

**REVIEW OF COUNCIL RESOLUTION 00-09, WHICH
ALLOWS ANY PARTY, THE SECRETARIAT, OR
MEMBERS OF THE PUBLIC THROUGH THE JPAC, OR
THE JPAC ITSELF, TO RAISE ISSUES CONCERNING
ARTICLES 14 & 15 OF THE NORTH AMERICAN
AGREEMENT FOR ENVIRONMENTAL COOPERATION**

Council's View on Council Resolution 00-09

and

**Report on the Council Review of the Operation of
Council Resolution 00-09**

November 2004

Council's View on Council Resolution 00-09, which allows any Party, the Secretariat, or members of the public through the JPAC, or the JPAC itself, to raise issues concerning Articles 14 & 15 of the North American Agreement for Environmental Cooperation

In 1994, when Mexico, the United States and Canada signed the *North American Agreement on Environmental Cooperation*, all three countries entered into a bold new experiment. Perhaps the most unique part of that experiment was the Articles 14 and 15 citizen submission process, whereby any non-governmental organization or person in North America may assert that a Party to the Agreement is failing to effectively enforce its environmental law. The possibility for a non-governmental organization or person to go directly to an international organization and assert that Canada, Mexico or the United States is failing to effectively enforce an environmental law is truly distinctive.

Bold as this experiment has been, however, putting the Article 14/15 process into practice has been neither easy nor obvious. As this process has evolved and unfolded, the Commission for Environmental Cooperation (CEC) Council has struggled to interpret this part of the Agreement, the Secretariat has tested the boundaries of independence in their legitimate role in the process, and the public has found that the high expectations they had at the outset may have been unrealistic in relation to what the citizen submission process is actually able to deliver. It is clear that the process has not yet reached maturity. Although 50 submissions have been received by the Secretariat since the signing of the Agreement, only 30 have advanced past the Secretariat's initial review stage and only 10 factual records have been completed and published to date.

In June of 2000, in reaction to concern expressed both by the public and the Joint Public Advisory Committee (JPAC), and in the spirit of improving the efficiency and efficacy of the Articles 14 and 15 process, the Council adopted Resolution 00-09 ("Resolution"). This Resolution was designed to achieve two things:

1. To task the JPAC to undertake a "lessons learned" report that could help the Council to improve the citizen submissions process.
2. To task the JPAC to bring the Council's attention to issues that any Party, the Secretariat and/or members of the public may raise concerning the implementation and further elaboration of the citizen submission process. The Council may then refer the issues raised to the JPAC for it to conduct a public review with a view to providing advice to the Council.

The Resolution, adopted by the Council in 2000, provides that the Council review its operation after two years. Attached is a detailed paragraph by paragraph factual review of the operation of the Resolution. Useful though this is in setting

out the facts on the operation of the Resolution, the Council wishes to utilize this opportunity to reflect on the usefulness of Council Resolution 00-09:

- Was the Resolution used?
- If so, was the Resolution useful?
- Should the Resolution remain in effect?

The first task was a time-limited one, with a JPAC “lessons learned” report on Citizen Submissions under Articles 14 and 15 delivered to the Council in June 2001. Some of the recommendations were immediately adopted by the Council. The Council passed Council Resolution 01-06 on 29 June 2001, in which it amended section 10.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC. The Resolution provided that the notification and the reasoning for the Secretariat’s recommendation to develop a factual record be made public five working days after the Secretariat has notified the Council, rather than 30 days. Additionally, the Council committed to publicly state its reasons whenever it votes not to prepare a factual record. The Council also encouraged the Secretariat to process submissions in a timely manner, which the Secretariat has accomplished. In addition, the Council agreed to consider other matters addressed in the report.

The public consultation process in task two was not used by members of the public, the Secretariat or the Parties. It was used twice by the JPAC to hold consultations on two issues: one related to work plans for factual records and the second related to the manner in which the scope of a factual record is defined. For the public consultation related to the issue of scope, the Council asked the JPAC to wait until a number of factual records then in preparation were completed and made public in order for the assessment to be made on the basis of the actual outcomes of the factual record process. As a result, this particular public consultation was held in 2003 instead of 2001.

The two JPAC public consultations were well attended. They also provided for useful debates on the issues at hand and gave the public an opportunity to express their views on issues they consider central to the Articles 14 and 15 process. Although the quantity of public consultations was small, the quality of the consultations was good and they brought about Advice to Council 02-07 (on work plans) and 03-05 (on scope and sufficiency of information).

The Council responded on June 14, 2002 to the JPAC’s Advice to Council on work plans (02-07) provided on 10 May 2002. In its letter to the JPAC, the Council clarified its intentions regarding work plans. The Council explained that providing work plans to the Parties to the NAAEC assists them in providing the necessary information, identifying appropriate contacts and expediting the information-gathering process. The Council also committed to make public any comments made by the Parties on work plans.

After having considered Advice to Council 03-05 provided on 17 December 2003, the Council responded on June 2nd, 2004 and addressed the issues raised by the JPAC.

With respect to the manner in which the scope of a factual record is defined, the Council explained that it often defers to the Secretariat in the context of the submissions process, but that it has determined in some instances that it has been necessary and appropriate for the Council to issue a factual record decision that varies from the Secretariat's recommendation. In such cases, the Council has endeavored to present clearly its reasoning within the text of the relevant Council Resolution or to have its reasoning reflected in a public summary record.

On the issue of "sufficient information" the Council acknowledged the role the Secretariat plays in determining whether a submission satisfies the Article 14(1) criteria, but noted that this role has limitations with respect to interpreting the NAAEC. More specifically, competence to interpret the NAAEC rests with the Parties. The Council, as the governing body of the CEC, is responsible for addressing questions or differences that may arise between the Parties respecting the interpretation or application of the Agreement (see Article 10(1)(d) and 20(1)).

