Comments from the public on the perception of an inherent conflict of interest in the North American Agreement on Environmental Cooperation

On 5 November 2004, the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) solicited public comments on the perception of an inherent conflict of interest in the North American Agreement on Environmental Cooperation (NAAEC).

Initially, the issue was raised in JPAC Advice 03-05 on limiting the scope of factual records and the review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the NAAEC, which stated the following:

> Further related to this matter is an emerging perception of Council being in conflict of interest. This was most recently clearly stated in the public meeting where is was noted that "Council is having a hard time differentiating their role—when they are acting as a Council and when they are acting individually as Parties." JPAC was specifically asked by the public to raise this issue with Council.
>
> During its regular session, held on 4 December 2003, JPAC discussed this complex issue. While this may indeed reflect a structural challenge within the NAAEC itself, with regards specifically to the citizen submission process, JPAC is concerned that the influence of the Parties is being reflected in Council decisions. JPAC considers this to be of sufficient concern as to warrant further analysis. Following this analysis, JPAC will develop an opinion on how best to proceed to address this matter and will advise Council accordingly.

In its response to the JPAC Advice 03-05 dated 3 June 2004, the Council stated:

> Your advice also raises concern regarding a Party's potential conflict of interest under Articles 14 and 15 as a member of the Council and as an individual Party. The Council understands you will be analyzing this matter more fully in the future. Should you indeed decide it to be necessary to analyze this matter more fully in the future, it will be important to bear in mind that the Parties have a duty and an obligation to carry out their responsibilities as set out in the NAAEC. The Council is very cognizant of the challenge presented by its decision-making roles in the public submission process and for this reason it takes great care to exercise its various responsibilities in strict accordance with the agreement.

At the JPAC Regular Session held in June in Puebla, JPAC agreed to extend the analysis to the NAAEC structure and not to limit this issue to Articles 14 and 15. JPAC further decided to commission a report on this issue and hired Gustavo Carvajal, a lawyer from Mexico, to prepare it. At its last regular session held in Montreal on 27 and 29 October 2004, JPAC decided to solicit comments from the public on this issue and to offer the report prepared by Mr. Carvajal, entitled "Inherent conflict of interest built into the North American Agreement of Environmental Cooperation" as a background document for this review. The report presents an analysis of the issue and recommendations on ways to create a balance between when Council members and

their Alternative Representatives are acting as representatives of their governments (Parties) or as Council. This report does not necessarily represent the opinion of the JPAC.

JPAC will now discuss the issue; including any comments received from the public, and will decide on whether or not to provide advice to Council on this matter.

Comments were received from the following people and institutions, are attached hereafter in the language in which they were received:

1. Jon Plaut, USA
2. Jeanny Romero, Switzerland
3. Carlos Yruretagoyena, Mexico
4. Andrzej Zeromski, Mexico
5. Sierra Legal, Canada
6. USCIB, USA
7. Policy West, USA

From: JPlaut@aol.com [mailto:JPlaut@aol.com]
Sent: Monday, November 08, 2004 5:36 PM
To: Info CEC
Subject: Re: JPAC calls for comments on the perception of an inherent conflict of inte...

To JPAC - My comment is a general, but important one, I think. While the study of the problem evidenced by "parties" vs "Council" may be at the heart of the continued misunderstanding of whether the Council is made up of the three separate parties which necessarily have three separate views and political courses, or represents one unified interest, the use of the term "conflict of interest" is unfortunate, since it suggests wrong doing and thus engenders defensiveness. I would suggest scrubbing the document to substitute a term like "leadership and administrative confusion" for "conflict of interest" and then submitting it to Council for discussion with them in a structured conversation at the next annual meeting. If agreement can be reached as to the problem, then perhaps JPAC can work with the Council in framing a guidance document for the Council and the public to avoid any suggestion of alteration of the Agreement, which might be extremely harmful and controversial.

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Comments on the perception of an inherent conflict of interest in the North American Agreement on Environmental Cooperation (NAAEC)

by Jeanny Romero Gonzalez[*]

In response to the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) solicitation for public comments regarding the perception of an inherent conflict of interest in the NAAEC, I present the following views for consideration. I hope this serves to encourage the public, as myself, to keep informed and actively enrolled (as opposed to passive observers) in JPAC efforts to improve the CEC functioning.

First of all, allow me to congratulate Mr. Gustavo Carvajal for his final report, and for revealing in a very clear manner (reachable, even for those who are not familiar with the legal basis and the importance of Articles 14 and 15 of the NAAEC) what the problem is and how this could be solved. This doesn't mean in any way that it is the only alternative, but it obviously opens the window for further discussion within the JPAC itself.

Taking Mr. Carvajal's final report as a background, as well as a personal research paper presented at McGill University[1], and by lately attending to the JPAC Regular Session held in Puebla, Mexico, I am in the position to state (from a general public standing point of view) that there is, indeed, an obvious conflict of interest within the NAAEC, in particular, with the Council's responsibilities and the achievements of the Agreement's goals. Puebla was a proof of the lack of impartiality between the Council's functions and the Parties' domestic agendas. The Council is *not listening* to the public and to JPAC's work and opinions. This **inherent conflict of interest** translates into frustration, lack of confidence on the system, and lack of enforcement where clear enforcement is needed.

In my humble opinion, JPAC should strongly consider to present all relevant documents and opinions presented in this matter to the Council. The Council, from its part, has an evident obligation of revising these opinions, and acting accordingly. The Council shall bear in mind this very simple reasoning, which is that the **inherent conflict of interest** within the NAAEC resides in that the Parties and the Council functions lie on the same *physical person*. In a practical sense, it is completely understandable that they cannot

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[*] *Bachelor of Laws (Escuela Libre de Derecho de Puebla, México, 2001). Master of Laws (McGill University, Montreal, Canada, 2004). Presently, fulfilling an internship position at the Permanent Mission of Mexico before the World Trade Organization (WTO), Geneva, Switzerland.*

[1] "An Analysis of the NAAEC-CEC Enforcement Mechanism and the Citizen's Submissions Procedure through a Case Study: Cozumel", International Environmental Law Course, McGill University, Faculty of Law, 2003 [unpublished]. In this context, it is relevant some issues raised in relation to the CEC Citizen Submissions on Enforcement Matters, its weaknesses and flaws, at 22 ff., and the conclusions.

disassociate their functions; the Parties' views will inevitably come out at any time. In other words, it is almost impossible to *take off* one jacket and *wear* another one 'on top': I see this more as a 'disguise' than an actual change of roles.

In my opinion, the following elements should be taken into consideration:

1. The Report's argument in relation to Article 10(1)(d).
2. The importance of Council's independence from Parties (Article 9(5)(c)).
3. The elaboration of **guidelines** to which the Council shall refer when deciding whether the Secretariat shall prepare a factual record or not (Article 15(2)).
4. The comparative legal analysis of useful international models and institutions to improve (as opposed to dramatically change) the current scheme.
5. The importance of reasoned denials from the Council (special attention to the last paragraph of the Report's recommendations in this respect) in order to help future submitters.[2] It is extremely important to keep attention on **accessibility and transparency.**

[2] See, Jane Gardner, "Analysis Articles 14 and 15 of the NAAEC Council's 'Emerging Conflict of Interest'", 28 April 2004, Discussion paper, available at: CEC, online: http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=1645 (last visited: November 18, 2004).

