opportunities grow, to be taken seriously in international arena, there must be money to support these efforts.

The increased demands upon the work of the CEC, however, should not result in expansion into areas that fall outside issues of interest in North America. It is the broad consensus of the GAC that the CEC must be targeted with any future activities, to engage in the most meaningful work at the intersection between trade and the environment. This is an area which we believe has been dabbled in through the work program, but that largely remains unconquered terrain ripe with many new opportunities.

Upcoming Trade Talks, Global Summit

The GAC universally agrees that the CEC should be highlighted in the context of the discussions which are currently occurring globally on trade liberalization. It is a unique

experiment, which was acknowledged by Assistant Administrator Ayres during our May meeting. The GAC agrees wholeheartedly with her assessment. The uniqueness of the CEC rests upon the fact that it is the only trilateral, treaty-driven entity with an administrative body (the Secretariat) to perform its mission within the constraints of the NAAEC. It is also unique in that primary responsibility for oversight of international activities rests with the agency that has substantive responsibility for implementation of domestic programs, in this case environmental programs. In virtually all other international trade agreements oversight rests with the agency responsible for trade promotion or international affairs. And, as a result, it should be recognized and touted for the many successes which have occurred during the past decade. Given the desires of this Administration to expand upon free trade opportunities in this hemisphere, it must publicize the strategic importance of these past North American successes and commit to further trade and environmental successes in order to garner public support and establish a basis for extending trade liberalization in this hemisphere.

During the Bali Prep Com and Global Summit, the United States must assume a pivotal leadership role for the eyes of the world to view, both through its practices and through the philosophy espoused at the highest levels of those federal government representatives present. President Bush should support the positive connection between environment and development while reaffirming the Rio Declaration during the Summit and agree to reengage in Kyoto.

The United States should take a major role in preparing documents for the Global Summit, with the centerpiece being a strong environmental protection theme at the heart of all US activities and pronouncements. It should also sign on to all Type II deliverables that are appropriate for the United States to participate, in keeping with this theme. An opportunity may even exist for the CEC to perform a Type II deliverable, which would establish its reputation well beyond North America and demonstrate the uniqueness of this organization. Central to the United States message should be the success of the CEC, through the NAAEC, proving that a balance can be struck between free trade and the environment even where the parties include both developed and developing nations.

As always, it is a pleasure to have the opportunity to provide you with our insight on these very important issues. In order to facilitate the preparatory discussions which are scheduled to occur during the next month, the GAC has reviewed and provided advice on various portions of the CEC work program in the attachments following this letter. We did so based upon an understanding that the portions of the work program that have been targeted are the ones of vital interest to you and the Mexican and Canadian Representatives to the CEC and are anticipated to be thoroughly discussed during the June Ministerial meeting in Ottawa.

We look forward to your response to our recommendations, and we are ready to assist you in any way possible as you prepare for the CEC Council of Ministers Session in Ottawa, Canada.

Sincerely,

Denise Ferguson-Southard
Chair
Governmental Advisory Committee

Attachments

cc: Judith Ayres, Assistant Administrator for International Affairs
David A. Wirth, Acting Chair, U.S. National Advisory Committee
Jonathan Plaut, Chair, Joint Public Advisory Committee
Jean Perras, Chair, Canadian National Advisory Committee
Mateo Castillo Ceja, Chair, Mexican National Advisory Committee
U.S. Governmental Advisory Committee
U.S. National Advisory Committee

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GAC Advice No. 2002-1

Trade and Environment

One of the areas which we understand that will be considered in Ottawa is the area of environmental finance. The question is what unique role can the CEC play in encouraging investment by the private sector in unique, environmentally-beneficial activities, services or products to fund and expand the chances for such green goods to succeed in North America.

Our advice is to build upon the lessons learned from the process used in the CEC shade grown coffee program while exploring the opportunities for the engagement of private venture capital to support this further expansion. It would also be helpful to identify other such opportunities by targeting particular green products and services that are unique to North America for additional support. This should be a key area of focus since it involves the intersection of environment and trade which, as we stated earlier, should be a target for future activities of the CEC.

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GAC Advice No. 2002-2

CEC Biodiversity Strategy

We commend the CEC for its continued good work regarding the conservation of biodiversity in North America. There are many opportunities, however, for the CEC to enhance its work in the area of biodiversity by targeting other issues that are important across the continent. Some of the new areas of focus could include efforts toward addressing invasive and endangered species that have particular interest across the continent, as well as looking at emerging issues such as genetic engineering of species and the potential impact on North American ecosystems.

We also want to emphasize the importance of ensuring federal and state coordination and cooperation in biodiversity conservation strategies. We feel that a regional approach, involving all levels of government and a broad cross section of state and national conservation organizations is essential to achieving sound approaches to conserving the biodiversity of North America. It would create a level of synergy that is sometimes absent from these activities as they are currently carried out across the continent.