It is the view of the Council that Council Resolution 00-09 should stay in place so that any Party, the Secretariat, members of the public through the JPAC or the JPAC itself may continue utilizing the process in order to raise issues concerning the implementation or further elaboration of Articles 14 and 15 of the Agreement. The JPAC has 'shown the way' in using the public consultation process designed through the resolution. The process is open, inclusive, and useful. The process has led to changes and has provided a mechanism for the public to articulate any issues it may have related to Articles 14 and 15 and for the Council to explain its perspective and make changes to the process as appropriate.

**REPORT ON THE COUNCIL REVIEW
OF THE OPERATION OF COUNCIL RESOLUTION 00-09,
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INTRODUCTION

Council Resolution 00-09 was adopted by the Council for Environmental Cooperation (CEC) on June 13, 2000 during the Seventh Regular Council Session in Dallas. Council Resolution 00-09 (“Resolution”) originated from a desire to increase public participation in the public submissions process under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC). The Resolution developed a process to enable the Parties, the Secretariat, the public, or the Joint Public Advisory Committee (JPAC) itself to refer issues to the JPAC concerning the implementation and further elaboration of NAAEC Articles 14 and 15 in order for the JPAC to conduct a public review with a view to providing advice to the Council as to how those issues might be addressed. Paragraph 4 of the Resolution directs the Parties, acting through the Council, to “consider the JPAC’s advice in making decisions concerning the issues in question relating to Articles 14 and 15 of the Agreement” and to make public the reasons for its decisions. The Resolution directed the JPAC to undergo a review of the history of submissions and to provide the Council with a report on lessons learned and also directed the Council to “provide the JPAC with a referral memorandum or other information identifying issues raised by the Parties relating to specific submissions”. Finally, the Resolution established that the “Council shall review the operation of this resolution after two years.”

The CEC Council initiated its review of the operation of Council Resolution 00-09, based on a process agreed upon at an Alternate Representatives meeting held March 11 and 12, 2004, in Oaxaca, Mexico.

This report is a descriptive review of the operation of Council Resolution 00-09, in accordance with the obligation set out in paragraph 8 of the operative section of the Resolution. This report, under each operative paragraph, sets out in chronological order either the activities or events that took place, the JPAC’s Advice to Council, or the Council responses that have arisen since the adoption of Council Resolution 00-09 on June 13, 2000.

Paragraph 1

“The Council may refer issues concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement to the 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;”

Since the adoption of this Resolution, the Council has not referred to the JPAC, for public review, any issue independently raised by the Council related to the implementation and further elaboration of Articles 14 and 15 of the Agreement.

Paragraph 2

“Any Party, the Secretariat, members of the public through the JPAC or, the JPAC itself, may also raise issues concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement to the Council, who shall refer any such issues as it proposes to address to the JPAC so that the JPAC may conduct a public review with a view to provide advice to the Council as to how those issues might be addressed;”

As described in this paragraph, issues concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement can also be raised by the Parties, the Secretariat, members of the public through the JPAC and the JPAC itself. Council Resolution 00-09 designates the JPAC as the entity that may conduct the public review on issues referred to it by Council and provide advice to the Council on how the issues raised might be addressed.

The JPAC adopted two documents detailing the steps to be followed by the JPAC for the reception and transmittal of issues from the public and for the review of issues referred to it by the Council (see the JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 - Internal JPAC Process of 30 January 2002 and JPAC Public Review of Issues concerning the Implementation and Further Elaboration of Articles 14 and 15 - J/PROC/Rev. 9/Final). These documents state that:

“Any member of the public wishing to raise an issue with the Council concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement should provide a written statement of the issue to JPAC.

If JPAC determines that the written statement does not raise an issue concerning the implementation and further elaboration of Articles 14 and 15, JPAC will forward the statement to Council accompanied by a written explanation why it considers that the issue is not within the scope of Resolution 00-09. JPAC will make its determination within 60 days of having received the written statement or seven (7) working days after the

next JPAC meeting, whichever is later. This written explanation will be sent to the person or organization that raised the issue and also be posted on the CEC web site within seven (7) working days.

When JPAC determines that an issue from a member of the public concerns the implementation and further elaboration of Articles 14 and 15, JPAC will transmit, in writing, to Council with an explanation as to why it considers the statement to be within the scope of Council Resolution 00-09 for its consideration. JPAC will make its determination within 60 days of having received the written statement or seven (7) working days after the next JPAC meeting, whichever is later. JPAC's determination will be sent to the person or organization that raised the issue and will also be posted on the CEC web site within seven (7) working days.

When JPAC receives the decision of Council whether or not to address the issue raised by a member of the public, it will be sent in writing to the person or organization that raised the issue and will be posted on the CEC web site within seven (7) working days.

Upon receipt of an issue from Council, JPAC will hold a public review in such a form as it determines is necessary to give its advice to Council. The format of the public review will be posted on the CEC web site.

As appropriate, JPAC will group like issues to further the efficiency of the process.”

To date, only the JPAC has raised issues concerning the implementation and further elaboration of Articles 14 & 15 to the Council.

On **October 23, 2001**, the JPAC provided **Advice to Council 01-07** regarding the Citizen Submissions on Enforcement Matters under Articles 14 & 15 of the NAAEC. In this advice, the JPAC wrote: “having been apprised that the Council would be asked to consider (1) a limit on the Secretariat's discretion to determine the scope of a pending submission as a condition for a vote to proceed with the development of a factual record; and (2) that the Secretariat submit a work plan to Council prior to undertaking the development of a factual record”, then expressed its frustration at being forced once again to advise on issues related to Articles 14 & 15 given that “past agreed-upon procedures are being ignored or circumvented”.