From: Carlos Yruretagoyena [carlosy@fapsa.com.mx]
Sent: Friday, November 19, 2004 6:16 PM
To: Carla Sbert
Subject: comentario sobre los posibles conflcitos del consejo

Estimada gente: leyendo su documento me quedo con la idea de que se encuentran todos uds (secretario-jpac y consejales) en un punto del camino de su actuar como miembros de la cce, que merece reflexion y analisis…..los tiempos cambian y las situaciones de conflcito ambiental, disputas entre acusados y acusadores; estilos de gobiernos y de los gobernantes tambien cambian….su hacer se ve influenciado por razones que ya hoy en dia no son las que le dieron a la cca vida…no hay esa robusta participación ciudadana y quizas tambien ese consejal o consejo esta ahora mas acostumbrado a tomar acciones y no tanto a dar consejo……aquel triangulo que funciono entre gobiernos-ciudadanos y consejales ya no esta igual en balance y fuerzas…de ello se sucitan quizas los conflictos del actuar y de la responsabilidad de todos los actores……por que se cambio algo que si funcionaba…quizas el caso mas facil de analizar lo encuentren en la cocef….por sugerencias de alguien se elimino la participación ciudadana de ese organismo…ya no hay un grupo ciudadano de consejeros y por ello el banco (natbank) y la cocef son ahora "otra mas estructura de financiamiento de proyectos" el ciudadano ya no opina ni mucho menos se entera o vigila…eso causara sin duda friccion y quizas conflcitos de intereses y de un actuar profesional de los miembros que quedara corto por el solo hecho de que nosotros los ciudadanos, los que pagamos impuestos y de donde se les paga para su funcion ya no tenemos nada que decir ni nada que vigilar…por eso este conflcito ahora es solo de uds….no pidan consejo a sus ciudadanos dado que ya no lo han tomado en cuenta……o bien decidan meter la carreta de la cca en reversa y retomar el verdadero rumbo que fue "un ambiente sano apoyado por una ciudadania informada y participativa dentro de una sociedad productiva y sustentable" compartida respetuosamente y con equidad entre nuestras tres naciones…..les deseo mucha suerte y espero que ahora no sea el consejo el blanco que esta en la mira de gobernadores poco sensibles (el primer blanco fueron los proyectos ambientales) ahora quizas siguen uds. Gracias
carlos yruretagoyena

COMENTARIOS SOBRE LA PERCEPCIÓN DE UN CONFLICTO DE INTERESES INHERENTE EN EL ACUERDO DE COOPERACIÓN AMBIENTAL DE AMÉRICA DEL NORTE (ACCAN)[*]

Andrzej Zeromski[**]

Observaciones Generales

El informe presentado por el Sr. Gustavo Carvajal Isunza manifiesta un alto profesionalismo y se encamina hacia la funcionalización y regulación de los trabajos de la CCA. No estoy seguro si para al fin pueden resultar útiles los documentos de la Comisión de Trabajo y Comercio —la problemática ambiental es mucho más compleja. Además, no conozco los documentos de la comisión mencionada.

Creo que es necesario cambiar el modelo conceptual de referencia para la CCA. Las controversias que surgen del modelo actual tienen su fundamento sobre todo en la diversidad cultural de las Partes, y se manifiestan en sus comportamientos y acciones ambientales, las cuales son sumamente diferenciadas. Sin duda, las experiencias europeas al respecto son muy valiosas y hay que seguirlas de cerca.

I

El autor del informe analiza las incongruencias presentes en el texto del documento del ACAAN, pero no reflexiona sobre si el texto mismo responde a la realidad externa que representan las Partes. Se trata del espacio geográfico del continente y de tres naciones que son diferentes en lo

[*] Elaborado con base en el informe preparado por el Sr. Gustavo Carvajal Isunza, titulado: "El Acuerdo de Cooperación Ambiental de América del Norte y su conflicto de intereses inherente. Informe final". Septiembre de 2004, 29 pp.

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referente a su herencia cultural, religiosa y humanista. El texto del ACAAN debe manifestar la voluntad de las Partes para superar sus divisiones al respecto, con base en un enfoque entendido en términos de "la unidad en la diversidad".

II

Las resoluciones del Consejo deben ser guiadas por un espíritu enfilado hacia la conformación del medio humano en el continente, reconsiderando, sin embargo, que los ciudadanos parten de diferentes puntos de vista en torno a la problemática en cuestión (pág. 5).

Lo anterior se refleja en la falta de orientación al interior de la CCA, y en el vacío de liderazgo en el Consejo. En resumen, no está clara la visión y participación de cada Parte, lo que debe aclararse en un nuevo documento del ACAAN (pág. 6).

III

El asunto de "cómo manejar todo posible conflicto de intereses inherente (...)" se relaciona con que las Partes juegan en realidad funciones opuestas dentro del ACAAN, las cuales deben ser tratadas como complementarias. Hay que reconsiderar esta cuestión, y puntualizarla de manera nueva y diferente. Los distintos intereses pueden ser reconciliados dentro del enfoque del equilibrio dinámico entre las Partes, y a largo plazo.

IV

Creo que debe modificarse el objetivo y propósito del ACAAN, que en estos momentos es "promover y alentar la protección y el mejoramiento del medio ambiente". La efectiva promoción y alentamiento de dicha protección depende del potencial y del estatus económico de las Partes, que son desiguales. El propósito central debe dirigirse hacia la conformación del

medio humano, a través del continuo mejoramiento del medio ambiental, en el cual se deben desarrollar las acciones de eficiencia económico-ambiental, de conservación de la naturaleza, así como de la funcionalización (regulación) del ambiente humano.

La falta de precisión conceptual (qué se entiende por "ambiental", por ejemplo) causa confusión en el manejo del Consejo y de las Partes. El Consejo podría ser una entidad independiente si se reconociera que cada Parte jerarquiza y valoriza de forma diferente los procesos que forman parte de la meta común.

V

Es necesario crear un comité interno que ayude a regular las acciones del Consejo dentro de un sistema tripartito. El Consejo no puede actuar como "juez y parte", sino solamente como juez, lo que significa que debe defender valores comunes a las tres Partes (pág. 20).

Un conflicto de intereses en el ACAAN deriva de la ausencia de determinación de un "metaproceso" que guíe las relaciones entere el hombre y la naturaleza, asunto que no ha sido considerado hasta el momento de forma sistemática.

La misión adoptada por la CCA no puede ser aplicada de forma homogénea para todas las Partes, por una sencilla razón: las mismas son económica, social, política, ambiental, espiritual y culturalmente diferenciadas, y ello ha de ser tomado especialmente en cuenta.

Guadalajara, Jal., México, 7 de diciembre de 2004

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December 7, 2004

Via Email: csbert@ccemtl.org
Commission for Environmental Cooperation
393, rue St-Jacques Ouest
Bureau 200
Montréal (Québec)
H2Y 1N9 Canada

ATTN: Carla Sbert, Interim JPAC Liaison Officer

Dear Ms. Sbert,

Re: Inherent Conflict of Interest and the CEC

We would like to thank the Joint Public Advisory Committee (JPAC) for its continued commitment to ensuring that *North American Agreement on Environmental Cooperation* (NAAEC) achieves its full potential in fostering the protection and improvement of the environment and also promoting transparency and public participation in the development of environmental laws, policies, and regulations. Since the inception of the Commission for Environmental Cooperation (CEC), the JPAC has been determined in defending the interests of the public. We are grateful for these efforts.

Once again, with this review of the "inherent conflicts of interests" in NAAEC, members of the public and advisory groups must try and persuade the Parties to uphold the purposes and objectives of the NAAEC. Although the JPAC has diplomatically described this situation as an "emerging perception of a conflict of interest," the underlying problem is far more than a perception and is more accurately described as entrenched in the carrying out of the Agreement.

The inability of Council members to embrace the spirit and intent of the NAAEC is the most troubling aspect of the CEC's ten-year history.

We begin our comments with a brief summary of our previous participation in CEC initiatives, after which we address two sections of the Isunza report:

Conflicts within specific provisions of the NAAEC; and
II. Recommendations.

