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RESEARCH REPORT

ISSUES RELATING TO ARTICLES 14 and 15 of the NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

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Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation

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The authors are solely responsible for the contents of this report. The report was prepared for the Joint Public Advisory Committee of the Commission for Environmental Cooperation, and does not necessarily reflect the views of the Commission or those of the governments of Canada, Mexico or the United States.

EXECUTIVE SUMMARY

A fundamental objective of the North American Agreement on Environmental Cooperation (NAAEC) is to enhance public participation in environmental decision-making. By far the most innovative and substantial mechanism created within the NAAEC for fostering these goals is the citizen submissions process in Articles 14 and 15. This process enables citizens of Canada, Mexico, and the United States to submit allegations that a Party to the Agreement is failing to effectively enforce its environmental laws, and to request an independent review of the facts. The purpose of the submissions process is not to gather information that will be used to impose sanctions, but rather to engage the "court of public opinion" by shining an international spotlight on perceived domestic enforcement issues. To be effective in examining and portraying these enforcement issues, the Secretariat needs both adequate investigative authority and access to sufficient factual information to fairly present the controversy at issue. The Secretariat also needs to maintain its independence as a neutral investigative body in order to ensure public trust in the process.

In November 2001, the Joint Public Advisory Committee (JPAC) of the CEC and several non-governmental organizations requested that the Council refer to JPAC for public review a set of Council resolutions defining the scope of four factual records. With respect to each of these submissions, the Secretariat recommended to the Council that a factual record be developed to investigate alleged widespread, systemic failures of a Party to effectively enforce its environmental laws. Although the Council approved the preparation of factual records for these submissions, it significantly narrowed the scope of the investigation. The JPAC also initiated a public review of the impacts of a Council decision interpreting what constitutes "sufficient" information to support an allegation of a Party's failure to enforce its environmental laws.

To further inform the review process, JPAC commissioned the Environmental Law Institute (ELI) to write this report, which analyzes the legal and policy implications of these Council resolutions, as well as the specific operation of Council Resolution 00-09. Council Resolution 00-09 mandates that, when the JPAC (or a member of the public acting through the JPAC) requests public review of an issue related to the implementation or further elaboration of the citizen submissions process, the Council shall refer "any such issues as it proposes to address" to JPAC for public review.

The JPAC stipulated the factual records for review by ELI. To conduct this review, the JPAC requested that ELI interview the authors of the submissions, academic experts, and other individuals with knowledge of the submissions process and its history. ELI also sought to interview the CEC Parties as part of the study, and asked JPAC for permission to do so. JPAC elected to contact the Parties itself to invite them to be interviewed by ELI. The Parties declined to be interviewed, or to attend the public meeting, stating that it was "important that the consultation represent the views of the public and not the Parties." It is therefore emphasized that the findings in this report do not reflect the views of the Parties to the NAAEC.

The report finds that, by defining the scope of the Secretariat's investigations in each of the four factual records examined, the Council jeopardized the ability of those records to fully expose the controversy at issue. Specifically, 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. Many commentators expressed the view that, by intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process. 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 non-enforcement than with respect to allegations of widespread, systemic patterns of ineffective enforcement. Finally, by requiring citizens' groups to detail every specific violation to be included in the Secretariat's investigations, this definition of the scope of factual records potentially increases the financial and human resources burdens placed on these groups.

The report also explores the Council's decision, related to the Ontario Logging submission, to re-open the Secretariat's determination that a submission provides "sufficient information to allow the Secretariat to review" that submission. In doing so, the Council appears to add to the existing "pleading" requirements of the NAAEC a new and higher evidentiary threshold for the sufficiency of information necessary to support allegations of non-enforcement. The report finds that, while some evidentiary threshold is necessary to avoid frivolous or specula-

tive allegations from submitters, the Secretariat has the mandate, authority, and expertise to determine where this bar should be set. Many interviewees have argued that, in setting the bar for "sufficient information" too high, the Council may render it prohibitively difficult for citizens to participate in the process. Further, as with the Council's decision to define the scope of factual records, by intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process.

Persuasive textual arguments can be and have been made to suggest that the Council's resolutions were not within the scope of authority granted to it under the NAAEC. A plain reading of the NAAEC finds that it does not explicitly grant or deny the Council authority to make the decisions that are the subject of this report. Yet even if the Council's actions are arguably consistent with the letter of the NAAEC, they appear to violate the object and purpose, or "spirit," of the Agreement, the fundamental objectives of which include the enhancement of transparency and public participation in environmental decision-making.

Finally, the report examines the operation of Council Resolution 00-09. The Council's resolutions defining the scope of factual records and addressing the sufficiency of information provided in submissions, in conjunction with the Council's decision to delay public review of its determination to define the scope of factual records, appear to jeopardize the commitment expressed in Council Resolution 00-09 to increased transparency and public participation in the citizen submissions process. Although the Council's actions are arguably consistent with the letter of Council Resolution 00-09 and of the NAAEC, they again appear to violate the object and purpose, or "spirit," of both of these documents, and to undermine the Council's credibility with the public.

TABLE OF CONTENTS

I Introduction and Methodology....1
Mandate....1
Research Approach....1

II The Citizen Submissions Process in Context: Public Participation and Environmental Governance....3
Public Participation in the NAAEC....3

III Defining the Scope of the Factual Record....5
A) Council's Scoping Decisions in Specific Submissions....5
BC Mining (SEM 98-004)....5
BC Logging (SEM-00-004)....6
Migratory Birds (SEM-99-002)....7
Oldman River II (SEM 97-006)....8
Summary....8
B) Impact of the Council's Resolutions Defining the Scope of Factual Record....9
Limiting the Usefulness of Factual Records....9
Heightening Potential for Further Scoping....12
Undermining the Credibility of the Citizen Submissions Process....13
Diminishing the Ability of Citizens' Groups to Participate in the Process....13
Straining the Resources and Capacity of the Secretariat....13
C) The Council's Authority to Define Scope of Factual Record....14

IV Sufficiency of Information....17
Nature and Impact of Sufficiency Requirement in *Ontario Logging*....17
Authority of the Council....18

V Council Resolution 00-09 on Matters Related to Articles 14 and 15 of the Agreement....21
Overview: Council Resolution 00-09 in Context....21
Interpreting Council Resolution 00-09....22
Actions Taken Pursuant to Council Resolution 00-09....23
Lessons Learned....23
Council Resolution 00-09 in the Context of Recent Council Decisions....24
Textual Analysis of the Council's Actions....24
Summary of Comments on the Effects of Council's Perceived Failure to Engage Council Resolution 00-09....25

VI Conclusion....27

Annex: Written Comments Received.....29
Academia Sonorense de Derechos Humanos, A.C.
Canadian Nature Federation
Canadian Parks and Wilderness Society
Comité Pro Limpieza del Rio Magdalena
Forest Products Association
Friends of the Oldman River
Hydro-Québec
International Environmental Law Project
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Paul S. Kibel
Northwest Ecosystem Alliance
Sierra Club of Canada
Sierra Legal Defence Fund (2)
Transboundary Watershed Alliance
United States Council for International Business
Wildlands League (2)

I. INTRODUCTION AND METHODOLOGY

MANDATE

In November of 2001, the Joint Public Advisory Committee (JPAC) of the Commission on Environmental Cooperation (CEC) and several non-governmental organizations (NGOs) requested that the Council of the CEC refer to JPAC for public review, the issue of defining the scope of factual records related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). The Council authorized JPAC to conduct this public review after the completion of the relevant factual records: SEM-99-002 (*Migratory Birds*); SEM 97-006 (*Oldman River II*); SEM-98-004 (*BC Mining*); and SEM-00-004 (*BC Logging*). JPAC informed the Council at its regular session in June 2003 that it would commence a public review on this issue on 17 July 2003. The public review was also to include the impacts of a recent Council decision interpreting what constitutes "sufficient" information to support an allegation of failure to enforce, related to SEM-02-001 (*Ontario Logging*).

On 11 August 2003, in preparation for a public meeting scheduled for 2 October 2003, JPAC commissioned the Environmental Law Institute (ELI) to write a report addressing the following issues:

- The impacts related to recent Council decisions defining the scope of factual records in the four submissions listed above. Specifically, JPAC requested an analysis of the potential impacts of these decisions on the effectiveness of the submissions process and on the Secretariat's ability to gather necessary information.
- The Council's authority to re-open the Secretariat's determination, pursuant to NAAEC Article 14(1)(c), that a submission provides "sufficient information to allow the CEC Secretariat to review the submission." Specifically, JPAC requested an analysis of this issue in the context of Council Resolution 03-05, deferring consideration of the Secretariat's factual record recommendation with respect to SEM 02-001 (*Ontario Logging*) pending the submission of "sufficient information."
- The operation of Council Resolution 00-09 on Matters Related to Articles 14 and 15 of the Agreement in the context of the need for transparency and public participation before decisions are made concerning implementation and further elaboration of the citizen submissions process.

RESEARCH APPROACH

JPAC identified and stipulated the four factual records for review (*Oldman River II, BC Logging, BC Mining,* and *Migratory Birds*). In preparation for drafting this report, ELI reviewed these four factual records, the corresponding submissions, Secretariat determinations and Council resolutions; materials prepared by the CEC related to the citizen submissions process; communications among the three bodies of the CEC, and between the CEC and the environmental community; materials drafted by independent experts for the CEC; and several scholarly articles.

In addition, JPAC requested that ELI interview the authors of the submissions addressed in this report, academic experts, and other individuals with knowledge of the submissions process and its history. These interviews were conducted accordingly, and the report incorporates the interviewees' relevant responses. In order to ensure that the responses received were as forthcoming as possible, there are no specific attributions.

ELI also sought to interview the CEC Parties as part of the study, and asked JPAC for permission to do so. JPAC elected to contact the Parties itself to invite them to be interviewed by ELI. The Parties declined to be interviewed, or to attend the public meeting, stating that it was "important that the consultation represent the views of the public and not the Parties."[1] It is therefore emphasized that any findings in this report do not reflect the views of the Parties to the NAAEC.

A preliminary version of this report was made available to the JPAC working group for its comments, which were incorporated prior to the public meeting on 2 October 2003. The public meeting was held to present and discuss the preliminary version of this report and related issues. Participants at the Montreal meeting were encouraged to provide written comments, which are incorporated into this final report. The JPAC working group will prepare a draft Advice to Council on the issues

[1] Letter from José Manuel Bulás Montoro, Alternate Representative for Mexico, to Gustavo Alanis-Ortega, JPAC Chair for 2003 (Sept. 29, 2003) (on file with JPAC).

raised in this report, to be finalized and approved by all JPAC members at the JPAC Regular Session on 4-5 December in Miami, Florida.

Section II of this report discusses the policy context within which these issues are placed. Transparency and public participation are central themes of the topics discussed in the report, and this section provides a general overview of issues related to these themes.

Section III analyzes the impacts of recent Council decisions defining the scope of factual records in SEM-99-002 (*Migratory Birds*); SEM 97-006 (*Oldman River II*); SEM-98-004 (*BC Mining*); and SEM-00-004 (*BC Logging*).

Section IV analyzes the Council's authority to reopen the Secretariat's determination, pursuant to NAAEC Article 14(1)(c), that a submission provides "sufficient information to allow the Secretariat to review the submission."

Section V discusses the operation of Council Resolution 00-09, on Matters Related to Articles 14 and 15 of the Agreement, in the context of the need for transparency and public participation before decisions are made concerning the implementation and further elaboration of the citizen submissions process.

II. THE CITIZEN SUBMISSIONS PROCESS IN CONTEXT: PUBLIC PARTICIPATION AND ENVIRONMENTAL GOVERNANCE

At a very basic level, the public has a fundamental right to be involved in decisions that have the potential to seriously impact their health and well-being. Public participation seeks to ensure that citizens have the opportunity to be notified, express their views, and even to influence these decisions. Engaging the public in environmental decision-making also often improves the quality of the environmental outcomes of those decisions.

Citizens, NGOs, and industry frequently have access to different forms of environmental and enforcement information than governments. Bringing diverse perspectives to bear can test existing assumptions and enable decision-makers to better account for these additional considerations.[2] Further, transparency and public participation can improve environmental governance by fostering support for final decisions. First, there is more practical likelihood that public concerns will be accounted for, thereby diminishing the probability of opposition. Second, access to the decision-making process enables the public to better understand the full context and competing considerations that must be taken into account in making these difficult decisions. Thus, even if the outcome is not the one preferred, the understanding fostered and the assurance that all views were considered often increases public receptiveness to a final decision.[3]

On the other hand, involving the public can be costly in terms of time, labor, and expense, adding to what are often already overly burdened administrative mechanisms for making these decisions. These sacrifices must be weighed against the strong arguments for including the public in decision-making. Once a decision has been finalized, public protest can ultimately be more costly than the inclusion of participatory mechanisms from the inception of the decision-making process. Determining the appropriate level of public involvement requires a careful balancing of all of these considerations.

Principle 10 of the 1992 Rio Declaration on Environment and Development states that, "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[4] Since this landmark mandate to facilitate and encourage public awareness and participation in environmental decision-making, several regional initiatives promoting public involvement have emerged.[5] Among the first of these was the North American Agreement on Environmental Cooperation (NAAEC or the Agreement), which emphasizes the role of the public in its vision of environmental governance throughout its text. Indeed, the participatory mechanisms in the NAAEC are in great measure the outgrowth of recommendations from the environmental community itself regarding how to address concerns related to perceived threats to domestic enforcement presented by the creation of the North American Free Trade Agreement (NAFTA).[6]

PUBLIC PARTICIPATION IN THE NAAEC

The Preamble of the NAAEC emphasizes "the importance of public participation in conserving, protecting and enhancing the environment;" and among the objectives of the Agreement as expressed in Article 1 is that of "promot[ing] transparency and public participation in the development of environmental laws, regulations and policies."[7] In addition, the very architecture of the CEC includes the Joint Public Advisory Committee (JPAC), which was established as a "cooperative mechanism to advise the Council in its deliberations and to advise the Secretariat in its planning and activities."[8] Constituted of five members from each country representing a variety of sectors, its purpose is to "ensure that the views of the North American public are taken into account."[9]

2 Carl Bruch & Meg Filbey, *Emerging Global Norms of Public Involvement*, *in* 5 The New Public: The Globalization of Public Participation (Carl Bruch ed., 2002).

3 *Id.*at 6.

4 Rio Declaration on Environment and Development, A/Conf.151/26 (Aug. 12, 1992), *reprinted in* 31 I.L.M. 874 (1992).

5 Bruch & Filbey, *supra* note 2 at 77.

6 *See Non-governmental Documents*, *in* 629 NAFTA & The Environment: Substance and Process (Daniel Magraw ed., 1995).

7 The North American Agreement on Environmental Cooperation, Sept. 8, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

8 This language is taken from the JPAC's "Vision Statement," *available at* http://www.cec.org/who_we_are/jpac/vision/index.cfm?varlan=english (last visited 7 Sept. 2003).

9 JPAC, "Assuring Public Participation," *available at* http://www.cec.org/files/PDF/JPAC/FactSheet_EN%20fin.pdf (last visited 7 Sept. 2003).

Further evidence of the NAAEC's commitment to public participation is found in the *Framework for Public Participation.* The framework was drafted to provide guidance to the three bodies of the CEC and states that "public participation should be approached in its broadest sense." It holds further that the CEC should "endeavor to conduct all of its activities in an open and transparent manner."[10]

By far the most innovative and substantial mechanism created within the NAAEC for fostering transparency and public participation is the citizen submission process provided for in Articles 14 and 15. Until relatively recently, international law only recognized State actors making claims against other State actors on the international stage. The "whistleblower" provisions of Article 14 of the NAAEC are innovative in allowing citizens to directly access and participate in the Commission's decision-making processes. These provisions enable citizens of all three countries of the CEC to submit allegations to the Secretariat and request an independent review of the facts if they believe that one of the Parties is failing to effectively enforce its environmental law(s).[11] The Secretariat administers the review process in accordance with Articles 14 and 15 and the *Guidelines for Submissions on Enforcement Matters* (Guidelines), which were drafted by JPAC following public consultations, adopted by the Council in 1995, revised in 1999 and again in 2001.[12] After its initial review, the Secretariat determines whether to make a request for a response from the Party that is the focus of the submission. The Secretariat then evaluates the submission in light of such a response and either terminates the submission or recommends to the Council that a factual record on the matter be developed.[13] At this point, the Council has the authority (by two-thirds vote) to decide whether a factual record should, in fact, be developed. To date, 42 submissions have been made through this process, eight of which have resulted in the development of a factual record.[14] If the Council approves the recommendation for the development of a factual record, the Secretariat then has the responsibility for gathering information related to the allegations from public sources, submissions from interested parties or JPAC, or developed by the Secretariat itself or through independent experts.[15] Once a factual record has been developed (and made public upon Council approval), the process is complete.

The purpose of the process, therefore, is not to apply explicit sanctions based on the information in a factual record, but rather to engage the "court of public opinion" by shining an international spotlight on perceived domestic enforcement issues and thereby avoiding the feared trilateral "race to the bottom" that could result from opening trade between the Parties.[16] Citizens play a significant role in the process by guiding that spotlight and contributing information regarding their concerns as related to the enforcement issues under examination.[17] In bringing the facts out into the open, it is expected that the Parties to the NAAEC will become more accountable and thus more effective in their enforcement measures.

The question of whether the process has in fact engendered more effective enforcement is beyond the scope of this report. However, one of the issues that potentially could influence the process' effectiveness as an enforcement tool is that of clearly defining the scope of authority of each of the players: the Council, the Secretariat, and the public.[18] This issue has been raised with respect to recent Council resolutions that define the scope of factual records and the sufficiency of information required to support development of a factual record, which are discussed in Parts III and IV of this report, respectively. It is also the central theme of Part V of the report, which explores Council Resolution 00-09 in the context of the need for transparency and public participation before decisions are made regarding the implementation or further elaboration of the citizen submissions process. Each of these sections analyzes the legal and policy implications of the Council's decisions, and summarizes the comments of those who were interviewed on these matters.

10 Framework for Public Participation in Commission for Environmental Cooperation Activities (Oct. 1999), *available at* http://www.cec.org/files/PDF/PUBLICATIONS/GUIDE19_en.PDF (last visited 7 Sept. 2003).

11 NAAEC, *supra* note 7.

12 CEC/North American Environmental Law and Policy, Citizen Submissions on Enforcement Matters: Secretariat Determinations under Articles 14 and 15 of the North American Agreement on Environmental Cooperation: August 1997 Through June 2002 (2002), p. xi.

13 NAAEC, *supra* note 7 at art. 15.

14 This information is available at the CEC website: http://www.cec.org/citizen/index.cfm?varlan=english (last visited 7 Sept. 2003).

15 NAAEC *supra* note 7 at art. 15(4).

16 David L. Markell, *The Citizen Spotlight Process*, 33 ENVTL F. (Mar./Apr. 2001).

17 David L. Markell, *The CEC Citizen Submission Process: On or Off Course?, in* Greening NAFTA: The North American Commission for Environmental Cooperation (Markell ed., 2003).

18 *Id.* at 274.

III. DEFINING THE SCOPE OF THE FACTUAL RECORD

This section examines the impact and authority of the Council's resolutions defining the scope of the following factual records: *BC Mining, BC Logging, Migratory Birds,* and *Oldman River II*. In each of these cases, the Secretariat recommended to the Council that a factual record be developed to investigate alleged widespread, systemic failures of a Party to effectively enforce its environmental law. Although the Council approved the preparation of factual records with respect to each of these submissions, it significantly narrowed the scope of the investigation. That is, rather than order the preparation of factual records on the alleged widespread failure to effectively enforce, it instructed the Secretariat to develop factual records concerning only specific examples of the alleged widespread failure that were detailed in the submission. This represented the "first time the CEC Council had used its approval authority under the NAAEC to narrow the substantive scope of the factual records."[19]

Section A will describe how the Council defined the scope of each of the above-mentioned factual records, and the effect of this "scoping" on the facts that were ultimately revealed in the factual record. Section B will discuss the impacts of scoping on the citizen submission process, including potential ramifications for the usefulness and credibility of the process, the ability of the public to participate in the process, and the capacity of the Secretariat to implement the process. Finally, Section C will address whether the Council acted within the scope of its authority under the Agreement in defining the scope of these factual records. It is again emphasized that any findings in this report do not reflect the views of the Parties to the NAAEC.

A) COUNCIL'S SCOPING DECISIONS IN SPECIFIC SUBMISSIONS

BC MINING (SEM 98-004)

In *BC Mining*, the submitters alleged "the systematic failure of the Government of Canada to enforce Section 36(3) of the Fisheries Act to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia."[20] The submission focused on three abandoned mine sites (Britannia, Tulsequah Chief, and Mt. Washington) as examples of ongoing non-compliance with section 36(3), but also referenced an additional 39 mines in British Columbia where violations of the Fisheries Act either may have occurred or may be occurring without any enforcement action being taken.[21] The submitters highlighted the fact that there had been no prosecutions of mining companies in British Columbia for violations of section 36(3) in the last 10 years, despite the Canadian government's knowledge of ongoing non-compliance.[22] In addition, the submitters pointed to reductions in the staff and resources available to Environment Canada to enforce this provision.[23]

The Secretariat determined that a factual record was warranted regarding Canada's alleged pattern of ineffective enforcement of section 36(3) in relation to mines operating in British Columbia.[24] It recommended that the factual record develop information not only with respect to the three highlighted mines, but also the 39 known or potentially acid-generating mines referenced in the submission.[25] However, the Council instructed the Secretariat to develop a factual record regarding Canada's enforcement of section 36(3) at only one of the three mines highlighted as examples in the submission—the Britannia mine.[26] The Council excluded from the factual record an investigation into enforcement at the other two mines discussed in detail as examples (Tulsequah Chief and Mt. Washington), based on Canada's notification to the Council that administrative or judicial proceedings were still pending with respect to those mines.[27] The Council's resolution did not, however, provide any explanation for its decision to exclude the submitters' broader allegations

19 Letter from Paul S. Kibel, attorney, Fitzgerald Abbott and Beardsley, and Adjunct Professor, Golden Gate University School of Law, to the JPAC, "Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC." (Sept. 8, 2003)(attached as Appendix to this report).

20 SEM 98-004 (*BC Mining*) Submission at 5 [hereinafter *BC Mining* Submission].

21 *Id.* at 8. Submitters attached a list of these mines as Appendix 1 to the submission.

22 *Id.* at 14-15.

23 *Id.* at 11.

24 See SEM-98-004 (*BC Mining*). Article 15(1) Notification to Council That Development of a Factual Record Is Warranted (May 11, 2001) at 18, 26-27, *available at* http://www.cec.org/citizen/status/index.cfm?varlan=english (last visited Oct. 28, 2003) [hereinafter *BC Mining* Secretariat's Notification].

25 See *id.* at 23-25.

26 SEM-98-004 (*BC Mining*) Factual Record at 138 [hereinafter *BC Mining* Factual Record].

27 Council Resolution 01-11, *in BC Mining* Factual Record, app. 1. Article 14(3) of the Agreement provides that matters subject to pending judicial or administrative proceedings (defined in Article 45(3)) shall not be investigated in a factual record.

regarding Canada's widespread failure to enforce at mines throughout British Columbia, in particular at the 39 additional mines referenced in the submission.

The Council's decision to limit the scope of the factual record necessarily limited the information that ultimately could be included in that record. Based on the Secretariat's determination, the factual record would have developed information regarding enforcement of section 36(3) at 42 known or potentially acid-generating mines throughout British Columbia.[28] This would have included information on the extent of section 36(3) offenses at relevant mines throughout the province; the effectiveness of various compliance-promoting measures in reducing those offenses; the extent of compliance monitoring and the findings of such monitoring; the extent of enforcement action taken as a result of findings of noncompliance; the effectiveness of such enforcement action; and whether reductions in enforcement resources have impacted the effectiveness of enforcement under this provision.[29] In other words, the factual record would have provided detailed information on the application and effectiveness of Canada's enforcement policies in ensuring compliance with section 36(3) by mining industries in British Columbia. However, as a result of the Council's resolution, the factual record included information about Canada's enforcement of 36(3) with respect to only one of the 42 mines.

With respect to the Britannia mine, the factual record found that Canada had taken no enforcement action under the Fisheries Act, despite evidence of ongoing violations of section 36(3).[30] However, the investigation found that Canada had supported British Columbia's enforcement of its provincial waste management act with respect to ongoing acid mine drainage from the Britannia mine. The factual record notes that Canada's Fisheries Act Compliance and Enforcement Policy allows the federal government to consider enforcement actions of other levels of government in determining the appropriate federal response to a violation of the Fisheries Act.[31] It revealed that recent amendments to the province's Waste Management Act preclude any further enforcement action by the province against former owners of the Britannia Mine, and exclude from the purview of the Act all other abandoned mines in British Columbia where a reclamation permit has been issued under the Mines Act.[32]

The factual record further revealed an apparent federal enforcement policy shift away from traditional enforcement responses and towards compliance promotion at abandoned mine sites,[33] noting that Federal Department of Justice policy allows prosecutors to consider whether a compliance promotion program might better serve the public interest than prosecution.[34] It described a federal-provincial compliance assistance program for contaminated mine sites, which lapsed in 1995,[35] and noted that since then, federal and provincial employees at the local level have cooperated on an ad hoc basis in seeking funding to study and solve the Britannia effluent problem.[36] Finally, the factual record reported that an effluent treatment plant (ETP) is expected to be operational at Britannia by 2004[37] and that it will likely be effective in preventing violations only if strict process controls are adopted and sufficient funding is made available on a long-term basis.[38]

BC Logging (SEM-00-004)

In *BC Logging*, the submitters alleged that Canada was failing to effectively enforce sections 35(1) and 36(3) of the Fisheries Act in connection with logging operations on public and private lands throughout British Columbia.[39] In particular, the submission asserted that Canada's reliance on British Columbia's regulation of forest practices as a means for ensuring compliance with the federal Fisheries Act constituted a "systemic" pattern of ineffective enforcement throughout the province.[40] The submission focused on logging operations on private land in the Sooke watershed as a "particularly troubling example" of Canada's failure to enforce sections 35(1) and 36(3) of the Fisheries Act.[41]

The Secretariat determined that "a factual record is warranted to examine what formal or informal policies Canada has in place for enforcing the Fisheries Act with respect to logging on public and private lands in British Columbia, whether and how those policies are being implemented, and whether those policies and their implementation amount to effective enforcement of the Act."[42] However, the Council instructed the Secretariat to prepare a factual record with regard to only two alleged violations in the Sooke watershed,[43] declining the Secretariat's recommendation to prepare a factual record addressing

28 *BC Mining* Secretariat's Notification, *supra* note 24 at 23-25.

29 *Id.*; See *also BC Mining* Factual Record, *supra* note 26 at 18-19 for list of information excluded pursuant to Council's resolution.

30 *BC Mining* Factual Record, *supra* note 26 at 8, 124.

31 *Id.* at 9.

32 *Id.* at 130-31.

33 *Id.* at 55 - 56.

34 *Id.* at 132.

35 *Id.* at 61.

36 *Id.* at 133.

37 *Id.* at 126.

38 *Id.* at 133.

39 SEM-00-004 (*BC Logging)* Factual Record at 1 [hereinafter *BC Logging* Factual Record].

40 *Id.* at 19.

41 *Id.* at 18.

42 *Id.* at 21.

43 *Id.*

the alleged province-wide failure to effectively enforce the Fisheries Act.

Here again, the Council's decision to limit the scope of the factual record limited the information that ultimately could be included in that record. First, since the Sooke watershed logging was on private land, the Council's resolution precluded the Secretariat from developing information relating to Canada's enforcement of section 35(1) in the context of public land, where the vast majority of logging in British Columbia occurs. Moreover, the factual record would limit information regarding Canada's enforcement on private land in British Columbia to the Sooke watershed. Finally, the Council's resolution excluded from the factual record information about Canada's alleged reliance on provincial laws and regulations to ensure compliance with the Fisheries Act.[44]

The factual record documented the limited enforcement actions taken by Canada with respect to the two sites in the Sooke watershed.[45] Although the Secretariat did not reach any conclusion in the factual record as to whether or not such limited enforcement constituted a failure to effectively enforce the Fisheries Act, it compiled "indicia of effective enforcement" that could be taken into account in considering this question.[46]

Migratory Birds (SEM-99-002)

In *Migratory Birds*, the submitters alleged that the United States was failing to effectively enforce section 703 of the Migratory Bird Treaty Act (MBTA) against the logging industry throughout the United States, despite its awareness that the logging industry consistently engaged in practices that violated the law.[47] In support of their allegations, submitters pointed to a draft Fish and Wildlife Service policy memorandum stating that no enforcement action was to be taken under the MBTA for logging incidents involving non-endangered or non-threatened migratory birds. The submitters also noted the apparent lack of prosecutions of logging companies for MBTA violations nationwide, and detailed certain specific cases in the submission.[48]

The Secretariat recommended that a factual record be developed on "the full scope of the Submitters' assertions that logging operations have violated and are continuing to violate the MBTA on a nationwide basis and in particular identified situations, and that the complete lack of any enforcement of the MBTA in regard to logging operations indicates that the United States is failing to effectively enforce the MBTA throughout the United States."[49] However, the Council limited the scope of the factual record to two specific cases identified as examples in the submission.