The JPAC also registered its “strong and considered objection” to such a proposal on the basis that it would violate the Council's reaffirmation in Council Resolution 00-09 of its commitment to improve transparency in the process. The JPAC wrote that this would “constitute a constructive amendment” to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC* (“Guidelines”) that should first be referred to the JPAC for a public review. According to the JPAC, this would “constitute a flagrant disregard for one of the recommendations of the JPAC's Lessons Learned Report with respect to

supporting the independence of the Secretariat in the Articles 14 and 15 process”.

The JPAC also pointed out that the amount of work being completed by the Secretariat and the work for the submitters to produce more detailed documentation has increased, which diminishes the credibility of the process.

Because of the reasons cited above, the JPAC asked the Council to act in “good faith” and vote on pending submissions “in the spirit of the renewed commitment to the Articles 14 and 15 process”, as expressed in the Council Resolution 00-09 and guided by the Lessons Learned Report prepared by the JPAC and submitted to Council in 2001.

The JPAC presented on **November 30, 2001, Advice to Council 01-09**, in which it mentioned that it had reviewed Council Resolutions 01-08 (Oldman River II – SEM 97-006); 01-10 (Migratory Birds – SEM 99-002); 01-11 (BC Mining – SEM 98-004); 01-12 (BC Logging – SEM 00-004) and 01-09 (Aquanova SEM 98-006) where the Secretariat was instructed, for the first four submissions, to prepare factual records dealing with the specific instances identified by the submitters, and for all, to provide the Parties with an opportunity to comment on the Secretariat’s overall work plan for gathering the relevant facts. The JPAC asked the Council to authorize a public review through the JPAC on two issues:

1. “the matter of limiting the scope of factual records; and
2. the requirement for the Secretariat to provide the Parties with its work plan and the opportunity to comment on it.”

In this same advice, the JPAC asked the Council to decide by January 14, 2002, whether or not it would refer these issues to the JPAC for public review, in order for the JPAC to have adequate time to prepare for the June 2002 scheduled Council review of the operation of Council Resolution 00-09.

The JPAC in a letter dated **January 21, 2002**, reiterated to the Council its desire that the Council respond positively to the JPAC’s request to call for public comments on the issues raised in Advice to Council 01-09, in order to consider the public input in the advice that the JPAC may produce.

On **February 11, 2002**, in response to JPAC Advice to Council 01-09 and to the January 21, 2002 letter, the Council authorized the JPAC to conduct a public review on the “manner in which the scope of a factual record is defined” after the relevant four factual records (Oldman River II – SEM 97-006, Migratory Birds – SEM 99-002, BC Mining – SEM 98-004 and BC Logging – SEM 00-004) were completed. The Council’s reasoning for this was that once the four relevant factual records were complete, the public review and subsequent advice would be based on actual experience.

The Council also authorized the JPAC to conduct a public review on the requirement for the Secretariat to provide the Parties with its work plan and the opportunity to comment on it. While the Council believed that the review and advice would also be enriched by waiting for the completion of the four factual records, the Council recognized that the draft work plan stage for the development of the factual records was almost complete, and would thus be based on actual experience.

Following the Council's response, the JPAC asked the Council, through its **Advice to Council 02-03 on March 8, 2002**, to reverse its decision to postpone any public review of the matter of limiting the scope of factual records until the relevant factual records had been completed for the following reasons:

1. "This postponement defeats the spirit and purpose of Council Resolution 00-09 by effectively eliminating an opportunity for public input into this very important issue; and
2. Allowing the development of the factual records to proceed in this restricted manner, particularly absent any public input and review of the implications and consequences for what will be at least one year and a half, 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*."

Furthermore, while cognizant of its mandate under Article 16(4) of the NAAEC to seek public input on any issue, the JPAC noted that it would prefer to engage in public review of the issue of limiting the scope of factual records through the review process established in Council Resolution 00-09.

On **March 12, 2002**, the JPAC, following receipt of the Council's letter dated February 11, 2002, authorizing the JPAC to conduct a public review on the Council's instruction to the Secretariat to provide the Parties with an opportunity to comment on its work plan for five factual records, requested public input on this issue. The JPAC asked that all public comments be provided by April 30, 2002.

On **May 10, 2002**¹, after conducting a public review of the work plan, the JPAC issued **Advice to Council 02-07** and the Council responded on **June 14, 2002**².

However, with respect to the "manner in which the scope of a factual record is defined", the JPAC on **July 4, 2002**, wrote to the Council regarding its response to Advice to Council 01-09 and reiterated its opinion that a public review of this matter was warranted for the reasons outlined in the Advice. The JPAC asked the Council to reconsider its decision to delay the public review until the completion of the factual records in question and authorize the JPAC to conduct

¹ JPAC Advice to Council 02-07 is discussed under paragraph 3.

² Council's June 14, 2002 response to JPAC advice 02-07 is discussed under paragraph 7.

such a review as recommended in the JPAC Advice 02-03. The JPAC, representing the views of the public at the 2002 Council Session, stated that it should not have to wait one or two more years before undertaking the review.

On **December 6, 2002**, the Council, after having reconsidered the JPAC's several requests³, continued to support a review upon the completion of the four relevant factual records, as expressed by the Council in its letter dated February 11 and during the June 2002 Council Session. The Council considered that to move forward in this manner was the most appropriate course of action and would provide the greatest value added. The Council, in this same letter, informed the JPAC that, based on information provided by the Secretariat, the four factual records would be completed in 2003.

The four relevant factual records were developed and were all released publicly by August 2003⁴, which allowed the JPAC to officially begin its review of the first issue raised in Advice to Council 01-09, namely the manner in which the scope of a factual record is defined.