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Sierra Legal Defence Fund's Participation in CEC Initiatives:

Sierra Legal has served as legal counsel to individuals or non-governmental organizations on five citizen submissions that have proceeded to factual records: BC Hydro; BC Mining; BC Logging; Ontario Logging; and Pulp and Paper. Additionally, Sierra Legal is counsel on two other citizen submissions currently in progress: Ontario Logging II and U.S. Coal-fired Power Plants. Sierra Legal representatives have also participated in CEC meetings including:

attendance at the JPAC meeting and CEC forum on *Building a Renewable Energy Market* in October 2004;
preparation of Comments and Participation in the JPAC Public Review of Articles 14 and 15 (Montreal, QC), October 2003;

- attendance and an address to Council at the 10th Annual Council Meeting (Washington, DC), May 2003;
  speaker, NAWEG Conference (Washington, DC), March 2002;
- participant, Electricity and Environment Forum (San Deigo, CA), November 2001;
- submission of comments and workshop participation in the *Lessons Learned* initiative, 2000 - 2001
- attendance and an address to Council at the Annual Council Meeting (Dallas, TX), June 2000;
- attendance and an address to Council at the Annual Council Meeting (Banff, AB), June 1999; and
- participation in Citizen Submission Guidelines Revision Workshop, (Montreal, QC), January 1999.

I. CONFLICTS WITHIN SPECIFIC PROVISIONS OF THE NAAEC

We have divided our comments between conflicts related to the Council's general powers (Articles 9 and 10) and conflicts related to the citizen submission process (Article 15).

1. Council's General Powers – Articles 9(5)(2), 10(1)(c) and 10(1)(d)

Article 9(5)(2): This article has been interpreted by the Council and by the Consultant preparing the report as "Council may take any action in the exercise of its function as long as the Parties may agree." However, this is not how the text reads. Section 9(5) states:

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The Council may:

> (a) establish, and assign responsibilities to, *ad hoc* or standing committees, working groups or expert groups;
>
> (b) seek the advice of non-governmental organizations or persons, including independent experts; and
>
> (c) take **such other action** in the exercise of its functions as the Parties may agree. (Our emphasis)

It is important to note that the NAAEC does not say "take *any* action" but instead says "take *such* other action." The use of the word "such" indicates that the types of actions appropriate for the Council are those similar to the explicit actions described in Articles 8(5)(a) and (b).

This reading is consistent with general rules of legal interpretation. The "power" set out in Article 9(5)(c) is a general statement that directly follows specifically enumerated powers. The statutory construction rule of *ejusdem generis* (the "limited class rule"), which is accepted in both Canada and the United States, provides that:

> Under "*ejusdem generis*" canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.[1]

Article 9(5) designates a limited class of powers that the Council may exercise. Article 9(5)(a) allows Council to work with ad-hoc working groups or experts. Article 9(5)(b) allows Council to seek the advice of NGOs or expert groups. Clearly, Article 9(5) is intended to provide Council with the authority to consult and work with individuals or groups outside the CEC. Article 9(5)(c) must be read in this spirit.

In short, if Article 9(5)(c) were intended to provide the Council with such a broad, unfettered grant of authority, it would be worded differently and would not be presented as a sub-article of a sub-article.

Additionally, the language of Article 9(5)(c) contains the restriction "in the exercise of its functions." The Council's functions are specifically enumerated in Article 10. Again, this cannot reasonably be read as allowing Council to "take any action it agrees on." Rather, Council is allowed to take "such other action" when exercising specifically defined functions.

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[1] *Blacks Law Dictionary*, definition of "ejusdem generis," (West, Sixth Edition), p. 517. See also, *Driedger on the Construction of Statutes*, (Buttersworth, Third Edition), p. 203.

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Council's powers must also be exercised in a manner consistent with the purposes of the NAAEC. Whenever a Party to the NAAEC votes in a manner protective of its "national interests" and contrary to the spirit and intent of the NAAEC, it is misinterpreting the NAAEC and misusing the discretion granted to the Parties.

In summary, we believe that any conflict in relation to Article 9(5)(c) does not arise from the text of the NAAEC, but from the Parties wilful refusal to interpret the text in a manner consistent with objectives and purposes of the NAAEC.

Article 10(1)(c). This Article provides that the Council will "oversee the Secretariat."

It is clear from the text of the NAAEC, that the Council is intended to be the governing body of the CEC. There are numerous instances in the operation of the CEC where such oversight is necessary and appropriate – items such as approval of budget, hiring of the Executive Director, and approval of annual work plans.

That being said, the word "oversee" does not imply that the Council should interfere in every instance where the Council is uncomfortable with decisions taken by the Secretariat. This is particularly so in respect of decisions in relation to Articles 14 and 15, where the respective roles of the Council and the Secretariat are clearly defined.

As stated above, when the Council exercises oversight in relation to the Secretariat, that oversight must be consistent with the purposes and objectives of the NAAEC. In other words, Council's oversight function should not be used to undercut objectives such as the protection of the environment and transparency in environmental law enforcement.

Article 10(1)(d): This article allows Council to "address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement."

The key word in Article 10(1)(d) is "address". It is clear that the choice of the word "address," rather than a word such as "decide," "determine" or "answer," indicates an intention that Council play an important role in resolving differences between the Parties, but not that Council has authority to decide these issues without regard to roles of other stakeholders under the agreement.

Reading the NAAEC as a whole, there is a strong emphasis on transparency and consensus, as well as a carefully designed structure that provides for *three* primary sections (the Council, Secretariat, and JPAC). The NAAEC also sets out roles for other advisory groups (NACs, GACs) while specifying a prominent role for members of the public through direct participation.

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We respectfully submit that interpreting the NAAEC in such a way as to allow Council to simply determine "questions" as they see fit, without regard to the roles of other stakeholders is a grave misapprehension of the spirit and intent of the NAAEC.

2. The Citizen Submission Process – Article 15

Articles 15(2) and 15(7) provide that the Council shall vote on recommendations to prepare factual records and vote on the publication of final factual records respectively. Thus, the NAAEC clearly contemplates that the Council will choose not to prepare or publish factual records in some cases.

The difficult issue is determining the types of situations where not preparing or publishing factual records would be appropriate. Some situations seem less contentious – such as a situation where there are so many citizen submissions that the Secretariat could not manage preparation of a factual record for each. To date, however, this situation has not presented itself.

Other situations are more troubling. Two past citizen submissions, *Quebec Hogs* and *Ontario Logging* merit examination.

Quebec Hogs:

In 1997, a number of nongovernmental organizations based in Quebec filed a submission asserting that numerous livestock operations in Quebec were operating in violation of several environmental laws. The Submitters further claimed that the pollution discharged from these operations in violation of the law was causing significant harm to the environment and human health.

The Government of Canada, in its response to the Submission, did not deny the existence of discharges from agricultural operations exceeding regulatory limits, but still argued that a factual record should not be prepared on the basis that there was evidence that the Government of Quebec was engaged in some "incentive-based" regulatory actions that attempted (unsuccessfully) to achieve compliance. Canada also argued that as the Quebec regulatory regime had been modified, a factual record concerning non-compliance under the previous regime would serve no purpose.

The Secretariat, after reviewing the claims put forward by Canada, recommended that a factual record be prepared. The Secretariat set out in considerable detail numerous regulatory violations that had gone unaddressed by provincial regulatory efforts and in

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addition stated that the previous regulatory regime was so similar to the current regime that any lessons drawn from the factual record would be applicable to the new regime.

Despite the Secretariat's recommendation and reasons supporting it, the Council voted against the preparation of a factual record without providing any explanation for its decision.