Here too, the Council's decision to limit the scope of the factual record necessarily limited the information that ultimately could be included in that record. In particular, it excluded from the factual record information about the United States' MBTA enforcement policy with respect to logging operations other than the two specific examples. For example, it excluded information regarding the effectiveness nationwide of the "non-enforcement initiatives" described in the United States' response as protecting migratory birds; the number of migratory birds taken as a result of logging as compared to those taken as a result of other activities as to which the United States had taken enforcement or regulatory action; the ease and effectiveness of requiring or encouraging the use of best practices in the logging context as compared to other contexts; the effectiveness of leveraging enforcement resources to achieve greater levels of compliance for logging as compared to other activities; and whether the U.S. practice of only pursuing enforcement action under the Endangered Species Act in connection with threatened or endangered migratory birds taken as a result of logging activity was an effective means of achieving the goals of the MBTA.[50] The Council's resolution also excluded information regarding several examples included in the submission, aside from the two selected by the Council, as illustrations of the nationwide failure to enforce.[51]

The factual record revealed that the federal government had taken no enforcement action with respect to either of the two identified cases.[52] The Secretariat observed that "these examples are consistent with the federal government's record to date of never having enforced the MBTA in regard to logging operations."[53] However, the factual record also revealed that the state government had prosecuted these cases under state law and had

44 *Id.* at 23. Excluded information might consist of, for example, information underlying or supporting Canada's decision to reduce the level of review of Forest Development Plans in British Columbia in light of stream protections provided under provincial law; the extent to which Canada monitors logging operations regulated under provincial laws to determine compliance with the Fisheries Act and the results of such monitoring activities; and actions taken by Canada to follow up on an inter-governmental letter regarding concerns about ineffective enforcement of the Fisheries Act. *See id.*

45 With respect to the first site, the Department of Fisheries and Oceans (DFO) received public complaints before and after the logging, but did not investigate the allegations after the submission was filed. Although DFO initiated Fisheries Act charges, it ultimately dropped them because a DFO officer had incorrectly advised the logging company that the stream at issue was not fish-bearing. *See id.* at 95. With respect to the second site, the government issued a warning letter and then closed the investigation. *See id.*

46 *Id.* at 95.

47 *See* SEM-99-002 (*Migratory Birds*), Article 15(1) Notification to Council That Development of a Factual Record Is Warranted (Dec. 15, 2000) at 2-4, *available at* http://www.cec.org/citizen/status/index.cfm?varlan=english (last visited Oct. 28, 2003) [hereinafter *Migratory Birds* Secretariat's Notification].

48 *Id.* at 6-8.

49 SEM-90-002 (*Migratory Birds*) Factual Record at 18 [hereinafter *Migratory Birds* Factual Record].

50 *Id.* at 21.

51 *Id.*

52 *Id.* at 63.

53 *Id.*

imposed criminal or administrative sanctions.[54] The record discussed at length the federal government's "Petite Policy,"[55] which determines when prior state enforcement action precludes federal enforcement, suggesting that this policy provides a measure for assessing the federal government's non-enforcement of the MBTA in these cases.[56]

Oldman River II (SEM 97-006)

In *Oldman River II*, the submitters alleged that, as a matter of nationwide policy, Canada was failing to effectively enforce sections 35, 37, and 40 of the Fisheries Act and related provisions of the Canadian Environmental Assessment Act.[57] In particular, the submitters asserted that Canada's use of informal "letters of advice" in reviewing projects and the decreasing and uneven distribution of prosecutions for Fisheries Act violations amounted to a systematic failure of the Canadian government to effectively enforce its environmental laws. The submitters cited the Sunpine Forest Products Access Road as an example of this widespread, systemic failure.[58]

The Secretariat determined that the submission warranted the development of a factual record to compile further information regarding the enforcement activity undertaken by Canada and the effectiveness of that activity in ensuring compliance with the Fisheries Act.[59] The Council, however, limited the scope of the factual record to Canada's enforcement of these provisions with respect to the Sunpine Forest Products Access Road.

Once more, the Council's decision to limit the scope of the factual record necessarily limited the information that ultimately could be included in that record. Specifically, in focusing solely on the Sunpine case, it excluded information regarding Canada's enforcement of the Fisheries Act nationwide, including information about its use of "letters of advice" and prosecution as enforcement tools for section 35 of the Fisheries Act; whether seeking assurances of voluntary compliance with respect to this provision constituted a reasonable exercise of enforcement discretion; and whether Canada's allocation of resources in connection with this provision constituted a bona fide resource allocation decision.[60]

The factual record did not conclude whether or not there was a Fisheries Act violation, or a failure to effectively enforce the Fisheries Act, in the Sunpine case. The record revealed that the federal government was not aware of the Sunpine project until the submitter sent a letter to the Federal Minister of Fisheries and Oceans, 18 months after the project was first reviewed by provincial authorities.[61] The record also found that the federal government did not participate in the decision to authorize the company to build a new road through the wilderness rather than use an existing road, or in the choice of a corridor for the road.[62] However, the federal government did participate in the decision to authorize two bridges that were part of the Sunpine project, providing advice to the Canadian Coast Guard regarding the permit application for the two bridges, and issuing "letters of advice" to Sunpine that listed mitigation measures for the two bridges.[63] The factual record noted that the Department of Fisheries and Oceans' (DFO's) Habitat Guidelines provides that the DFO may issue such "letters of advice" where it considers that mitigation measures could avoid a determination of harm (which would trigger the need for Fisheries Act authorization and an environmental assessment under the Canadian Environmental Assessment Act).[64] The factual record provided information on measures proposed by the company to mitigate fisheries impacts from the project,[65] and noted the absence of any follow-up monitoring by the federal or provincial government to verify the effectiveness of those measures.[66] Finally, the factual record revealed the lack of regulations regarding the submission of information by project proponents under the Fisheries Act[67] and for reviewing the effectiveness of mitigation measures under the Canadian Environmental Assessment Act.[68]

Summary

With respect to the four submissions discussed above, the Council has declined to instruct the Secretariat to develop a factual record investigating the submitters' allegations of widespread, systemic patterns of ineffective enforcement. Rather, the Council has instructed the Secretariat to develop factual records limited to the specific violations that submitters have included as examples of such widespread patterns. Although these rulings are not legally binding upon the Council with respect to

54 *Id.*

55 *Id.* at 41-42.

56 *Id.* at 63.

57 SEM-97-006 (*Oldman River II*) Submission at 1 [hereinafter *Oldman River II* Submission].

58 *See* SEM-97-006 (*Oldman River II*), Article 15(1) Notification to Council that Development of a Factual Record Is Warranted (Jul. 19, 1999, at 1, *available at* http://www.cec.org/citizen/status/index.cfm?varlan=english (last visited 28 Oct. 2003) [hereinafter *Oldman River II* Secretariat's Notification].

59 *Id.* at 3.

60 SEM-97-006 (*Oldman River II*) Factual Record at 18 [hereinafter "*Oldman River II* Factual Record].

61 *Id.* at 63.

62 *Id.* at 74, 90.

63 *Id.* at 76-81, 90.

64 *Id.* at 10, 49-50.

65 *Id* at 76-7.

66 *Id. at* 81.

67 *Id.* at 30-31.

68 *Id.* at 44.

future submissions,[69] many commentators have expressed concern that the Council may follow consistent reasoning in future cases. At the very least, the Council's resolutions set the tone for the submissions process and provide cues to future submitters about the kinds of claims that will support the development of a factual record.

The Council's resolutions indicate to submitters that allegations of specific violations—rather than widespread, systemic patterns of ineffective enforcement—are more likely to give rise to a factual record. The resolutions also indicate that multiple violations may be alleged and investigated within the scope of one factual record, as long as each one is a fact-specific violation. What is less clear is whether—and if so, how—submitters can still successfully assert widespread, systemic patterns of ineffective enforcement, sufficient to support the development of a factual record. For example, can submitters show a pattern of ineffective enforcement by asserting numerous specific violations? If so, how many specific violations must be asserted, and what evidence must be provided with respect to each violation? Some of these questions are currently being tested in the context of the *Ontario Logging* submission, discussed in Section IV of this report, in which submitters have documented numerous specific violations in an attempt to support an investigation of widespread failure to enforce.

B) IMPACT OF THE COUNCIL'S RESOLUTIONS DEFINING THE SCOPE OF FACTUAL RECORD

Section A, above, set forth the specific information excluded from each of the factual records as a result of the Council's resolutions defining the scope of the Secretariat's investigations. This section will examine the impact of these decisions more broadly on: the utility of the factual records, the credibility of the process, the ability of citizens' groups to participate in the process, and the capacity of the Secretariat to carry out its investigative functions. It is again emphasized that any findings in this report do not reflect the views of the Parties to the NAAEC.

Limiting the Usefulness of Factual Records

Submitters have openly and vociferously expressed frustration that the factual records do not adequately address the concerns that prompted their submissions.[70] One issue is that the factual records—when limited to a few specific instances—have failed to address the cumulative effects that stem from the widespread patterns of ineffective enforcement alleged by the submitters. For example, in *BC Logging*, the submitters were concerned about the cumulative effects arising from certain types of damage routinely permitted under provincial law—clearcutting stream banks, individual stream crossings, and clearcutting of landslide prone areas. The submitters noted that, "the significant environmental harm from these practices arises not necessarily from any one instance, but more importantly, from the cumulative effects of these practices occurring on a frequent basis in widespread parts of British Columbia."[71] By limiting the scope of the factual record to two sites within a single watershed in the province, the Council's resolution precludes the consideration of such cumulative effects in the factual record.

The factual records also have failed to address the submitters' broader concerns about a Party's implementation of its enforcement policies. As illustrated most clearly in the *Migratory Birds* submission, factual records limited to a few specific instances will not reveal widespread patterns of non-enforcement. Here, in spite of the Secretariat's determination that "information provided by the United States appears to support the assertion that logging operations that violate the MBTA are rarely prosecuted, if ever," and a draft government policy memorandum indicating a policy of non-enforcement *vis à vis* the logging sector, the Council limited the scope of the factual record to two cases identified in the submission. The factual record determined that state authorities had already imposed criminal or administrative sanctions under state law in these cases, thus providing an arguably reasonable basis for the federal government's failure to prosecute within these specific instances. However, as Paul Kibel notes, these specific instances "may be part of a programmatic policy of non-enforcement that cannot properly be characterized as reasonable exercises of prosecutorial discretion or bona fide enforcement allocation decisions."[72] Due to the Council's resolution, the Secretariat was unable to investigate this issue in the factual record. The submitters nevertheless aimed to draw value from the factual record, noting that the two examples "showed how the state of

[69] Letter from U.S. National Advisory Committee to Christine Todd Whitman, Administrator, U.S. Environmental Protection Agency (Oct. 15, 2001), *available at* http://www.epa.gov/ocempage/nac/pdf/nac_advice_101501.pdf (last visited Sept. 9, 2003).

[70] Letter from Sierra Legal Defense Fund to CEC Council (6 Mar. 2002), *in BC Logging* Factual Record, *supra* note 39 at 22 ("The result is that the factual record that will be prepared in this matter will not address the environmental concerns that prompted the filing of the Submission."); Friends of the Oldman River, Written Submission on JPAC Review of Citizen Submission Process (Oct. 8, 2003) (attached in Appendix to this report); Comments on the Secretariat's "Overall Plan to Develop a Factual Record" for SEM-99-002 submitted by the Center for International Environmental Law (Jan. 18, 2002), *in Migratory Birds* Factual Record, *supra* note 49 at 19 (noting that the focus on "the two illustrative examples included in the submission … will obviously not result in any useful information unless it is placed in a broader context").

[71] Letter from Sierra Legal Defense Fund to Council Members, *supra* note 70 at 22. *See also* Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003 (8 Sept. 2003) (attached as Appendix to this report) at 4.

[72] Letter from Paul S. Kibel, *supra* note 19.

California could identify and prove violations of the MBTA, something that the federal government claims is too difficult,"[73] and that the factual record demonstrated that a regulatory regime to regulate logging and conserve migratory birds is, in fact, possible.[74] However, "the result, in the context of a detailed submission of widespread non-enforcement, was presumably a rather barren one for the submitters and of little value in achieving the objectives of the NAAEC."[75]

The *BC Mining* factual record also failed to adequately address the broader policy concerns underlying the submission. Here, the submitters were concerned that a lack of prosecutions for violations of the law against mines in British Columbia,[76] the ineffective use of enforcement mechanisms other than prosecution,[77] and reductions in federal enforcement staff and resources had led to the devolution of environmental law to the provinces and a systemic failure to enforce the Fisheries Act.[78] The Secretariat determined that these allegations raised "central questions" about the effectiveness of Canada's enforcement efforts with respect to mines in British Columbia generally.[79] The Secretariat further noted that Canada's response, which pointed to the enforcement tools available to Canada under its enforcement policy, failed to explain the extent to which this policy had been implemented in practice and the effectiveness of its implementation.[80] However, the factual record—limited to an investigation of Canada's enforcement with respect to one particular mine—was unable to shed light on any of these larger policy issues, except by reference to the application of the enforcement policy in the context of the Britannia mine.[81]

Similarly, in *BC Logging*, the submitters sought to investigate Canada's general policy of deferring to the provinces in matters related to the regulation of logging, even though provincial laws were allegedly insufficient to prevent violations of the federal Fisheries Act.[82] The submitters were primarily concerned with such violations on public lands, which comprise over 90 percent of the land base and are held in trust for the larger public interest.[83] Although the submission noted similar concerns with respect to logging on private land, this was not the focus of the submission.[84] The submitters assert that by limiting the factual record investigation to two instances of logging on private land, the Council "direct[ed] the Secretariat's attention away from the concerns of the submitters, and … the concerns of greatest environmental importance."[85]

Oldman River II provides yet another example of a factual record that focused on issues that weren't those of primary concern to the submitters. The submitters in this case focused on Canada's general policy of issuing informal "letters of advice" and thus bypassing environmental assessment requirements, as well as Canada's practice of abdicating its Fisheries Act enforcement responsibilities to the provinces.[86] However, once again, the factual record did not address the policy concerns that constituted the basis of the submission. Rather, detailed information about Canada's enforcement was only provided with respect to one particular case—the Sunpine case—which the submitters had specified was "provided only as an example."[87]

As illustrated by these examples, the submissions were largely prompted by concerns about broad enforcement issues—such as the allocation of staff and resources for enforcement, use and effectiveness of compliance assistance programs, use and effectiveness of traditional enforcement tools, and policies regarding when state or provincial enforcement action may preclude federal enforcement. Although the Secretariat has identified these issues as "central questions" in its determinations, it is precisely these issues that have been excluded by the Council from the scope of the factual record.

Where the scope of the factual record is limited to specific instances, it also may be significantly more difficult for submitters to show ineffective action by a Party. First, scoping allows the Council—and not the submitters—to determine where to direct the factual investigation. The Council may selectively narrow the focus to specific instances that are not representative or illustrative of its larger enforcement practices and policies. For example, in *BC Mining*, the submitters expressed frustration that the Council narrowed the scope of the factual record from the 42 known or potentially acid-generating mines identified by the submitters to focus solely on the Britannia mine—"one of the few mines [the Canadian

73 See http://ciel.org/Tae/NAFTA_MigratoryBirds_24Apr03.html

74 *Id.*

75 SEM-02-001 (*Ontario Logging*), Supplementary Submission in Response to Council Resolution 03-05 (Aug. 20, 2003) (*Ontario Logging* Supplementary Submission), *available at* http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf (last visited Oct. 28, 2003).

76 *BC Mining* Submission, *supra* note 20 at 14-15.

77 *Id.* at 17.

78 *Id.* at 11.

79 *BC Mining* Secretariat's Notification, *supra* note 24 at 20-21.

80 *Id.* at 23.

81 *See generally,* Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003, *supra* note 71 at 4.

82 *See BC Logging Submission Pursuant to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, *available at* http://www.cec.org/files/pdf/sem/00-4-SUB-E.pdf (last visited Oct. 28, 2003) [hereinafter *BC Logging* Submission].

83 Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 October 2003 (8 Sept. 2003) (attached in Appendix to this report) at 4.

84 *Id.*

85 *Id.*

86 *Oldman River II* Factual Record, *supra* note 60 at 13.

87 *Id.* at 14.

government] had shown any engagement on."[88] Submitters alleged that looking solely at the Britannia mine would "paint an unrepresentative and inaccurate picture," thus "almost certainly ensuring Canada a favourable factual record."[89] In a process built on the principle that "sunshine is the best disinfectant,"[90] limiting transparency through scoping diminishes the potential of the factual record to trigger improved environmental enforcement by the Parties.

Even where the factual record may reveal a Party's failure to effectively enforce, limiting the investigation to a series of specific detailed instances may make such failure less egregious and more "palatable" to the public. In other words, a Party's failure to effectively enforce an environmental law on a wider scale—e.g., nation-, state-, or province-wide, or with respect to an entire industry—would likely raise more public outcry than a Party's failure to enforce in a specific instance. A Party may more easily be able to justify a failure to enforce in a specific instance—attributing it to an exercise of prosecutorial discretion or bona fide decision regarding allocation of enforcement resources[91]—than to explain a more widespread and systemic pattern of ineffective enforcement.[92] For example, in BC Mining, Canada explained that it made a policy decision to not prosecute for violations at the Britannia mine, and to instead engage in compliance promotion measures and support provincial enforcement efforts.[93] In the context of a single violation, Canada's decision may appear to be a reasonable exercise of prosecutorial discretion. However, if, as the submitters alleged, Canada had not brought a single prosecution for violations of this provision, its policy may not seem as reasonable or consistent with its obligations under NAAEC. As Paul Kibel observes, "[a]n investigation of whether a particular instance of non-enforcement is a reasonable/unreasonable exercise of prosecutorial discretion and/or a bona fide/non-bona fide enforcement allocation decision, requires evaluating the particular instance of non-enforcement in the context of the relevant agency's overall enforcement program for the particular legal provision at issue."[94] By precluding the Secretariat from fully considering a government's overall enforcement policy and its implementation, the Council's resolutions prevent the factual record from fully shedding light on potential government abuse of prosecutorial discretion.

It is important to note that in spite of the narrowed scope, the factual records examined in this report have proved valuable to a certain extent. First, these factual records have prompted or are likely to prompt enforcement efforts in the particular cases investigated. For example, the submitters in BC Mining commented that the factual record produced "will almost certainly assist in environmental protection and remediation efforts at [the Britannia mine] site."[95]

Second, the factual records have spotlighted problems and generated negative publicity in the context of specific cases, sometimes leading the government to address the broader enforcement concerns giving rise to the specific cases. For example, according to the submitters, the factual record in *Oldman River II* has led to the addition of enforcement staff in the provinces and has increased the number of projects being submitted to panel review. Similarly, with respect to *BC Logging*, the submitters noted that, "the investigation uncovered deficiencies in the procedures of Fisheries and Oceans Canada, which the agency subsequently sought to address."

Third, the factual records have generated information about government policies raised in the context of a specific case that may be useful to submitters in assessing or bringing other cases. For example, according to the submitters, the *BC Logging* factual record generated "valuable information regarding policy and funding issues impeding environmental law enforcement."[96] Similarly, the *Migratory Birds* factual record provided a detailed discussion of the federal government's "Petit Policy," governing the circumstances under which prior state enforcement action precludes federal enforcement; the *Oldman River II* factual record provided detailed information about the government's "Habitat Policy" with respect to the issuance of letters of advice. The *BC Logging* factual report also produced a set of "indicia of effective enforcement,"

88 Sierra Legal Defense Fund, "International report slams British Columbia and federal government over environmental nightmare of Britannia Mine" (Aug. 12, 2003), *available at* www.sierralegal.org (last visited Sept. 9, 2003).

89 Letter from Sierra Legal Defense Fund to CEC Council, *supra* note 70.

90 Janine Feretti, *Innovations in Managing Globalization: Lessons from the North American Experience*, 15 GEO. INT'L ENVTL. L. REV. 367, 374 (2003).

91 Article 45(1) of NAAEC provides:

> A Party has not 'failed to effectively enforce its environmental law' where the action or inaction in question by agencies or officials of that Party: (1) reflects a reasonable exercise of their discretion in respect to investigatory, prosecutorial, regulatory or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.

92 International Environmental Law Project, Comments on Issues Relating to Articles 14 and 15 of the North American Agreement on Environmental Cooperation (Oct. 2, 2003) (attached in Appendix to this report) [hereinafter "IELP Written Comments"] at 7; Letter from Sierra Legal Defense Fund, Re: Supplementary Written Comments Related to the Articles 14 and 15 (Oct. 23, 2003) (attached in Appendix to this report).

93 *BC Mining* Factual Record, *supra* note 26 at 10.

94 Letter from Paul S. Kibel, *supra* note 19.

95 Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003, *supra* note 71 at 4. Also, although outside the stipulated focus of this report, certain other factual records have produced useful results despite having been limited in scope to a specific violation. For example, as a result of the Cozumel factual record, the Mexican government promised to improve its laws on protecting endangered coral reefs and to develop a new environmental plan for the Cozumel Island. Jonathan Graubert, *Giving Meaning to Trade-Linked Soft Law Agreements on Social Value: A Law-in-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. OF INT'L L. AND FOR'N AFF., 452, 439 (2001-2002).

96 *Id.*

which may be useful to citizens in assessing the effectiveness of a government's enforcement practices.[97]

Fourth, the factual records put the public on notice of the broader enforcement problems alleged by the submitters. Although the Secretariat was constrained in its ability to investigate these broader allegations, there are references in the factual records to the full scope of the submitters' allegations, along with some of the evidence supporting those allegations.[98]

The issue, therefore, is not whether the factual records are useful—as they clearly are, with respect to prompting enforcement in individual cases, discussing governmental policies that may also be at issue in other cases, and bringing public attention to the potentially larger scope of the problem—but whether the factual records are as effective and useful as they could be if the Council did not limit their scope.

Finally, it is significant to note the likely impact of the Council's resolutions on the distribution of submissions brought against the Parties to the Agreement. Several commentators have noted that the Council's resolutions may tilt the distribution overwhelmingly towards submissions against Mexico, as the United States (and to a lesser degree, Canada) already have adequate processes under domestic environmental law to address case-specific enforcement failures. Since Mexico has fewer domestic remedies, the citizen submission process will be more useful to Mexican submitters than to their U.S. or Canadian counterparts. As a result, the large majority of factual records will be about site-specific failures to enforce in Mexico, thus defeating the tri-national nature of the Agreement.[99]

Heightening Potential for Further Scoping

Limiting the scope of the investigation to specific instances may make it easier for the Parties to invoke other exceptions within the Agreement, further confining the scope and usefulness of the factual record. For example, Parties may be able to invoke Article 14(3) (excluding from the factual record matters subject to pending judicial or administrative proceedings) with respect to specific instances more easily than with respect to allegations of widespread, systemic patterns of ineffective enforcement. In *BC Mining*, Canada initiated administrative action with respect to two identified mines after the filing of the submission, thus removing these sites from the scope of the factual record. The submitters expressed concern that these administrative actions promised to be ineffective, as the two-year limitation period for the government to bring summary convictions against these mines had already expired, and therefore such actions should not exclude the two mines from the investigation.[100] A conservation group has recently validated such concerns, noting that "non-compliance with Canadian law continues to be a problem," and there has been no progress in addressing the problem of acid mine drainage at the Tulsequah mine, one of the mines excluded under the Article 14(3) exemption.[101]

While a Party's bona fide enforcement action to remedy an identified violation following the submission would likely be welcomed by submitters, there is an underlying potential for misuse of this provision. The potential for misuse is amplified if the term "administrative proceeding" is broadly defined to encompass even minimal actions such as warning letters,[102] or if (as advocated by Canada), the Secretariat must accept at face value a Party's notification that administrative actions have been taken and thus refrain from investigating the nature and effectiveness of such action in light of the language of the NAAEC.[103]

Furthermore, allegations of specific instances of ineffective enforcement "often shift[s] the focus from government conduct to the acts or omissions of a single industry, business or other entity."[104] Thus, limiting of scope to specific instances may make it more likely for a submission to be seen as "aimed at … harassing industry," within the

97 Industry has, however, objected to the inclusion of this indicia, suggesting that "such information is not relevant to the instructions of the Council and should not be included." See Letter from Forest Products Association of Canada to Manon Pepin, Commission for Environmental Cooperation of North America (Sept. 5, 2003)(on file with the JPAC). *See also* Letter from Norine Smith (Assistant Deputy Administrator for Environment Canada) to Executive Director of CEC Secretariat (June 3, 2003) *in* Letter from Paul S. Kibel, *supra* note 19 (asserting that the Secretariat's "attempt to establish a set of 'criteria' to determine what could be considered 'effective enforcement' … goes beyond the Council resolution…").

98 For example, each of the factual records lists a number of issues that would have been considered absent Council interference. Industry and the Parties have objected to this list of exclusions as irrelevant and beyond the scope of the Council's instructions. *See* Letter from Forest Products Association of Canada to Manon Pepin, *id. See also,* Letter from Judith Ayres, Assistant Administrator, U.S. Environmental Protection Agency to CEC Secretariat's Submissions on Enforcement Unit, *in* Factual Record at 206 (also objecting to detailing of information not addressed in the factual record) (on file with the JPAC); Letter from Norine Smith, *supra* note 97. The *BC Logging* factual record includes an excerpt from the submitters' letter discussing the issues of widespread non-enforcement, also objected to by the Parties.

99 *See also* IELP Written Comments, *supra* note 92 at 7 ("Limiting factual records to isolated, individualized instances will increase the relative number of Submissions against Mexico and Canada by wiping out most of the claims for widespread noncompliance brought against the United States.")

100 Letter from Sierra Legal Defense Fund to CEC Council *supra* note 70. Canada has not responded publicly to this concern.

101 Letter from Transboundary Watershed Alliance to Joint Public Advisory Committee (Sept. 16, 2003) (attached in Appendix to this report).

102 The definition of "judicial or administrative proceeding" in Article 45(3) lists a range of actions, including "seeking an assurance of voluntary compliance." The Secretariat has recognized the danger of a broad interpretation of "administrative proceeding," noting that this term must be interpreted narrowly in light of the objectives of the NAAEC. *See BC Mining* Secretariat's Notification, *supra* note 24 at 15.

103 For example, the definition of "judicial or administrative proceeding" in Article 45(3). Canada has asserted that "Article 14(3) does not provide the Secretariat with any jurisdiction to question, assess or interpret a notification by a NAAEC Party under this Article." David Andersen, Response from Governmental Committee to Chair of the National Advisory Committee (17 March 2003), *available at* http://www.naaec.gc.ca/eng/nac/gr032_e.htm (last visited 9 Sept. 2003).

104 IELP Written Comments, *supra* n. 92 at 3.

meaning of Article 14(1)(d), thus precluding the development of a factual record.[105]

Undermining the Credibility of the Citizen Submissions Process

Interviews with submitters, academic experts, and others have consistently revealed that the credibility of the citizens' submissions process stems from the independence of the Secretariat. There is widespread concern that allowing the Council to set the terms of the Secretariat's fact-finding process will undercut this independence. Having the Council define the scope of the factual record effectively entitles the Party—against whom the allegations have been directed—to dictate through the Council how such allegations should be investigated. This is, in the words of several commentators, as effective as "the fox guarding the chicken coop." Although the Council has the ultimate authority to decide whether or not a factual record should be developed, allowing it to "micromanage" the process may "make preparation of factual records a process essentially run by the parties."[106] In other words, the Council may legitimately exercise its authority to accept or reject the development of a factual record, which is built into the inherent structure of the Agreement. Dictating how the fact-finding itself is conducted, however, undermines the independence of the Secretariat, which is a key component of the Agreement and the basis for the credibility of the submissions process.[107]

Diminishing the Ability of Citizens' Groups to Participate in the Process

The Council's resolutions appear to require submitters to allege specific violations in order to support the development of a factual record. Submitters contend that such a requirement dramatically increases their financial and human resources burdens by requiring them to detail every specific violation to ensure that it will be included within the scope of a factual record. Submitters will no longer be able to rely on evidence of widespread, systemic failures to enforce (such as lack of prosecutions, inadequate enforcement staff and resources, or memoranda indicating a policy of non-enforcement of a particular law) to support the development of a factual record. Rather, they will be forced to expend extensive amounts of time and funding to document the specific examples to be investigated. This is particularly burdensome in the context of the Articles 14-15 process, as citizens' groups cannot recoup the attorneys' fees expended, as they often may under various domestic statutes.[108] Increasing the burden on citizens' groups in this way may, in fact, render the process "unmanageable and inaccessible to the very individuals and organizations who benefit most from the openness and transparency that this process provides…"[109]

Straining the Resources and Capacity of the Secretariat

Although intuitively it may seem that narrowing the scope of factual records to specific instances would result in a quicker and easier investigation, this is not necessarily the case. Rather, the Council's resolutions narrowing the scope to specific instances may actually necessitate more time- and resource-intensive investigations by the Secretariat. Specifically, as noted by the U.S. National Advisory Council, the citizen submission process may be "inundated by additional submissions with each new example of non-enforcement that is discovered by the submitter."[110] Or, as in the *Ontario Logging* submission (discussed below), submitters may allege an extensive number of documented specific violations in one submission, requiring the Secretariat to investigate each and every such violation in the course of developing a factual record.