On **July 17, 2003**, the JPAC solicited public comments on this issue. To better inform the review process, the JPAC commissioned the Environmental Law Institute (ELI) to prepare a report that would analyze the legal and policy implications surrounding this issue. The JPAC also requested public comments by September 8, 2003.

On **July 30, 2003**, the JPAC informed the Council that the JPAC had launched a public review on the manner in which the scope of a factual record is defined and on the review of Council Resolution 00-09. The JPAC also included an additional issue --"sufficiency of information"--, which they believed was a related issue.

The JPAC informed the Council that the public review period would end on September 8, 2003 and that comments would be synthesized and form the basis for a public meeting on October 2, 2003. The objective of the JPAC, as expressed in the letter, was that the exchanges, along with the results of the JPAC's own deliberations and interactions, would form the basis for an Advice to Council on these important matters. Finally, the JPAC also indicated that it believed that it would be very beneficial for representatives of the three governments to attend and participate in the public meeting, in the interests of balance and transparency.

³ JPAC Advice 01-09, 02-03 and letters to Council dated January 21, 2002 and July 4th, 2002.

⁴SEM-99-002 -- Migratory Birds was made public April 24, 2003; SEM-97-006 -- Oldman River II was made public August 11, 2003; SEM-00-004 -- BC Logging was made public August 11, 2003; SEM-98-004 -- BC Mining was made public August 12, 2003.

On **September 29, 2003**, the Alternate Representatives, on behalf of the Council, responded to the JPAC's July 30, 2003 invitation letter and informed the JPAC that they would not be attending the session. The reasoning behind that decision was that "the JPAC consultation on issues related to Articles 14 and 15 is specifically a public review of these issues, and it is important that the consultation represent the views of the public and not the Parties." They indicated that comments from the Parties would follow any advice provided by the JPAC.

On **October 2, 2003**, the JPAC held the public meeting on the draft report that ELI prepared for the JPAC, which discusses the issue of limiting the scope of factual records and what constitutes "sufficient information" to support an assertion that a Party is failing to effectively enforce environmental law. Participants were called upon to provide input with respect to these issues as well as on the review of the operation of Council Resolution 00-09.

On **October 30, 2003**, the JPAC provided the Council with a copy of the final report, which incorporated the comments received during the October 2, 2003 public meeting, along with the JPAC's analysis.

On **December 17, 2003**, after conducting a public review of the issues raised, the JPAC issued **Advice to Council 03-05**⁵, which strongly recommended "that the Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat." The Council responded on June 3, 2004⁶.

Paragraph 3

"Any advice provided by the JPAC shall be supported by reasoned argumentation;"

Paragraph 3 of Council Resolution 00-09 requires the JPAC to support, by reasoned argumentation, its Advice to Council on issues concerning the implementation and further elaboration of Article 14 and 15 of the Agreement for which a public review was conducted.

Following the JPAC public review on the issues raised in Advice to Council 01-09 and 02-03, the JPAC provided the Council with Advice to Council 02-07 and 03-05, which are discussed in the following paragraphs.

On **May 10 2002**, after conducting a public review of the first issue, the JPAC issued **Advice to Council 02-07**, recommending that the Council refrain in the future from including a requirement that the Secretariat provide the Parties with an opportunity to comment on the overall work plans. The JPAC supported its recommendation with a page of reasons drawn from an analysis of the public

⁵ JPAC Advice to Council 03-05 is discussed under paragraph 3.

⁶ Council's response to JPAC Advice 03-05 is discussed under paragraph 7.

comments as well as the JPAC's past advice, having to do with the effects on the independence of the Secretariat, the potential effect on timeliness, and transparency. For the Council's information, the JPAC also attached to its Advice a summary of comments received during the public review.

On **December 17, 2003**, the JPAC provided **Advice to Council 03-05** after having conducted a public review on the matter of limiting the scope of factual records, following the release of the four factual records as authorized by Council. The JPAC also decided to include in the public review the issue of the operation of CEC Council Resolution 00-09 on its own initiative. In preparation for this review, the JPAC commissioned ELI to develop a background report on two matters:

1. Limiting the scope of factual records and, adding to this original topic what constitutes "sufficient information" to support an allegation of failure to enforce; and
2. Review of Council Resolution 00-09.

On the matter of limiting the scope of factual records, the JPAC strongly recommended that the Council refrain in the future from limiting the scope of factual records. The JPAC supported this recommendation by stating that the Council's intervention in the fact-finding process undermined the independence of the Secretariat, the credibility of the process, the capacity of factual records to address the matters raised by the submitters and any potential evidence of widespread enforcement failures. The JPAC also argued that restricting factual records to exploration of specific instances could make it easier for the Parties to invoke other exceptions of the Agreement for excluding elements of a factual record while, at the same time, potentially increasing the financial and human resources burdens on submitters.

As for the other issues addressed in the JPAC Advice 03-05, they consist of conclusions as opposed to recommendations. On the issue of what constitutes "sufficient information" to support an allegation of failure to enforce, the JPAC concluded that:

- "Such a decision adds 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;
- While some evidentiary threshold is necessary to avoid frivolous or speculative allegations from submitters, according to the Article 14(1)(c), the Secretariat has the mandate, authority, and expertise to determine where this bar should be set; and
- In setting the bar for "sufficient information" too high, the Council may render it prohibitively difficult for citizens to participate in the process."

In its advice, the JPAC also commented in passing, on "an emerging perception of Council being in a conflict of interest", an issue of concern to the public. In the

JPAC's view, this was considered of sufficient concern to warrant further analysis. Following this analysis, the JPAC informed the Council that they would develop an opinion on how best to proceed to address this matter and would advise the Council accordingly.