Ontario Logging:

In February 2002, a coalition of Canadian and American non-governmental organizations filed a submission alleging that Canada is failing to effectively enforce the *Migratory Birds Convention Act* and its regulations against the logging industry in Ontario. The Submitters estimated, based on statistical data, that in the year 2001 clear-cutting activity destroyed over 85,000 (subsequently revised to 44,000 given that not all projected harvest took place in the year anticipated) migratory bird nests --a violation of the *MBCA* --- and further claimed that no enforcement action was taken with respect to these violations.

After a review of the Submission and Canada's Response, the Secretariat recommended that a factual record be prepared. Again, Council did not accept the Secretariat's recommendation, stating "the submission does not contain the sufficient information required to proceed with the development of a factual record at this time." Instead of terminating the submission, the Council instead "granted" the submitters 180 days to provide additional information. Many commentators have taken the position that the examination of the sufficiency of information and the direction to provide further information is *ultra vires* the Council under the terms of NAAEC.

Consistent with previous interpretations that only site-specific allegations of non-enforcement could be reviewed under the NAAEC, the Council took the position that a submission containing only evidence of systemic non-enforcement lacked "sufficient information." There was no suggestion of a practical inability to assess allegations concerning widespread patterns of non-enforcement raised in the submission, only that the Secretariat lacked the jurisdiction to entertain such a question.

The submitters did provide additional information, but not related to specific incidents. Instead, the submitters provided additional and refined data regarding the widespread pattern of non-enforcement. The submitters themselves described this process as "having to provide a 'factual record' in order to get a factual record." More importantly, the

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submitters' decision to provide further information related to only the patterns of non-enforcement set the stage for another face-off. The Council would have to either terminate the submission – and accept the attendant political fallout – or abandon its interpretation regarding patterns of non-enforcement.

During the period between the filing of the additional information and the Council's decision, the submitters and others undertook efforts to put pressure on the Council to authorize a factual record as proposed by the Secretariat. The JPAC even undertook a public review that resulted in an "Advice to Council" whereby JPAC "strongly recommends that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat." The Advice also criticized the Council's decision to examine and reject the "sufficiency of information" in *Ontario Logging* noting that in setting the bar for "sufficient information" too high, the Council may render it prohibitively difficult for citizens to participate in the process.

In both cases, it is apparent that Council decisions to deviate from the advice of the Secretariat were driven by a desire to preclude or limit investigation of failures of enforcement, rather than being driven by rationale consistent with the spirit and intent of the NAAEC.

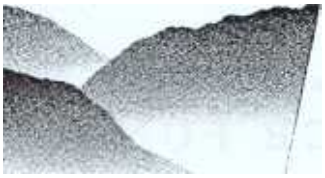
II. RECOMMENDATIONS

Based on our experience with the CEC, we make the following recommendations to improve the operation and restore public confidence in the CEC. Our recommendations are grouped around two major themes, namely, transparency and the independence of the Secretariat.

A. Transparency

Transparency is increasingly recognized as an essential aspect of the governmental decision making process, particularly with regard to environmental matters that concern balancing powerful economic interests with the public interest in a healthy environment.. This rationale is at the core of the NAAEC purposes and provisions.

Unfortunately, there is little if any transparency in the decision making that takes place at the Council level. Even where there has been some acknowledgement of the need for transparency, true transparency has not been achieved. An example is Council Resolution 00-09 committing Council to providing written reasons when its decisions depart from recommendations of the



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Secretariat. In practice, reasons subsequent to Resolution 00-09 have been perfunctory and do not reflect the reasoning process or considerations leading to the decision.[2]

In *BC Mining*, Canada's Response to the submission asserted that two of the three mines that were the primary focus of the complaint were "subject to administrative or judicial proceedings."[3] The Secretariat, in its recommendation to Council, engaged in an extensive consideration of whether the circumstances cited by Canada fell within "judicial or administrative" proceedings under the NAAEC and concluded that "none of the actions Canada has taken in relation to the three mines falls within the definition of "judicial or administrative proceedings" under Articles 14(3) and 45(3)."[4] The Council, in rejecting the recommendation of the Secretariat, simply stated that its decision to remove the two mines from the scope of the factual record was based on Canada's assertion that the mines were subject to administrative proceedings. The Council made no effort to explain why the Secretariat's view of the facts or its interpretation of the NAAEC was rejected.[5]

The Council's resolution in the *Ontario Logging* case presented similar concerns. In this case, the Secretariat had recommended that the factual record could and should be prepared with relation to the concerns of the submitters,[6] yet the Council Resolution simply stated that "the submission does not contain the sufficient information required to proceed with the development of a factual record at this time."[7]

Recommendation:

> Council should commit to provide full and accurate written reasons in relation to all decisions made under Articles 14 and 15, as well as other decisions of significant public importance.

B. Independence of the Secretariat

Since the inception of the citizen submission process, there has been an ongoing tension between Council and the Secretariat on individual citizen submissions. This issue has been canvassed in numerous preceding disputes, public processes, reports, and Council resolutions.

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[2] Council Resolution 00-09 may be found at: http://www.cec.org/files/PDF/COUNCIL/00-09e_EN.pdf.
[3] Response of the Government of Canada to the *BC Mining* submission., pp. 22, 24. Found at: http://www.cec.org/files/pdf/sem/98-4-RSP-E.pdf.
[4] Secretariat's Recommendation regarding the *BC Mining* submission, p. 16. Found at: http://www.cec.org/files/pdf/sem/ACF11.PDF.
[5] Council Resolution 00-11 (*BC Mining*), p.1. Found at: http://www.cec.org/files/pdf/sem/98-4-Res-e.PDF.
[6] Secretariat's Recommendation regarding the *Ontario Logging* submission. Found at: http://www.cec.org/files/pdf/sem/02-1-ADV-E.pdf.
[7] Council Resolution 03-05, p. 1. Found at: http://www.cec.org/files/pdf/sem/02-1-RES-E.pdf.

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These ongoing disputes result from the fact that members of the Council --- which hold decision-making power --- are also the target of allegations in citizen submission. In short, Council members are both the accused and judge in the same matter. This has lead many observers to interpret certain actions of the Council as cynical manoeuvres to prevent scrutiny of their environmental performance. Any perception that a party may be able to inappropriately influence the citizen submission process will undermine public confidence.

One method of ensuring the independence of the Secretariat would be for the Council to articulate a methodology for considering Secretariat recommendations. For example, in the judicial context, courts often employ a "standard of review" that recognizes the independence granted to a decision maker balanced against the need for oversight and independent review. In Canadian law, courts often adopt a standard that a decision should be respected unless it is "patently unreasonable." A similar approach at the Council level would increase public confidence in the citizen submission process.

Recommendation:

> Under Articles 14 and 15, Council should institutionalize a strong level of deference to the Secretariat in relation to decisions regarding the preparation and publication of factual records. Council should only interfere with such decisions when the recommendations or decisions of the Secretariat are patently unreasonable. In this way the integrity of the CEC process can be maintained and, ultimately, respect for international trade agreements can be fostered.

Thank you in advance for your consideration of our comments and recommendations.

Yours truly,

Randy Christensen
Albert Koehl
Sierra Legal Defence Fund

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December 7, 2004

Ms. Carla Sbert
Interim JPAC Liaison Officer
Commission for Environmental Cooperation of North America
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec, Canada H2Y 1N9

Dear Ms. Sbert:

The United States Council for International Business (USCIB) is pleased to offer the following comments in response to the JPAC request for comments on the perception of an inherent conflict of interest in the North American Agreement on Environmental Cooperation (NAAEC).

USCIB is a multi-sectoral business association comprised of over 300 leading U.S. companies and associations. USCIB promotes international trade and investment as the U.S. affiliate of the International Chamber of Commerce (IOE), the International Organization of Employers (IOE), and the Business and Industry Advisory Committee to the OECD (BIAC).