Allegations of widespread, systemic patterns of ineffective enforcement may, in some cases, be more efficient and less time-consuming to investigate than allegations of specific violations. The Secretariat would not need to investigate every violation, but could instead examine evidence such as the number of prosecutions or internal policy memoranda regarding non-enforcement of particular laws. The Secretariat could also investigate specific examples of

105 *Cf.* Letter from Myriam Truchon, Hydro-Quebec, to Manon Pepin, Joint Public Advisory Committee (4 Sept. 2003) (attached in Appendix to this report) [hereinafter "Hydro-Quebec Written Comments"] (noting that "associating a business' name with a complaint when the business is in no way involved with the procedure negatively effects the business' reputation"). Hydro-Quebec's concern evidences industry's perception of being targeted by this process, particularly where the factual record focuses on specific violations by specific industries.

106 *See* U.S. National Advisory Committee Advice No. 2000-2.

107 *See* U.S. Governmental Advisory Committee Letter to Christine Todd Whitman (19 Oct. 2001) ("We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat will be eviscerated… If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility in the submission's process.").

108 Citizens' suit provisions under U.S. environmental statutes, for example, allow citizens' groups to recover costs and attorney's fees.

109 Letter from Governmental Advisory Committee to U.S. Representative for the Commission for Environmental Cooperation (19 Oct. 2001), *available at* http://www.ciel.org/Announce/Whit-man_Letter_19Oct01.html (last visited 9 Sept.2003). *See also* Letter from Center for International Environmental Law to JPAC (17 Oct. 2001), *available at* http://www.ciel.org/Announce/CEC_JPAC_ Letter.html (last visited 9 Sept. 2003) (noting that such an effort "is beyond the resources of non-profit NGOs[.]") *See also* Letter from Joe Scott, Northwest Ecosystem Alliance, to Joint Public Advisory Committee (attached in Appendix to this report) (hereinafter "Written Comments Northwest Ecosystem Alliance") ("If the process continues to be undermined, citizens will no longer see the process as an important accountability mechanism and will justifiably cease to participate"); and Letter from Rachel Plotkin, Sierra Club of/du Canada, to Joint Public Advisory Committee (19 Sept. 2003) (attached in Appendix to this report) (hereinafter "Written Comments Sierra Club Canada") ("…groups that might see the CEC as a useful tool in environmental protection will be discouraged from expending the time and resources necessary to make a submission").

110 *See* Letter from National Advisory Committee to Christine Todd Whitman, *supra* note 69.

failures to enforce, but as several interviewees have pointed out, it would not need to investigate every violation.[111]

The research undertaken for this report—limited in focus to the four factual records stipulated by JPAC—does not permit a definitive conclusion as to whether investigations of specific instances or widespread failures are generally more time-consuming or burdensome. Rather, the value of the breadth of a given investigation seems to vary from case to case, depending on the nature of the allegation. However, the research does suggest that widespread allegations are not more time-consuming to investigate *per se*, and such allegations can and have been investigated in a time- and resource-efficient manner by the Secretariat.[112] In the course of developing the work plan (and requesting additional information from the parties or submitters, as needed), the Secretariat could identify examples that are particularly illustrative or representative of an alleged systemic failure to enforce. In other words, the Secretariat would be able to make practical decisions regarding the most effective way to investigate the submitters' allegations, without being prematurely constrained to the specific instances identified by the Council—a body that is inescapably "interested" in the outcome of the factual record and that lacks the independence, expertise, and mandate of the Secretariat to implement the investigative process.

C) THE COUNCIL'S AUTHORITY TO DEFINE SCOPE OF FACTUAL RECORD

This section examines whether the Council has the authority under the NAAEC to limit the scope of factual records to specific instances, as it has done in the four factual records examined in Section A. As discussed in detail below, although the letter of the NAAEC does not explicitly prohibit the Council from narrowing the scope of the factual records in this way, such narrowing appears to violate the spirit and purpose of the Agreement.

The Agreement itself does not explicitly grant or deny the Council the authority to narrow the scope of the factual record. The Agreement simply provides that "[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so."[113] It does not state whether the Council's authority to order the Secretariat to prepare a factual record also includes the authority to narrow its scope. However, several textual arguments have been made to suggest that the Agreement does, in fact, deny the Council the authority to narrow the scope of the factual record.

The Secretariat has observed that the opening sentence of Article 14 lays out several specific parameters for the submissions process. Submissions must involve "environmental law," they must involve an asserted failure to "effectively enforce" that law, and the asserted failure must be continuing. The Secretariat thus argues that,

> The Parties inclusion of these limitations on the scope of the Article 14 process reflects that they knew how to confine the scope of the process and that they decided to do so in specific ways. The Parties could have limited the species of actionable failures to effectively enforce to either particularized incidents of such, or to asserted failures that are of a broad scope, in the same way they included the limits referenced above. They did not do so. The fact that the Parties did not limit assertions to either particularized incidents or to widespread failures to effectively enforce provides a strong basis for the view that the Parties intended the citizen submission process to cover both kinds of alleged enforcement failures.[114]

In other words, it is logical to assume that if the Parties had intended this kind of limitation, they would have included it in the Agreement.

In a recent article, Professor David Markell, formerly Director of the CEC Secretariat's Submissions on Enforcement Matters unit, set forth another argument that the Council's resolutions are *ultra vires* based on the language of the Agreement. Markell argues that the Agreement does not allow the Council to act *sua sponte* to direct the Secretariat to develop a factual record. Rather, the Council is empowered to instruct the Secretariat to develop a factual record only after: (1) a submitter has identified particular enforcement practices or policies in a submission; and (2) the Secretariat has determined and recommended to the Council that a factual record is warranted to further investigate the issue. According to Markell, by narrowing the scope of the four factual

111 *See Ontario Logging* Supplementary Submission, *supra* note 75 at 16, ("We are prepared to work with [the Secretariat] in determining whether there can be [sic] any beneficial *scoping* of the investigation. For instance, it may be possible to conclude that certain findings related to one [Forest Management Unit] can be applied to other FMUs without further work. We believe, however, that it would be both unfortunate and premature to *tie the hands* of the international investigative body prior to its review of the available evidence, without knowing what resources will be at their disposal, and without giving it the opportunity to canvass the views of the parties, including the submitters, in this matter.").

112 Several commentators have pointed to *BC Hydro* as an example of the Secretariat's ability to identify and select representative examples for investigation in the factual record. The resulting factual record has been overwhelmingly identified as one that has been particularly useful from the point of view of the submitters. In enabling the Secretariat to perform the necessary "scoping," the factual record was able to address an allegation of widespread enforcement issues. *See* Letter from Sierra Legal Defense Fund, Re: Supplementary Written Comments Related to Articles 14 and 15 (describing how the Secretariat narrowed the scope of the submission to develop an appropriately focused factual record in cooperation with the submitters) (attached in Appendix to this report). *See also* Letter from Wildlands League, Re: Further Comments on Articles 14 and 15 (23 Oct. 2003) (attached in Appendix to this report).

113 NAAEC, *supra* note 7 at art. 15(2).

114 *Migratory Birds* Secretariat's Notification, *supra* note 47 at 8-9.

records, the Council is requiring the Secretariat to develop a factual record on matters that were not the concern of the submission, and that the Secretariat may not have determined warranted the development of a factual record.[115] In effect, argues Markell, the Council is *sua sponte* directing the Secretariat to develop what is essentially a new factual record, which is not permitted under the Agreement.[116]

Another textual argument points to the structure of Article 15, which provides the Council with the authority to instruct the Secretariat to prepare a factual record. Article 15 omits any standard or criteria for the Council's review of the Secretariat's determination. If the Agreement contemplated that the Council could essentially rewrite the Secretariat's determination *de novo*, it arguably would have provided such standards or criteria to guide the Council's decision. The fact that there is no "meat on the bones" at that stage may suggest that the Agreement contemplates that the Council either accept the Secretariat's recommendation in full, or alternatively, exercise its explicit authority under the Agreement to reject the recommendation entirely. However, by rewriting the scope without any criteria to guide its decision, the Council risks politicizing a deliberately independent process.[117]

While these textual arguments are persuasive and compelling, they are by no means decisive. In fact, most of those interviewed in the preparation of this report have agreed that the text of the NAAEC itself is silent, or at best ambiguous, as to whether or not the Council has the legal authority to narrow the scope of the Secretariat's investigation in developing factual records to specific instances of ineffective or non-enforcement.

In fact, there are also textual arguments indicating that the Agreement does contemplate that a factual record could be limited to specific instances. For example, the Council's authority to outright reject the Secretariat's determination that a factual record is warranted arguably encompasses the lesser authority to reject such a determination in part.

The definition of "effective enforcement" in Article 45(1) of the Agreement also arguably does not encompass allegations of widespread failure to enforce. Specifically, Article 45(1) provides that a Party has not failed to "effectively enforce its environmental law" where the action or inaction at issue reflects a reasonable exercise of their prosecutorial discretion, or results from bona fide resource allocation decisions. Thus, the Parties have argued that Article 45(1) prohibits the Secretariat from investigating widespread allegations of ineffective enforcement involving resource allocation or policy decisions. However, this interpretation of Article 45(1) has been previously rejected by the Secretariat.[118] As several commentators have suggested, the apparent purpose of Article 45(1) is to specify that reasonable prosecutorial decisions or bona fide resource allocation decisions cannot be the basis of Part V sanctions—but not to presumptively remove all such decisions from the investigations involved in preparing in a factual record.[119]

Finally, the Parties' strongest argument may simply be that this is their agreement, and that, pursuant to Article 10(1) of the NAAEC, they are the ultimate authorities on the interpretation of its terms.[120] Article 10(1) specifically provides that the Council shall "oversee the Secretariat" and "address questions and differences that may arise between the Parties regarding the interpretation or application of [the] Agreement."

Because the terms of the treaty are silent or ambiguous on the issue of the Council's authority to narrow the scope of a factual record, it is necessary to look to the object and purpose of the Agreement in its interpretation. This is not only required under the Vienna Convention on the Law of Treaties,[121] but also contemplated in the

115 The Secretariat implied that this might be the case in *Oldman River II*, noting that "It should not be assumed that the Secretariat's Article 15(1) Notification to Council recommending a factual record for [Oldman River II] was intended to include a recommendation to prepare a factual record of the scope set out [in the Council's Resolution], or that the Secretariat would have recommended a factual record of this scope." *Oldman River II* Factual Record, *supra* note 60 at 90. *See also* IELP Written Comments, note 92 at 5.

116 See Markell, *supra* note 17 at 284-85.

117 Several commentators have proposed that the Agreement adopt a specific standard for the Council's review of the Secretariat's recommendation. John Knox, of the U.S. National Advisory Committee, proposes an "arbitrary and capricious" standard of review (from U.S. administrative law), and Jerry DeMarco of the Sierra Legal Defense Fund has proposed a similar "patently unreasonable" standard from Canadian administrative law. See Letter from Sierra Legal Defense Fund, Re: Supplementary Written Comments Related to Articles 14 and 15 (23 Oct. 2003) (detailing the latter viewpoint) (attached in Appendix to this report).

118 For the Secretariat's detailed analysis of this issue, see *Migratory Birds* Secretariat's Notification, *supra* note 47 at 139. In short, the Secretariat asserts that it has the authority to assess whether a Party's assertion of prosecutorial discretion is in fact "reasonable" or whether its resource allocation decision is in fact *bona fide* given the Party's enforcement priorities. In other words, a Party must explain why its exercise of discretion is reasonable or its resource allocation decision a *bona fide* one, and may not simply assert that all such decisions are beyond the purview of a factual record.

119 See Chris Tollefsen, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 Yale J. Int'l. L. 141, 172-173 (2002) ("The complexity and political sensitivity surrounding the resolution of those issues would strong suggest that the Secretariat should not deal with them as threshold matters.") It has also been suggested that the Secretariat does not have the mandate to determine what constitutes effective enforcement within the context of the submissions process, but simply to determine the facts surrounding allegations. As such, the definition of what entails effective enforcement in Article 45 would more relevant to the Article V sanctions process. *But see* Letter from United States Council for International Business (21 Oct. 2003) (stating that the definition of effective enforcement in Article 45 is relevant to the citizen submissions process) (attached in Appendix to this report).

120 See Council Resolution 00-09, C/00-00/RES/09/Rev.2, *available at* http://www.cec.org/files/PDF/COUNCIL/00-09e_EN.pdf (last visited 7 Sept. 2003)("Further recognizing that countries that are parties to international agreements are solely competent to interpret such instruments."). *See also* Letter from Norine Smith, *supra* note 97 ("The NAAEC is very clear that the Council is the ultimate authority for determining the scope of the Factual Record.")

121 The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). The Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The United States has signed but not ratified the Vienna Convention. The Convention is generally regarded as an authoritative statement on the principles of treaty interpretation.

NAAEC itself.[122] Based on such analysis, the Council's resolutions—although arguably consistent with the letter of the Agreement—seem to clearly violate the object and purpose, or "spirit," of the Agreement.

One of the fundamental objectives of the NAAEC is to enhance public participation in environmental decision-making. This is evidenced by the Agreement itself, which includes among its explicit objectives to "promote… public participation in the development of environmental laws, regulations and policies."[123] Another objective is to "support the environmental goals and objectives of the NAFTA,"[124] which specifically include public participation. In addition, the Preamble of the Agreement also emphasizes "the importance of public participation in conserving, protecting and enhancing the environment."[125] Moreover, the fact that the Agreement includes a citizen submission process and bodies such as the Joint Public Advisory Committee, the National Advisory Committees and the Government Advisory Committees indicates that the Parties intended the public to be an integral part of this process.[126] As discussed above, by requiring submitters to allege specific violations, the Council limits the usefulness of the factual records and imposes onerous human resource and financial constraints on citizens' groups that could limit their ability to participate in the process. As such, the resolutions may effectively cut the public out of the process and are thus inconsistent with the Agreement's public participation objectives.

Moreover, the Council's resolutions confining submitters' allegations to fact-specific violations are inconsistent with the goals of the Agreement, which are "ambitious and broad in scope."[127] These goals include, for example, "foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations," and "enhanc[ing] compliance with, and enforcement of, environmental laws and regulations."[128] The term "enforcement" has been defined broadly to include appointing and training inspectors, issuing information on enforcement procedures, and promoting environmental audits[129]—failures of which would tend to support allegations of systemic, rather than specific, violations.

Given these broad objectives, for the Council to interpret the citizen submission process to be confined to specific violations appears both internally incoherent and contrary to the intent of the Agreement. As the Secretariat has aptly noted,

> [T]he larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC.[130]

Finally, a key purpose of the Agreement is to "promote transparency in the development of environmental laws, regulations and policies."[131] The citizen submission process is a "sunshine mechanism," and its sole mode of effecting improvements is through the disclosure of information.[132] The creation of an independent Secretariat charged with investigating the facts, immune from the "influence" of Parties,[133] appears to evidence this purpose.[134] The Council's resolutions, in interfering with the Secretariat's fact-finding process by deciding where to shine the spotlight, undermine the independence of the Secretariat and the ability of the process to enhance transparent and accountable environmental governance practices.

122 In determining whether a submission merits a response from the Party, the Secretariat must consider whether the submission "raises matters whose further study would advance the goals of this Agreement." NAAEC, supra note 7 at art. 14(2). This provision reflects the intent of the Parties that the submission process in fact advance the purposes of the Agreement, which therefore should be considered in interpreting the terms of the Agreement.

123 NAAEC, supra note 7 at art. 1(h).

124 *Id.* at art. 1(d).

125 *Id.* at Preamble.

126 See Feretti, *supra* note 90 at 370 (noting that "Public participation was built into the structure of the Commission, not added as an afterthought."). *See also*, Raymond MacCallum, Comment, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, (1997) 8 Colo. J. Envtl. L. & Pol'y, 395, 400 (noting that a fundamental purpose of the citizen submission process was "to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective laws.")

127 *Migratory Birds* Secretariat's Notification, *supra* note 47 at 10. *See also*, IELP Written Comments, *supra* note 92 at 3 ("While telescoping in on isolated fact-specific cases might be appropriate from time to time, broader patterns of conduct are more likely to elevate the concerns to a regional level and more directly advance the goals and objectives of the NAAEC, including the effective enforcement of environmental law in Canada.")

128 *See id.*

129 NAAEC, *supra* note 7 at art. 5.

130 *Migratory Birds* Secretariat's Notification, *supra* note 47 at 10.

131 NAAEC, *supra* note 7 at art. 1(h). *See also* art. 10(5) (obligating the Council to "promote… public access to information concerning the environment that is held by public authorities of each party, including information on hazardous materials and activities in its communities, and opportunity to participate in decision-making processes related to such public access…"). *Id.*

132 Although the citizen submission process is simply a "sunshine" mechanism, Part V of the Agreement authorizes enforcement measures and sanctions for a "persistent failure by a Party to effectively enforce its environmental law." Some commentators have suggested that it may be the Parties' fear of being subject to such sanctions for "persistent failures" that has motivated the Council's decisions to narrow the scope of factual records to specific instances. However, it is important to note that a citizen cannot bring a Part V action – only a Party can bring such an allegation against another Party. Therefore, as suggested by John Knox, the political realities are unlikely to ever give rise to a real risk of Part V sanctions.

133 NAAEC, *supra* note 7 at art. 11(4).

134 *Cf.* Feretti, *supra* note 90 at 369 (noting that the "authority of an independent Secretariat to write reports and develop factual records represents an unprecedented commitment to governmental accountability at the international level...")

IV. SUFFICIENCY OF INFORMATION

This section of the report addresses a separate, but related, issue regarding the determination of whether a submission has presented "sufficient information" to support the development of a factual report. This issue was raised by Council Resolution 03-05 with respect to the *Ontario Logging* submission, in which the Council seems to have reopened the Secretariat's determination as to whether the submission "provides sufficient information to allow the Secretariat to review the submission."[135] In doing so, the Council appears to add to the existing "pleading" requirements of the NAAEC a new and higher evidentiary threshold for the sufficiency of information necessary to support allegations of non-enforcement. This is facially distinct from the issue raised in the four factual records discussed earlier, which focused on whether or not a systemic pattern of non-enforcement could be the subject of a factual record. The issue in *Ontario Logging* focuses on "what kind of information Submitters must present in support of such an allegation."[136] However, the two issues are closely related because requirements for "sufficient information" may in effect define the scope of the submission, and the permissible scope may vary based upon the sufficiency of information.

NATURE AND IMPACT OF SUFFICIENCY REQUIREMENT IN *ONTARIO LOGGING*

In *Ontario Logging*, the submitters alleged that Canada was failing to effectively enforce section 6(a) of the Migratory Birds Regulations against the logging industry in Ontario.[137] To support their allegation of Canada's widespread, systemic failure to enforce, submitters (taking the cue from the prior four factual records) estimated the number of specific violations—the destruction of approximately 85,000 migratory bird nests in 59 provincial forests—that had resulted from or would result from Canada's failure to effectively enforce these regulations.[138] This estimate was based on planned harvest areas identified in forest management plans approved by the government, and information about the timing of planned cuts and the presence of migratory birds in the identified areas.[139] Although submitters admitted that their estimate of 85,000 destroyed nests was not exact, the Secretariat found that the estimate was "compelling," and that information about the areas actually harvested and concrete information regarding destruction of migratory bird nests during logging operations "could readily be developed in a factual record."[140] The submitters also referred to e-mail statements of enforcement authorities as evidence of a general policy of non-enforcement *vis à vis* the logging sector,[141] and an access to information request which yielded no information on specific enforcement actions.[142] Based on this information, the Secretariat determined that a factual record was warranted.

The Council, however, found that the submission did not contain "sufficient information" to proceed with the development of a factual record. It therefore resolved to delay its decision, giving the submitters 120 days to provide additional information to support their allegations.[143] The Council did not specify what additional information would be required, simply noting that the submission was "based in large part on an estimation derived from the application of a descriptive model, and does not provide facts related to cases of asserted failures to enforce environmental law…"[144]

In response to the Council's resolution, the submitters unearthed additional information to substantiate their allegations. Rather than relying on the forest management plans to estimate numbers of trees logged in each identified forest, submitters obtained actual numbers of trees logged, enabling them to provide more accurate estimates of the number of migratory birds likely taken due

135 NAAEC *supra* note 7 at art. 14(1)(c).

136 SEM-02-001 (*Ontario Logging*), Article 15(1) Notification to Council That Development of a Factual Record Is Warranted (12 Nov. 2002) at 9 [hereinafter *Ontario Logging* Secretariat's Notification].

137 SEM-02-001 (*Ontario Logging*) Submission (2 Feb. 2002) at 1 [hereinafter *Ontario Logging* Submission].

138 *Id.* at 4-5.

139 The submitters identified the planned harvest areas pursuant to the forest management plans; matched the specific harvest areas to one of eight eco-regions in Ontario and calculated a breeding bird density discounted to account only for the presence of birds both actually found in those specific areas and included under the MBCA; confirmed that logging occurred during the 2001 breeding season and regularly occurs within the breeding season; and cross-checked to ensure that numerous breeding birds were observed in areas that were clearcut during the breeding season. *Ontario Logging* Secretariat's Notification, *supra* note 136 at 10.

140 *Id.*

141 *Ontario Logging* Submission, *supra* note 137 at 6-7 and App. 8.

142 *Id.* at 6.

143 Council Resolution 03-05, C/C.01//03-02/RES/05/final, (April 22, 2003), *available at* http://www.cec.org/files/PDF/COUNCIL/Res-Ontario-Logging_en.pdf (last visited 28 Oct. 2003).

144 *Id.*

to the alleged failure to enforce.[145] Submitters provided this information to the Secretariat within the 120-day period set by the Council,[146] and the Secretariat recently determined that the additional information warrants a response by Canada.[147] It remains to be seen whether the Council will find that the additional information is "sufficient" to support an instruction to the Secretariat to develop a factual record.

Through its resolution, the Council may have raised the evidentiary bar that future submitters must meet in supporting their allegations. If the Council ultimately finds that the submitters have not met the "sufficiency" requirement, then many would argue that the Council has made it impossible for submitters to meet this burden.[148] Moreover, by setting such a high evidentiary threshold, the Council may essentially eliminate the practical value of the citizen submission process for citizen groups. Indeed, as the submitters in *Ontario Logging* observe, "the perception may develop that to obtain a factual record under the citizen complaint procedure one must essentially provide a factual record to the CEC."[149]

AUTHORITY OF THE COUNCIL

The Agreement itself does not explicitly grant or deny the Council the authority to determine what constitutes "sufficient information" to support a factual record, to require additional information to meet this standard, or to establish a new round of review (including a second request for a response from the Party or a second factual record notification by the Secretariat) at the Article 15(2) stage. The Agreement simply provides that "[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so."[150] It does not state whether the Council's authority to instruct the Secretariat to prepare a factual record includes the authority to require what it deems "sufficient information" to support the development of a factual record.

However, the location of the "sufficient information" standard in the Agreement appears to indicate that it is the Secretariat, and not the Council, that is specifically empowered to make such determinations. Article 14(1), which lists the threshold criteria that a submission must meet to be considered in this process, provides that a submission may be considered "if the Secretariat finds that the submission … provides sufficient information to allow the Secretariat to review the submission…". The Council's role, as per Article 15(2), is to instruct the Secretariat to prepare the factual record—and significantly, no "sufficient information" criterion is found in that section. Indeed, no criteria are found in that section at all, which would suggest that the Council's role is limited to accepting or rejecting the Secretariat's determination *in toto*, and not acting as a *de novo* panel to determine whether the sufficiency requirements have been met.

The Council, on the other hand, could make the argument that its ultimate authority to accept or reject the Secretariat's determination necessarily encompasses the lesser authority to determine whether the submission has met the Article 14(1)(c) "sufficient information" requirement and to condition its decision on the provision of such information. The Council could also argue that, as the parties to the agreement, they are the ultimate authority on the meaning of its terms.[151] As the terms of the Agreement do not explicitly deny the Council this authority, and Article 10(c) gives the Council authority to "oversee the implementation and develop recommendations on the further elaboration" of the NAAEC, it is difficult to make a strong textual argument that the Council has acted outside the scope of its authority.

However, the Council's imposition of "sufficiency" requirements does appear to be inconsistent with the object and purpose of the NAAEC.[152] As discussed above with respect to the Council's authority to narrow the scope of factual records, a key purpose of the Agreement is to enhance public participation. Many interviewees have argued that, in setting the bar for "sufficient infor-

145 In their Supplementary Submission, submitters updated their original estimate of bird nests destroyed from 85,000 to 44,000 nests, using actual numbers for clearcut harvest areas that were not available at the time of the original submission. *See Ontario Logging* Supplementary Submission, *supra* note 75 at 3-4.

146 *See id.*

147 See SEM 02-001 (*Ontario Logging*), Determination Pursuant to Council Resolution 03-05 (21 Aug. 2003).

148 For example, submitters in *Ontario Logging* point out that requiring eyewitness or similar evidence of violations is dangerous and unreasonable, as it would require a citizen to either: (a) gain access to a logging site (perhaps illegally) and "in the midst of falling trees observe trees with nests being removed," or (b) gain access to an area where clearcut logging was proposed, "locate trees with migratory bird nests, determine when logging actually takes place, return to that site when logging has been completed, and establish that the tree or trees in question had been cut down." *Ontario Logging* Supplementary Submission, *supra* note 75 at 13. *See also* Letter from Marc Johnson, Canadian Nature Federation, to Joint Public Advisory Committee (15 Sept. 2003) (attached in Appendix to this report) (hereinafter "Canadian Nature Federation Written Comments") ("We used this approach because we felt that alternative approaches, such as eyewitness accounts of nest destruction, were less desirable, a significant safety risk, and potentially illegal.") *Id.*

149 *Ontario Logging* Supplementary Submission, *supra* note 75 at 18.

150 NAAEC, *supra* note 7 at art. 15(2).

151 See Council Resolution 00-09, *supra* note 120 ("Further recognizing that countries that are parties to international agreements are solely competent to interpret such instruments.")

152 See Vienna Convention on the Law of Treaties, *supra* note 121 (providing that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.")

mation" too high, the Council may render it prohibitively difficult for citizens to participate in the process.[153]

Another key objective of the Agreement is to enhance transparency in environmental governance, as discussed above with respect to the Council's authority to narrow the scope of factual records. A high evidentiary burden would undermine the transparency, or "sunshine," function of the citizen submissions process. As observed by the submitters in *Ontario Logging*, "the object of the complaint procedure is not to prove the commission of an offense beyond a reasonable doubt, as would be necessary in a criminal or quasi-criminal proceeding, nor to a civil standard of proof."[154] Rather, as discussed above, it is simply intended to shed light on the facts, drawing no ultimate conclusions about the effectiveness of a Party's enforcement nor imposing any enforcement measures or sanctions. Thus, the evidentiary threshold to trigger such "sunshine" mechanisms should arguably not be as high as it would for a legal proceeding.[155]

Certainly, some evidentiary threshold is necessary to avoid frivolous or speculative allegations from submitters, particularly where such allegations could theoretically lead to sanctions under Part V of the Agreement. However, the Agreement explicitly provides the Secretariat with the mandate and authority to weed out any such "fishing expeditions" by submitters. For example, the Secretariat must ensure that the submission provides "sufficient information" and "appears aimed at promoting enforcement rather than at harassing industry." Additionally, the Secretariat must take into account whether a submission is "drawn exclusively from mass media reports." Most interviewees felt that the Secretariat had thus far effectively eliminated frivolous or speculative allegations,[156] and that there was no legitimate policy reason for the Council to re-open the Secretariat's determination that the *Ontario Logging* submission met the evidentiary threshold.

Similarly, while it could be argued that a high evidentiary bar is necessary to avoid overtaxing the capacity of the Secretariat to obtain the necessary information, the Secretariat has the mandate, authority, and expertise to determine where this bar should be set. Moreover, the Secretariat has expressed the view that gaps in information may, in fact, be relevant to determining whether or not a party is effectively enforcing its environmental laws. That is, "identifying information gaps could reveal an area where additional efforts to obtain information—through surveys, inspections, investigations or other activities—could improve [enforcement] efforts…"[157] Thus, even where submitters have not provided the necessary information and the information-gathering burden is beyond the capacity of the Secretariat, the Secretariat could add value to the factual record simply by identifying the information gap.