Finally, concerning Council Resolution 00-09, the JPAC stated that in its considered opinion, "Council's resolutions limiting the scope of factual records and rulings on the sufficiency of information provided in submissions, in conjunction with the Council's decision to delay public review of its decision to define the scope of factual records and subsequent delays in conducting a review of this resolution appear to:

- Jeopardize the commitment, expressed in Council Resolution 00-09, to increase transparency and public participation in the citizen submissions process; and
- Violate the object and purpose, or "spirit," of Council Resolution 00-09, which as we all recall was a hard-fought compromise designed to allow the process to move forward and re-establish public confidence."

In Advices 02-07 and 03-05 the JPAC supported its advice with reasoned argumentation. The Advice 01-09 was, in effect, a request by the JPAC to conduct a public review and it was not supported by detailed reasoned argumentation. In addition, some elements of Advice to Council 03-05 reflect the opinions of the JPAC rather than advice to the Council that can be considered by the Council in making its decision.

Paragraph 4

"The Parties, acting through 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."

Council Resolution 00-09 provides that the Council shall consider the JPAC's advice in its decision-making related to Articles 14 and 15. The JPAC has offered to the Council advice on these matters since Council Resolution 00-09 was passed. The JPAC has provided the Council with advice on the issues of the scope of factual records and the preparation of work plans for the development of factual records on different occasions.

The advice deals with issues concerning the Secretariat providing the Parties with an opportunity to comment on work plans for the development of factual records (Advice to Council 02-07), the limitation of factual records, sufficiency of information, and the review of Council Resolution 00-09 (Advice to Council 03-05).

The Council considered the JPAC's Advice to Council 02-07 and responded on June 14, 2002. In its letter to JPAC, the Council clarified its intentions regarding work plans. The Council explained that providing work plans to the Parties assists them in obtaining the necessary information and expedites the information-gathering process. The Council also noted that the work plans provide the Parties with notice of the nature of the information sought in a particular submissions process, as well as with opportunity to identify the appropriate contacts. The Council committed to making comments made by the Parties in this process fully accessible to the public. The Council also instructed the Secretariat to forward public comments to the JPAC as well as the Council, so that the JPAC may consider them when providing future advice.

Finally, the JPAC provided the Council with Advice 03-05 on December 17, 2003. The Council responded on June 3, 2004 and addressed the three issues raised by the JPAC:

- The manner in which the scope of a factual record is defined.
- What constitutes sufficient information.
- The review of Council Resolution 00-09.

With respect to the manner in which the scope of a factual record is defined, the Council explained that it often defers to the Secretariat in the context of the submissions process, but that it has determined in some instances that it has been necessary and appropriate for the Council to issue a factual record decision that varies from the Secretariat's recommendation. In such cases, the Council has endeavored to clearly present its reasoning within the text of the relevant Council Resolution or in a summary record.

On the issue of "sufficient information" the Council reminded the JPAC that although Article 14(1) calls on the Secretariat to determine whether a submission satisfies the Article 14(1) criteria, it is ultimately the responsibility of the Council, as the governing body of the CEC, to interpret the NAAEC (see Article 10(1)(d)).

With respect to the timing of the JPAC public review, the Council reiterated its belief that waiting for the completion of the four factual records was the most appropriate course of action. In the Council's view, only after the relevant factual records were completed would the necessary additional information to conduct its review of Resolution 00-09 be available.

For that reason, as provided for in paragraph 4, the Council has made its decisions and their reasoning public in written letters to the JPAC, face-to-face meetings with the JPAC, in the text of Council Resolutions, and in summary records which are available to the public.

Paragraph 5(a):

“The JPAC shall review the public history of submissions made under Articles 14 and 15 of the Agreement, including all actions taken to implement those articles, and shall provide a report identifying the lessons learned.”

As provided for in paragraph 5(a) of Council Resolution 00-09, the JPAC undertook the review of the public history of submissions made under Articles 14 and 15 of the NAAEC, and provided the Council with a *Lessons Learned* final report dated **June 6, 2001**.

The *Lessons Learned* report contains an overview of the citizen submissions process under Articles 14 and 15 of the NAAEC; a discussion of the two factual records that had been finalized at the time the review was undertaken; a summary of public comments received by the JPAC concerning the Articles 14 and 15 process; and conclusions by the JPAC.

Overview of BC Hydro and Cozumel Pier Factual Records

The two factual records discussed by the JPAC in its *Lessons Learned* report had been completed by the Secretariat at the time the report was written. The JPAC considered that, in both instances, the procedures followed adhered to the *Guidelines* and instructions given by the Council to the Secretariat.

BC Hydro

The Sierra Legal Defence Fund and Sierra Club Legal Defence Fund filed the BC Hydro submission in April 1997. The submission alleged that Canada had failed to effectively enforce the *Fisheries Act* against BC Hydro because it failed to obtain a required permit to cause the alteration, disruption or destruction of fish habitat. Canada’s response (on July 1997) explained why it believed that there had been no such violation by BC Hydro, that Canada had not failed to enforce its environmental laws, and that the relevant permits and orders had been issued in the case. The Secretariat recommended the preparation of a factual record in April 1998 concerning the alleged violation of 35(1) of the *Fisheries Act* (but not including other violations claimed by the submitters). The Secretariat collected information through prescribed methods and from relevant sources and also prepared a Scope of Inquiry document in order to focus the process before finalizing the factual record.

The JPAC concluded, in the *Lessons Learned* report, that the *BC Hydro* factual record, despite its limitations, was a valuable source of expert opinion; clearly explained the *Canadian Environmental Assessment Act* and its decision-making procedure, as well as other guideline documents; that the process of developing the record encouraged public involvement; and that the process may have “increased the transparency of governmental decision-making with respect to BC Hydro projects.”