As a general comment, USCIB does not support the premise of the report prepared for the JPAC, namely that an inherent conflict of interest exists within the NAAEC. The term "conflict of interest" refers to a situation when someone has competing professional or personal obligations or financial interests that make it difficult to fulfill his duties fairly. In this instance, the claim is that the Parties' national interests are in inherent conflict with the interests of the CEC, a view that USCIB does not share.

The agreement clearly delineates the respective roles and responsibilities of the Parties as signatories to the agreement and as actors in the institutions of the Commission for Environmental Cooperation (CEC). The Parties have both individual obligations, such as ensuring effective enforcement of their laws, and joint obligations with the other Parties in the Council, such as approving the program and budget for the CEC. The simple fact that each Party has individual and joint obligations does not create a situation of inherent conflict of interest.

Further, the report confuses the situation by treating the Parties and the Council as distinct entities, when in fact they are one and the same. The Council is comprised of the three Parties. Decisions by the Council are made either by consensus among the Parties or, where required, by Party vote, with two-thirds majority required. In either case, there is no difference between the Council and the Parties.

The report prepared for JPAC focuses on the Parties obligations related to citizen submissions under Article 14-15 of the NAAEC as an example of the alleged conflict of interest. Once again, USCIB does not find that the evidence provided in the report for JPAC supports the claim of an inherent conflict of interest. The role of the Parties is clear and well established, as are the roles of the Secretariat. The process is clearly not without tension, as the Secretariat must assess claims made against the very Parties that make up its governing council, but that tension does not rise to the level of conflict of interest. At a minimum, the two-thirds voting required to advance or publish a factual record removes the ability of a Party to individually block a submission against itself.

In closing, USCIB finds that the report prepared for the JPAC has not established an inherent conflict of interest in the NAAEC and therefore recommends that the JPAC should not accept the report or any of its conclusions.

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

Best regards,

Adam B. Greene
Vice President, Labor Affairs
& Corporate Responsibility

policywest.net

3 December 2004

Ms. Carla Sbert
JPAC Liaison Officer
North American Commission for Environmental Cooperation
393 St. Jacques Ouest
Montreal, Quebec H2Y 1N9
Canada

Re: Response to JPAC Call for Comments on CEC Council Conflicts of Interest

Dear Ms. Sbert:

I am Director of Policy West, and an adjunct professor of *Trade and the Environment* at Golden Gate University School of Law in San Francisco. In response to JPAC's request, I am providing the comments set forth below and the attached 2002 article *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission* (32 Environmental Law Reporter 10769). Pages 10780-10783 of the *Awkward Evolution* article contain a discussion of conflict of interest issues related to the CEC Council's role in the NAAEC citizen submission process.

Conflicts Built Into Structure of NAAEC Citizen Submission Process

Back in 1993, the NAAEC was drafted under great political duress. With NAFTA on hold until a companion North American environmental agreement was finalized, there was intense pressure to complete the NAAEC negotiations as soon as possible. These circumstances resulted in a citizen submission process that was not as thoughtfully constructed as it could have been.

At the outset, it was clear that the independence of the CEC's review of citizen submissions and preparation of factual records was essential to the integrity of the process. The raison d'etre of the Article 14 and 15 process is to establish a mechanism for the processing of nonenforcement claims by North American citizens against the national governments of North America. Significantly, and unlike most of North

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American international law, the process does not involve claims by one North American national government against another North American national government. For such a process to work, those persons responsible for its operation must be situated such that they can safeguard the submission rights of North American citizens even if such safeguarding may result in the disclosure of information showing malfeasant actions by North American national governments. Unfortunately, because it was drafted in relative haste, the structure of NAAEC does not include sufficient attention to this consideration.

For example, Articles 14 and 15 of NAAEC could have provided the Executive Director of the CEC Secretariat with final authority to determine whether a factual record is to be prepared, and the scope of such a factual record. The Executive Director of the CEC Secretariat is appointed by the CEC Council but, as a full-time employee of the CEC in Montreal, is somewhat insulated politically and geographically from the North American national governments.

As another example, Articles 14 and 15 could have been drafted to provide the CEC Council with the authority to determine whether a factual record is prepared and the scope of such a record, but could have also provided that CEC Council members (although designated by the North American national governments) serve on a full-time basis at the CEC's offices in Montreal. This arrangement, by its design, would have helped to reinforce that CEC Council members serve a constituency that is broader and an institution that is different from the particular interests of the North American national governments that may have appointed them. Such is the arrangement for ambassadors to the United Nations in New York, or members of the European Parliament in Strasbourg.

Instead of the two possible approaches outlined above, however, Articles 14 and 15 granted critical decision-making authority over the operation of the NAAEC citizen submission process to direct representatives of North America's national governments that do not work (in the physical/geographic sense) at the CEC in Montreal, and whose role on the CEC Council is just a small portion of their full-time employment as the head of environmental agencies for their respective North American national governments. CEC Council members are based in their national capitols (where their respective national environmental agencies are headquartered) and as such work in close concert with those persons or parties establishing policy for their respective national governments. In practice, these heads of national environmental agencies frequently delegate their CEC Council responsibilities (including attending CEC Council meetings) to more junior agency staff.

Under such an arrangement, CEC Council members have often confused their dual roles as (on the one hand) advocates of the interests of their respective North American national governments and as (on the other hand) guardians of the integrity of the NAAEC citizen submission process created to serve the interests of North American citizen who believe North American national governments are failing to enforce environmental laws. Such potential confusion is unfortunately built into the very structure of Articles 14 and 15. Theoretically this confusion could be avoided through

the exercise of principled restraint on the part of CEC Council members when performing their duties under Articles 14 and 15, but experience to date has shown that such restraint has often been overrun by the competing interest to shield North American national governments from disclosures that can result from factual records.

The more preferable course of action in the long-term would be to revise Articles 14 and 15 to address the NAAEC's structural shortcomings related to the poorly-defined role of the CEC Council in the citizen submission process. At present, however, there is little indication that such treaty revisions are likely to be forthcoming. As such, for the present the option that remains is clarification of the role of the CEC Council within the existing NAAEC framework.

Proposals to Clarify the Role of the CEC Council Within Current NAAEC Framework

Several constructive proposals in this regard were recently presented in the April 2004 discussion paper by JPAC member Jane Gardner (*Articles 14 and 15 of the NAAEC Council's Emerging Conflict of Interest*) and the September 2004 report by Gustavo Carvajal Isunza (*Inherent Conflict of Interest Built Into the North American Agreement on Environmental Cooperation*, commissioned by JPAC). Some of the more promising proposals presented in these publications are noted below.

- As discussed on page 8 of Jane Gardner's discussion paper, the World Bank's Board of Executive Directors has taken steps to preserve the integrity of the World Bank Inspection Panel process. More specifically, in its April 1999 Second Review of the Inspection Panel, the World Bank Board of Directors clarified that World Bank management staff are forbidden from interfering with the Inspection Panel process until after the Panel has finished its investigation and issued it report. Similarly, the NAAEC citizen submission guidelines could be revised to prohibit CEC Council members or North American national governments from taking actions that interfere with the CEC Secretariat's preparation of an authorized factual record. This guideline revision could also specify that such prohibited interference includes precluding the CEC Council from imposing substantive or procedural restrictions on a factual record at the time preparation is approved, and establishing that the CEC Council's role in authorizing the preparation of factual records is limited to either approval or rejection of the particular factual record proposed by the CEC Secretariat and that such approval may not be used by the CEC Council as means to condition the substance of the document.