The International Environmental Law Project (IELP) and other commentators have suggested that the World Bank Inspection Panel presents a useful comparison to the CEC citizen submission process. The Inspection Panel, based on citizen submissions, investigates allegations involving the failure of the World Bank to enforce its internal policies. The Panel, like the Secretariat, determines the eligibility of a submitters' claim and decides whether to recommend an investigation. The World Bank Board, like the Council, then decides whether to approve the recommendation. The IELP notes that the Inspection Panel process faced "strikingly similar" challenges to the CEC process, stemming from the Board's narrowing of the scope of investigations and requiring the Panel to obtain additional information. The World Bank, recognizing that such problems were "undermining the independence and authority of the Panel," ultimately issued Clarifications providing that only the Panel—and not the Board—has the authority to judge whether a submission has met the threshold eligibility criteria. The IELP suggests that the World Bank's experience could provide the CEC with "not only a model for its citizen submission process, but also the lesson that institutional legitimacy is ultimately dependent on public perception."[158]

153 See *Ontario Logging*, Supplementary Submission, *supra* note 75 at 17 ("We believe that to require evidence beyond that which we have obtained through significant effort would set the bar too high for citizen complaints and thereby discourage participation."); Canadian Nature Federation Written Comments, *supra* note 148 ("…the time and energy required to develop… the additional requested information makes it extremely difficult for an organization like ours to effectively participate in the Article 14 process."); Letter from Stephen Hazell, Canadian Parks and Wilderness Society, to Joint Public Advisory Commission (Sept. 16, 2003) (attached in Appendix to this report) ("If too much information is demanded of groups simply to ask for an investigation, it will no longer be an accessible process for groups such as [ours]"); Letter from Anne Bell, Wildlands League, to Joint Public Advisory Commission (12 Sept. 2003) (attached in Appendix to this report) (noting that ""tens of thousands of dollars" were spent to compile the additional information requested by the Council in *Ontario Logging*); Wildlands League, Further Comments on Articles 14 and 15 (stating that if "procedural and financial burdens remain as high as recently set by the Council, the process could no longer be legitimately termed a *citizen-friendly* process)(attached in Appendix to this report).

154 *Ontario Logging*, Supplementary Submission, *supra* note 75 at 13.

155 See *id.* For example, as submitters suggested, statistical and modeling information should be considered appropriate where it is the best information reasonably available.

156 See, e.g., IELP Written Comments, *supra* note 92 at 2.

157 *Ontario Logging*, Secretariat's Notification, *supra* note 136.

158 IELP Written Comments, *supra* note 92 at 8.

V. COUNCIL RESOLUTION 00-09 ON MATTERS RELATED TO ARTICLES 14 AND 15 OF THE AGREEMENT

OVERVIEW: COUNCIL RESOLUTION 00-09 IN CONTEXT

This section provides an assessment of the operation of Council Resolution 00-09 on Matters Related to Articles 14 and 15 of the Agreement ("the Resolution"). In particular, this section analyzes how the Resolution operates in the context of the need for transparency and public participation before decisions are made concerning the implementation and further elaboration of the citizen submissions process. It is once more emphasized that any findings in this report do not reflect the views of the Parties to the NAAEC.

Defining the scope of authority of the Council, the Secretariat, and the public with regard to the submissions process has been a controversial issue since inception of the CEC.[159] This balance of authority is a central issue, and one that has the potential to influence the effectiveness of the citizen submissions process as a tool for improving enforcement.[160] A great deal of authority is granted both to the public, in choosing which issues should be the focus of submissions, and to the Secretariat, which is meant to be a neutral forum for evaluating such submissions and the fact-finding process. The Parties maintain an oversight role, through the Council, in determining whether a factual record should be developed in a particular case and whether that record, once completed, should be made public.[161] The Parties' dual role, as both custodians of the process and potential targets of specific submissions, inevitably creates tension regarding the appropriate level of oversight versus the independence of the Secretariat.[162] This tension initially reached a peak during closed-door negotiations in 1999 and 2000, in which the Parties discussed the prospect of revising the Guidelines in order to scale back the role of the Secretariat in the process, and consequently to facilitate a larger oversight role for the Council.[163]

The Guidelines to the submissions process were drafted by JPAC with public notice and comment, and adopted by the Council in 1995. At its 1997 Regular Session, the Council agreed to initiate a review process for the Guidelines, which would include submitting the proposed revisions to JPAC for a 90-day public review.[164] In 1998, in accordance with Article 10(1)(b) of NAAEC, which mandated review of the operation and effectiveness of the Agreement four years after its entry into force, an Independent Review Committee (IRC) was appointed to conduct the review and report its findings.[165] Among the IRC's findings was a recommendation that "[t]he existing review of the operation of this [submissions] process should be completed after more submissions have been processed, including factual records when appropriate, in order to provide a greater body of experience to draw upon."[166] Despite this recommendation, the revised Guidelines were released to JPAC for the public review process. In its Advice to Council No. 99-01, JPAC noted that, "[b]y far the majority of those members of the public who provided written comments…held the view that the case had not been made to support the revision process."[167] Nonetheless, the Council adopted revised Guidelines in June 1999.[168]

159 See the description of this history in Knox, *A New Approach to Compliance With International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOL. L.Q. 1, 33.

160 See Markell, *supra* note 17, at 274.

161 See NAAEC, *supra* note 7, at arts. 14-15.

162 Letter from Paul S. Kibel, *supra* note 20, at 33; IELP Written Comments, *supra* note 92, at 4.

163 Letter from Paul S. Kibel, *supra* note 19, at 24; "Environmental, Citizens' Groups Claim Victory After NAFTA Environment Ministers Meet," June 20, 2000, *available at* http://www.ictsd.org/ html/weekly/story2.20-06-00.htm (last visited 7 Sept. 2003); Canadian Institute for Environmental Law and Policy, "Joint Statement on Articles 14-15," *available at* http://www.cielap.org/dallasngo.html (last visited 7 Sept. 2003) (letter from 10 environmental NGOs from all three member nations, making this demand). Additionally, several of the interviewees we contacted confirmed that the proposed revisions would have resulted in such changes to the process, as do the comments submitted by the Canadian NAC regarding the proposed revisions. *See* "Letter to JPAC regarding the revised Guidelines for Submissions," 10 Dec. 1998, *available at* http://naaec.gc.ca/eng/nac/letter_jpac_e.htm (last visited 7 Sept. 2003). Further, several of the interviewees we contacted stated that the closed-door meetings of the Parties regarding the revisions were the central point of contention between the JPAC, the Parties, and the public during the time leading to the Seventh Regular Session of the Council in June 2000.

164 Summary Record of the 1997 Regular Session of the Council, C/97-00/SR/01/Rev.2, *available at* http://www.cec.org/files/PDF/COUNCIL/97-00e_EN.pdf (last visited 7 Sept. 2003).

165 A copy of the IRC's report can be found at http://www.cec.org/pubs_info_resources/law_treat_agree/cfp3.cfm?varlan=english#1.1 (last visited 7 Sept. 2003).

166 *Id.* at Rec. 11.

167 JPAC Advice to Council 99-01, J-99-01/ADV/Rev.1, *available at* http://www.cec.org/files/pdf/JPAC/99-01E_EN.PDF (last visited 7 Sept. 2003).

168 Council Resolution 99-06 (28 June 1999).

Thereafter, the Parties continued to meet and discuss further revisions to the Guidelines without public review. These meetings triggered widespread public protest, including a letter-writing campaign involving several environmental NGOs from all three countries, demanding that the closed meetings be suspended and that the public be consulted in any further decision-making processes regarding this matter.[169] In June 2000, in lieu of revising the Guidelines, the Council adopted Council Resolution 00-09.

Many commentators note that tensions leading to the enactment of Council Resolution 00-09 stemmed from the fact that the submissions process had been a U.S. initiative, opposed by both Canada and Mexico as too substantial a constraint on the Parties' discretion. The preservation of this discretion was, according to these sources, a key consideration in retaining the Council's right to decide whether or not a factual record should be developed with regard to a given submission. The increasingly "provocative" nature of the submissions that were received in the early life of the process re-opened this debate, as the Parties (acting through the Council) wished to further limit the potential scope of the inquiries made through the process, as well as streamline the process for efficiency. As stated in the Sierra Legal Defence Fund's written submission:

> From time to time, the citizen submission process has been subjected to efforts to restrain the independence of the Secretariat and to restrict the ability of the citizen submission process to evaluate environmental enforcement—including occasional attempts by NAFTA Parties to "revise" the Guidelines for citizen submissions. Each attempt to limit the citizen submission process has been met with strong opposition from JPAC, citizen submitters and nongovernmental organizations.[170]

INTERPRETING COUNCIL RESOLUTION 00-09

Regardless of the motive behind the Parties' initiative to further revise the Guidelines, the Council's response to the public's objections was to adopt Council Resolution 00-09 at its Seventh Regular Session.[171] The Resolution affirms the "importance of the unique role of the Secretariat regarding its responsibilities under Articles 14 and 15," and recognizes "the need for transparency and public participation before decisions are made concerning implementation of the public submission process." Accordingly, the Resolution states that the Council "may refer issues concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement to JPAC so that it may conduct a public review with a view to providing advice to the Council as to how those issues might be addressed."

Further, "[a]ny Party, the Secretariat, the public acting through JPAC, or JPAC itself, may also raise issues concerning the implementation or further elaboration" of the process to the Council, "who shall refer any such issues as it proposes to address to JPAC so that JPAC may conduct a public review with a view to providing advice to the Council as to how those issues might be addressed." Any such advice must be "supported by reasoned argumentation," and in response, the Council "shall consider JPAC's advice in decisions concerning the issues in question relating to Articles 14 and 15 of the Agreement and shall make public its reasons for such decisions, bringing the process to conclusion."[172] Any Council decision taken "following advice received by JPAC" was from then on to be explained in writing by the Parties, and the explanations made public. Finally, the Resolution instructed JPAC to review the history of the submissions process, and stipulated that the Council was to conduct a review of the operation of the Resolution after it had been in effect for two years.

Commentators were divided in their understanding of the intention of the Resolution, as well as of its initial reception by JPAC and the environmental community. Some considered the Resolution to be a clear indication of the Council's absolute intention to avoid further controversy in this area by automatically referring all matters that implicate the "implementation or further elaboration" of the Articles 14 and 15 process to JPAC for public review. The majority of those consulted, however, believed that the language appeared to be a compromise intended to escape a specific controversy while preserving the Council's discretion in this area.

The language itself clearly preserves the Council's discretion regarding whether to refer these issues to JPAC for public review on its own initiative. The Council "may" take this action, but is not obligated to do so. When an issue related to implementation or further elaboration of the submissions process is brought to the Council's attention by JPAC itself, or by a member of the public through JPAC, the Council does not retain this discretion. The plain meaning of the language of Council Resolution 00-

169 See Letter from Paul S. Kibel, *supra* note 19; IELP Written Comments, *supra* note 92, at 7.

170 Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003, *supra* note 71.

171 Council Resolution 00-09, *supra* note 120.

172 *Id.*

09 is that the Council is obligated to ("shall") refer "any such issues as it proposes to address" to JPAC for public review. In other words, if the Council is approached regarding an issue it is in the process of addressing or is proposing to address, the Council's clear intention was always to hold a public review through JPAC on the matter. Although what "proposes to address" means remains open to interpretation, the prospective connotation indicates that the Council need not be in the process of addressing an issue when it is brought to the Council's attention by JPAC or others.

Article 16(4) of the NAAEC grants JPAC the discretion to "provide advice to the Council on any matter within the scope of this Agreement, including…on the implementation and further elaboration of this Agreement." Article 16(5) also enables JPAC to "provide relevant technical, scientific or other information to the Secretariat, including for the purpose of developing a factual record under Article 15." The Resolution 00-09 process would therefore be redundant if it weren't for the additional requirement in the Resolution that the Council provide a public record of its reasoning. This additional transparency requirement makes an enormous difference when viewed in light of the history leading to the Resolution's enactment. The public was concerned about the motivations underlying the Parties' decisions to continue moving forward with revising the Guidelines to the submissions process. The assurance that all related matters referred to the Council by JPAC would be addressed through public review, and that the reasoning underlying any final decision would be made public, was therefore a great step in principle towards alleviating those concerns by improving the transparency and participatory quality of the process.

Finally, JPAC has always taken the view that a review of the operation of Council Resolution 00-09 should take place immediately following the first two years of its operation, which began in June 2002. Despite repeated requests from JPAC, no such review has been initiated. In June 2003, JPAC informed the Council that it intended to include this evaluation in the current public review.

ACTIONS TAKEN PURSUANT TO COUNCIL RESOLUTION 00-09

Lessons Learned

JPAC completed its review of the submissions process in June 2001 and published its findings in *Lessons Learned*, a report submitted to the Council for review and further action. *Lessons Learned* reaffirmed the vital role of the process in "fostering vigorous environmental enforcement," and stressed that the professional independence of the Secretariat is "indispensable to a credible and properly functioning Articles 14 and 15 process."[173] The report cites the fact that, "some commentators criticized the role of the Council because it has absolute discretion to decide whether or not to instruct the Secretariat to prepare a factual record."[174] It also indicates that an issue of concern for those who submitted comments was the lack of an appeal process when the Council determines that a factual record should not be produced.[175] The report 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 given submission, and increased financial and human resources for the Secretariat to administer the process more effectively. No recommendations were made regarding the potential structural conflict of interest involved in the Council's dual role as both parties subject to the Articles 14 and 15 process and "custodians" of the NAAEC.[176]

To date, the Council has adopted only one of the recommendations in the report. By Council Resolution 01-06, section 10.2 of the Guidelines was amended to provide that five days after the Secretariat has notified the Council that it considers a submission to warrant development of a factual record, the reasoning supporting that decision shall be made public. In the same Resolution, the Council "committed" to providing a public statement of its reasons whenever it votes not to instruct the Secretariat to prepare a factual record, and to "making best efforts" to ensure that submissions are processed as efficiently as possible.[177] The Council responded to JPAC's requests for further consideration of additional recommendations in an explanatory letter detailing the reasons for the Council's non-adoption of those recommendations.[178]

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173 JPAC, *Lessons Learned: Citizen Submissions Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (June 6, 2001), *available at* http://www.cec.org/pubs_docs/documents/index.cfm?ID=121&varlan=english (last visited 7 Sept. 2003).

174 *Id.* at Sec. 3(b).

175 *Id.* at Sec. 3(c).

176 *See* Letter from Paul S. Kibel, *supra* note 19.

177 Council Resolution 01-06, C/01-00/RES/06/Rev.4, *available at* http://www.cec.org/files/PDF/COUNCIL/Res-06r4_EN.pdf (last visited Sept, 7, 2003).

178 Letter to Jon Plaut (JPAC Chair), Mar. 6, 2002, *available at* http://www.cec.org/files/PDF/JPAC/L_Coun-6mar2002.pdf (last visited 7 Sept. 2003). JPAC had requested that when a Party's response to a submission contained new information, or if the Party simply provided such additional information, that the submitter be notified and given the chance to respond. The Council felt that considerations of timeliness outweighed the need for transparency in these situations. Additionally, JPAC recommended that there be instituted an opportunity for a Party to follow up on the release of a factual record with a report to the Council on actions taken to address the matters addressed in the factual record. The Council responded that this would be beyond the scope of the 14/15 process, and that follow-up to the process was a domestic policy matter.

A number of commentators expressed concern with what they viewed as the Council's lack of receptiveness to *Lessons Learned*. These individuals believed that, in requesting JPAC's assistance in Council Resolution 00-09, the Council had undertaken to respect and implement the recommendations that resulted from the process, and that it has failed to do so. It was unclear to them why the Council could not have made a stronger statement in Council Resolution 01-06 than a mere "commitment to" making public all of its determinations regarding the development of factual records.[179] To these commentators, this appeared to belie the Council's commitment in both the NAAEC and Council Resolution 00-09 to maintaining a high level of transparency in the submissions process, and thus to undermine the credibility of that process.

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

The substantive effect of Council Resolution 00-09 remained relatively untested until the Council's series of decisions altering the scope of four factual records and requiring the Secretariat to prepare a work plan detailing how those factual records were to be developed. These instructions were matters "concerning the implementation and further elaboration" of the citizen submissions process, and therefore within the purview of Council Resolution 00-09.

Prior to the Council's resolutions defining the scope of the factual records discussed in Section II of this report, JPAC issued Advice to Council 01-07, expressing its "frustration" at being "forced once again to advise on issues related to Articles 14 and 15, because past agreed-upon procedures are being ignored or circumvented," and registering its "strong and considered objection" to the proposals to limit the Secretariat's discretion in determining the scope of the factual records and to require that a work plan be submitted to the Council prior to undertaking development of a factual record.[180] In JPAC's view, the decisions were tantamount to a constructive amendment to the Guidelines, and were in "flagrant disregard" of the recommendation in *Lessons Learned* that the independence of the Secretariat be respected. Thus, JPAC expressed the view that the substance of these decisions, as well as the failure to open them to public review, was inconsistent with the Council's commitment in Council Resolution 00-09 to improving transparency, and was circumventing the process established in that Resolution. Despite these criticisms, the Council chose not to refer the matter of limiting the scope of factual records to JPAC for a public review. The Council did, however, support going forward with a public review of the matter of requiring the Secretariat to "provide the Parties with its overall work plans for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan."

Following the Council decision to move forward with "scoping," JPAC formally requested that the Council authorize a public review, pursuant to Council Resolution 00-09, of the matters of limiting the scope of factual records and of the requirement for preparing a work plan prior to development of a factual record.[181] The Council responded that JPAC should proceed with public review of the work plan issue, but postpone review of the scoping issue until the factual records were completed. As a result, the Council stated, review would be "based on actual experience, an important value-added in what has been a difficult topic."[182]

Textual Analysis of the Council's Actions

As noted above, under Council Resolution 00-09, the Council is not required to refer matters to JPAC for a public review, although it may do so. Therefore, the Council was not acting ultra vires in failing to refer these matters to JPAC for public review on its own initiative. But once JPAC (or members of the public acting through JPAC) raises such an issue to the Council, if the Council "proposes to address" that issue, it "shall" refer the matter to JPAC for a public review. Further, it must respond in writing to any advice offered by JPAC pursuant to the public review, detailing its reasons for accepting or rejecting that advice.

The Council's response to JPAC's request for public review of the scoping issue was to delay the review until after the relevant factual records had been developed. Council Resolution 00-09 merely states that the Council shall refer "any such issues as it proposes to address" to JPAC for public review. This language does not specifically contemplate delay of the public review, but neither does it prohibit such actions on the part of the Council.

The Council expressed its conviction that the delay would add value to the process. JPAC, on the other hand, argued that waiting for completion of the factual records would effectively eliminate any meaningful opportunity

179 See *also* letter from Paul S. Kibel, *supra* note 19, at 29.

180 JPAC, Advice to Council 01-07, J/01-03/ADV/01-07/Rev.3, *available at* http://www.cec.org/who_we_are/jpac/advice/index.cfm?varlan=english (last visited 7 Sept. 2003).

181 JPAC, Advice to Council 01-09, J/01-04/ADV/01-09, *available at* http://www.cec.org/files/pdf/JPAC/01-09-en_EN.PDF (last visited 7 Sept. 2003).

182 Letter from Council to Jonathan Plaut (JPAC Chair) (11 Feb. 2002) *available at* http://www.cec.org/files/PDF/JPAC/Council01.PDF (last visited 7 Sept. 2003).

for public input into this process.[183] When the Council's decision is considered in light of the recognition in Council Resolution 00-09 of the need to "increase transparency and public participation *before* decisions are made regarding the implementation and further elaboration" [*emphasis added*] of Articles 14 and 15, as well as the prospective nature of the requirement that the Council refer any such issue it "proposes to address," it appears that the Council's decision to delay the public review contravened of the object and purpose of Council Resolution 00-09 and of the NAAEC.

Many of the benefits of public participation in decision-making processes stem from inclusion of public concerns at an early stage in those processes. If the public cannot influence the final decision in a given case, its input is only meaningful for future instances in which similar issues arise. While such input into the process will certainly add value in the future, the submissions discussed in this report will not benefit from the broader perspective and public support that could have been garnered by opening these questions to the public earlier. Several commentators maintained that, by delaying the public review, the Council is attempting to avoid subjecting its actions to review in any meaningful way with regard to the specific submissions in question. Overall, this delay was regarded as contributing to the erosion of the Council's credibility as a disinterested body.

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

It was the unanimous opinion of those interviewed for this report that the Council's actions, while technically not in violation of Council Resolution 00-09, violated the object and purpose of both the Resolution and the NAEEC itself. The Resolution was passed to address the substantive concerns of JPAC and civil society regarding a lack of transparency in the alteration of the Guidelines to the submissions process and the related matter of the Secretariat's independence in administering that process. The same substantive concerns are raised by the Council's resolutions to narrow the scope of the factual records discussed in this report.[184] Forcing the JPAC or a member of the public to raise the issue in order to obtain public review of these decisions gives the appearance that the Council is revoking its commitment to maintaining high levels of transparency and participation in this process. One commentator stated that the "clear understanding" at the time Council Resolution 00-09 was adopted was that the Council had discretion regarding its use, but that matters such as these (so clearly related to those that prompted the passage of the Resolution), would clearly be referred to JPAC for public review. The Sierra Fund's submission states, "The overwhelming message arising from these efforts was that the NAFTA Parties must, and would, respect the citizen submission process and the independence of the Secretariat."[185]

Substantively, many commentators believe that the Council is attempting to achieve *ad hoc* what it would not have had the political support to achieve through a more formal process that included public review. They argued that the substantial modifications of Articles 14 and 15 and the Guidelines that is being achieved through these Council decisions should instead be conducted either through an official amendment to the Guidelines or another formal procedure.[186] The Sierra Fund's submission concluded that "[w]hat the Council refrained from doing through revision of the Guidelines it has done, on a case-by-case basis, through Council resolutions."[187] One commentator did concede that it was possible that the Council was exercising its discretion pursuant to Article 10 of the NAAEC to streamline the process and enable it to function more efficiently.[188]

Several commentators acknowledged that the actions of the Council were not outside the literal scope of its authority in the NAAEC (see Section II of this report). The Council has the authority to alter and interpret the Agreement as it chooses.[189] In addition, there was no requirement within the NAAEC for the Council to adopt any Guidelines at all, and the Guidelines themselves are to be read consistently with the NAAEC.[190] Thus, there is no procedural requirement for their revision.

The commentators also unanimously stated that the Council's decisions should be viewed in light of the controversy leading to adoption of Council Resolution 00-09, the commitment of the NAAEC and of the Resolution to transparency and public participation, and the very nature of the submissions process as a "sunshine" mechanism.

183 JPAC, Advice to Council 02-03, J/02-01/AVD/02-03/Rev.1, *available at* http://www.cec.org/who_we_are/jpac/advice/index.cfm?varlan=english (last visited 7 Sept. 2003).

184 *See* IELP Written Comments, *supra* note 92, at 3-4; 7.

185 Sierra Legal Defense Fund Written Comments, *supra* note 72.

186 *See, e.g.,* Letter from Chris Lindberg Re: Request for Public Comments on the Preliminary report for JPAC Public Meeting on Issues Related to Articles 14 and 15 (Oct. 16, 2003) (attached in Annex to this report).

187 Sierra Legal Defense Fund Written Comments, *supra* note 72.

188 Article 10(1) describes Council's functions as, *inter alia*, allowing the Council to "oversee the Secretariat" and to "oversee the implementation and further elaboration of this Agreement." NAAEC, *supra* note 7.

189 *Id.*

190 *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Guideline18.1, *in* CEC Submissions Unit, Bringing the Facts to Light (2002).

Given this context, they felt the Council's decision to leave the impetus for public review up to JPAC was in contravention of the spirit and purpose of the Agreement and the Resolution. In the words of one commentator, refusing to allow public involvement in these decisions "guts the process."

Additional support for the views expressed above may be found in a variety of communications from the U.S. and Canadian National Advisory Committees and the U.S. Governmental Advisory Committee.[191]

[191] Letter from U.S. National Advisory Committee to Marianne Lamont Horinko (Acting Administrator of the U.S. Environmental Protection Agency) (29 Oct. 2003) (stating that "it is necessary and important for the Council to act consistently with that resolution [00-09] as well – specifically, with its provision that the Council 'shall consider the JPAC's advice in making decisions concerning the issues in question relating to Articles 14 and 15 of the Agreement and shall make public its reasons for such decisions, bringing the process to conclusion.'"). *See also* U.S. National Advisory Committee, Letters of Advice, Oct. 15, 2001, 29 Apr. 2002, and 30 Apr. 2002, *available at* http://www.epa.gov/ocempage/nac/index.html (last visited 7 Sept. 2003); U.S. GAC Letter of Advice, 17 May 2002, *available at* http://www.epa.gov/ocempage/gac/index.html (last visited 7 Sept. 2003); Canadian National Advisory Committee Letter of Advice, 17 Mar. 2003, *available at* http://naaec.gc.ca/eng/nac/adv032_e.htm (last visited 7 Sept. 2003).

VI. CONCLUSION

If current trends continue, the CEC Council appears unlikely to approve the development of factual records on allegations of widespread, systemic patterns of ineffective enforcement, beyond the specific examples of such a pattern that are detailed in a given submission. Although the submitters of the four factual records examined in Part I put forth evidence of such widespread failures—such as a lack of prosecutions with respect to entire industries, governmental memoranda stating policies of non-enforcement, and indications of severe staff and resource shortages for enforcement—the Council declined to order a factual record on these issues. Rather, the Council narrowed the scope of the factual record to specific instances mentioned in the submissions as examples of the widespread enforcement failures.

The resulting factual records, scoped down to one or two specific instances, had limited usefulness for the submitters. For the most part, the records failed to address the issues that had prompted the submission, and that the Secretariat had identified as "central questions" in its determination. As a result, the Secretariat was unable to examine alleged patterns of non-enforcement, governmental policies underlying such patterns, and the cumulative impacts of such failures to enforce. By limiting the focus of the Secretariat's investigation to a few specific instances, the Council diminished the potential of the factual record to reveal widespread enforcement failures that generate the public outcry and political embarrassment that can ultimately compel change. Moreover, by interfering in the fact-finding process, the Council threatened to undermine the independence of the Secretariat and the credibility of the process.

The submitters in *Ontario Logging* have again alleged widespread patterns of non-enforcement—but, based on the experiences with the earlier four factual records, have adopted a slightly modified approach. Here, the submitters have alleged a widespread failure to enforce—but have also identified and documented specific violations. In other words, submitters are attempting to show a widespread failure to enforce by using an *extensive* number of detailed, substantiated, specific violations as evidence of such widespread failure. They are essentially testing whether the sheer number of identified specific violations could prompt the Council to order a factual record on an alleged widespread pattern of non-enforcement.

It remains to be seen whether the Council will in fact order such a factual record. The Council could, as it has in the past, confine the scope of the factual record to investigate only the specific instances (or some of the specific instances) that the submitters have identified. Alternatively, the Council could order a factual record to investigate the broader allegation of a widespread failure to enforce. This would allow the Secretariat to examine and include in the factual record broader enforcement issues it determined to be relevant—such as information used to establish current enforcement policies, information on methods used to balance priorities, information on provincial (particularly Ontario) enforcement policies affecting federal enforcement decisions and how they are set, information regarding the decision to engage in compliance promotion in the forestry sector, information on current initiatives, information regarding the position that compliance promotion activities are a necessary precursor to prosecution, and information regarding the manner of resource allocation for administering the migratory bird conservation program.[192]

Thus, *Ontario Logging* may shed light on the Council's view of the underlying relationship between scope and sufficiency issues. In particular, it may help to clarify whether the Council is in fact finding that allegations of widespread patterns of ineffective enforcement can never be the subject of a factual record—or simply that allegations of such widespread failure must meet a greater evidentiary threshold to trigger the development of a factual record. If the latter, what amount of evidence would be considered "sufficient information" to trigger such a factual record?

This report also examined the Council's authority under the Agreement to narrow the scope of the factual record or to require the submitters to provide additional information beyond what the Secretariat had already determined was "sufficient." The report first looked at the plain meaning of the terms of the Agreement, outlining the key textual arguments that have been or could be made to suggest that the Council's resolutions were *ultra vires*. These textual arguments—although perhaps persuasive—are by no means decisive, as there are also textual arguments that may support the Parties' position that the Council possesses the ultimate authority regarding both

[192] *Ontario Logging* Secretariate Notification, *supra* note 136 at 11.

scope and sufficiency issues. Thus, the text of the agreement is inconclusive.

However, even if arguably consistent with the letter of the Agreement, the Council's resolutions seem to contravene its spirit. As discussed throughout the report, the Agreement is deeply rooted in principles of public participation and transparency. The Council's resolutions undermine these objectives by diminishing the usefulness of the factual record to submitters, imposing prohibitively high "pleading" requirements that discourage citizen submissions, threaten the independence of the Secretariat and thus its credibility with the public, and minimize the amount and focus of the "sunshine" that is intended to enhance transparency and improve environmental governance.