Cozumel Pier

Several non-governmental organizations (NGOs) filed this submission alleging that Mexico failed to effectively enforce its environmental law by approving a port terminal project without requiring a comprehensive Environmental Impact Assessment (EIA) for the entire project. The submitters also asserted that the activity authorized would result in habitat destruction for some species. Mexico’s response was that the submission was improper because the actions took place before the NAAEC entered into force and that the submitters also failed to exhaust available administrative resources under Mexican law. The Council directed the Secretariat to prepare a factual record including relevant facts prior to January 1994.

The JPAC, in the *Lessons Learned* report, concluded that the factual record was a clear summary of parties’ contentions and claims, and the relevant statutes, but that no conclusion was reached as to the effective enforcement of the relevant laws.

Identification of Lessons Learned

The JPAC received extensive public comments regarding Articles 14 and 15, concerning mainly the issues of timeliness, transparency and effectiveness of the submission process. The JPAC highlighted a number of issues:

Timeliness

Regarding the timeliness issue, one of the lessons learned was that there should be clear time limits regulating the operations of the Secretariat and the Council. Specifically, limits should be in place to restrict the Secretariat’s time to review a submission for compliance with Article 14 and the Party’s response, as well as the preparation of the draft and final factual records. The report suggested that the time taken by the Council to make its recommendation to prepare a factual record should be restricted as well.

In addition, the JPAC report spoke against the 30-day (“blackout”) period where the Secretariat withholds the Secretariat’s recommendation to the Council from the public, arguing it undermines the purpose of the submissions process. Also,

the report considered that the Secretariat's resources were insufficient, affecting the efficiency and timeliness of the process.

Transparency

Concerning the transparency of the submissions process, the report considered that "factual records should be made public and should clearly state conclusions and recommendations" and that the latter should be disclosed to the public as soon as they are made. The report expressed concerns related to the potential for abuse of confidentiality provisions because that would be a deterrent to public participation. Further, the report identified concerns about the inability of submitters to offer comments on a draft factual record and the Council's absolute discretion in instructing the Secretariat on whether to prepare or not prepare a factual record.

Effectiveness

Finally, the report was concerned about the effectiveness of the submissions procedure because submitters have no direct ability to enforce environmental laws in a Party country, but must wait for a Party to act on the record and pursue a claim under other enforcement and dispute resolution provisions of the NAAEC. The report made a variety of recommendations of possible ways to remedy this concern. Also, the report expressed concerns about not having an appeals process when the Council decided not to recommend that a factual record be prepared, and some commentators were concerned by the absence of conclusions and/or recommendations for further action in the factual record.

Conclusions

The JPAC provided the five main conclusions and recommendations at the end of the report, and in those they sought to address the issues referred to them by the Council on **October 13, 2000**.

First, the JPAC concluded that the citizen submissions process "plays an essential role in achieving the goals of the NAAEC." Some ways in which such an essential role is characterized are: (a) the process has been used by NGOs from NAAEC countries in an effort to effectively enforce environmental laws; (b) the Parties have responded when a submission has merited a response; (c) inquiries into challenged actions have provided incentives for the relevant Party to take actions to comply with their laws; (d) factual record development allows for public and expert involvement; (e) the process provides opportunities for compromise and settlement of disputes and focused public attention.

Second, the JPAC concluded that the Secretariat must maintain its independence concerning submissions, adequacy of information, responses, and recommendations to the Council and development of factual records and that to do so, it must continue to have adequate resources.

Third, the JPAC considered that the submission review process must be expedited in order to be effective, and that sufficient resources should be allocated to handle the submissions under Articles 14(1) and (2), as well as other steps of the process, such as Party responses and recommendations to Council. The JPAC provided examples of timeliness that could be used to limit the different stages of the submissions process.

Fourth, the citizen submission process should be characterized by “open, informed and reasoned” decision-making. The JPAC suggested that the Council should provide substantive reasons for any decision of the Council not to accept a Secretariat’s recommendation. The JPAC also made the following suggestions to achieve this goal: (a) new information in a Party’s response should be provided to the submitters and they should be given opportunity to respond; (b) the Secretariat should inform the submitter when it refers a matter and makes a recommendation to the Council for a factual record and the 30-day “blackout” should be abolished or reduced and the Secretariat should be able to state its reasons for making a recommendation; and (c) if a Party provides additional information to the Council, it should be communicated to the submitters and they should be given an opportunity to make a brief written reply if they so decide.

Fifth, the JPAC provided a possible way to deal with actions to be taken as a follow-up to the development of a factual record in order to encourage monitoring of a Party’s failure to enforce its environmental laws, such as requiring that a Party reports actions, if any, taken to address matters in the factual record within 12 months or another reasonable time. They also suggested that such a report be made public and that the JPAC members be granted an opportunity to review it and provide comments.

Council’s Response to *Lessons Learned* Report

The CEC Council responded to the *Lessons Learned* report on three separate occasions: Council Resolution 01-06, and letters dated March 6, 2002 and June 14, 2002⁷.

Paragraph 5(b):

“To guide the JPAC in the performance of such review, the Council shall provide the JPAC with a referral memorandum or other information identifying issues raised by the Parties relating to specific submissions.”

⁷ Council Resolution 01-06, and letters dated March 6, 2002 and June 14, 2002 in response to the *Lessons Learned* Report are discussed under paragraph 7.

The CEC Council provided the JPAC with a memo, dated October 13, 2000, to serve as a guide for its review of the public history of the Articles 14 and 15 submissions process, including any actions taken in the implementation of the articles. The Council requested “that the JPAC conduct a review in consultation with each Party, the submitter and the Secretariat, of each submission for which the submission process has been completed.” The Council referred the following issues for consideration in compiling lessons learned:

- a) Sufficiency of information to allow the Secretariat to review a submission under Article 14(1)(c).
- b) Processes followed by the Secretariat in gathering information for the preparation of a factual record.
- c) Timing of the public release of non-confidential information.
- d) Designation of confidential or proprietary information in connection with the Articles 14 and 15 process.