The importance of fully engaged outreach and public participation in developing these conservation strategies cannot be overemphasized. Along with the inclusion of other governmental organizations, it is important for the CEC to be acutely sensitive to the integration of indigenous peoples into these discussions early on and consistently throughout the life of these activities.

One of our Committee member, Mr. Mel Moon, is very knowledgeable of these issues and has attended an earlier CEC meeting in Guadalajara, Mexico which was expressly for the purpose of providing a tribal perspective on the conservation of biodiversity. We believe that forums of this type are an excellent means of ensuring participation from indigenous people who might not otherwise have an opportunity to share their views. Unfortunately this meeting was an isolated event and continuous interaction with indigenous peoples on this and other CEC work programs that directly impact upon their lives have failed to materialize in recent years.

We strongly recommend that the CEC reignite and improve upon its work with tribal representatives to develop an effective public participation process for indigenous peoples. One of the mechanisms for this type of interaction was the mapping of the location of indigenous peoples through out the North American continent. This work was initiated several years ago, but never completed and we request that a renewed effort be made to capitalize on the initial investment made and bring the work to closure so that it is available, not only to the CEC, but also to the North American community at large. This

identification should not be based strictly on whether or not a group has been formally recognized by a Party to the NAAEC, but should be viewed as a resource which is available to identify who should be engaged in particular North American based projects.

There is also the need to address tribal exclusion due to the absence of capacity and infrastructure within those communities and to identify the needs, opportunities and resources (whether through CEC funds or governmental programs) to build the infrastructure to address these priorities, particularly in the US-Mexico border region. It may be necessary to identify a significant source of funding to be used in support of indigenous groups who don't otherwise have funding or the resources to participate in CEC-related activities. Additionally, we reaffirm our support of the JPAC resolution related to indigenous peoples and encourage the Secretariat to review all CEC work programs to identify the opportunity to create the linkages with indigenous groups so that they can play an important role in projects where a void currently exists.

Finally, the Migratory Bird Treaty Act and the United States failure to enforce it relating to non-endangered migratory species remains a concern to the GAC. Although this is being addressed in the context of the Articles 14 and 15 process, we view this as an issue which impacts upon biodiversity across the continent. We strongly suggest that the United States rethink its position regarding the exercise of its enforcement authority in this area in order to assure that migratory bird species are protected in the broadest manner in order to enhance the biodiversity of North American birds.

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GAC Advice No. 2002-3

Pollutants and Health

In this area, we would like to applaud the CEC's continued focus on children's health issues on the North American continent. The work that has identified the continental organizations and resources available can certainly be a cornerstone of this work, as well as the future deliberations of the expert panel, which will give specific direction and recommendations regarding the opportunities which exist in this area. We believe that the CEC's decision to target asthma and its impact upon the youth of North America is a poignantly appropriate step given the link between asthma, air quality, transportation and electricity generation. There is a tremendous opportunity to link this work into the trade implications of opening markets to the three Parties in North America, with particular emphasis on the border choke points and we would strongly encourage you to pursue that path, the specific implications for children, and the broader implications for the continent.

As to the work associated with the Pollutant Release and Transfer Registry (PRTR), we are heartened to learn that Mexico is moving forward with its mandatory program. We would strongly encourage the United States to aggressively work to assure that the regulatory scheme which is adopted in Mexico is comparable and equivalent to the requirements which our country and Canada currently embrace in our sister programs. More specifically, there is a fundamental need that the reporting and release of this information in Mexico be at the facility level. Any other configuration would make much of the work which is contemplated and the positive impacts that are readily available from this program impossible to achieve across the continent.

Fundamentally, this is a sunshine law with fairly minor enforcement risk to facilities. What has driven the great advances which have occurred is the provision of information to the facilities, so that they can act in an environmentally responsible manner and to the public, so that citizens understand the environment in which they live, particularly if it is in close proximity to industrial activities. Its greatest success is this transparency, which drives responsible corporate behavior to achieve greater control, innovation and ultimately protection of the greater environment as releases are reduced significantly over the duration of such programs. It must be held out as a model globally, where the United States can advocate for comparable schemes well beyond this continent. Although the aftermath of September 11th may seem to cry for a different result, it is important that we not allow overreaching regarding national security concerns to hamper or rollback inappropriately the very important milestones which have occurred in this program within the U.S. and North America.

On the CEC work associated with the sound management of chemicals, we continue to support the work associated with addressing persistent toxic bioaccumulativity (PBTs) given its importance within North America and globally. The United States's

signing of the POPs Convention, banning twelve chemicals, is largely based upon the work already performed through the CEC. We look forward to future efforts to ban additional chemicals when evidence is provided to justify such actions. We urge the Administration to support a POPs Treaty that both bans the first twelve named chemicals and permits the banning of additional chemicals when supported by sound scientific evidence. The CEC work associated with lyndane is fully supported by this Committee and we strongly urge you to move forward aggressively in bring the North American Regional Action Plan associated with that chemical to fruition. Finally, the adoption of a NARAP is only the first step and the next requires adequate monitoring and assessment of Party activities once the NARAPs are adopted. The CEC is uniquely postured to carry out this work.