Certainly, practical realities dictate that there must be some limit on the scope of citizen submissions to avoid overly burdensome and time-consuming investigations, as well as a certain evidentiary threshold to filter out speculative or frivolous allegations. The Agreement provides the Secretariat with a range of tools to address these practical realities. For example, the Secretariat has the explicit authority and mandate to determine whether a submission contains "sufficient information," whether it is aimed at "promoting enforcement rather than at harassing industry," and whether it "raises matters whose further study would advance the goals of the Agreement." Moreover, in developing the work plan for the investigation, the Secretariat can develop a manageable scope of the factual record, for example, by identifying illustrative or representative examples for investigation. The issue is not *whether* there should be a limit on scope or an evidentiary threshold, but rather *who* should make these determinations. The Agreement appears to contemplate that this is the role of the Secretariat—the fact-finding body with the independence, mandate, and expertise to be making these practical decisions—and not that of a politically-motivated Council whose very enforcement practices are the subject of the investigation.

This report also examined the operation of Council Resolution 00-09 in the context of the need for public participation and transparency before decisions are made regarding the implementation or further elaboration of the submissions process. The Resolution was drafted in such a manner as to preserve the discretion of the Council to refer matters to JPAC of its own accord for public review. However, when placed in the larger context of: (a) the NAAEC, which consistently stresses the need for public participation and transparency; (b) the citizen submissions process, which was purposely constructed as a "sunshine" mechanism for enabling access to participation and to information; and (c) the controversy surrounding the origin of Council Resolution 00-09, it appears that the Council has less political discretion than the language would imply. When viewed in these contexts, Council Resolution 00-09 appears clearly geared towards assuaging concerns regarding lack of transparency and public participation in the Council's decisions related to implementation and further elaboration of the Articles 14 and 15 citizen submission process of the NAAEC. In light of the comments we received, to maintain credibility as an appropriate authority in the submissions process, the Council must take the initiative to refer such matters to JPAC for public review, or at the very least refrain from postponing a review once requested. At the same time, it is clear that JPAC retains its independent authority under Article 16(4) to "provide advice to the Council on any matter within the scope of this Agreement" and "on the implementation and further elaboration of the [NAAEC]."[193]

Regardless of whether the Council has exceeded its authority in making the decisions regarding the scope of factual records and the required evidentiary basis for submissions, the public and JPAC have made it clear that they expect their voices to be heard on these matters. Council Resolution 00-09 provides a written record of commitment to enabling such participation. The Council's behavior is inconsistent with this record, and appears to retract its commitment to public participation and transparency. This, in turn, contravenes the object and purpose of the NAAEC and has undermined the Council's credibility with the public.

[193] NAAEC, *supra* note 7 at art. 16(4).

ANNEX:
WRITTEN COMMENTS RECEIVED

ACADEMIA SONORENSE DE DERECHOS HUMANOS, A.C.

Atención: Manon Pepin - mpepin@ccemtl.org

Asunto: Reunión del Comité Consultivo Público Conjunto

Comisión para la Cooperación Ambiental de América del Norte.
393, rue St-Jacques Ouest, Bureau 200
Montreal, Quebec, Canada H2Y 1N9

Estimados miembros del Comité:

A nombre de la Academia Sonorense de Derechos Humanos, A.C. envío este comentario acerca del poco satisfactorio tratamiento que reciben las peticiones ciudadanas por parte de la CCA.

En primer término, consideramos que la simple elaboración de un expediente de hechos no contribuye de manera significativa a la observancia de la normatividad ambiental por parte de las autoridades, particularmente en el caso de México, donde no se acatan ni siquiera las resoluciones vinculatorias.

Peor aún es el hecho de que el Consejo de la CCA decide con sesgo político y no jurídico sobre las determinaciones del Secretariado, como ocurrió con nuestra petición CYTRAR II.

Observamos un buen desempeño técnico del Secretariado, aunque muy lento, suponemos que por la falta de recursos, ejemplo de lo cual es la tardanza en la formulación del expediente de hechos relativo a nuestra petición MOLYMEX II.

Por otra parte, debido a la deficiente regulación contenida en los artículos 14 y 15, el Secretariado se vé orillado a emitir decisiones absurdas, como sucedió con nuestra petición CYTRAR I, la que fue desestimada con base en un informe falso de la entonces Secretaria de Medio Ambiente, Recursos Naturales y Pesca del gobierno federal mexicano, Julia Carabias Lillo, quien afirmó que a la fecha en la que se otorgó la primera autorización al basurero tóxico CYTRAR (diciembre de 1988), no existía disposición legal alguna en cuanto a la distancia mínima para su establecimiento respecto del límite del centro de población, siendo que desde seis meses antes, es decir, el 06 de junio de 1988 se había publicado en el Diario Oficial de la Federación la Norma Técnica Ecológica NTE-CRP-008/88, que entró en vigor al día siguiente, y que estableció el requisito de veinticinco kilómetros como distancia mínima, aclarando que cuando se confirió la referida primera autorización el confinamiento de residuos peligrosos se localizaba a ocho kilómetros de la ciudad de Hermosillo, Sonora, hoy a menos de cuatro kilómetros, porque la mancha urbana ha crecido en dirección al confinamiento como consecuencia de los ilegales permisos de uso del suelo que el Ayuntamiento de Hermosillo ha seguido expidiendo, con violación del multicitado requisito de distancia mínima. Se hace notar además que los residuos peligrosos depositados en el basurero CYTRAR eventualmente contaminarán, si es que no han contaminado ya, los mantos freáticos que se comunican con el área de la Costa de Hermosillo, en la que se cosechan diversos productos agrícolas que en su gran mayoría son exportados para el consumo humano en Estados Unidos.

Cabe puntualizar que la ASDH se inconformó ante el Consejo de la CCA con la determinación que el Secretariado adoptó acerca de la petición SEM-98-005 (CYTRAR I). En contestación a ello, Norine Smith, representante alterna de Canadá, según oficio del 11 de octubre de 2001, manifestó que: *"El Secretariado tuvo acceso a todas las secciones consideradas confidenciales de la respuesta de México y por lo tanto emitió su determinación con pleno conocimiento de causa de los hechos relevantes presentados en la respuesta a su petición.",* pero nada dijo respecto del delatado informe falso de la señora Julia Carabias, lo que implica su aceptación.

Todo ello revela que los artículos 14 y 15 del Acuerdo de Cooperación Ambiental ameritan una profunda revisión para hacer posible la efectiva protección del medio ambiente. De no llevarse a cabo esa urgente reforma, los objetivos de la CCA están destinados a un rotundo fracaso, lo que a nadie conviene.

Atentamente,

Domingo Gutiérrez Mendívil.
Presidente de la Academia Sonorense de Derechos Humanos, A.C.
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September 15, 2003

Ms. Manon Pepin
Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, bureau 200
Montréal, Québec H2Y 1N9

Dear Ms. Pepin,

The Canadian Nature Federation is pleased to have the opportunity to prepare this submission to the JPAC to inform their review of specific issues related to Article 14 and 15 of NAAEC. This letter addresses specifically the Article 14 Citizen Submission process.

The Canadian Nature Federation is the national voice of naturalists in Canada. We represent more than forty thousand individual members and supporters in every province and territory, together with over one hundred affiliated organizations, including local and provincial naturalist groups. Our mission is to protect nature, its diversity and the processes that sustain it. As a Canadian BirdLife International co-partner with Bird Studies Canada, the CNF is involved in a global effort to celebrate birds, protect them and educate people about their importance.

The Canadian Nature Federation has been actively involved in the Article 14 submission related to Ontario Logging (SEM 02-001). The CNF strongly supports the mandate and purpose of the CEC in reviewing issues related to the potential non-enforcement of environmental legislation, such as the Ontario Logging case. We have however two broad concerns related to our ongoing experience with this case: the extent of information requested from the submitters, and the potential for a narrowing of the scope of application of the submission.

Information Requested from Submitters

Considerable time, research and resources were committed by the eight submitters and by Sierra Legal Defence Fund in the preparation of the complaint submission. The Commission for Environmental Cooperation's Secretariat carefully reviewed the submission and the government response and recommended the preparation of a factual record. We were therefore significantly dismayed and concerned when the Council ruled counter to the Secretariat and requested that the submitters prepare additional information.

In our initial submission, we believe that we compiled the necessary information to assert the broad scale non-enforcement of Migratory Bird Regulations with respect to forestry operations in Ontario in 2001. The best available information was assembled and modeling was used to provide realistic estimates of the numbers of migratory bird nests destroyed. We used this approach because we felt that alternate approaches, such as eyewitness accounts of nest destruction, were less desirable, a significant safety risk, and potentially illegal.
We therefore believe it was not in the public interest for the Council to require the submitters to prepare additional supporting information. **It is important to note that the additional information that we did compile was specifically identified by the CEC Secretariat as being information that should be included in a recommended factual record.** In other words, the Council was asking us to do the work that the Secretariat believes should be the job of the CEC.

We believe that the time and energy required to develop both the factual record and the additional requested information makes it extremely difficult for an organization like ours to effectively participate in the Article 14 process. I would anticipate that the burden would be even greater on the countless individuals and organizations that face similar concerns, but do not have the capacity and resources that we do. If the Article 14 process is to be effective, then it must be accessible to the North American public.

Scope of Complaint
It is our understanding that the purpose of the Article 14 process is to look not only at site-specific issues, but also to broadly assess the widespread non-enforcement of environmental legislation.

It remains to be seen whether the Council will accept the recommendation of the Secretariat to proceed with a factual record with respect to the Ontario Logging complaint. We note with concern however the proceedings of a similar complaint filed in the US in relation to the enforcement of the U.S. Migratory Birds Treaty Act (SEM-99-002). The submitters in the MBTA complaint requested an investigation into the widespread lack of enforcement of the Act, however the Council narrowed the complaint to look only at two specific cases. The final factual record therefore did little to address the submitters' concerns about broad policy measures of non-enforcement.

The non-enforcement of environmental legislation on a site-specific basis is important in its own right. However, the systemic broad-scale lack of enforcement has potentially far reaching implications. It is therefore of the utmost importance that the scope of Article 14 applications not be unduly narrowed or interfered with.

We thank you for your consideration of our concerns expressed in this letter. We support the efforts of the JPAC to review and improve upon the Article 14 process.

Sincerely,

Marc Johnson
Manager, Protection Campaigns
Canadian Nature Federation
#606 – 1 Nicholas St.
Ottawa, Ontario
K1N 7B7
Phone (613) 562-3447 ext. 227
Fax (613) 562-3371

September 15, 2003

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Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, bureau 200
Montréal, Québec H2Y 1N9

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We thank you for your consideration of our concerns expressed in this letter. We support the efforts of the JPAC to review and improve upon the Article 14 process.

Sincerely,

Marc Johnson
Manager, Protection Campaigns
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COMITÉ PRO LIMPIEZA DEL RIO MAGDALENA
Av. Jesús Arellano No. 103 Pte. Magdalena de Kino, Sonora, Mex., C.P. 84160
y/o, Giotto No. 132 Int. 202 Col. Alfonso XIII, Del. Álvaro Obregón, C.P. 01460
México DF., TEL: (55) 56115072
lfayalas@hotmail.com
A, 8 de Octubre de 2003.

Manon Pepin
JAPAC Liaison Officer
Commision for Enviromental Cooperation
Gustavo Alanís
Centro Mexicano de Derecho Ambiental.

Respetuosamente

Por este medio de la manera mas atenta, me permito dar opinión respecto a la aplicación de los Arts. 14 y 15 del Acuerdo de Cooperación Ambiental.

El objetivo que se plantea en Acuerdo de Cooperación Ambiental, es precisamente la preservación del medio, y la salud, en base a los mecanismos legales de cada Pías.

Es obvio que al llegar una petición ciudadana en los términos del Art. 14 es debido a que ya fueron tomadas en cuenta las instancias locales, a cada País.

Ahora, en la pretensión ciudadana de dar respuesta local a su demanda, ello toma un determinado tiempo, y si a este tiempo, le agregamos el tiempo requerido por el secretariado para, primero aceptar y posteriormente requerir información de la contraparte, esto es, para darse una idea del asunto en cuestión, ello es un largo y sinuoso camino para alcanzar las pretensiones de atención, en perjuicio de la salud ambiental, lográndose el desaliento de los peticionarios y la perdida de confianza en la CCA.

Desde el punto de vista mas elemental de procedimiento legal, la determinación de la magnitud de los hechos ambientales son básicos y **deben determinarse previamente** y no esperar a que la contra parte informe.

Es decir que la CCA, a través del Secretariado, debe de valorar en el lugar de los hechos la magnitud del problema como primera parte de una petición ciudadana presentada y aceptada en los términos del los Arts. 14 y 15 del Acuerdo de Cooperación. De esta manera quedaría a prueba, tanto la veracidad y magnitud de la petición, como las acciones tomadas por la contra parte, y sobre todo la CCA, se percataría del estado en que ha sido alterado el medio en si. De esta manera se evitaría que un asunto de magnitud ambiental sea minimizado o viceversa.

Continua……..

Claro que para ello, el Secretariado debe de contar con los medios administrativos, técnicos y económicos que le permitan llevar acabo esta **visita de hechos previa,** en el lugar de los hechos, así los peticionarios se sienten atendidos.

Yo creo que el secretariado debe de ser mas autónomo y debe de contar con mas apoyo pero normada su operación.

Así mismo el Secretariado debe de contar con un sistema normativo que regule el "**Nacimiento del Deseo**", para tomar en cuenta los asuntos ambientales de importancia presentados por Personas particulares conscientes, por el publico, ONG´s, etc., y en su caso, proponerlo al Consejo conforme al Art. 13 y sus fracciones 1 y 2, estos asuntos de importancia que no hallan sido autorizados en el programa anual del Secretariado, como lo es el caso de gran magnitud del Lago de Chapala, en el Estado de Jalisco, México, el cual merece toda nuestra atención y apoyo en su solución.

En estas condiciones, una Petición ciudadana cualquiera por su importancia, por su magnitud, puede recibir todo el apoyo que se tenga con el objeto de alcanzar la cooperación planteada y la solución concreta, finalmente en beneficio del medio en si, la salud, esto es, conforme a la función para la que fue creada la Comisión de Cooperación Ambiental.

En espera de haber dado cumplimiento, agradezco de antemano las atenciones que a bien tengan prestar al presente.

Atentamente

Ing. Luis Felipe Ayala Soto.
Secretario del Comité

Nota: (Respecto a la reducción, presupuestal planteada por W. Kennedy, Director de la CCA, el pasado 3 de Octubre el Montreal, Canadá, quizás pudiera compensarse esta reducción, tratando de efectuar en gastos, el equivalente a la reducción o en su caso mas, con mayores eventos a celebrar en México, esto es aprovechando la infraestructura y las condiciones de paridad monetaria entre los dólares Americanos y Canadienses en relación al Peso Mexicano)

Forest Products Association of Canada | Association des produits forestiers du Canada

September 5, 2003

Ms. Manon Pepin
Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec H2Y 1N9

Dear Ms. Pepin :

Submission on
Issues Related to Articles 14 and 15

Factual Records

The Forest Products Association of Canada (FPAC) is pleased to submit the following in response to the call for public comments by the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) on issues related to Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC).

General Comments

The Canadian forest products industry is committed to continual improvement and promotes accountability in all its operations. Based on the principle that trade and environment should be mutually supportive, the industry is committed to achieving global free trade as a tool for increasing efficiency in resource use and encouraging more environmentally efficient products. Good information is essential to improving environmental performance and Canada's forest producers support respectful and informed dialogue on sustainable development by bringing information into the public domain.

Accordingly, FPAC members support the objectives of the NAAEC to resolve disputes, increase cooperation and improve the effectiveness of environmental protection. FPAC is of the view that these objectives are well served by the citizen's submission process which allows for public input to promote environmental enforcement as outlined by articles 14 and 15. Furthermore, it believes that the NAAEC could be the model for other trade agreements such as the current FTAA (Free Trade Area of the Americas) process.

…/2

99 Bank Street, Suite 410, Ottawa, Ontario Canada K1P 6B9 Tel.: (613) 563-1441 Fax: (613) 563-4720 www.fpac.ca
99, rue Bank, bureau 410, Ottawa, Ontario Canada K1P 6B9 Tél: (613) 563-1441 Téléc.: (613) 563-4720 www.fpac.ca

Given the recent release of the factual record for Submission SEM–00–004 (BC Logging), FPAC believes it can provide timely and specific feedback that will assist in the development of future factual records. We therefore welcome the opportunity to provide comments on issues related to the Articles 14 and 15 process and in particular the scope of factual records.

Scope of factual records

It is the intent of the Articles 14 and 15 process that factual records enable readers to draw their own conclusions as to whether environmental laws are being effectively enforced. Accordingly, it is essential that factual records be accurate in their scope and purpose. As per the guidelines outlined in the CEC document, *Bringing the Facts to Light,* a factual record should outline "…in as objective a manner as possible, the history of the issue, the obligations of the Party under the law in question, the actions of the Party in fulfilling those obligations, and the facts relevant to the assertions made in the submission of a failure to enforce environmental law effectively." Factual records should therefore include only information and language that is relevant to the investigations in question. Furthermore, the investigations themselves should focus on specific incidents of alleged non-enforcement rather than broad allegations.

Given this, FPAC is of the view that, while the recently released SEM-00-004 Factual Record deals with specific allegations and does not draw specific conclusions, it goes beyond the intended scope and includes suggestive language that is not relevant to the investigation.

In terms of **scope**, while the Secretariat was instructed by the Ministers to focus on the narrow issue of whether the Department of Fisheries and Oceans (DFO) had properly enforced the *Fisheries Act* on two private land areas, the report discusses issues outside this scope such as the *Forest Practices Code*, which does not apply to private land. In addition, the factual record appears to go beyond an objective presentation of the facts on whether environmental laws are being enforced, by including a set of "criteria" for effective enforcement, and by discussing what is not included in the report. Such information is not relevant to the instructions of the Council and should not be included.

In terms of **language**, the report includes suggestive language and commentary, which appear throughout the text, and should be avoided, as it is misleading and detracts from a clear presentation of the facts.

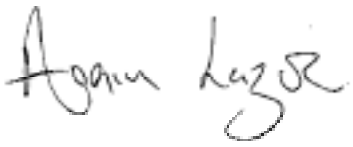
Conclusions

Based on SEM-00-004, FPAC believes that improvements can be made to factual records to ensure that they remain focused and present an objective record of the facts concerning specific allegations of non-enforcement. FPAC believes that consideration of the above concerns related to scope and language will improve the preparation of future factual records and will ensure that they respect the intent of Articles 14 and 15.

…/3

FPAC understands that the CEC experience with factual records is relatively new. Therefore, FPAC is fully prepared to provide timely assistance to ensure that the process is fair and balanced, and results in the ultimate objective of improving the effectiveness of environmental protection.

Sincerely yours,



Avrim Lazar
President and CEO

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99, rue Bank, bureau 410, Ottawa, Ontario Canada K1P 6B9 Tél: (613) 563-1441 Téléc.: (613) 563-4720 www.fpac.ca

Martha Kostuch, Vice-President
The Friends of the Oldman River
Box 1288
Rocky Mountain House
Alberta T4T 1A9

October 8, 2003

Gustavo Alanis-Orteja, Chair
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montreal, Quebec H2Y 1N9

Attention: **mpepin@ccemtl.org**

Re: JPAC Review of Citizen Submission Process

I am writing on behalf of the Friends of the Oldman River (FOR) to express our support for a strong, effective Article 14/15 Process.

FOR believes that one of the most important purposes of the North American Agreement on Environmental Cooperation is to ensure that environmental laws of the three countries that are part of NAFTA do not weaken their enforcement of their environmental laws.

FOR made a submission on the general failure of the Government of Canada to enforce and comply with the Fisheries Act and CEAA. Unfortunately, because the Council narrowed the scope of the factual record, the Factual Record that was produced did not address the topic of our submission. It is our position that the Council had no right to narrow the scope of our factual record and was wrong to do so.

Regarding sufficiency of information, it is the Secretariat's responsibility, not council's to determine whether sufficient information has been submitted to warrant preparation of a factual record.

Since Article 14/15 submissions do not result in legally binding decisions, the main benefit from factual records is the ability to make public a government's failure to enforce its laws.

I encourage JPAC to make strong recommendations to Council regarding these issues.

sincerely,

Martha Kostuch

Montreal, 4 September 2003

Direction Environnement
Hydro-Québec
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Montréal (Québec) H2Z 1A4

Tél. : 514-289-2211, poste 3629
Téléc. : 514-289-4977
C. élec. : berube.gilles.g@hydro.qc.ca

Manon Pepin
JPAC Liaison Officer
North American Commission for Environmental Cooperation
393, rue Saint-Jacques Ouest, Bureau 200
Montreal (Quebec) H2Y 1N9

Re: Comment concerning public consultations on issues related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation

Dear Ms. Pepin,

Since the Commission for Environmental Cooperation first came into existence, we have followed its work and the various developments related to citizen submissions to the CEC Secretariat with interest. This past summer, we learned that the Joint Public Advisory Committee is soliciting comments from the public related to, notably, limiting the scope of factual records.

In a context in which the objective of your organization consists in promoting and ensuring the effective enforcement of environmental laws by the Parties to the NAAEC, we would like to take this opportunity to point out a facet of the complaints procedure that puzzles us. It seems strange that the records are generally titled after the businesses concerned by the enforcement of Canadian, US, or Mexican laws—indeed, the "abridged title," the one most often employed, is limited to the name of the business itself. Yet the issue is not whether these businesses have contravened environmental laws; rather it is about assessing whether they have been effectively enforced by the public administration. We feel that associating a business's name with the complaint when that business is in no way involved with the procedure negatively effects the business's reputation.

To remedy this situation, and given that the Parties involved are the signatories to NAAEC, we believe that the records should be named after the Parties themselves or the laws involved rather than after third parties who are involved only indirectly. If you cannot find your way to implementing this suggestion, then we feel that the businesses involved should at least have a chance to set right certain details raised by the Parties involved that they deem to be false. Our comment does not arise from a wish to become a party to a dispute but rather from the standpoint of basic rights. At the very least, providing a right of reply would let businesses identified as having contravened certain environmental laws re-establish the facts.

We applaud all efforts to ensure the effective enforcement of environmental laws in North America, and we thank you in advance for your attention to this matter.

Sincerely,

Original letter signed

Myriam Truchon
Directrice Environnement

c.c.: Pierre-Luc Desgagné

International Environmental Law Project (IELP),[1]
Comments on Issues Relating to Articles 14 & 15 of the
North American Commission on Environmental Cooperation
(2 October, 2003)

Introduction

The International Environmental Law Project (IELP) applauds the Joint Public Advisory Committee (JPAC) for engaging in this discussion about the scope of factual records under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). Further, we commend the thoughtful and comprehensive report compiled for this meeting and agree with its findings. The ability of citizens to present submissions to the Secretariat of the Council for Environmental Cooperation (CEC) alleging failures of a government to enforce environmental law provides a valuable opportunity for North Americans to address enforcement issues in the context of free trade in the region. IELP strongly supports the Citizen Submission Process and has played an active role in supporting and employing the mechanism.[2]

The importance of your advice to Council on the matters under discussion today, and of how Council responds to this advice, cannot be overstated. The Citizen Submission Process is widely regarded as the most innovative and closely-watched aspect of the NAFTA environmental side agreement. Many regard the Citizen Submission Process as a potential model of accountability and governance for a new breed of international institutions—a positive response to globalization giving citizens a voice in the often impenetrable affairs of international organizations. In the young history of the Process, it has attracted volumes of articles from scholars, and consumed most of Council's attention. The activities of the Council, however, have been widely criticized. JPAC itself has made repeated, and increasingly exasperated, attempts to convince Council that the submission mechanism needs breathing room to develop to its widely-desired potential. Citizen Submissions, in the words of JPAC's recent *Lessons Learned* report, "play a unique—and indispensable—role in fostering the vigorous environmental enforcement that is a necessary component of expanded free trade under NAFTA."[3]

Once again, the JPAC has been called upon to put a stop to Council's seeming inability to allow the process to mature and flourish. We are not crying wolf. Groups such as the IELP, who have sought to use the Citizen Submission Process in a balanced and fair way to examine government conduct in the region, will simply turn away from the process once and for all if Council does not respect the roles and boundaries so clearly articulated in the NAAEC.

We are confident that with a strong and unified voice, JPAC can help restore and maintain the integrity and legitimacy of the Citizen Submission Process.

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[1] Comments prepared by Prof. Chris Wold, Director of the International Environmental Law Project of Lewis & Clark Law School (IELP), and IELP Staff Members Matthew Clark, Lucus Ritchie, and Deborah Scott.
[2] For example, IELP drafted the Migratory Bird Submission, (SEM-99-002), on behalf of the nine groups signing on to that submission.
[3] *Lessons Learned,* JPAC report, June 6, 2001.

The Secretariat Has Processed Submissions in a Fair and Balanced Way

IELP agrees with the virtually unanimous evaluation of scholars, NAAEC review committees and members of the public, all of whom have applauded the Secretariat's rigorous review of submissions for eligibility and scrupulous determination of whether a factual record is warranted.[4] With respect to eligibility, it has denied those submissions that clearly fail to meet the requirements of Articles 14 and 15 and it has accepted those that clearly meet such requirements. Where interpretations of Article 14 were required, the Secretariat has provided thoughtful legal analysis to support its position. With respect to whether a factual record is warranted, the Secretariat's actions have also been exemplary. For example, in Migratory Birds, the Secretariat carefully reviewed the U.S. response and determined that the preparation of a factual record was warranted.[5] The Secretariat, however, has also found that five submissions, while meeting eligibility requirements under Article 14, did not warrant development of a factual record.[6] The Secretariat consistently has been evenhanded in its decisions, and has shown no bias toward or against submitters or governments.[7]

In sum, the Secretariat to date has fulfilled its role in the process in a competent and professional manner. Its decisions and legal interpretations are rigorous, not capricious.[8] As a result, the Secretariat has been instrumental in ensuring the integrity of the Article 14/15

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[4] *Accord* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L. Q. 1, 96-97 (2001)(stating that the Secretariat "has not shown any particular deference to states' suggested interpretations of the [NAAEC]. Conversely, it has dismissed submissions—even by major environmental groups—that did not meet the requirements for eligibility. In short, the Secretariat's decisions appear to be consistently grounded on carefully reasoned legal interpretations of the [NAAEC] rather than on fear of adverse reactions by, or the desire to carry favor with, either states or submitters."). In addition, a review of the Independent Review Committee concluded that:

> The record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well-reasoned group of decisions. While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.

North American Comm'n for Envtl. Cooperation, Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee, §3.3.3 (1998)

[5] Article 15(1) Notification to Council that Development of a Factual Record Is Warranted, SEM-99-002 (Dec. 15, 2000).

[6] Oldman River I, SEM-96-003; Lake Chapala, SEM-97-007; Cytrar, SEM-98-005; Great Lakes, SEM-98-003; Mexico City Airport, SEM-02-002.

[7] For example, many environmental groups opposed the Secretariat's interpretation of "environmental law" when it ruled that a legislative act repealing the applicability of environmental laws for logging projects did not constitute an "environmental law" within the meaning of Article 45 of the NAAEC. *See, e.g.*, Spotted Owl, Secretariat, Determination Pursuant to Article 14(2), SEM-95-001 (Sept. 21, 1995); Logging Rider, Secretariat, Determination Under Article 14 & 15, SEM-95-002 (Dec. 8, 1995). As John Knox concludes, "There is room for reasonable minds to disagree on the correct legal outcome of the first two submissions, since the Agreement does not clearly address the issues involved. The key point, however, is that the Secretariat reached a plausible, principled interpretation." Knox, *supra* note 4, at 102, n.439.

[8] *Accord* David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000).

process.[9]

Critical Background: Council's Reluctance to Examine Allegations of a Broad Pattern of Ineffective Enforcement Is the Driving Force Behind Limiting the Scope of Factual Records and Questioning the Sufficiency of Information

After gaining some experience with Citizen Submissions, Submitters quickly recognized that the process was especially useful when examining a broader pattern of government conduct, which, if not adequately justified or explained, might reveal a systematic failure to enforce environmental law. While telescoping in on isolated, fact-specific cases might be appropriate from time-to-time, broader patterns of conduct are more likely to elevate the concerns to a regional level and more directly advance the goals and objectives of the NAAEC, including the effective enforcement of environmental law in North America. Such widespread failures would almost certainly levy an important environmental toll, and shining a spotlight on systematic enforcement deficiencies would help ensure that the NAFTA countries were upholding their part of the bargain not to relax environmental enforcement due to competitive pressures.

The Secretariat has consistently provided clear and well-reasoned analysis of the so-called "pattern" issue. The Secretariat has stated in compelling terms how these broader claims were consistent with, and furthered the goals of, the NAAEC.[10] In many important respects, narrow, highly specific fact patterns often shift the focus from government conduct to the acts or omissions of a single industry, business or other entity. Single events may also mask the aggregate effects of policies or practices, and single events are much more easily sidestepped by governments asserting enforcement discretion.