Paragraph 6

“Pending any final decision by the Council, the Secretariat shall continue to process expeditiously any submissions on enforcement matters in accordance with the Agreement and existing Guidelines;”

Since the adoption of Council Resolution 00-09 and in accordance with paragraph 6, the Secretariat has endeavored to process more expeditiously submissions on enforcement matters in accordance with the Agreement and *Guidelines*. An internal guideline process was implemented to streamline the citizen submission process. The average time required for the Secretariat to consider a submission according to Articles 14(1) and 14(2) has shortened from approximately 225 days to 37 days since 2001. The average time required for the Secretariat to submit an Article 15(1) recommendation to Council has also shortened from approximately 490 days to 245 days.

The Secretariat has continued to process citizen submissions and the development of factual records expeditiously. Since the approval of Council Resolution 00-09 on June 13, 2000, the Secretariat has released a total of 8 factual records, 6 of which were released and made public in 2003.

Paragraph 7

“Any decision taken by the Council following advice received by the JPAC shall be explained in writing by the Parties and such explanations shall be made public;”

Since the adoption of Resolution 00-09 on June 13, 2000, the JPAC has provided the Council with Advice with regard to the implementation and further elaboration of Articles 14 and 15 of the Agreement⁸.

This paragraph requires the Council to explain in writing, through the Parties, and make public any decision taken by the Council that was preceded by a JPAC advice. The following is a chronological description of the JPAC's Advice to Council which have been followed by a Council's decision and the Council's responses which ensued, since the adoption of Council Resolution 00-09.

In its *Lessons Learned* report, the JPAC included a section where it reached conclusions and made a number of recommendations to the Council. In general, the JPAC recognized the importance of maintaining the Secretariat's independence and resources, as well as expediting the review of public submissions. The JPAC also considered that the Council's decision-making must be "open, informed and reasoned" and that the Council should consider adopting some sort of follow-up measure to monitor an involved Party's activities following the development of a factual record.

The Council agreed to consider "expeditiously" the following specific recommendations "where it deems appropriate":

- "... [W]here a Party's response includes new information not referred to in the original submission, the submitter should be provided with that information and a brief opportunity to respond. A time period of up to 30 days should be given to the submitter for this purpose."
- "...[I]f a Party chooses to submit additional information directly to the Council in response to (...) a recommendation [for a factual record] from the Secretariat, the submitters should be so advised and, if they request, permitted to make a brief written reply to such information so that the Council can make a more fully informed decision on the Secretariat's recommendation."
- "To respond to the concern regarding monitoring [a.k.a. factual record follow-up], one option would be for the Party involved to report to the CEC within a reasonable period of time (for example, not exceeding 12 months) after the

⁸ **Advice to Council: No. 01-07** Submissions on Enforcement Matters under Articles 14 & 15 of NAAEC, 23/10/2001; **Advice to Council: No. 01-09** 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, 30/11/2001; **Advice to Council 02-03** Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15, 8/03/2002; **Advice to Council 02-07** Work plan issue related to Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 10/05/2002; **Advice to Council 03-05** Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 17/12/2003.

release of a factual record pursuant to Council authorization on the actions, if any, that it has taken to address the matters set forth in that factual record. Such a report should be made public in the next CEC annual report, after an opportunity for JPAC members to review and provide comments, through the draft CEC annual report in accordance with Article 16(6) of the NAAEC.”

- “With respect to (...) [confidential information], we believe that a Party’s right to invoke that defense against disclosure should be narrowly construed and should be limited to those circumstances in which it is expressly authorized by Art. 39 of the NAAEC....”

The following are the three separate occasions in which the CEC Council responded in writing to the *Lessons Learned* report:

First, the Council passed **Council Resolution 01-06** on **29 June 2001**, in which it amended section 10.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC*. This resolution provided that the notification and the reasoning for the Secretariat’s recommendation to develop a factual record “will be placed in the registry referred to in section 15 of the Guidelines and in the public file referred in section 16” five working days after the Secretariat has notified the Council. The Council also committed to publicly state its reasons whenever it votes not to prepare a factual record, as well as to “making the best efforts, and encouraging the Secretariat” to do so, in order to ensure a timely submissions process, usually completed in no more than two years after the receipt of the submission. In addition, the Council agreed to consider other matters addressed in the report.

Second, the Council responded by letter on **March 6, 2002**. The Council replied to the recommendations for an open and transparent process by recognizing that these may involve a “trade-off” between an efficient and timely process and the desire for transparency. The Council considered that the implementation of such recommendations would not result in an appropriate balance between those ideas, especially when considering the length of time needed for completion of the process. The Council was also concerned with the possibility that exchanges between the Secretariat, a named Party, and the submitters would result in a more adversarial submissions process.

Concerning the recommendation regarding accountability of the Parties, the Council noted on several occasions⁹ that the NAAEC provides for the process to terminate “with the development and potential release of the final factual record.” In addition, the Council noted that there are mechanisms available in each country to help ensure the compliance with commitments, and that any follow-up taken in response to the development of a factual record is a “domestic policy matter.” The Council did not address the fourth recommendation, regarding the confidentiality of information, because it was under the impression that the JPAC no longer considered it to be an issue. During a face-to-face meeting between

⁹ Letters to the JPAC dated on March 6, 2002, June 14, 2002, and December 6, 2002.

the Alternative Representatives and the JPAC on March, 2002, the JPAC informed the Council that the confidentiality concern remained an issue.

In a letter dated **April 22, 2002**, the JPAC revised a previous recommendation concerning a follow-up mechanism to the factual record process. The JPAC recommended encouraging a Party named in a submission, for which a factual record had been prepared, to provide a written briefing within a reasonable period (e.g. 12 months) after the factual record release, addressing developments, if any, affecting matters addressed in the factual record and activities, if any, that the Party may have undertaken. They also recommended that such briefing be made public.