- As discussed on page 8 of Jane Gardner's discussion paper (in regard to the development of Ethical Rules) and on pages 9-10 of Gustavo Carvajal Isunza's report (in regard to the European Union's Code of Good Administrative Behavior and Code of Conduct of Commissioners), the CEC Council could adopt a CEC Council Code of Conduct that clarified its obligations and the constituency it represents when performing its duties under Articles 14 and 15. The CEC Council Code of Conduct could be adopted either as a free-standing

document, or as an appendix to the NAAEC citizen submission guidelines. Among other things, it could clarify that although CEC Council members are appointed by their respective national governments, when performing their obligations under Articles 14 and 15 CEC Council members' primary duty is to serve as guardians of the integrity of the NAAEC citizen submission process. This CEC Council Code of Conduct could further provide that it is improper for a CEC Council member to take actions (including conditioning votes to authorize the preparation of factual records) for the main purpose of preventing disclosure or discussion of information that may be politically-damaging or embarrassing to their respective national governments, and that the basis for a CEC Council member's vote to reject a CEC Secretariat recommendation to prepare a factual record shall be the respective CEC Council member's determination that the CEC Secretariat's recommendation does not comply with Articles 14 and 15 of the NAAEC. This CEC Council Code of Conduct could further provide that it is improper for a CEC Council member representing a first country to vote to limit or refuse authorization to prepare a factual record containing a nonenforcement claim against a second country in exchange for the commitment of the CEC Council member representing this second country to vote to limit or refuse authorization to prepare a factual record containing a nonenforcement claim against the first country.

- Under the current citizen submission provisions of the NAAEC, there is no mechanism to appeal a CEC Council decision regarding the preparation of a factual record. It should be noted that such appeals are provided by other international organizations, such as the World Trade Organization through its appellate body review of dispute panel rulings. Although the express inclusion of an appeal process in the text of Articles 14 and 15 would be preferable, there may be other ways to provide for review of CEC Council actions without revising the NAAEC. As discussed on pages 10-11 of Gustavo Carvajal Isunza's report (in regard to European Union provisions for filing a complaint when it appears there has been a violation of the Code of Good Administrative Behavior), a procedure could be established to provide for the independent review of claims that there has been a breach of the CEC Council Code of Conduct. Presumably, this procedure would be set forth in the CEC Council Code of Conduct. It would appear that JPAC would be the appropriate entity within the CEC to review and act upon such claims for at least two reasons. First, since such claims are likely to involve allegations about the respective actions of both the CEC Council and the CEC Secretariat, it would seem that neither of these two entities would be in a position to provide a reasonably independent assessment of such claims. Second, given its composition, JPAC appears particularly well-suited to evaluate the extent to which efforts to promote the interests of particular national government may or may not have resulted in a breach of CEC Council members' broader obligations to the North American public.

Conclusion

JPAC should be commended for recognizing the significant role that CEC Council conflict of interest considerations play in the effective operation of the Articles 14 and 15 nonenforcement submission procedure, and for soliciting broader discussion and public input on this question. The failure to address these conflict of interest problems to date has undermined the citizen submission process, which in turn has undermined public confidence in the NAAEC. If the CEC Council and the current North American national governments wish to rehabilitate public confidence in the NAAEC, a key step is to restore the integrity of the citizen submission process by effectively curtailing the perception and the reality of conflicts of interest.

Yours,

Paul Stanton Kibel

ELR
New & Analysis

Extract of article:

Awkward Evolution: Citizen Enforcement at the North American Environmental Commission

Pages 10780-10783

> ommendation to the CEC Council regarding whether a factual record should be prepared. There is every reason to presume that the CEC Secretariat would demonstrate similar sound judgment and impartiality when providing an independent assessment of substantive allegations and responses.[112]

The case for inclusion of such findings and recommendations in the NAAEC factual records is further supported by the fact that such findings and recommendations are already included in written decisions issued by the North American Free Trade Commission and Arbitration Panels established under NAFTA.[113] If such findings and recommendations are appropriate in decisions involving application of North American trade law, it is unclear why they are inappropriate in decisions involving application of North American environmental law. Moreover, there is nothing in the text of the NAAEC or of the CEC's *Citizen Submission Guidelines* that prohibits the inclusion of findings or recommendations in factual records.

Notwithstanding the comments and considerations discussed above, *Lessons Learned* did not contain any conclusions regarding whether the effectiveness of the NAAEC's citizen submission process would be strengthened by the inclusion of findings and recommendations in factual records.

The CEC Council's Conflicts of Interest

Section 3(c) of *Lessons Learned* notes that "[s]ome commentators criticized the role of the [CEC] Council because it has absolute discretion to decide whether or not to instruct the [CEC] Secretariat to prepare a factual record"[114] and that "[a]nother issue regarding [CEC] Council accountability was the absence of any appeal when the [CEC] Secretariat or the [CEC] Council has decided not to proceed with the preparation of a factual record."[115]

The above-quoted statement is supported by comments submitted to the JPAC. Cloghesy expressed concern about the increasing "politicization" of the citizen submission process by the three national governments, which are represented on the CEC Council.[116] Alanis remarked that Article 15 permits a Party to vote on whether to prepare a factual record even though a Party is a respondent in the citizen submission proceeding, and that this presents an inherent conflict of interest.[117] Kostuch commented that "[t]he Governments have a conflict of interest. The Governments should separate their responsibilities as members of the CEC Council from their interests as Parties subject to review . . . . The [CEC] Council is undermining the integrity of the public submission process."[118]

The commentators raised serious concerns about the integrity of the current citizens submission process, wherein a government alleged to be violating its own environmental law is entitled to vote on whether the CEC should prepare and/or release a factual record. This problem has also been noted by the former Director of the CEC Secretariat's Submissions on Enforcement Matters Unit, David Markell, who noted in an April 2001 *Environmental Forum* article that "the dual roles the countries play—as the [P]arty whose enforcement practices are being challenged and as custodians of the [NAAEC]—is a source of potential tension."[119]

Concerns about the inappropriateness of this arrangement also find support by comparison with the investor claims process established under Chapter 11 of NAFTA. Under NAFTA, when a complaint is filed by a private corporation with an Arbitration Panel, the private party is not required to secure approval from two out of the three NAFTA signatory nations before its claim can go forward. Under NAFTA, private corporations are entitled to unilaterally initiate binding dispute resolution procedures. There is no apparent basis for the disparate treatment of the environmental rights of environmental organizations and the investment rights of private corporations.

Notwithstanding the comments and considerations discussed above, the JPAC does not directly address this issue in §4 of *Lessons Learned*. It should be noted that the JPAC does recommend that the CEC Council should disclose the basis for its decision to not prepare a factual record. This recommendation, however, does not address structural and conflict of interest concerns related to the CEC Council's discretion to authorize the preparation and release of factual records. As discussed in the next section, these concerns have been validated by the CEC Council's recent actions.

De-Evolution and the CEC Council's November 2001 Actions

Although many North American environmental groups are disappointed with the pace and extent of its evolution, there are nonetheless indications that the NAAEC citizen enforcement process is slowly evolving. The innovative use of the expert group in the *BC Hydro* factual record and the findings and recommendations in *Lessons Learned* all signal a growing commitment to strengthen the Article 14 procedures. However, alongside these signs of progress, there are also signs of de-evolution, of efforts to limit the scope of NAAEC citizen enforcement. One such sign is the CEC Council's failure to adopt substantive changes to the citizen enforcement process that are responsive to most of the recommendations set forth in *Lessons Learned*. However, perhaps the most significant and troubling of these signs are the November 2001 actions by the CEC Council.