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GAC Advice No. 2002-4

Law and Policy

One of the emerging issues, which may be appropriately focused upon given the financial investment issues and the trade-related impacts, is fresh water as a commodity and the challenges and opportunities associated with it. There is certainly some CEC-related activities associated with fresh water that is just commencing, but it is a fairly small component of the work program. There is a need to build upon this activity, first by engaging those who are most affected so that it is possible to target the appropriate issues for the CEC's expanded role. There are, for example, unique challenges in the Rio Grande region for American farmers, who are now suffering from its absence given the diversion of this great resource by neighboring farmers in Mexico to their fields, given that they have greater access to American produce markets to sell their crops. This is just one anecdote, but many others exist at both the US-Mexican and US-Canadian borders. It's just a matter of identifying where the best opportunities lie to support this work.

Another opportunity, which the CEC has not expressly pursued, is the upward harmonization of environmental standards on the North American continent. We believe that there is a need, as new approaches are identified by this Administration, that the CEC address the NAAEC provision that allows it to promote the upward harmonization of environmental standards among the three countries. An example in the existing workplan of where this opportunity exists is in the baseline work which has established the practices in each of the three countries associated with combined animal feeding operations. We continue to believe that this is a very important area of work by the CEC and one that the CEC now has the maturity and credibility to initiate in not only identifying the best practices, but working to create a level threshold for such operations across North America. We urge that a standards harmonization project be identified, or evolve out of existing work programs so that this unique opportunity is not missed.

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GAC Advice No. 2002-5

Other Issues

As to the interaction between the NAAEC and NAFTA, we would like to emphasize the importance of Article 10(6) of the NAAEC and the level of cooperation between the CEC Council and the NAFTA Free Trade Commission of that these provisions should engender. We strongly encourage the U.S. Government to make the greatest possible use of the Article 10(6) Working Group to advance the trade and environment dialogue, particularly regarding the Chapter 11 investor-state dispute provisions of NAFTA. In pursuit of that goal, we strongly advocate using the Article 10(6) Working Group to review pending Chapter 11 cases and develop recommendations on lessons learned that could guide the NAFTA parties on the issues in the future. We also recommend using the 10(6) Working Group to help identify criteria for intervention in trade cases where North America environmental policy may be effected.

We want to emphasize our belief that this Working Group should operate in a transparent and inclusive manner when establishing and delivering upon the agenda set for it. There is also the opportunity to establish an agenda which addresses the prevention of trade disputes, in accordance with Article 10(6)(C) through the discussions at the Ministerial meeting, which can be later developed and implemented under the auspices of the 10(6) Working Group.

There remain great opportunities to assure that Chapter 11 of NAFTA is consistent with the basic due process standards which are the norm under American jurisprudence in order to allay many fears associated with the investor cases which may arise under this chapter. We would encourage the United States to assure that such occurs, whether through clarifications which are agreed upon by the Parties or some other mechanism.

An additional enhancement to Chapter 11 proceedings would be a commitment by all of the Parties to a speedy resolution of the cases with the commitment to a transparent process at each step of the process. Certainly the steps that the parties have already taken in providing an interpretation of these provisions to allow certain documents related to the proceedings to be available to the public is a commendable step. There is a need to be even more expansive in this area by providing access other documents currently unavailable. It is our understanding that such might be the case for amicus briefs and we would strongly encourage the United States to strongly stand for additional access to documents unless it would otherwise be unavailable under American law.

We understand that there is also some discussion regarding possible interpretations or amendments to NAFTA which would eliminate frivolous cases at the earliest possible moment and also provide for an appellate process after arbitration. Any such proposals, though well-intentioned, should not be adopted without the opportunity for the public to

provide its input into what the best approach might be. An interpretative clarifications, modifications or amendments to the Agreement which can eliminate all reasonable fear that an action intended to protect the environment could lead to a colorable claim under Chapter 11 would be an essential correction, in our view. The chilling effect on environmentally beneficial regulatory actions within the sovereignty of any Party to NAFTA could have serious impact on the willingness of a variety of constituencies to support future trade liberalization.

Finally, it is our understanding that a meeting between the trade and environment ministers of the Parties may occur, assuming that an agenda is established which will result in clear progress in the work which they share. Many of the deliverables that can be contemplated for those discussion can be culled from the preceding paragraphs discussing the overlap between Article 10(6)(C) and Chapter 11 and the need to refine Chapter 11. Those tasks can be summarized as a commitment to fully engage each other in ongoing cases where there is an environmental nexus, as well as preventing trade disputes with purposeful and unintended environmental implications. Instead of focusing upon the big picture, it might be appropriate to develop the criteria and process which will affirmatively assure that these activities will occur in the future and not await the crisis-driven atmosphere that occur after a dispute arises.