The Council sent another letter to the JPAC on **June 14, 2002**, in which it addressed the issues of potential follow-up after the release of the factual record, and of confidentiality of information.

The Council restated that the submissions process terminated with the development and potential release of the factual record and any follow-up undertaken by a Party was a matter of domestic policy. In cases in which a factual record may set forth facts that warrant attention by a Party, the Council supported a decision by such Party to provide follow-up information by the Party "in a manner that is compatible with its domestic practices."

Concerning the issue of confidentiality, the Council noted that the JPAC report only referred to Article 39 as the relevant provision in this matter, even though there are two other relevant articles - Articles 21 (Provision of Information) and 42 (National Security). It also emphasized the importance of transparency and the need for a Party to provide information requested by the Secretariat according to the provisions of the NAAEC. In its response, the Council also mentioned a report then being prepared by the Secretariat in an effort to summarize the laws and regulations of the three parties in an attempt to assist in dealing with issues of confidential information that might arise. The report was released on February 7, 2003.

On **October 23, 2001**, the JPAC provided **Advice to Council 01-07** regarding the citizen submission on Enforcement Matters under Articles 14 & 15 of the NAAEC. In this advice, the JPAC expressed its frustration at being forced once again to advise on issues related to Articles 14 & 15 given that "past agreed-upon procedures are being ignored or circumvented."

On **30 November 2001**, the Council received **Advice to Council 01-09**, whereby the JPAC requested to conduct a public review of two issues:

1. the matter of limiting the scope of factual records; and
2. the requirement for the Secretariat to provide the Parties with an opportunity to comment on its work plan.

On **January 21, 2002**, the JPAC sent a letter to the Council expressing its hope for a positive response to Advice 01-09 but offered no additional arguments to support its request. **On February 11, 2002**, the Council authorized the JPAC to conduct a public review on the two issues referred to in Advice 01-09 after the completion of the four pending factual records being developed by the Secretariat¹⁰ at that time. The Council also asked that the first issue read “the matter of limiting the scope of a factual record”.

On **March 8, 2002**, the JPAC approved **Advice to Council 02-03** and recommended that the Council reverse its decision to postpone any public review of the matter of limiting the scope of factual records until the four factual records have been completed.

The JPAC, on **March 8, 2002** also provided **Advice to Council 02-07** regarding the work plan issue related to Submission under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.

The Council considered the JPAC’s Advice to Council 02-07 and responded on June 14, 2002. In its letter to the JPAC, the Council clarified its intentions regarding work plans. The Council explained that providing work plans to the Parties assists them in obtaining the necessary information and expedites the information-gathering process. The work plans also provide the Parties with notice of the nature of the information sought in a particular submissions process, as well as with opportunity to identify the appropriate contacts. The Council committed to making comments made by the Parties in this process fully accessible to the public. The Council also instructed the Secretariat to forward public comments to the JPAC as well as the Council, so that the JPAC may consider them when providing future advice.

On **December 6, 2002**, the Council, after having reconsidered the JPAC’s several requests¹¹, continued to support a review upon the completion of the four relevant factual records, as expressed in the Council letter dated February 11, 2002, as well as during the June 2002 Council Session. The Council considered that to move forward in this manner was the most appropriate course of action and would provide the greatest value added. Also in this letter, the Council informed the JPAC that, based on information provided by the Secretariat, the four factual records would be completed in 2003.

In this same letter, the Council again reviewed the issue of factual record monitoring and follow-up. Again, the Council agreed with the JPAC that in some instances a factual record may present information warranting attention by a

¹⁰ BC Logging (SEM-00-004), BC Mining (SEM-98-004), Migratory Birds (SEM-99-002) and Oldman River II (SEM-97-006).

¹¹ JPAC Advice 01-09, 02-03 and letters to Council dated January 21, 2002 and July 4th, 2002.

Party. However, under the terms of the NAAEC, the Article 14 and 15 submissions process concludes with the preparation and potential publication of a factual record and, as such, any follow-up which a Party might choose to pursue is a domestic policy matter.

On 17 December 2003, the JPAC provided Advice to Council 03-05 after having conducted a public review on the matter of limiting the scope of factual records. The Council responded on June 3, 2004 and addressed the three issues by the JPAC:

- The manner in which the scope of a factual record is defined.
- What constitutes sufficient information.
- The review of Council Resolution 00-09.

With respect to the manner in which the scope of a factual record is defined, the Council explained that it often defers to the Secretariat in the context of the submissions process, but that it has determined in some instances that it has been necessary and appropriate for the Council to issue a factual record decision that varies from the Secretariat's recommendation. In such cases, the Council has endeavored to clearly present its reasoning within the text of the relevant Council Resolution or in a summary record.

On the issue of "sufficient information" the Council reminded the JPAC that although Article 14(1) calls on the Secretariat to determine whether a submission satisfies the Article 14(1) criteria, it is ultimately the responsibility of the Council, as the governing body of the CEC, to interpret the NAAEC (see Article 10(1)(d)).

With respect to the timing of the JPAC public review, the Council reiterated its belief that waiting for the completion of the four factual records was the most appropriate course of action. In Council's view, only after the relevant factual records were completed would the necessary additional information to conduct its review of Resolution 00-09 be available.

Paragraph 8

"The Council shall review the operation of this resolution after two years."

Paragraph 8 of the resolution requires the Council to review the operation of the resolution after two years. While recognizing that the two year mark was the 2002 Council session, the Council considered it essential that the JPAC public

review of the matters raised in Council Resolution 00-09 be completed before the Council would undertake its review of Council Resolution 00-09.

As such, the Council in March 2004 finalized its process and began its review of the operation of Council Resolution 00-09.