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*,[120] *Aquanova*,[121] *Migratory Birds*,[122] *BC Mining*,[123] and *BC Logging*.[124] The CEC Council approved the preparation of factual records for all five of these citizen submissions. Its approval was, however, subject to two important conditions. First, in the case of four of the submissions (all but *Aquanova*), the CEC Council or-

112. Letter from Paul Stanton Kibel, to the JPAC (Dec. 27, 2000) (on file with author).
113. *See* MANN & VON MOLTKE, *supra* note 72.
114. LESSONS LEARNED, *supra* note 8, §3(c).
115. *Id.*
116. CEC WORKSHOP SUMMARY, *supra* note 106, at 3.
117. *Id.* at 9.
118. Letter from Martha Kostuch, to the JPAC (June 12, 2000), included in CEC WORKSHOP SUMMARY, *supra* note 106.
119. David L. Markell, *The Citizen Spotlight Process*, ENVTL. F., Mar./Apr. 2001, at 41.
120. SEM-97-006.
121. SEM-98-006.
122. SEM-99-002.
123. SEM-98-004.
124. SEM-00-004.

dered the preparation of factual records that are far more limited than what had been recommended by the CEC Secretariat. Second, for all five, the CEC Council required that the CEC Secretariat prepare (and submit for the CEC Council's review) a workplan detailing how each factual record will be prepared. These conditions mark the first time that the CEC Council has used its approval authority under the NAAEC to narrow the substantive scope of factual records.

Below is a summary of the five citizen submissions that were substantively narrowed by the CEC Council's November 2001 actions.

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 effectively enforce the Canadian Environmental Assessment Act and §§35, 37, and 40 of the federal Fisheries Act.[125] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, 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.[126]

In *Migratory Birds*, the citizen submitters cited two examples in support of widespread U.S. failure to effectively enforce §703 of the Migratory Bird Treaty Act in connection with logging operations.[127] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, 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.[128]

In *BC Mining*, the citizen submitters cited the Britania Tulsequah and Mt. Washington mines as examples of Canada's widespread failure to effectively enforce §36(3) of the federal Fisheries Act in connection with mining operations.[129] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, however, the CEC Council disregarded the CEC Secretariat's recommendation, and instead ordered the preparation of a factual record only with respect to the Britania Tulsequah mine.[130]

In *BC Logging*, the citizen submitters cited TimberWest's logging operations in the Sooke watershed as an example of Canada's failure to enforce §§35 and 36 of the federal Fisheries Act in connection with TimberWest's logging operations throughout British Columbia.[131] The CEC Secretariat recommended that a factual record be prepared regarding the full scope of the submission. In its November 2001 decision, 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.[132]

125. Press Release, CEC, CEC Council Votes on Five Factual Record Recommendations (Nov. 19, 2001), *available at* http://www.cec.org/home/index.cfm?varlan=english (last visited Apr. 10, 2002) [hereinafter CEC Press Release].

126. Council Resolution 01-08; CEC Press Release, *supra* note 125.

127. SEM-99-002.

128. Council Resolution 01-10; CEC Press Release, *supra* note 125.

129. SEM-98-004.

130. Council Resolution 01-11; CEC Press Release, *supra* note 125.

131. SEM-00-004.

132. Council Resolution 01-12; CEC Press Release, *supra* note 125.

Although the NAAEC and the *Citizen Submission Guidelines* provide the CEC Council with authority to accept or reject the CEC Secretariat's recommendation to prepare a factual record, it is questionable whether these documents also provide the CEC Council with authority to unilaterally limit the substantive scope of a factual record, or to prohibit the CEC Secretariat from preparing a factual record in the absence of CEC Council review and approval as to its method of preparation. Article 15(2) of the NAAEC and *Citizen Submission Guideline* 10.4 both provide in pertinent part that "[t]he Secretariat shall prepare a factual record if the [CEC] Council, by a two-thirds vote, instructs it to do so." There is nothing in this language that provides or suggests that the CEC Council may use its authority to approve a factual record as a means to narrow the substantive scope of the record recommended by the CEC Secretariat. Likewise, neither the NAAEC nor the *Citizen Submission Guidelines* provide or suggest that the CEC Council may use its authority to either compel the preparation of or disprove a pre-factual record workplan. Because the NAAEC does not provide a mechanism to review whether the CEC Council has exceeded its authority, however, the CEC Council's November 2001 actions will probably not be subject to any formal legal challenge.

Notwithstanding the absence of a forum to directly challenge whether the CEC Council's November 2001 actions were ultra vires, these actions have been subject to intense criticism. This criticism has come not only from North American environmental groups, but from other institutions within the CEC, including the JPAC, the U.S. Governmental Advisory Committee to the U.S. Representative to the CEC (U.S. Governmental Advisory Committee), and the U.S. National Advisory Committee to the U.S. Representative to the CEC (U.S. National Advisory Committee). This criticism, discussed below, was voiced both prior to and after the CEC Council's imposition of new conditions on the scope and preparation of the *Oldman River II*, *Aquanova*, *Migratory Birds*, *BC Mining*, and *BC Logging* factual records.

On October 23, 2001, the JPAC adopted Advice to Council No. 01-07, which began by noting that the JPAC had been "apprised that [the CEC] Council will be asked to consider . . . a limit on the [CEC] 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."[133] The JPAC then went on to state:

> [JPAC] is compelled to express 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 . . . .
> [JPAC] registers its strong and considered objection to such a proposal on the basis that this would:
>
> - violate [the CEC] Council's reaffirmation in Council Resolution 00-09 of its commitment to improve transparency;
> - circumvent the process established in Council Resolution 00-09 concerning the implementation and elaboration of the Articles 14 and 15 of the NAAEC;

133. JPAC Advice to Council: No. 01-07, *Re: Citizen Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Oct. 23, 2001) (on file with author and available on CEC's website).

> • constitute a constructive amendment to the guidelines and, therefore, should first be submitted to [the] JPAC and public review;
> • constitute a flagrant disregard for one of the recommendations of [the] JPAC's *Lessons Learned* Report with respect to supporting the independence of the [CEC] Secretariat in the Articles 14 and 15 process . . . .[134]

On November 30, 2001, the JPAC adopted Advice to Council No. 01-09. In this document, the JPAC asserted that CEC Council's November 2001 actions were taken "without sufficient background and consideration of the public interest" and requested that the CEC Council authorize the JPAC to conduct a public review on "the matter of limiting the scope of factual records; and (2) the requirement for the [CEC] Secretariat to provide the Parties with its work plan and the opportunity to comment on it."[135]

On October 15, 2001, the U.S. National Advisory Committee sent a letter to Christine Todd Whitman, EPA Administrator. This committee was established pursuant to Article 17 of the NAAEC. The letter states that

> (t)he Committee was most disturbed to learn that the United States in 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, 2002 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 [CEC] 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 . . . .
> [A] conditional approval of a Secretariat proposal for preparing a factual record would set a highly undesirable precedent for future actions by other NAAEC [P]arties. We understand that, legally, actions taken by the [CEC] Council in response to a particular [CEC] Secretariat recommendation do not bind future [CEC] Council decisions. Nonetheless, if the United States responds with conditions in this case, it will undoubtedly substantially increase the likelihood that the other NAAEC [P]arties will also do so in the future, thereby undermining the integrity of the Article 14.15 process.[136]