Over time, it has become abundantly clear that some Council members are uncomfortable defending government enforcement *practices and policies*, and would rather mount highly technical and legal defenses to specific, isolated cases. Council demonstrated its hostility to the pattern issue by first attempting to quietly renegotiate the *Guidelines on Enforcement Matters* ("*Guidelines"*), an approach that was halted by strong JPAC and public opposition at the June 2000 Council meeting in Dallas, Texas. In response to JPAC and public concerns expressed at that meeting, Council Resolution 00-09 established the JPAC-led process for addressing concerns about the implementation of the Citizen Submission Process. Soon, however, Council

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[9] S*ee id*. (describing further details on the decisions of the Secretariat).

[10] For example, the Secretariat stated in Migratory Birds:

> In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environmental, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC.

Article 15(1) Notification to Council that Development of a Factual Record Is Warranted, SEM-99-002 (Dec. 15, 2000) at 10.

found it could attack the pattern issue and circumvent the JPAC consultation process by simply reshaping the scope of factual records when deciding whether to instruct the Secretariat to prepare a factual record. Most recently, Council has identified a new line of attack—questioning the "sufficiency" of the information upon which the submission is based.

Council Continues to Undermine the Integrity of the Citizen Submission Process by Impermissibly Narrowing the Scope of Factual Records

The Council's actions to narrow the scope of factual records and interpret provisions of the NAAEC clearly within the purview of the Secretariat are not only troubling, but are also *ultra vires,* beyond its authority in the NAAEC. Council's actions have eroded support for the NAAEC,[11] as well as for the use of provisions similar to the Article 14/15 process in other free trade agreements.[12] Council's refusal to respect the boundaries delineated in the NAAEC has led to repeated calls from the JPAC, NAC and independent review committees for Council to step back and allow the process to operate independently, as intended. Recently, for example, the U.S. Governmental Advisory Committee declared that the Council's decisions to narrow the scope of factual records had "eviserate[d]" the autonomy of the Secretariat to define the scope of the factual record.[13] JPAC has raised similar concerns, even charging that Council was narrowing factual records and taking other action on a case-by-case basis—through its Article 14/15 votes—as a means of circumventing the JPAC-led public consultation procedure for considering revisions to the Article 14 and 15 Submission Guidelines.[14]

The NAAEC carefully establishes a system of "checks and balances" by granting the Council and Secretariat distinct roles and clear boundaries. In this case, the Secretariat has the duty to decide what the scope of the factual record should be. By its own terms, Article 15 of the NAAEC confers on Council the power to approve or reject the Secretariat's recommendation to prepare a factual record. Through substituting its own judgment of what constitutes "sufficient information" and the appropriate scope of a factual record, the Council is denying the Secretariat its proper role set out in the NAAEC. In so doing, Council is further undermining public confidence that the process will be allowed to operate as designed, even if that occasionally shines an embarrassing spotlight on government conduct.

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[11] The Sierra Legal Defense Fund, in a letter to the Canadian NAC, stated that the Council's actions are a "clear infringement on the independence of the Secretariat" that could "threaten to strip the citizen submission process of its integrity, utility and legitimacy." Letter from Sierra Legal Defense Fund to Council (Mar. 6, 2002). Also, the Center for International Environmental Law wrote to the JPAC that the Council's narrowing of the Migratory Bird Submission "limit[s] the utility of the citizen submission process." Letter from the Center for International Environmental Law to the Joint Public Advisory Committee (Oct. 17, 2001).

[12] For example, a citizen submission process was not included in the recent U.S./Chile free trade agreement.

[13] Letter of Advice to the EPA Administrator Christine Whitman from the Chair of the Governmental Advisory Committee to the U.S. Representative to the CEC, 1-2 (Oct. 19, 2001).

[14] *See, e.g.*, JPAC Advice to Council No. 01-07 (Oct. 23, 2001)("[JPAC] is compelled to express its frustration at being forced once again to advice on issues related to Articles 14 and 15, because past-agreed upon procedures are being ignored or circumvented."); JPAC Advice to Council No. 02-03 (Mar. 8, 2002)(stating Council's narrowing actions are "effectively eliminating an opportunity for public input into this very important issue; and…is considered by JPAC as a *de facto* change to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*."

Narrowing the scope of factual records beyond the Secretariat's specific recommendations has already radically altered the balance between Secretariat and Council functions. In the Migratory Birds submission, it is highly doubtful the Submitters ever would have employed the process had they known that Council would, in an arbitrary and unexplained fashion, limit the record to two specific instances cited only as examples of widespread government conduct. Moreover, it is highly doubtful whether the Secretariat would have recommended the development of a factual record to Council if the Secretariat had known that the scope of the submission would be narrowed in this manner.[15] The absurdity of the result is patent: Council directed the Secretariat to develop a factual record that resembled neither the issues presented by the Submitter nor those recommended for study by the Secretariat. Indeed, it is the factual record that nobody wanted.

With respect to both points, the *ad hoc* nature of the Council's decision-making creates great uncertainty for both the Secretariat and Submitters. Without clear rules, neither the Secretariat nor Submitters know whether Council decisions constitute a type of "precedent" or whether the Council will establish a different rule in future cases. Even if we accept that the Council can override decisions of the Secretariat, a system must have clear rules that establish boundaries and definitions, and thus expectations, for all participants. The NAAEC Articles 14 and 15 establish such clear rules: Council votes "yes" or "no" on whether to instruct the Secretariat to prepare a factual record on the issues recommended for further study by the Secretariat.

Council Has Appropriated The Secretariat Function Of Assessing "*Sufficient Information*" And Has Defined It In A Manner Inconsistent With The Clear Language Of Article 14 Of The NAAEC

Council recently opened a new line of attack on the pattern issue by deciding in Ontario Logging (SEM-02-001) that the Submission did not contain sufficient information to warrant the development of a factual record.[16]

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[15] For example, if the Migratory Birds Submission only related to the two California non-enforcement examples that became the focus of the factual record, the Secretariat may have answered several key eligibility requirements differently and decided to reject the Submission. Questions relating to the pursuit of private remedies, harassment of industry, or reasonable use of prosecutorial discretion may all have different answers depending on whether Submitters allege general non-enforcement behavior or non-enforcement in a specific instance. As a result, the Secretariat may have determined that such a submission did not warrant a factual record. The Secretariat implied such a result in the context of Oldman River II's narrowed scope:

> It should not be assumed that the Secretariat Article 15(1) Notification to Council recommending a factual record for [Oldman River II] was intended to include a recommendation to prepare a factual record of the scope set out [in the Council's limiting Resolution], or that the Secretariat would have recommended a factual record of this scope.

Factual Record, SEM-97-006 at 90.

[16] Council Resolution 03-05 (Apr. 22, 2003). Council questioned the sufficiency with the use of a statistical model which Submitters contend provides the best available information precisely because the government of Canada has abdicated its enforcement responsibilities by, among other things, failing to collect the kind of information required

Article 14 explicitly states that the Secretariat alone has authority to determine whether a submission provides "sufficient information." It unambiguously commands that "[t]he Secretariat may consider a submission . . . if *the Secretariat* finds that the submission . . . provides sufficient information to allow *the Secretariat* to review the submission. . . . ." (emphasis added).

Instead of simply terminating the Ontario Logging submission with a thumbs up or down vote, Council impermissibly remanded the submission, allowing the Submitters to resubmit by supplementing the information upon which the submission was based. While innocent in form, this approach actually usurps the Secretariat function of reviewing the sufficiency of submissions by laying out markers the Secretariat must presumably follow in its reconsideration of the matter.[17] In other words, Council appears to be signaling to the Secretariat that it expects the "sufficiency" element to be applied in a much more restrictive and limiting way. Faced with a Secretariat that refuses to adopt a cramped definition of "sufficiency," Council may attempt to simply revise the *Guidelines*, defining "sufficiency" in a way that shuts down efforts to examine patterns of government conduct. Following this path will lead to the virtual extinction of the Citizen Submission Process, since it will have terminated its most useful applications.

Impacts of Council's Actions

The manner in which the Council has narrowed the scope of factual records—by rejecting investigations of general policy failures—allows Parties to disrupt the factual inquiry process, dictates where future claims will be brought and sidesteps the Council's commitment to ensure that JPAC and the public are involved in any process to amend the Article 14/15 *Guidelines*.

Derailment of the Factual Inquiry Process

Allowing council to narrow factual records to isolated examples will enable governments to more easily derail factual inquiries by asserting that specific cases are the subject of ongoing proceedings or reflect a reasonable exercise of investigatory, prosecutorial, regulatory or compliance discretion. In Oldman River II, the factual record certification and development process was slowed because the example case selected by Council was the subject of a pending judicial proceeding.[18] In the future, a case with multiple appeals could be subject to significant delays in the factual record review process. Further, Article 45(3)(a) contemplates halting factual inquiry for cases subject to judicial *or* administrative proceedings. Alarmingly, the definition of "administrative proceeding" encompasses a laundry list of terms, including the loose wording, "seeking an assurance of voluntary compliance." Limiting broad policy claims to specific examples subject to such proceedings could bar important matters from being addressed for indefinite periods.

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to assess the impact of commercial logging on bird populations protected by the Migratory Bird Treaty Act.

[17] The Secretariat promptly found that the new Submission, which continues to employ the statistical model objected to by Canada, met the sufficiency threshold and the Secretariat requested a response from Canada.

[18] Council Resolution 00-02 (May 16, 2000).

Additionally, governments will be able to inequitably employ Article 45(1)(a)'s reasonable enforcement discretion defense in narrowed claims. In practice, it is unquestionably easier to show such discretion when the scope of a factual record is limited to one or two illustrative cases, rather than a Party's countrywide failure to enforce its environmental laws. That is, governments can almost always point to one example that is more, or equally, in need of resource allocation as another discrete example. Allowing such defenses in the limited scope context, when they would not have been effective in Submitter's original policy claim, deflects Party responsibility for enforcement of environmental law on a broad scale.

Eliminating Allegations of Widespread Failures to Enforce Environmental Law Will Dramatically Reduce the Amount of Submissions Filed against the United States

Limiting factual records to isolated, individualized instances will increase the relative number of Submissions against Mexico and Canada by wiping out most of the claims for widespread noncompliance brought against the United States. Citizens in the United States often have recourse to citizen suit provisions in domestic law. In practice, specific claims of government action or inaction of the type Council suggests are necessary to meet the "sufficiency" or scoping tests will be pursued in a court of law where a binding remedy can be sought. Broad, widespread policy failures, conversely, are not usually the subject of citizen suits in the United States. Canada and Mexico, while conferring some access to administrative bodies or courts for environmental harm, do not feature citizen suits as widely as the United States. Thus, Council may effectively be cutting off the last practical avenue for citizens to allege that the United States is failing to effectively enforce its law by shutting the only window for evaluating widespread conduct.

Sidestepping the JPAC-Led Public Consultation Mechanism for Changing the Guidelines for Submissions on Enforcement Matters

In June 2000, Council met amidst widespread concerns that the Parties were engaged in backroom negotiations to revise the *Guidelines* in a manner that further restricted public access to the mechanism.[19] In particular, Council was entertaining proposals to narrow the scope of factual records and to limit the Secretariat's fact-gathering powers. Public concern over these potential revisions as transmitted by an energized JPAC halted the discussions and led to Council Resolution 00-09. The Resolution assured that JPAC would play a central role in facilitating public input and formulating advice for any proposed guideline revisions, in addition to permitting the JPAC to hold public consultations on the implementation and operation of the Citizen Submission Process.

Since Resolution 00-09, Council has repeatedly, and disturbingly achieved some of the very rule changes under consideration in 2000 by simply narrowing the scope of factual records or cramping definitions of terms like "sufficient information" in specific decisions. Council is

[19] The concerns were conveyed by JPAC, NAC and NGO advice and letters, in addition to a lead Editorial in the *Washington Post* entitled "How to Wreck Trade" (June 10, 2000). The *Pos*t editorial warned the NAFTA Parties against weakening the fragile but valuable Citizen Submission Process.

simply making an end-run around Resolution 00-09 by circumventing JPAC input and the JPAC–led public consultation procedure, thereby accomplishing the same objective in secret, without providing its rationale or reasoning.

Comparison with the World Bank Inspection Panel

The World Bank Inspection Panel presents a helpful analogy to the CEC Submission Process. Both the Inspection Panel and the CEC Secretariat started operations in 1994.[20] The Inspection Panel responds to citizen requests for investigation of the failure of the World Bank Management to enforce its policies.[21] Quite frequently, the Requests are based on region-wide environmental destruction resulting from or threatened by a World Bank project. The Panel, like the Secretariat, determines the eligibility of a Submitter's claim and decides whether to recommend an investigation. The Board, like the Council, then decides whether to approve the recommendation. The Panel investigates the situation and prepares a factual record.

The strikingly similar processes have faced strikingly similar challenges. The Bank Management was often in close contact with the Board while the Panel was still determining eligibility. The Board often debated the substance of requests in the beginning stages of the process and narrowed the scope of investigations, sending the Panel back to get more information. In 1999, the World Bank recognized that those problems were "undermining the independence and authority of the Panel."[22] To a large extent, the 1999 Clarifications rectified those problems. The Board reaffirmed the Panel's functions and independence by clearly stating that the Panel, not the Board, had the authority to judge the merits of a claimant's petition, including whether or not eligibility criteria had been met.[23] Now, the Board basically votes "yes" or "no" on the development of a factual record, just as the clear language of the NAAEC suggests is the role of the Council.

By delineating clear boundaries between the Panel and Board, the World Bank was able to restore legitimacy and confidence in their process and alleviate tension between Board, Panel, and citizens. Instead of constantly struggling with each other for power, each component now has a concrete role. From the World Bank's experience, the CEC can gain not only a model for its citizen submission process, but also the lesson that institutional legitimacy is ultimately dependent upon public perception.

IELP Findings and Recommendations to Council and JPAC

Findings

[20] World Bank Inspection Panel, *Accountability at the World Bank—The Inspection Panel 10 Years On,* at xv (2003); CEC, *Milestones, available at* http://www.cec.org/fles/pdf //CEC_timeline_en.pdf.
[21] *See* IBRD Resolution 93019/IDA 93-06, Resolution Establishing the Inspection Panel, para. 12 (September 22, 1993); Inspection Panel Operating Procedures, as adopted by the Panel on August 19, 1994, *available at* http://wbln0019.worldbank.org/IPN/ipnweb.nsf/WoperatingProcedures/CS50E3080622C169385256874005E3490.
[22] World Bank Inspection Panel, *supra* note 21, at 32.
[23] 1999 Clarifications, Conclusions of the Board's Second Review of the Inspection Panel (April 20, 1999), *available at* http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WResolution?openview&count=500000.

1. The Citizen Submission Procedure is an innovative means of giving a voice to citizens in an era of globalization and free trade. The mechanism must be strengthened, and the NAFTA Parties must avoid even the perception that they are restricting the ability of citizens to raise concerns about the effective enforcement of environmental law in North America.

2. Civil groups such as IELP who have supported the development and implementation of the Citizen Submission process are growing increasingly frustrated over Council's unwillingness to respect the boundaries established in the process. If this perception continues, many of the groups who support and defend the CEC may simply abandon the process and declare it (and the CEC) unworkable.

3. The spirit and letter of the NAFTA side agreement support the development of factual records on broad patterns of government conduct that may reveal systematic deficiencies in environmental enforcement. Conversely, narrowing factual inquiries to highly localized and specific acts or omissions will (1) frustrate the objectives of the NAAEC by reducing the importance of the matters at issue, (2) focus inquiries on specific companies and enterprises, rather than on widespread government practices and conduct, and (3) enable governments to more easily derail factual inquiries by asserting that the matter is the subject of an ongoing judicial or administrative hearing or reflects a reasonable exercise of investigatory, prosecutorial, regulatory or compliance discretion (Article 45(1)(a)).

4. By modifying the scope of factual records and attempting to limit the kind of information the Secretariat can consider, Council is calling for the preparation of factual records that no one (except Council) wants. Surely the Citizen Submission Process was not designed to achieve this absurd outcome.

5. Council has usurped the role of the Secretariat by attempting to constrain the definition of "sufficiency of information".

Recommendations

1. Council should implement the clear and direct language of the NAAEC by conducting a straightforward "yes" or "no" vote on the development of a factual record as recommended by the Secretariat.

2. Council should not revise the *Guidelines*, remand Submissions, or take any other action to narrow the definition of "sufficient information" to exclude broad patterns of conduct under NAAEC Article 14(1)(c).

3. Parties should recall their role as a steward of the NAAEC, and not solely as a defendant in a fact-gathering process. Accordingly, Parties should respect the roles and boundaries delineated in the NAAEC.

4. Council should fully implement Council Resolution 00-09, including respecting JPAC's central role in consulting with the public and formulating advice to Council on issues concerning the implementation and further elaboration of Articles 14 and 15.

Manon Pepin
CEC

RE: Request for Public Comments on the preliminary report for JPAC public meeting on issues related to Articles 14 and 15

Greetings,

I have reviewed the preliminary report written for the JPAC public meeting on issues related to Articles 14 and 15 and would like to submit my opinions on this matter. I am writing as an individual citizen with a background in environmental science and community economic development. I have attended JPAC and CEC meetings before and am familiar with their objectives and processes.

I am very concerned about the information revealed in this report. I agree wholeheartedly with their conclusions regarding the mandate and role of the CEC, and the risk of compromising it by continuing to limit the extent of factual record reporting. The CEC has no enforcement capabilities and exists purely to provide a venue for citizens to make public their concerns about member countries lack of compliance with environmental regulations. Given this limited scope, it is vital that the CEC is capable of preparing and presenting factual records of a nature and scope that are:

i) accessible to the public; and
ii) capable of galvanizing public opinion in order to create political pressure for a real, legal, enforcement solution.

This report documents several cases where the CEC has opted to limit the scope of the factual record to such an extent that the record is both an inappropriate response to the citizen submission and an ineffective tool for informing and motivating public response.

As a concerned citizen, I recommend that the CEC develop a clear-cut set of guidelines that indicate when they can use this discretionary power, and eliminate the possibility of limiting the scope of politically sensitive factual records. This is crucial because

i) it's the mandate of the CEC to create these records;
ii) a tremendous amount of citizen time and energy is going into generating this submissions and they deserve the according respect and support; and
iii) these reports are only generated when there is significant evidence that member governments are ignoring their own legislation at the cost of the environment which is completely unacceptable.

Thank you very much for this opportunity. I have included below excerpts from the conclusion that I strongly agree with. I hope that the CEC takes these concerns into account and changes its way of proceeding in these matters.

"If current trends continue, the CEC Council appears unlikely to approve development of factual records on allegations of widespread, systemic patterns of ineffective enforcement, beyond the specific examples of such a pattern that are detailed in the submission. Although the submitters of the four factual records examined in Part I put forth evidence of such widespread failures—such as a lack of prosecutions with respect to entire industries, governmental memoranda stating policies of non-enforcement, and indications of severe staff and resource shortages for enforcement— the Council declined to order a factual record on these issues. Rather, the Council narrowed the scope of the factual record to specific instances mentioned in the submissions as examples of the widespread enforcement failures. The resulting factual records, scoped down to one or two specific instances, had limited usefulness for the submitters. For the most part, they failed to address the issues that had prompted the submission, and that the Secretariat had identified as "central questions" in its determination. They were unable to examine alleged patterns of non-enforcement, governmental policies underlying such patterns, and the cumulative impacts of such failures to enforce. By limiting the focus of the Secretariat's investigation to a few specific instances, the Council diminished the potential of the factual record to reveal the widespread enforcement failures that generate the public outcry and political embarrassment that can ultimately compel change. Moreover, by interfering in the fact finding process, the Council threatened to undermine the independence of the Secretariat and the credibility of the process."

"This report also examined the Council's authority under the Agreement to narrow the scope of the factual record or to require the submitters to provide additional information beyond what the Secretariat had already determined was "sufficient." The report first looked at the plain meaning of the terms of the Agreement, outlining the key textual arguments that have been or could be made to suggest that the Council's resolutions were ultra vires. These textual arguments—although perhaps persuasive—are by no means decisive, as there are also textual arguments that may support the Parties' position that the Council possesses the ultimate authority regarding both scope and sufficiency issues. Thus, the text of the agreement is inconclusive. However, even if arguably consistent with the letter of the Agreement, the Council's resolutions seem to contravene its spirit. As discussed throughout the report, the Agreement is rooted in principles of public participation and transparency. The Council's resolutions undermine these objectives by diminishing the usefulness of the factual record to submitters, imposing prohibitively high "pleading" requirements that discourage citizen submissions, threaten the independence of the Secretariat and thus public credibility in the process, and minimize the amount and focus of the "sunshine" that is intended to enhance transparency and thus improve environmental governance."

"Certainly, practical realities dictate that there must be some limit on the scope of citizen submission to avoid overly burdensome and time-consuming investigations, as well as a certain evidentiary threshold to filter out speculative or frivolous allegations. The Agreement provides the Secretariat with a range of tools to address these practical realities. For example, the Secretariat has the explicit authority and mandate to determine whether the submission contains "sufficient information," whether it is aimed at "promoting enforcement rather than at harassing industry," and whether it "raises matters whose further study would advance the goals of the Agreement." Moreover, in developing the work plan for the investigation, the Secretariat can develop a manageable scope of the factual record, for example, by identifying illustrative or representative examples for investigation."

The Agreement appears to contemplate that this is the role of the Secretariat—the fact-finding body with the independence, mandate and expertise to be making these practical decisions—and not that of a politically-motivated Council whose very enforcement practices are the subject of the investigation.

Sincerely,

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Re: Comments to JPAC on CEC Council Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of NAAEC

Dear Mr. Alanis-Ortega and Mr. Pepin:

I am an environmental attorney with Fitzgerald Abbott & Beardsley, and an Adjunct Professor at Golden Gate University School of Law were I have taught an LL.M. seminar on *Trade and the Environment* for the past six years. In response to the request of the Joint Public Advisory Committee (JPAC) of the North American Commission for Environmental Cooperation (CEC), enclosed are my comments on the matter of recent actions by the CEC Council of Ministers (CEC Council, composed of the environmental ministers of Canada, Mexico and the United States) to limit the scope of factual records prepared by the CEC Secretariat pursuant to the citizen submission process establish under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). The enclosed comments are based on my independent research[1] and analysis regarding NAAEC's citizen submission process.

[1] Paul Stanton Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, Environmental Law Reporter (July 2002); Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law after the Cozumel Reef Case*, 39 Columbia Journal of Transnational Law 397 (2001).

I. CEC Council's November 2001 Resolutions: A Watershed Event for NAAEC's Citizen Submission Process

In 1993, Canada, Mexico and the United States created a new integrated North American framework for environmental protection and international trade through the adoption of the NAAEC and the North American Free Trade Agreement (NAFTA). This new framework seeks to achieve the twin objectives of improving environmental conditions and fostering economic progress in all three countries. A core component of this framework is the citizen submission process created under Articles 14 and 15 of NAAEC (NAAEC citizen submission process).

The NAAEC citizen submission process was adopted to address the problem of non-enforcement and lax enforcement of domestic environmental laws in Canada, Mexico and the United States. It provides for the right of private citizens and non-governmental organizations to file citizen submissions with the CEC Secretariat alleging the failure of Canada, Mexico or the United States to enforce particular environmental laws. If a citizen submission meets the criteria set forth in Articles 14 and 15 of NAAEC (and further clarified in the citizen submission guidelines adopted in 1999), the CEC Secretariat then recommends that the CEC Council adopt a resolution authorizing the CEC Secretariat to prepare a document entitled a factual record. The factual record is a detailed investigation and analysis of the non-enforcement claims set forth in a citizen submission. The NAAEC does not indicate the criteria that the CEC Council should use in acting upon a recommendation from the CEC Secretariat to authorize preparation of a factual record, nor does the NAAEC provide any means to appeal or review a CEC Council decision to reject or limit a CEC Secretariat recommendation concerning the preparation of a factual record.

Although there was broad support for the underlying objective of the NAAEC citizen submission process, namely to ensure effective enforcement of environmental laws, from the very beginning there were also concerns about the structure of the process. More specifically, by providing the CEC Council with unreviewable discretion to reject or modify the CEC Secretariat's recommendations concerning the preparation of factual records, the process itself created certain conflicts of interest. This conflict of interests resulted from the fact that the nation that was the subject of the non-enforcement claims in a citizen submission was also entitled to vote (through its national representative on the CEC Council) on whether to approve the preparation or otherwise limit the scope of a factual record to investigate these claims.

Concerns about the conflict of interests inherent in the NAAEC citizen submission process were made plain in JPAC's May 2001 report to the CEC Council entitled *Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (*Lessons Learned*). *Lessons Learned*, which was based on public comments submitted to JPAC and a series of JPAC-organized public workshops, explained that "commentators criticized the role of the Council because it had absolute discretion to decide whether or not to instruct the Secretariat to prepare a factual record" and that "another issue regarding Council accountability was the absence of any appeal when the Secretariat or the Council has decided not to proceed with the preparation of a factual record."

At the time JPAC's *Lessons Learned* was published in May 2001, there had only been one specific instance where these potential conflicts of interests came directly into play. This was when the CEC Council voted (see CEC Council Resolution 00-001, May 16, 2000) to reject a CEC Secretariat recommendation to authorize preparation of a factual record. In CEC Council

Resolution 00-001, the CEC Council provided no explanation or justification for its refusal to follow the CEC Secretariat's recommendation.

As the events of November 2001 revealed, CEC Council Resolution 00-001 was just the beginning. The conflicts of interest inherent in the NAAEC citizen submission process would continue to manifest themselves.

A. CEC Council's November 2001 Resolutions: What Was Decided

On November 16, 2001, the CEC Council voted on whether to adopt the CEC Secretariat's recommendation that factual records be prepared for the following five citizen submissions: *Oldman River II*, *Aquanova*, *Migratory Bird*, *BC Mining*, and *BC Logging*. The CEC Council approved the preparation of factual records for all five of these citizen submissions. In the case of four of these citizen submissions *(Oldman River II*, *Migratory Bird*, *BC Mining*, and *BC Logging*), however, the CEC Council ordered the preparation of factual records far more limited that what had been recommended by the CEC Secretariat. This was the first time that the CEC Council had used its approval authority under the NAAEC to narrow the substantive scope of factual records. Below is a summary of the four citizen submissions that were substantively narrowed by the CEC Council's November 2001 resolutions.

In *Oldman II*, the citizen submitters cited the approval of Sunpine Forest Products Forest Access Road as an example of Canada's widespread failure to effective enforce the Canadian Environmental Assessment Act and the federal Fisheries Act. The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 resolution, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the Sunpine case.

In *Migratory Bird*, the citizen submitters cited two examples in support of the United States' widespread failure to effectively enforce Section 703 of the Migratory Bird Treaty Act in connection with logging operations. The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 resolution, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the examples cited in the initial submission.

In *BC Mining*, the citizen submitters cited the Britannia Tulsequah and Mt. Washington mines as examples of Canada's widespread failure to effectively enforce section 36(3) of the federal Fisheries Act in connection with mining operations. The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 resolution, however, the CEC Council disregarded the CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to the Britannia Tulsequah mines.

In *BC Logging*, the citizen submitters cited TimberWest's logging operations in the Sooke watershed as an example of Canada's failure to enforce sections 35 and 36 of the federal Fisheries Act in connection with TimberWest's logging operations throughout British Columbia. The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 resolution, however, the CEC Council disregarded the

CEC Secretariat's recommendation and instead ordered the preparation of a factual record only with respect to TimberWest's logging operations in the Sooke watershed.

The CEC Council's November 2001 resolutions were subject to intense criticism. This criticism came not only from North American environmental groups, but from other institutions within or associated with the CEC, including JPAC, the United States' Government Advisory Committee to United States Representative to the CEC ("U.S. Government Advisory Committee"), and the United States' National Advisory Committee to the United States' Representative to the CEC ("U.S. National Advisory Committee").

On October 23, 2001 JPAC adopted Advice to Council No. 01-07, which began by noting that JPAC had been "apprised that Council will be asked to consider...a limit on the Secretariat's discretion to determine the scope of pending submission as a condition for a vote to proceed with the development of the factual record." JPAC's Advice to Council then went on to state that these limitations "...constitute a flagrant disregard for one of the recommendations of JPAC's *Lessons Learned* Report with respect to supporting the independence of the Secretariat in the Articles 14 and 15 process..."