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

> [T]he GAC [U.S. Governmental Advisory Committee] has been a staunch and ardent supporter of the Articles 14 and 15 submission process given its uniqueness as the first mechanism of its type in any international treaty. The GAC believes that it is a cornerstone of the [NAAEC] and provides an extraordinary measure of transparency which benefits the citizens of the North American continent. Any action that would impede the efficacy of this process would not only undermine public support for [NAFTA], but could thwart any active expansion of NAFTA or the possible adoption of [an FTAA].
> The *Migratory Bird* submission alleges that the United States 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 [United States] intends to vote yes on the [CEC] 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 [United States], the independence historically exercised by the [CEC] Secretariat in the submission process will be eviscerated. The [United States] would undercut this independence by limiting the factual record to the two examples provided in the submission, where a broader pattern was adequately alleged. If the [CEC] Secretariat's independence is undercut in the manner proposed by the [United States], 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 [a] 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 . . . .
> The most troublesome point in the current U.S. position is the requirement that the [United States] be allowed to negotiate the [CEC] Secretariat workplan for development of the Migratory Bird [Treaty Act] factual record. Such an approach would undoubtedly infringe upon the [CEC] Secretariat's independent factual investigation. It does so by giving the Party which has the most at stake in the process the opportunity to control the development of the factual record and, as a result, the outcome. . . . Beyond the serious conflict of interest that such an approach would involve, there is no clear mechanism to resolve disagreements between the [CEC] Secretariat and the [United States] involving the factual record workplan . . . .[137]

Although this Article otherwise covers developments through January 2002, the March 6, 2002, response by the Sierra Legal Defense Fund (in Vancouver) should also be noted. The commentator served as legal counsel for the submitters in the *BC Hydro* factual record and now serves as counsel for the submitters in the *BC Logging* submission. In a letter to the Canadian, Mexican, and U.S. environmental ministers serving on the CEC Council, Sierra Legal Defense Fund stated that

> [w]hat is particularly troubling about the [CEC] Council's decision [regarding the *BC Logging* submission] is that the [CEC] Secretariat had directly considered Canada's Response and indicated that the "other matters"

134. *Id.*

135. JPAC Advice to Council: No. 01-09, *Re: Request to Conduct a Public Review of Two Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (Nov. 30, 2001) (on file with author and available on CEC's website).

136. Letter from Adam Greene, Chair, U.S. National Advisory Committee, to Christine Todd Whitman, Administrator, U.S. EPA (Oct. 15, 2001) (on file with author).

137. Letter from Denise Ferguson-Southard, Chair, U.S. Government Advisory Committee, to Christine Todd Whitman, Administrator, U.S. EPA (Oct. 19, 2001) (on file with author).

> could and should be part of any factual record. Despite the findings of the [CEC] Secretariat—and the [CEC] Council's promise to respect the independence of the [CEC] Secretariat—the [CEC] Council rejected the Secretariat's recommendation without so much as an explanation . . . .
> The Submitters' second concern relates to what appears to be a de facto revision of Article 15 of [the NAAEC]. Specifically, the [CEC] Council in several of the November 16, 2001 resolutions restricts the [CEC] Secretariat's ability to examine the failure to enforce environmental laws on a systemic basis. This occurred despite the fact that there is no basis for such a limitation in the NAAEC or in the [*Guidelines*], and despite the fact that [the CEC] Secretariat has previously considered such issues in the content of citizen submissions such as *BC Hydro* (SEM-97-001). In effect, the [CEC] Council has changed the rules of citizen submissions, mid-process, without any public consultation or input . . . .[138]

As the responses from the JPAC, the U.S. National Advisory Committee, the U.S. Governmental Advisory Committee, and the Sierra Legal Defense Fund all observe, there are several troubling aspects to the CEC Council's November 2001 actions. Three points, in particular, should be noted. First, these actions reveal the CEC Council's willingness to disregard the findings of the JPAC's *Lessons Learned* and to disregard the CEC's Secretariat's recommendations regarding the preparation of factual records. Second, these actions highlight the absence of mechanisms to ensure that the CEC Council complies with the NAAEC. Third, and perhaps most importantly, these actions provide the clearest evidence to date of the underlying structural and conflict of interest problems with the current Article 14 citizen enforcement process, a process in which a party alleged of violating the NAAEC can determine the scope of the CEC Secretariat's investigation of the alleged violation.

The CEC Council's actions suggest that the NAAEC citizen enforcement procedure is a process moving forwards and backwards simultaneously. The commitment to strengthen the process is gaining broader public and governmental support, at the same time that the current national representatives on the CEC Council are seeking to limit the process' scope.

Conclusion: Lessons for the Hemisphere

In the United States, the environmental debate over the FTAA is taking place in the shadow of the experience with the NAAEC and NAFTA. The environmental positions of the participants in the FTAA debate are shaped to a considerable degree by how these participants assess the performance of the NAAEC's citizen enforcement process and NAFTA's investor protection provisions.

Those who perceive the NAAEC's citizen enforcement as environmentally adequate are likely to seek the inclusion of similar procedures in the FTAA. Those who view the NAAEC's citizen enforcement as environmentally inadequate are likely to call for the inclusion of stronger environmental enforcement procedures in the FTAA. Those who view the NAAEC's citizen enforcement process as too intrusive are likely to oppose the inclusion of similar or strengthened environmental procedures in the FTAA.

The same type of assessment is taking place in regard to NAFTA's investor protection provisions. Those who perceive NAFTA's investor protection provisions as an appropriate check on environmental regulation are likely to seek the inclusion of similar provisions in the FTAA. Those who view NAFTA's investor protection provisions as undermining environmental protection are likely to call for the removal or weakening of such provisions in the FTAA.

The interplay between the performance of the NAAEC and the emerging FTAA environmental debate was highlighted in a June 2001 report prepared by the Center for Strategic and International Studies and the Yale Center for Law and Environmental Policy (CSIS-Yale Report). The CSIS-Yale Report, entitled *Environment and Trade: Predicting a Course for the Western Hemisphere Using the North American Experience*, was based on interviews with government officials and environmental groups in Canada, Mexico, and the United States, as well as interviews with CEC staff. The CSIS-Yale Report concluded that the prospects for inclusion of an NAAEC-type citizen enforcement provision in the FTAA were slim:

> Many governmental and CEC officials also were skeptical about the applicability of certain other provisions for transparency and citizens' participation to the entire hemisphere. The most often cited example was the citizens' submission process under Articles 14 and 15 of the NAAEC—a process that allows individuals and NGOs [nongovernmental organizations] to lodge complaints about their governments' failure to enforcement environmental laws. These NAAEC provisions have been both praised and criticized, but many officials fear that vastly differing levels of democracy and traditions of citizen participation in decisionmaking would make it nearly impossible to implement such a program for the entire Western Hemisphere.[139]

If the observations in the CSIS-Yale Report are an accurate forecast of the provisions that will be left out of the final version of the FTAA, the road ahead for the proposed agreement looks increasingly stormy. To recall, in June 2001, a coalition of leading North American environmental groups released a document entitled *Trade and Environment Principles*.[140] This document provided that trade agreements should include "binding, enforceable measures . . . to maintain and effectively enforce environmental laws" and to ensure that "environmental provisions in trade agreements are subject to the same dispute resolution and enforcement mechanisms that apply to all other aspects of the agreements."[141] The FTAA's omission of mechanisms to ensure the enforcement of environmental laws would constitute a rejection of the *Trade and Environment Principles*, and this rejection would likely catalyze opposition to the agreement. Under this scenario, the battle over the FTAA could prove even more contentious than the battle over NAFTA, because unlike with NAFTA, the FTAA's promoters would face a united environmental front.

The performance of the NAAEC's citizen enforcement process has hemispheric implications. The assessment of the North American experience will influence the course of trade and environmental policies throughout the Americas. In undertaking this assessment, it is critical that the right questions are posed so that the right lessons can be learned.

138. Letter from Randy Christensen, Sierra Club, to David Anderson (Minister for the Environment, Canada), Victor Lichtinger (Secretary for the Environment, Mexico), and Christine Todd Whitman (Administrator, U.S. EPA) (Mar. 6, 2002) (on file with author).

139. CSIS-Yale Report, *supra* note 10, at 15.

140. TRADE AND ENVIRONMENT PRINCIPLES, *supra* note 9.

141. *Id.*