On October 15, 2001, the U.S. National Advisory Committee sent a letter to Christine Todd Whitman, Administrator for the United States Environmental Protection Agency. This committee was established pursuant to Article 17 of NAAEC. This letter states:

> "The Committee was most disturbed to learn that the United States is proposing a conditional approval of the MBTA [Migratory Bird Treaty Act] submission that would confine the CEC Secretariat to investigating the particular events that were identified in the submission as illustrative examples...
>
> We have considered the integrity of the citizen submission process extensively in our previous meetings, and our earlier advice reflects the Committee's commitment to maintaining the consistency and transparency of the process. The Committee's advice of May 24, 2001 stated that we recommend that the U.S. government maintain its position to support the preparation of factual records "to the greatest extent possible" when the Secretariat finds that a factual records is warranted.
>
> Consistent with that advice, we strongly recommend that the United States approve the development of a factual record of the MBTA submission without conditions..."

On October 19, 2001, the U.S. Governmental Advisory Committee also sent a letter to Christine Todd Whitman. This committee was established pursuant to Article 18 of NAAEC. This letter states:

> The *Migratory Bird* submission alleges that the U.S. has failed to effectively enforce U.S. environmental laws by historically failing to pursue any criminal prosecutions of the Migratory Bird Treaty Act for non-threatened or non-endangered species. It is our understanding that the U.S. intends to vote yes on the Secretariat proceeding with a factual record for this submission, but only if it is limited to a review of the facts associated with the two anecdotal violations identified in the submission...
>
> We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat in the submission process will be eviscerated. The U.S. would undercut this independence by limiting the factual record to the two examples provides in the submission, where a broader pattern was adequately alleged. If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process...
>
> There is no affirmative requirement in the Agreement that a petitioner lists all instances of a Party's failure to effectively enforce an environmental law to consider these events within the scope of factual record. And such an interpretation flies in the face of the plain language of the NAAEC, which contemplated a submission where a pattern and practice of ineffective enforcement exists, as opposed to an isolated failure by a Party to the Agreement...

On March 6, 2002, the Sierra Legal Defence Fund (in Vancouver, British Columbia) sent a letter to the Canadian, Mexican and United States environmental ministers serving on the CEC Council. Sierra Legal Defence Fund served as legal counsel for the submitters in *BC Logging* submission. This letter from Sierra Legal Defence Fund stated "What is particularly troubling about the Council's decision (re: the *BC Logging* submission) is that the Secretariat had directly considered Canada's Response and indicated that the 'other matters' could and should be part of any factual record. Despite the findings of the Secretariat -- and the Council's promise to respect the independence of the Secretariat -- the Council rejected the Secretariat's recommendation without so much as an explanation..."

B. Prosecutorial Discretion and Allocation of Enforcement Resources

Article 14(1) of NAAEC provides that "the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is *failing to effectively enforce its environmental law*..." (italics added.) Guideline 5.1 of the CEC's Guidelines for

Submissions on Enforcement Matters provides that preparation of a factual record is not warranted unless the submission asserts "that a Party is *failing to effectively enforce its environmental law*..." (italics added.) Article 45(1) of NAAEC provides the definition of what does not constitute a failure to effectively enforce environmental law: "A Party has not failed to 'effectively enforce its environmental law'...where the action or inaction in question by agencies or officials of that Party: (1) reflects a reasonable exercise of their discretion in respect to investigatory, prosecutorial, regulatory or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities..." (italics in original.)

Article 45(1) of NAAEC reflects a legal principle commonly known as "prosecutorial discretion." The principle recognizes that the executive agencies that enforce laws are entitled to a fair amount of discretion in how they undertake enforcement activities, and that courts will generally refrain from interfering with agency enforcement decisions unless it can be shown that there has been an abuse of discretion or a complete abdication of enforcement responsibility. Whether or not there has been an abuse of discretion or complete abdication of enforcement responsibility is determined by considering a particular enforcement action (or omission) in the larger context of an agency's enforcement policy and record.

The qualifying language in the definition provided in Article 45(1) of NAAEC recognizes that there are limits to the principle of prosecutorial discretion. Article 45(1) of NAAEC provides that a particular instance of non-enforcement will not constitute a "failure to effectively enforce environmental law" provided that this instance of non-enforcement represents a "reasonable" exercise of prosecutorial discretion or a "bona fide" decision to allocate enforcement resources to other environmental matters. This language indicates that there may be instances where a particular instance of non-enforcement constitutes an "unreasonable" exercise of prosecutorial discretion and/or a "non bona fide" enforcement allocation decision. An investigation of whether a particular instance of non-enforcement is a reasonable/unreasonable exercise of prosecutorial discretion, or a bona fide/non-bona fide enforcement allocation decision, requires evaluating the particular instance of non-enforcement in the context of the relevant agency's overall enforcement program for the particular legal provision at issue.

One of the problems with the CEC Council's November 2001 Resolutions, however, is that these resolutions appear to curtail the CEC Secretariat from considering an agency's overall enforcement program, policy and record when preparing a factual record involving the particular instances of non-enforcement alleged in the citizen submission. This prohibition prevents the CEC Secretariat from preparing a factual record that meaningfully addresses the question of whether the particular instances of non-enforcement alleged in the citizen submission constitute an abuse of prosecutorial discretion.

II. Post-November 2001 Results: *Migratory Bird* and *BC Logging* Factual Records

Two of the factual records authorized by the CEC Council's November 2001 Resolutions have been completed and released to the public. These two factual records are discussed below.

A. April 2003 *Migratory Bird* Factual Record

The *Migratory Bird* factual record was released to the public on April 24, 2003. As discussed below, there are numerous indications that the CEC Council's November 2001 instruction frustrated the CEC Secretariat's efforts to develop a factual record that addressed the underlying question of whether the alleged instances of non-enforcement constitutes an abuse of prosecutorial discretion.

Page 8 of the *Migratory Bird* factual records states:

> Council Resolution 01-10 governs the scope of this factual record. The Resolution authorizes a factual record narrower in scope than the factual record that the Submitters sought and that the Secretariat considered to warrant development in its notification to Council under NAAEC Article 15(1)....Certain information that the Submitters suggests be included or that was discussed in the Secretariat's Article 15(1) notification is beyond the scope of Council Resolution, such as information regarding the overall number of migratory birds taken (as defined in the MBTA) as a result of logging operations in the United States; the effectiveness, in the absence of any enforcement on the MBTA in the context of logging, of certain 'non-enforcement' initiatives discussed in the United States response to submission; the reasonableness under NAAEC Article 45(1)(a) of the exercise of the United States discretion in never to date having enforced the MBTA in regard to logging operations; and whether under NAAEC Article 45(1)(b) of the United States' general approach to enforcing the MBTA to date results from *bona fide* decisions to allocate resources to enforcement matters of higher priority than enforcement of the MBTA against logging operations.

Pages 21-22 of the *Migratory Bird* factual record notes:

> The following matters raised in the submission and put forward in the Secretariat's Article 15(1) notification are generally excluded from the factual record under Council Resolution 01-10...Information regarding the effectiveness nationwide of the 'non-enforcement' initiatives described in the US response in protecting migratory birds in the absence of enforcement against logging operations...Information regarding the effect nationwide of limiting the MTBA permit program to activities involving the intentional killing of migratory birds, including information regarding the effect that a permit program for logging would have in reducing bird deaths due to logging...Information regarding the assertion that, as a general matter, it is more effective to leverage enforcement resources to achieve greater levels of compliance for activities other than logging than it is for logging...Information regarding whether the US practice to date of only pursuing

> enforcement action under the [US Endangered Species Act] in connection with threatened or endangered migratory birds killed or taken as a result of logging activity is an effective means of achieving the goals of the MBTA.

It is unfortunate that the *Migratory Bird* factual record was unable to address these broader considerations because it appears that the particular instances of non-enforcement alleged in the underlying citizen submission may be part of a programmatic policy of non-enforcement that cannot be properly characterized as reasonable exercises of prosecutorial discretion or bona-fide enforcement allocation decisions. More specifically, the crux of the submitter's allegation pertained to a March 1996 memorandum of the Director of the United States Fish & Wildlife Service (FWS) to FWS law enforcement officers that states: "The agency has had a longstanding, unwritten policy relative to MBTA that no enforcement or investigative action should be taken in incidents involving logging operations that result in the taking of non-endangered, non-threatened migratory birds and/or their nests…The service will continue to enforcement the MBTA in accordance with this longstanding policy." Although this blanket prohibition on enforcement nationwide does not appear to be the type of prosecutorial discretion and enforcement allocation decision permitted by Article 45(1) of NAAEC, the *Migratory Bird* factual record could not pursue this question further.

The underlying citizen submission in the *Migratory Bird* case involved two situations where California wildlife officials eventually took enforcement in connection the destruction of migratory bird habitat by logging operations. The FWS could therefore rightfully claim that its non-enforcement in these two situations may have been warranted because the State of California took appropriate action to remedy the problem. Yet, this justification for non-enforcement is not particularly persuasive if FWS has a national policy of not enforcing the MTBA against logging operations under any circumstances regardless of whether or not a state takes enforcement action. This was a point, however, that the CEC Secretariat could not examine further in its factual record.

In a January 13, 2003 letter to the Director of the CEC Secretariat's Submissions on Enforcement Unit, Judith Ayres (Assistant Administrator for the United States Environmental Protection Agency) voiced her objection to the *Migratory Bird* factual record's description of the manner in which the CEC Council had limited the scope of the CEC Secretariat's investigation of the underlying citizen submission: "[A]lthough the U.S. agree that explaining the scope of the factual record for purposes of providing context is appropriate, we do not believe it is appropriate for the Secretariat to include commentary regarding its view of the Council's decision. Rather, a factual record scope discussion should be limited to providing information relevant to the Council's actual instruction to the Secretariat not on whether the Secretariat agrees with the Council's decision. Additionally, a substantial portion of the scope discussion involves detailing what is not addressed in the factual record. Again, such a discussion should focus on what the factual record actually covers…" Significantly, Ms. Ayers letter or January 13, 2003 did not dispute or seek to correct the CEC Secretariat's factual characterization of the manner in which the CEC Council had limited the scope of the *Migratory Bird* factual record or of the issues that were excluded from consideration by virtue of the CEC Council's November 2001 resolution.

B. August 2003 *BC Logging* Factual Record

The *BC Logging* factual record was released to the public on August 11, 2003. As discussed below, there are numerous indications that the CEC Council's November 2001 instruction frustrated the CEC Secretariat's efforts to develop a factual record that addressed the underlying question of whether the alleged instances of non-enforcement constituted an abuse of prosecutorial discretion.

Page 7 of the *BC Logging* factual record provides:

> Council Resolution 01-12 governs the scope of this factual record. The Resolution authorized a factual record narrower in scope that the factual record that the Submitter's sought and that the Secretariat recommended in its notification to Council under NAAEC Article 15(1). Certain information that the Submitters suggest be included or that was discussed in the Secretariat's Article 15(1) notification is generally beyond the scope of the Council Resolution, such as information regarding Canada's enforcement of §§ 35(1) and 36(3) on public land subject to British Columbia's Forest Practices Code, province-wide information regarding the extent the which private land logging in British Columbia fails to comply with §§ 35(1) and 36(3) of the Fisheries Act and province-wide information regarding Canada's enforcement of those provisions in connection with private land logging.

Pages 22-23 of the *BC Logging* factual record states:

> The following matters raised in the submission and the Secretariat's Article 15(1) notification are, except as relevant to the two areas referenced in Council Resolution 01-12, generally excluded from the factual record…the extent to which and the circumstances under which Canada exercises its power under §§ 35(2) [of the Fisheries Act] in the context logging on public land in British Columbia and the effectiveness of actions taken under §35(2) to prevent harmful alteration, disruption and destruction of fish habitat…the extent to which Canada monitors logging operations regulated in British Columbia by the Forest Practices Code or the Private Land Forest Practices Regulation to determine compliance with the Fisheries Act, and the results of monitoring activities, including the frequency, number and severity of suspected violations of the Fisheries Act by logging operations on public and private land in British Columbia…the overall frequency, number and severity of suspected violations of the Fisheries Act by logging operations in British Columbia that are not regulated by either the Forest Practices Code or the Private Land Forest Practices Regulation…

In a June 3, 2003 letter to the Executive Director of the CEC Secretariat, Norine Smith (Assistant Deputy Administer for Environment Canada) objected to the manner in which the *BC Logging* factual record characterized the limited scope of the report:

> Section 5.4 [of the *BC Logging* factual record]...is problematic. This section raises concerns about the scope of the Factual Record. Canada does not believe the Secretariat should attempt to establish a set of "criteria" to determine what could be considered "effective enforcement." This section goes beyond the Council Resolution, which authorized the Secretariat to examine whether or not Canada is "in fact" failing to effectively enforce its environmental laws. Therefore, we request that this section be removed...
>
> With regards to Section 4 [of the *BC Logging* factual record] entitled "Scope of the Factual Record", Canada considers the discussions surrounding the Secretariat's review of the Council's instruction regarding the scope of the Factual Record to be superfluous...We suggest that the Secretariat limit this discussion to the information that will be the subject of the Factual Record...
>
> Also, Section 4 [of the *BC Logging* factual record] includes a summary of the comments provided by the submitters, which were in reaction to Council's instruction to the Secretariat. The NAAEC is very clear that the Council is the ultimate authority for determining the scope of a Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue. Therefore Canada requests that this information be removed...

The NAAEC citizen submission was created to foster transparency, citizen involvement and the independence of the CEC Secretariat in preparing factual records. The comments of Environment Canada's Norine Smith are contrary to these objectives, and demonstrate the ways in which the current NAAEC citizen submission process permits a Party that is the subject of a non-enforcement claim to influence the CEC Secretariat's investigation of this same claim.

III. Conclusion: A Process Made Hollow

The CEC Council's November 2001 Resolutions, and the limited scope of the recent *Migratory Bird* and *BC Logging* factual records, reveal the emerging political dynamics of NAAEC's citizen submission process. The conflicts in this process are not national disputes between Canada, Mexico and the United States. Rather, the conflicts in this process are disputes between the governments of Canada, Mexico and the United States (on the one hand) and North American citizens and non-governmental organizations (on the other hand) who maintain that the national governments of Canada, Mexico and the United States are refusing to enforce existing environmental laws.

Operating through its representatives on the CEC Council, there now appears to be a concerted effort by the current governments of Canada, Mexico and the United States to divest

NAAEC's citizen submission process of its political independence and relevance. In so doing, a cornerstone of the North American environmental-trade regime is being dismantled, and a once promising process for citizen enforcement and government accountability is being made hollow.

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

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Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec H2Y 1N9

Re: JPAC Review of Citizen Submission Process

Dear Members of the Joint Public Advisory Committee:

I am writing on behalf of the 9000 member Northwest Ecosystem Alliance. NWEA works to conserve and restore the wild lands and biodiversity of the Pacific Northwest of the U.S. and British Columbia.

NWEA staff has extensive expertise in forest ecology and restoration, forest policy and practices, endangered species law and conservation and forest products trade and subsidies. We have recently published a report called *Greening the Trade in Trees: Solutions to the U.S./Canada Softwood Lumber Dispute.*

NWEA has been involved in the Article 14 submission process in the BC Logging file. We view the Article 14 process as a potentially important mechanism to raise significant and widespread awareness of the flouting of North American environmental laws. Unfortunately, the utility of this process may be undermined by overly narrow investigations or political interference with the Secretariat's expertise and inquiries.

Article 14 and the CEC in general is in danger of becoming a sham, when despite overwhelming evidence supporting a full scale investigation, the scope of the investigation is limited by overt political pressure from the very economic interests and/or their governments that the CEC are meant to oversee. The cumulative effect is the erosion of the public trust and the fulfillment of the predictions that social values will fall prey to free trade.

We recommend that it again be made clear that the process can examine both narrow and broad issues of non-enforcement and that the Secretariat's decisions on the scope of investigations and the sufficiency of information will be respected.

If the scope of investigations is too narrow, citizens will view the process as ineffective in addressing critical issues of non-enforcement. If the process continues to be undermined, citizens will no longer see the process as an important accountability mechanism and will justifiably cease to participate. We support your efforts to improve the process and look forward to further communications and cooperation.

Sincerely,

Joe Scott
International Campaigns Director

Sierra Club of/du Canada

September 19, 2003

Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec H2Y 1N9

Attention: mpepin@ccemtl.org

Dear Members of the Joint Public Advisory Committee:
Re: JPAC Review of Citizen Submission Process

I am writing on behalf of the Sierra Club of Canada about the Article 14 and 15 Citizen Submission process. The Sierra Club's mission is to develop a diverse, well-trained grassroots network working to protect the integrity of our global ecosystems.

We have been involved in an Article 14 citizen submission in the Ontario Logging case. We believe that Article 14 is an essential tool to facilitate vital public input into the enforcement, or lack thereof, of North American environmental laws. The effectiveness of this process may, however, be in jeopardy given the narrow scope which the council has attached to investigations and the high threshold that has been set for establishing "sufficient information". In addition, the process will only gain acceptance if it is free from perceived political manipulation.

Our understanding is that both narrow and broad issues of non-enforcement are properly investigated by the CEC. We believe this view must be reiterated. We note that in the US migratory birds case the evidence was that of widespread non-enforcement. The Council nonetheless ordered a factual record of two limited cases, despite the recommendation of the Secretariat and the extensive work of the Submitters in detailing a broad policy of non-enforcement by the USA. We suspect that the result was therefore not at all what the submitters had hoped to achieve.

We are concerned that the same type of restrictive factual record in a case such as ours in Ontario Logging will result in the same rather futile result. In fact, not only would the factual record be of limited value but groups that might see the CEC as a useful tool in environmental protection will be discouraged from expending the time and resources necessary to make a submission. In other words, the process as a whole will lose the support of the citizens and groups for whom it was designed to provide access.

Thank you in advance for your attention to our concerns.

Respectfully submitted,

Rachel Plotkin
Forest campaigner
The Sierra Club Canada

SIERRA LEGAL DEFENCE FUND

September 8, 2003

Via Mail and Electronic Mail (mpepin@ccemtl.org)
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec, Canada H2Y 1N9

Dear Members of the Joint Public Advisory Committee:

Re: Issues Related to the Articles 14 and 15 Process – Written Comments of the Sierra Legal Defence Fund for the JPAC Public Meeting on October 2, 2003

Introduction and Summary

On behalf of the Sierra Legal Defence Fund's[1] British Columbia and Ontario offices, we are pleased to provide comments regarding the Articles 14 and 15 citizen submission process. At the outset, we wish to thank the Joint Public Advisory Committee (JPAC) for its continued support of the environmental goals of the North American Agreement on Environmental Cooperation (NAAEC) and in particular its strong support of the citizen submission process.

Sierra Legal's lawyers have acted as legal counsel for a wide variety of groups that have filed citizen submissions, including BC Hydro (97-001), BC Mining (98-004), BC Logging (00-004), Pulp and Paper (02-003), and Ontario Logging (02-001). We have also been involved in several efforts to preserve the integrity and utility of the citizen submission process, including attendance at the Workshop concerning revised Citizen Submission Guidelines in 1999, participation in the December 2000 workshop on the history of the Citizen Submission process in Montreal, and the submission of comments as part of the *Lessons Learned* initiative in 2001. We have also

[1] Sierra Legal, founded in 1990, is a non-profit environmental law organization that provides free legal services to the environmental community in Canada. Sierra Legal has three primary goals: to 'level the playing field' for environmental groups that simply cannot afford to go to court against large institutions when important ecological and wilderness values are at stake; to bring carefully selected cases with the ultimate goal of establishing an aggregate of strong legal precedents that recognize the vital importance of environmental values; and to provide professional advice on the development of environmental legislation. Sierra Legal is funded by public donations and foundations grants. We currently have approximately 30,000 individual supporters across Canada.

participated in each of the last five annual Council sessions and made submissions regarding the citizen submission process at each session.

These comments present both general concerns about how the citizen submission process has been compromised by the actions of the Council and also describe the effects of Council actions on individual submissions.

On a broader level, the actions of the Council – through resolutions and orders – have broken the commitments made to the citizens of North America, eroded the credibility of the citizen submission process, undermined environmental protection, and have dramatically reduced the effectiveness and utility of the process.

These effects are clearly seen with respect to three submissions filed by Sierra Legal and are addressed in detail below. In two cases, the Council has precluded the investigation of legitimate and pressing environmental problems. The factual records for BC Mining and BC Logging have been publicly released. Both factual records are valuable documents, for which the Secretariat staff deserves great credit. However, in both cases the factual records could have been more effective and useful documents if the Council had not narrowed the investigations. In both cases, opportunities to improve environmental protection and environmental law enforcement have been squandered. The third case, Ontario Logging, is still active but has been significantly delayed by the actions of Council.[2]

Overarching Concerns

Among the critical promises made to the citizens of North America at the time of the NAFTA's adoption was that the NAFTA Parties would enforce their respective environmental laws. Each NAFTA Party is obligated to achieve this in Article 5 of the NAAEC. Indeed, this guarantee was fundamental to both the political and substantive character of the NAFTA system. The citizen submission process under the NAAEC is the sole means by which ordinary citizens can seek international redress if they believe this fundamental obligation has been broken.

Council resolutions including 01-11 (BC Mining) and 01-12 (BC Logging) issued November 16, 2001 and resolution 03-05 (Ontario Logging) issued April 22, 2003 threaten to negate that promise. Through the first two resolution, the Council disregarded the recommendations of the Secretariat regarding the appropriate scope of individual factual records. The Council's narrowing of the scope of factual records prohibited valuable examination of broader enforcement efforts (or lack thereof). These actions were an incursion on the independence of the Secretariat. A similar undermining of the Secretariat's work occurred in resolution 03-05, in which the Council substituted its own view of what constitutes "sufficient information". Despite previous commitments of the three countries to support and respect the integrity of the citizen submission process, these Council Resolutions leave an impression of political manipulation and failure to respect the independence and judgment of the Secretariat.

[2] Our recent Supplementary Submission in Ontario Logging (August 20, 2003) contains additional information that relates to the JPAC's current study of Articles 14 and 15 and we request that it be considered in addition to this submission. See: http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf

From time to time, the citizen submission process has been subjected to efforts to restrain the independence of the Secretariat and to restrict the ability of the citizen submission process to evaluate environmental enforcement – including occasional attempts by NAFTA Parties to "revise" the Guidelines for citizen submissions. Each attempt to limit the citizen submission process has been met with strong opposition from the JPAC, citizen submitters and non-governmental organizations.

In June 2000, it appeared that the Council had undertaken to respect the citizen submission process. Through Resolution 00-09, Council expressed its strong support of the citizen submission process and authorized the JPAC to undertake a public process concerning "further implementation and elaboration" of Articles 14 and 15, as well as a review of the "lessons learned" from the citizen submissions filed to date. The overwhelming message arising from these efforts was that the NAFTA Parties must, and would, respect the citizen submission process and the independence of the Secretariat. The JPAC report from the *Lessons Learned* process states:

> *The professional independence and competence of the Secretariat is indispensable to a credible and properly functioning Articles 14 and 15 process. The Secretariat must, of course, continue to have adequate resources to attract and retain consistently high quality staff and, where needed, specialized consultants. However, the Secretariat must also have (and be perceived to have) the independence to exercise its best professional judgment with respect to Submissions, the adequacy of Party responses, recommendations to Council and development of factual records.*[3]

Unfortunately, the Council, through its most recent resolutions concerning factual records, seems to have moved away from the consensus of the public, the government and national advisory committees, and the JPAC. What damage the Council refrained from doing through a revision of the Guidelines it has now done, on a case-by-case basis, through Council resolutions.

In light of the actions of Council, citizens will almost certainly have less confidence that the citizen submission process can achieve its purported objective – to bring facts to light – as it is clear that the Council will act to limit factual record investigations simply to avoid meaningful scrutiny of environmental enforcement efforts. The actions of the NAFTA parties demonstrate that despite rhetoric to the contrary, the parties are far more concerned about preventing political embarrassment than protecting the environment. Unfortunately, the structure of the citizen submission process provides no real safeguards against the bad faith actions of the parties.

The resolutions of the Council concerning individual citizen submissions contradict the spirit and intent of the NAAEC and the Council's own resolutions, and contravene the strong recommendations of the JPAC, national advisory committees and the public. Most importantly, the Council's actions threaten to strip the citizen submission process of its integrity, utility and legitimacy. In addition to undermining the effectiveness of the Commission for Environmental Cooperation and creating distrust about the NAFTA, the end result may well be to further reduce public support for economic integration efforts. Fears that such efforts run roughshod over the environment and public participation will be confirmed.

[3] http://www.cec.org/files/PDF/JPAC/rep11-e-final_EN.PDF, at page 15.

Effects on Individual Submissions

BC Mining

The BC Mining submission identified the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. In particular, the submitters alleged that Canada was ignoring the ongoing environmental destruction caused by abandoned mine sites in British Columbia. While the submission focused primarily on three mines (the Tulsequah Chief, Mount Washington and Britannia mines) the submission also noted nearly 40 other acid-generating mines in BC where violations of the *Fisheries Act* either may have occurred or may be occurring without any enforcement action being taken.

Environmental contamination from abandoned mines is a chronic problem in BC and throughout Canada. It is estimated that there are more than 10,000 abandoned mines across the country. Despite the widespread problem of abandoned mines and the chronic failure to enforce the *Fisheries Act,* the Council limited the factual record investigation to one mine site – Britannia Mine.

As it relates to the Britannia Mine, the factual record is a thorough, well-written and useful document. It will almost certainly assist in environmental protection and remediation efforts at that site. However, the larger and more pressing issue is the failure of Canada's environmental law enforcement at many other mine sites throughout BC, and this issue was not explored in the factual record. Environmental protection would have been dramatically improved if the Secretariat had been able to examine and report on this systematic failure. An opportunity to improve environmental law enforcement was lost and for no other reason than Canada wanted to avoid embarrassment related to its enforcement record and succeeded in utilizing the Council's role to achieve that goal.

BC Logging:

The BC Logging submission alleged that the Government of Canada was in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection by systematically failing to enforce the *Fisheries Act* against logging activities undertaken in British Columbia.

The primary concern of the submitters was the failure of the Canadian government to enforce the *Fisheries Act* on public lands, which comprise over 90% of the land base in BC. The submitters also noted a similar concern with regard to logging on private land, however, this was clearly not the focus of the submission. Further, the public obviously has a greater interest in the management of public lands when those lands are held in trust for the larger public interest.

In addition, it is important to note that the Submitters also focused on activities that are not always individually significant (e.g., individual stream crossings; clearcutting the banks of smaller streams) but cumulatively are a source of considerable environmental damage.

The Council limited the BC Logging factual record investigation strictly to two instances of logging activities on private land. Given the central concerns of the submission – logging on public lands and the cumulative damage of common logging practices – the effect of the Council resolution was to direct the Secretariat's attention away from the concerns of the submitters, and, we believe, the concerns of greatest environmental importance.

Despite the limitations imposed by the Council's resolution, the Secretariat staff nonetheless produced a valuable factual record. The Secretariat's investigation uncovered deficiencies in the procedures of Fisheries and Oceans Canada, which the agency subsequently sought to address. Further, the Secretariat provided valuable information regarding policy and funding issues that are impeding environmental law enforcement.

Although we recognize the value of the BC Logging Factual Record, the Council's prohibition against considering the issues raised by the Submitters clearly undercuts environmental protection and prevents scrutiny of one of the largest environmental problems in British Columbia. The Factual Record itself states:

> *... the scope of this factual record is different from the scope of both the factual record requested in the submission and the factual record that the Secretariat considered to warrant development in its Article 15(1) notification.. After Council Resolution 01-12 was released, the Submitters stated:*
>
> > *Resolution 01-12 of the Council, issued November 16, 2001, raises serious concerns about the handling of the BC Logging Submission and the integrity of the citizen submission process generally. The BC Logging Submission was intended to highlight issues of widespread nonenforcement of the federal Fisheries Act engendered by the operation of provincial laws regulating the conduct of logging operations in British Columbia. Specifically the BC Logging Submission was intended to highlight three particular types of damage routinely permitted under provincial law: clearcutting the riparian areas of certain fish bearing streams; falling and yarding of logs across fish bearing streams; and the clearcut logging of areas that have been determined to be highly prone to landslides. The significant environmental harm from these practices arises not necessarily from any one instance, but more importantly, from the cumulative effects of these practices occurring on a frequent basis in widespread parts of British Columbia. Resolution 01-12 narrows of [sic] the scope of the factual record for the BC Logging Submission, contrary to the recommendation of the Secretariat, and only allows the examination of factually isolated instances and precludes examination of logging conducted under the provincial Forest Practices Code. The result is that the factual record that will be prepared in this matter will not address the environmental concerns that prompted the filing of the Submission.*

As the Factual Record itself makes clear, investigation of the larger and more pressing environmental issues was precluded. Specifically, at pages 22 and 23, the Factual Record lists a number of issues that would have been considered in the absence of Council interference. These inquiries would have shed light on number of violations occurring across the province, policies decisions made to stop pre-approval review of logging proposals, and the interrelationship and

harmonization of provincial and federal environmental policies. The Factual Record scope proposed by the Secretariat would have more fully achieved the goals and objectives of the NAAEC.[4]

Ontario Logging

In February 2002, eight prominent environmental groups from Canada and the U.S.A. alleged that Canada was failing to effectively enforce regulations under the *Migratory Birds Convention Act*. The petition relied on government bird census data and approved clearcut-harvesting plans to estimate that tens of thousands of bird nests were being destroyed during logging operations on an annual basis. This evidence was supplemented by information, obtained through an *Access to Information* request, showing that the destruction of bird nests was simply considered "incidental" to logging operations by relevant government authorities and that Canada had never investigated a single case or charged a single logging company with destroying a migratory bird nest[5] on any of the 210,000 hectares of forest logged in Ontario each year. The submitters limited their petition to areas in the province of Ontario where clearcut logging was permitted under provincial forest management plans.

In November 2002, the Secretariat recommended that a factual record be prepared within the parameters set out in the petition. In April 2003, the Council resolved to defer the matter and required that additional evidence be provided to avoid a termination of the file. The Council said that the submitters had failed to "provide facts related to cases of asserted failures to enforce environmental law".[6]

The context of the case is noteworthy. In November 1999, various environmental groups had filed a similar petition[7] with the CEC alleging that the US Wildlife Service was failing, on a widespread basis, to enforce their own migratory bird protection laws. In that case, the Council ordered a factual record but limited it to two examples of nest destruction, contrary to the

[4] Another downside to narrowly scoped factual records is that any discussion of the overall context surrounding a particular incident under investigation becomes open to criticism by other interests. For example, the submission to JPAC by the Forest Products Association of Canada dated September 5, 2003 takes issue with aspects of the factual record which it believed strayed too far from the incident in question. Similarly, Norine Smith of Environment Canada expressed concern about alleged 'superfluous' contents in the factual record (see page 10 of the submission to JPAC of Paul Kibel dated September 8, 2003). Further disputes about what should or should not be contained in narrowly scoped factual records could be avoided by Council refraining from artificially limiting the scope of records to areas of inquiry that inevitably give rise to such disputes. If Council were to respect the Secretariat's view that both narrow and wide scope reviews are contemplated by the NAAEC (it should be noted that the Secretariat's view is in accord with the actual wording of the NAAEC) then unproductive debates such as those arising from BC Logging will be avoided. Attention should be redirected to the important allegations raised by the submitters and not to interpreting just how narrow a factual record a brief Council resolution was meant to contemplate. Council should respect the expertise of the Secretariat and proceed with approving the preparation of a factual record according to the scope contemplated by the Secretariat itself (unless the Secretariat had acted in a patently unreasonable manner).

[5] Neither in the Canadian Response to our petition nor at a meeting with the Canadian Wildlife Service has the evidence that logging companies have never been investigated or charged for destroying a migratory bird nest been contradicted.

[6] In response to the Council resolution we provided, on August 20, 2003, further evidence consisting of data about actual clearcuts. In other words, the passage of time had allowed us to revise projected data regarding approved harvesting for 2001 to actual data about clearcuts that were undertaken in 2001 --- data that a factual record would have obtained anyway (and that was unavailable at the time of the original submission).

[7] SEM-99-002, *Migratory Birds*.

recommendation of the Secretariat. The factual record eventually found that those two cases --- one involving four trees and the other several hundred trees --- had already been locally investigated. In other words, the petition to investigate widespread failure to enforce produced a factual record that was of little or no value in the context of the actual widespread problem. This should provide an important lesson for the Council when it considers the Ontario Logging file again in the near future. The Council should use the current JPAC forum for discussion to take stock of the many adverse effects caused by 'downscoping' the US Migratory Birds factual record. It should then use the Ontario Logging file as an opportunity to examine how a factual record with a wider scope on a similar topic can better achieve the goals of the citizen submission process and the NAAEC as a whole.

Ontario Logging is also a good example of a case where the integrity of the CEC process is at significant risk because one of the decision-makers on the Council, namely Environment Canada's Minister, is, to use a legal analogy, at the same time the accused *and* the judge and jury. Environment Canada, through the Canadian Wildlife Service (CWS), is responsible for enforcing the *Migratory Birds Convention Act*. Therefore, we might ask: "Is the Minister of Environment Canada (or another decision-maker within the Minister's office or the Environment Canada bureaucracy) likely to objectively decide that a factual record of his own ministry should be ordered?" The answer is predictable and therefore problematic if the integrity of the CEC is to be maintained. In fact, our most recent *Access to Information* request revealed that the head[8] of the relevant CWS unit at the time of our petition (who, given his position and as revealed in documents obtained under *Access to Information*, was a key official in the preparation of the original Party response) was still being asked for his input on matters concerning the Council decision on a factual record mere weeks before the Council was to make its decision.[9] One possible solution to this problem is for each Party to ensure that the individuals involved in the first stage are not involved in the second stage.

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[8] Steve Wendt was the "Chief, Migratory Birds Conservation, Canadian Wildlife Service, Environment Canada", at the time of our petition. In more recent ATIP-requested correspondence he is shown as "A/Director Wildlife Conservation, Canadian Wildlife Service, Environment Canada".

[9] Following an overly lengthy amount of time without any Council response to the Secretariat's November 12, 2002 Notification in the Ontario Logging file, on April 2, 2003, Sierra Legal wrote a letter to the CEC Council urging them to accept the recommendation of the Secretariat. On April 22, 2003, a Council resolution with little specific guidance required the submitters to provide "further information" within 120 days or the file was to be terminated. In an *Access to Information* request filed on April 28, 2003 with Environment Canada, we asked for documents related to the Ontario Logging file. The response package, received in September 2003 (after our supplementary submission was due and filed), included a message from Steve Wendt to a Policy Advisor with Environment Canada regarding the letter sent by Sierra Legal to the Council. He writes on April 3, 2003 "I have a docket for input – from Sierra Legal Defence Fund – the incoming letter is a plea for the CEC Ministers [sic] agree on the preparation of a factual record in the Ontario logging/birds case….I do not think the CWS has new input, our views have already been communicated …" In addition, just prior to a meeting of the Alternate Council representatives for Ontario Logging in March 2003, Norine Smith (the Canadian Alternate on Council) is being advised by her staff to have a short meeting with Mr. Wendt. These records confirmed our fear that officials within Environment Canada were putting themselves in a conflict of interest position by first 'advocating' a particular position in the Party response and when those positions did not persuade the Secretariat, the same officials were allowed to offer behind closed-doors input into the Council's decision-making process. This conflict of interest was suspected, based on the similarity of the Party response and the Council resolution as highlighted in our supplementary submission on Ontario Logging (see page 15 of our August 20, 2003 supplementary submission on Ontario Logging). Since that supplementary submission, the new ATIP documents have confirmed our suspicion that officials were improperly involved in both the 'advocacy' stage of the Party Response and the 'decision-making' stage of the Council Resolution process.

The role of the head of the government unit under scrutiny in a citizen submission is no exception in the decision-making process. Indeed, it appears that throughout the course of our CEC submission there is no actual distinction between the handling of the file by Environment Canada staff and the Minister's Office. The Minister's Office made no attempt to avoid the perception of bias and indeed actively created actual bias and conflict of interest situations. And in any case, the underlying problem is that the Environment Minister is ultimately being asked to authorize an investigation of his/her own Department. This will naturally lead to a perception of bias and impartiality and thereby undermine the CEC.[10] A possible solution to this problem is that when an allegation of non-enforcement pertains to the actual department overseen by the Minister who sits on Council (which was the case in Ontario Logging), a neutral alternate representative that is not involved with the work of that Minister or the Minister's department would be appointed. Similar processes are used within government when potential conflicts like those that may arise under the NAAEC manifest themselves. This helps promote a sense of fairness and helps abide by the legal requirements associated with bias and conflict of interest.

Conclusion

As recommended in the *Lessons Learned* Report, it is essential that the citizen submission process be *timely, open, equitable, accountable* and *effective*.

The fact that "*timeliness*" has been put at risk is most obvious in the Ontario Logging file. A great deal of time passed between the Secretariat' Notification and the Council resolution, which itself created yet another delay by requiring further information. With the Council apparently attempting to re-do the work of the Secretariat, and doing its own review of what it believes to be sufficient information (including apparently requiring that information that was not available at the time of the original submission be produced), a significant delay has occurred. Indeed, two full breeding bird seasons (along with more clearcutting and more violations without enforcement) have passed since the original submission and we still await a revised Party Response. Had the Secretariat's work been respected, we would already be at the factual record preparation stage.

As is evident form the above discussion, the Council's recent decisions to "second-guess" the Secretariat and make decisions on "scope" or "sufficient information" issues behind closed-doors – and indeed in one case (Ontario Logging) actually involving the officials involved in the previous Party response – the concept of "*openness*" has been lost from the citizen submission process. Key decisions are being made in a forum that is anything but open. The process has become politicized and open to allegations of conflict of interest.

Related to the openness question, it is also clear that "*equity*" has been sacrificed as well. A process in which the submitters and the Party are allowed to "make their case" before an independent Secretariat has now largely been undermined by the creation of a situation in which the Party is able to achieve at Council what it unsuccessfully sought before an independent agency (without any involvement from the submitter). A level playing field has been replaced with an inequitable one that is being used in a way that satisfies the political desires of the Party

[10] A broader discussion of the conflict of interest issues that can arise under the NAAEC is found in the submission of Paul Kibel to JPAC dated September 8, 2003.

but undermines the principles of fairness, the work of the CEC, and the spirit and requirements of the NAAEC.

The citizen submission process is at its core, about "*accountability*". It was a key element in the NAFTA development process vis-à-vis the public and the environment. That accountability has been steadily eroded by the recent actions of Council. A desire to ensure that citizens can openly call into question important matters of non-enforcement (be they broad or narrow) has been replaced by a "bunker" mentality in which Council seeks to insulate the three governments from any possibility that systemic issues of non-enforcement will be brought to light and corrected. Public accountability has been replaced with political expediency. The casualties of this recent "evolution" of the citizen submission process include public confidence in the CEC, NAAEC and NAFTA as a whole. The Council should seriously consider the broad ramifications that its actions have had on the notion of public accountability.

Finally, with particular reference to 'downscoped' files such as BC Logging, BC Mining, and US Migratory Birds the recent actions of the Council have significantly reduced the citizen submission process' ability to "*effectively*" examine critical situations of widespread non-enforcement. In usurping the independent role of the Secretariat in those files as well as Ontario Logging, the Council has jeopardized the effectiveness of the citizen submission process and the Secretariat.

We concur with the need to ensure that the process is timely, open, equitable, accountable and effective. The recent experience has not only failed to foster those important objectives but in many ways, run directly contrary to them. Despite the significant problems raised in this submission, we are encouraged by the fact the JPAC is examining this issue and that the Council is supportive of this inquiry. At a minimum, the recent experiences in the five citizen submissions under study should provide some key lessons – lessons that will allow the process to be reinvigorated.

Sincerely,

Original signed by…

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SIERRA LEGAL DEFENCE FUND

October 23, 2003

Via Electronic Mail (mpepin@ccemtl.org)
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec, Canada H2Y 1N9

Dear Members of the Joint Public Advisory Committee:

Re: Supplementary Written Comments Related to the Articles 14 and 15

Once again, we wish to thank the members of the JPAC for their ongoing efforts concerning the citizen submission process and for the opportunity to participate in the October 2, 2003 meeting in Montreal. We have some brief additional comments concerning issues that were raised and discussed at that meeting, including:

- lessons from the BC Hydro factual record process;
- the need for a review standard or guidelines for Council decisions regarding recommendations regarding factual records; and
- how restricting factual records to narrow factual instances limits the effectiveness and utility of the process.

The BC Hydro Process

We were co-counsel for submitters on the BC Hydro factual record process. With regarding to the ongoing dispute concerning the narrowing of issues that may be investigated in factual records, it is instructive to examine the BC Hydro process. There, the Secretariat's recommendation for a factual record did not include all issues put forward by the Submitters. The most important lessons that may be drawn from the BC Hydro process is that the Secretariat is able and willing to narrow legal and factual issues as appropriate and that submitters and the public will accept those decisions, primarily because of the perceived independence of the Secretariat.

The original submission in the BC Hydro process asserted a failure to enforce the *Fisheries Act* (which was ultimately the subject of a factual record) and also challenged decisions under the *National Energy Board Act* that allowed power exports that the submitters alleged were environmentally damaging. Regarding that power export issue, the Secretariat stated:

> *Where an environmental law grants discretionary decision-making power, a Submitter must adduce evidence that under the circumstances the Party acted "unreasonably" in exercising discretion in respect of such matters. The Submitters have failed to meet this standard. As a result, the preparation of a factual record with respect to the allegations concerning the* NEB *Act is not warranted.*[1]

While the Submitters may disagree with the Secretariat's determination on its merits, the Submitters accepted this decision without challenge because the reasons for the decision were adequately set out and the Submitters were not concerned that the determination reflected anything other than a good faith assessment of the issues and evidence.

This may be contrasted with subsequent submissions such as BC Mining, BC Logging and Ontario Logging where the Submitters did not feel that Council decisions regarding the scope of factual records or sufficiency of information were adequately explained and where there was a clear perception that the Council decisions were driven by the objective of avoiding scrutiny, rather than a good faith assessment of the issues.

The specific factual instances investigated in the BC Hydro factual record were also narrowed by the Secretariat. There, the Submitters alleged that there was a failure to enforce the *Fisheries Act* at 33 separate BC Hydro facilities. The Secretariat recommended, and the Council approved, the preparation of a factual record regarding those allegations. However, once the Secretariat began to develop its work plan, it asked the Submitters whether it was necessary to consider all 33 facilities, or whether a representative sample could be investigated. Based on conversations with both the Submitters and the Government of Canada, a list of six facilities was developed. Again, the Submitters and the public accepted this decision as it reflected a legitimate concern about limited resources and there was not a perception of an attempt to avoid scrutiny of issues or factual instances.

In BC Mining, BC Logging and Ontario Logging, the Council's decisions limiting the factual instances to be investigated or questioning the sufficiency of information did not include any consultation with submitters and there is a clear perception that the decisions were driven by a desire to avoid scrutiny of certain issues and factual instances.

Because of the nature of the citizen submission process -- where a member of Council will also be the subject of the citizen submission -- there is a risk that the pubic will perceive Council's decisions as guided by the self-interest of parties rather than the spirit and purpose of the agreement. It is for this reason that decisions about narrowing factual records or determining the sufficiency of information should be made at the Secretariat level. The BC Hydro process shows that the Secretariat is both willing and able to undertake this task.

A Review Standard for Article 15(1) Recommendations

Under the NAAEC, the Secretariat performs the initial assessment of citizen submissions and makes a recommendation to Council regarding whether a factual record is warranted. As was

[1]Secretariat's Recommendation under Article 15(1); http://www.cec.org/files/pdf/sem/97-1-adv-e.pdf.

noted at the October 2 meeting in Montreal, there is no consensus regarding how much deference the Council should give to the Secretariat's assessment and recommendations.

However, it seems reasonable that the Council is neither bound to wholly accept the Secretariat's recommendation, nor is it likely intended that Council should have no regard for the Secretariat's position. It is possible to articulate standards or principles somewhere between these extremes that ensure respect for the role and independence of the Secretariat, also respect the role of the Council as the ultimate decision-maker and that are consistent with the NAEEC's goals of openness and transparency.

The analogy in the Canadian judicial system is known as the "standard of review". Canadian courts, when reviewing the decisions of lower courts or administrative bodies, analyze a number of factors to determine the appropriate deference to be given to the decision under review. Depending of the circumstances of the case, this may range from no deference (a *de novo* review) to very high deference (no interference with the decision unless it is "patently unreasonable"). We have addressed this issue in our submissions regarding the Ontario Logging submission, which are excerpted below:

> *Although we are providing the information required by the Council in its April 2003 Resolution, we believe there are both legal and public policy reasons which suggest that limiting the factual record to particular instances, as was done in the US Migratory Bird submission[28] and as appears to be suggested here, both goes beyond the Council's authority under the NAAEC and will potentially lead to a factual record that has little or no value in furthering the goals of the NAAEC.*
>
> *First, the NAAEC sets out the various powers of the Council but nowhere gives it the authority to order a factual record that is by its nature wholly different from the factual record recommended by the Secretariat. The Council is only empowered to recommend or reject the Secretariat's recommendation. This is as it should be in that the Secretariat is the expert body mandated to report to the Council. The Council's role is not that of a new or de novo panel charged with the task of determining whether the Article 14 or 15 requirements have been met.*
>
> *Second, from a public policy point of view, there is a serious danger that any interference with the Secretariat's recommendation will undermine respect for the institution of the CEC. In this case, for instance, the public will be mindful of the fact that Canada's Minister of the Environment is one of the Council members being asked to decide whether the CEC should undertake a factual record of the very ministry for which he is responsible. For this reason, a departure from the recommendation of the Secretariat should not occur, except, for example, if the Secretariat has acted in a patently unreasonable way. Allowing or encouraging the Environment Minister, his delegate, or his staff to reargue, at the Council level, the positions it took in the Party (government) response to the Secretariat is inappropriate and threatens to undermine the credibility of the CEC and the important independent role of the Secretariat.* (internal citations omitted)[2]

[2] Ontario Logging, supplemental submission; http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf, pg. 15

Given the issues that have arisen with a number of citizen submissions, we believe that it is necessary to develop a review standard or principles that appropriately and transparently set out the manner that Council uses to assess recommendations of the Secretariat.

Limiting the Scope of Factual Records Limits the Utility of the Mechanism

The Council has taken the position, with respect to numerous factual records, that only "narrow" factual instances may properly be the subject of factual records as opposed to wider patterns of non-enforcement. This approach both limits the effectiveness of the mechanism and has the practical effect of limiting the geographic scope where the mechanism may be used.

Prohibiting the examination of wider patterns of non-enforcement makes is much less likely that the lessons that may be drawn from a factual record will prompt environmentally positive changes. First, it is almost always possible to explain a failure to enforce in a particular case (e.g., inadequate evidence of a violation of law or baseline data; limited resources; characterizing the incident as an anomaly). However, when that same failure is demonstrated multiple times, failures of enforcement are not so easily dismissed. Moreover, it is more likely that a factual record's observations about patterns of enforcement will influence future, prospective decision, preventing environmental damage.

As a practical matter, the most environmental laws in the United States contain "citizen suit" mechanisms that allow its citizen's to challenge the failure to enforce law in a particular instance. What is unavailable in US law is the ability to challenge a wider pattern of non-enforcement. This raises concerns about discrepancies in of rights of public participation and of discrepancies in the level of environmental protection. But is also means that almost all citizen submissions will be directed at the governments of Canada and Mexico. The current position of Council will make the United States effectively immune from the citizen submission process, which will ultimately undercut the credibility of the process.

Sincerely,

Original signed by…

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TRANSBOUNDARY WATERSHED ALLIANCE

16 September 2003

Attention: Manon Pepin - mpepin@ccemtl.org
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec H2Y 1N9

Dear Committee members:

Re: JPAC Review of Citizen Submission Process

I am writing on behalf of the Transboundary Watershed Alliance (TWA), an alliance of 23 conservation and environmental organizations from both sides of the border working to promote healthy watersheds and healthy communities in the large contiguous region shared between northwestern British Columbia and Southeast Alaska. We have been involved in the Article 14 citizen submission process in the BC Mining file, specifically with respect to the Tulsequah Chief Mine, an abandoned copper mine located on the Tulsequah River in northwest British Columbia. I trust that our reflections on our experiences in the citizen submission process will be useful to you as you review and work to improve that process.

One of our member organizations, the Taku Wilderness Association, was a Submitter on the original BC Mining submission to the Secretariat of the CEC. Our alliance supported that submission because we view the Article 14 process as an essential mechanism for scrutinizing non-enforcement of North American environmental laws and the ramifications of such non-enforcement. Our experience with the Article 14 process has unfortunately eroded our confidence in its utility, since we have witnessed how the process can be undermined by overly narrow investigations or by Council interference in areas within the Secretariat's expertise.

The BC Mining process was certainly a valuable exercise in that it brought attention to the long-standing and long overlooked environmental problems at the abandoned Britannia mine site. We are very concerned, however, that the Council instructed the Secretariat not to consider the Tulsequah Chief mine, which remains a major concern for our Alliance, or the Mount Washington mine. We can comment in detail only on the Tulsequah Chief, where non-compliance with Canadian law relating to environmental protection and the protection of salmon and salmon habitat continues to be a concern. Five years after Canadian federal scientists first confirmed a serious acid mine drainage problem at the Tulsequah site (reconfirmed on two subsequent visits), there has been no progress made toward addressing it. A factual record including the Tulsequah Chief mine site would have been valuable in highlighting non-enforcement of Canadian

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environmental law there, but also in drawing attention to what appears to be a problem of systemic non-enforcement related to abandoned mine sites in British Columbia.

For North American publics as well as non-governmental organizations to retain their confidence in the process, we strongly recommend that it be reaffirmed that it can examine both narrow and broad issues of non-enforcement. We also recommend that the process be improved so that the Secretariat's decisions on the scope of investigations and the sufficiency of information will be supported and respected. If there is continued evidence that the process is subject to interference or undue constraints on the latitude of investigations, it will cease to be an accountability mechanism of any importance in addressing critical issues of non-enforcement.

Thank you for your efforts in relation to this matter.

Sincerely,

David MacKinnon
Canadian Field Coordinator

Rivers Without Borders

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October 21, 2003

Ms. Manon Pepin
Joint Public Advisory Committee (JPAC) Liaison Officer
Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec, Canada H2Y 1N9

Dear Ms. Pepin:

I am writing in response to the JPAC request for comments on issues related to the implementation and further elaboration of Articles 14 and 15: limiting the scope of factual records and the review of the operation of CEC Council Resolution 00-09.

1) Limiting the scope of factual records:

With regard to the issue of limiting the scope of factual records, a central issue appears to be differences of opinion between the Parties and submitters in question regarding the definition of "*effectively enforce its environmental law*" as set forth in Article 45.1.

First, Article 45.1 sets out two areas where government action or inaction is not a failure to effectively enforce its environmental law, both of which appear relevant to the issues raised in the relevant submissions. Second, Article 45.1 begins with the wording "*For the purposes of this Agreement*," which is a clear indication that the definition applies to the NAAEC as a whole, including Articles 14 and 15, and not just Part V as indicated by the Secretariat.

As the link with Article 45.1 was not explored in the preliminary report prepared for the JPAC, this issue should be addressed prior to any final JPAC recommendations to the Council. Looking forward, one option to resolve this issue is to include Article 45.1 in the Guidelines for Submissions on Enforcement Matters, which is not currently done, along with language concerning what types of enforcement functions would fall under the exceptions.

2) Review of the operation of CEC Council Resolution 00-09:

Resolution 00-09 was adopted in order to provide for the proper functioning of the Articles 14-15 process and an orderly assessment of what changes, where necessary and appropriate, should be made to that process. Where the process had always been based on the principles of transparency, fairness and due process, Resolution 00-09 was intended to add the principle of stability.

Following its adoption, some of the activities called for in the resolution have been carried out, including the JPAC's development of the Lessons Learned report. However, the process appears to have suffered from reduced communication between the Council, the JPAC and the Secretariat. Part of the value of the resolution was the open dialogue between these groups that is both explicit and implicit in the process. As increased communication between these actors would help maintain the stability and predictability of the Articles 14-15 process, the JPAC should consider recommendations toward that end.

I hope these comments are helpful. Please feel free to contact me with any questions.

Best regards,

Adam B. Greene
Director, Environmental Affairs
& Corporate Responsibility

SENT BY EMAIL AND REGULAR MAIL

September 12, 2003

Attention: mpepin@ccemtl.org <mailto:mpepin@ccemtl.org>
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec H2Y 1N9

Re: JPAC Review of Citizen Submission Process

Dear members of the Joint Public Advisory Committee:

I am writing on behalf of the Wildlands League, a chapter of Canadian Parks and Wilderness Society, to express our concern about the integrity of the CEC citizen submission process with regard specifically to the Ontario Logging file.

The Wildlands League is a non-profit conservation organization working to protect wilderness in Ontario since 1968 and more recently, to ensure that forestry on public lands is sustainable.

Represented by the Sierra Legal Defence Fund, we have been involved in the Article 14 submission process regarding the impact of clearcut-logging on migratory birds and Canada's non-enforcement of the Migratory Birds Convention Act. We are concerned that the integrity of the submission process is being undermined by the CEC Council's actions to limit the citizen submission process and the Council's failure to respect the independence and judgment of the CEC Secretariat.

The Article 14 process is key to raising significant issues about the non-enforcement of environmental laws throughout North America and ensuring that governments are held accountable. To be effective, the process must be timely, open and equitable, and not subject to political manipulation by the Council. It should cover all issues of non-enforcement, whether narrow or broad in scope, and should not place undue demands on those making submissions (as in the Ontario logging case, where tens of thousands of dollars were spent by groups to compile the information requested).

We recognize that the Joint Public Advisory Committee is undertaking a review of the Article 14 submission process, and appreciate your strong and continued efforts to ensure that the process is fair, accountable and effective.

Yours truly,

Dr. Anne Bell
Acting Executive Director

October 23, 2003

Gustavo Alanis-Ortega, Chair
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
303 rue St. Jacques Ouest, Bureau 200
Montreal Quebec
H2Y 1N9

Dear Mr. Alanis-Ortega,

Re: Further comments on Articles 14 and 15

Congratulations on the high quality of the October 2 meeting in Montreal. It was enlightening and inspiring, and I feel fortunate to have been able to participate.

In my earlier written comments (September 12, 2003) to JPAC regarding the citizen submission process, I stressed the importance of maintaining a timely, open and equitable process, free from political manipulation by the Council. In light of the October 2 discussions, I would like to add the following points:

1. For the submission process to be open to the citizens, it has to be *doable* by the citizens. This means that requirements about the information that has to be submitted by citizens have to be reasonable in terms of costs and human resources. The Ontario Logging file, to which the Wildlands League is a party, has cost the non-profit organizations involved tens of thousands of dollars so far to obtain the necessary information. First, we had to obtain and analyze enough data so as to attempt to avoid the restricted scope situation that occurred in the US Migratory Birds file (i.e. providing data on a wide range of non-enforcement situations, rather than just one or two examples, so as to ground an allegation of widespread non-enforcement). Second, we had to obtain the additional information requested by Council, most of which was not even available at the time of the original submission. This, in my opinion, is a far too heavy burden to be carried by groups like my own (and an even greater burden for the average citizen), and is a strong disincentive to public participation, particularly when, as in this case, the recommendations of the Secretariat are likely to be overturned by the Council. I believe that the final JPAC report should emphasize that this is supposed to be a *citizen* submission process. If procedural and financial hurdles to participating remain as high as recently set by the Council, the process could no longer be legitimately termed a *citizen-friendly* process. I also believe that the final report should recommend that submissions that utilize a limited number of examples (as was the case for the four completed factual records under review) are sufficient for proceeding with a factual record regarding widespread non-enforcement. The Secretariat's factual record development process (not a Council resolution) is the appropriate forum for subsequently determining how wide-ranging an inquiry will be conducted. If an inordinate amount of information is required at the outset just to try to get past the Council resolution stage, citizens will become reluctant to use the process, and the credibility of the process and CEC will be undermined.

2. I disagree strongly with those participants (the minority) who felt that by limiting the scope of the investigations the Council was putting forth an acceptable compromise position. These yes/no answers (i.e. a 'no' disguised as a 'yes') are not an acceptable compromise. They result in a lack of clarity about the issues under investigation. Or worse, the key issue being put forward by the public (e.g. issues of widespread non-enforcement) is lost altogether.

3. An example of an acceptable compromise to scoping, in light of the comments made by Randy Christensen of the Sierra Legal Defence Fund, might be the approach taken in the B.C. Hydro case. In this case, the Secretariat sought input from the submitters and Canada about limiting the scope of the investigation. This approach adequately addressed the issues because the group was able to ensure that a sufficient number of highly pertinent specific cases were included in the investigation. In addition, the role of the Secretariat throughout this scoping exercise and the production of the factual record was open and transparent, and thus very much in keeping with the goals of the CEC regarding public participation. If the scope of investigations has to be narrowed in the future, then I recommend that an approach like that taken in the B.C. hydro case be adopted: i. ensure adequate participation of the group making the submission; ii ensure that an adequate number of highly pertinent examples are included; and iii. ensure that it is the expert Secretariat that makes the decisions on the ultimate scope of the investigation after it is decided that a factual record will be prepared.

4. I agree with the participants at the October 2 meeting that transparency of decision-making is key to the success of the citizen submission process. Dialogue with the Council around Articles 14 and 15 should be encouraged, and to this end, JPAC should seek responses from the Council about the issues at hand as well as explanations from the Council about the decisions that it arrives at. Concerns about political interference are undermining the credibility of the CEC, and if credibility is to be restored, the Council will have to be fully accountable to the public about the role that it plays.

Thank you once again, for inviting further comments on the citizen submission process. I truly appreciate the role that JPAC is playing to ensure that public participation in the CEC is meaningful.

Yours sincerely,

Anne Bell, Ph.D.
Acting Executive Director

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