FINAL REPORT:

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

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

Executive Summary

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

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

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

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

The report finds that, by defining the scope of the Secretariat's investigations in each of the four factual records examined, the Council jeopardized the ability of those records to fully expose the controversy at issue. Specifically, the factual records were not able to address evidence of widespread enforcement failures, cumulative effects that stem from such widespread patterns, or the broader concerns of submitters about implementation of enforcement policies. Many commentators expressed the view that, by intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process. Restricting factual records to exploration of specific instances may also make it easier for the Parties to invoke other exceptions within the Agreement, such as Article 14(3) (excluding from the factual record matters subject to pending judicial or administrative proceedings), which are more readily invoked with respect to specific instances of non-enforcement than with respect to allegations of widespread, systemic patterns of ineffective enforcement. Finally, by requiring citizens' groups to detail every specific violation to be included in the Secretariat's investigations, this definition of the scope of factual records potentially increases the financial and human resources burdens placed on these groups.

The report also explores the Council's decision, related to the *Ontario Logging* submission, to re-open the Secretariat's determination that a submission provides "sufficient information to allow the Secretariat to review" that submission. In doing so, the Council appears to add to the existing "pleading" requirements of the NAAEC a new and higher evidentiary threshold for the sufficiency of information necessary to support allegations of non-enforcement. The report finds that, while some evidentiary threshold is necessary to avoid frivolous or speculative allegations from submitters, the Secretariat has the mandate, authority, and expertise to determine where this bar should be set. Many interviewees have argued that, in setting the bar for "sufficient information" too high, the Council may render it prohibitively difficult for citizens to participate in the process. Further, as with the Council's decision to define the scope of factual records, by intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process.

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

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

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I Introduction and Methodology

Mandate

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

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

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

Research Approach

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

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

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

A preliminary version of this report was made available to the JPAC working group for its comments, which were incorporated prior to the public meeting on 2 October 2003. The public meeting was held to present and discuss the preliminary version of this report and related issues. Participants at the Montreal meeting were encouraged to provide written comments, which are incorporated into this final report. The JPAC working group will prepare a draft Advice to Council on the issues raised in this report, to be finalized and approved by all JPAC members at the JPAC Regular Session on 4-5 December in Miami, Florida.

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

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

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

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

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

II The Citizen Submissions Process in Context: Public Participation and Environmental Governance

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

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

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

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

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

[3] *Id.*at 6.

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

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

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

Public Participation in the NAAEC

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

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

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

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

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

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

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

[11] NAAEC, *supra* note 7.

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

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

been made through this process, eight of which have resulted in the development of a factual record.[14] If the Council approves the recommendation for the development of a factual record, the Secretariat then has the responsibility for gathering information related to the allegations from public sources, submissions from interested parties or JPAC, or developed by the Secretariat itself or through independent experts.[15] Once a factual record has been developed (and made public upon Council approval), the process is complete.

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

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

III Defining the Scope of the Factual Record

This section examines the impact and authority of the Council's resolutions defining the scope of the following factual records: *BC Mining*, *BC Logging*, *Migratory Birds*, and *Oldman River II*. In each of these cases, the Secretariat recommended to the Council that a factual record be developed to investigate alleged widespread, systemic failures of a Party to effectively enforce its environmental law. Although the Council approved the preparation of factual records with respect to each of these submissions, it significantly narrowed the scope of the investigation. That is, rather than order the preparation of factual records on the alleged widespread failure to effectively enforce, it instructed the Secretariat to develop factual records concerning only specific examples of the alleged

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

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

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

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

[18] *Id.* at 274.

widespread failure that were detailed in the submission. This represented the "first time the CEC Council had used its approval authority under the NAAEC to narrow the substantive scope of the factual records."[19]

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

A) Council's Scoping Decisions in Specific Submissions

BC Mining (SEM 98-004)

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

The Secretariat determined that a factual record was warranted regarding Canada's alleged pattern of ineffective enforcement of section 36(3) in relation to mines operating in British Columbia.[24] It recommended that the factual record develop information not only with respect to the three highlighted mines, but also the 39 known or potentially acid-generating mines referenced in the submission.[25] However, the Council instructed the Secretariat to develop a factual record regarding Canada's enforcement of section 36(3) at only one of the three mines highlighted as examples in the submission—the

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

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

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

[22] *Id.* at 14-15.

[23] *Id*. at 11.

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

[25] *See Id.* at 23-25.

Britannia mine.[26] The Council excluded from the factual record an investigation into enforcement at the other two mines discussed in detail as examples (Tulsequah Chief and Mt. Washington), based on Canada's notification to the Council that administrative or judicial proceedings were still pending with respect to those mines.[27] The Council's resolution did not, however, provide any explanation for its decision to exclude the submitters' broader allegations regarding Canada's widespread failure to enforce at mines throughout British Columbia, in particular at the 39 additional mines referenced in the submission.

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

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

The factual record further revealed an apparent federal enforcement policy shift away from traditional enforcement responses and towards compliance promotion at abandoned

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

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

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

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

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

[31] *Id.* at 9.

[32] *Id.* at 130-31.

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

BC Logging (SEM-00-004)

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

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

Here again, the Council's decision to limit the scope of the factual record limited the information that ultimately could be included in that record. First, since the Sooke watershed logging was on private land, the Council's resolution precluded the Secretariat from developing information relating to Canada's enforcement of section 35(1) in the context of public land, where the vast majority of logging in British Columbia occurs. Moreover, the factual record would limit information regarding Canada's enforcement on private land in British Columbia to the Sooke watershed. Finally, the Council's

[33] *Id.* at 55 - 56.
[34] *Id.* at 132.
[35] *Id.* at 61.
[36] *Id.* at 133.
[37] *Id*. at 126.
[38] *Id.* at 133.
[39] SEM-00-004 (*BC Logging)* Factual Record at 1 [hereinafter *BC Logging* Factual Record].
[40] *Id.* at 19.
[41] *Id.* at 18.
[42] *Id*. at 21.
[43] *Id*.

resolution excluded from the factual record information about Canada's alleged reliance on provincial laws and regulations to ensure compliance with the Fisheries Act.[44]

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

Migratory Birds (SEM-99-002)

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

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

Here too, the Council's decision to limit the scope of the factual record necessarily limited the information that ultimately could be included in that record. In particular, it excluded from the factual record information about the United States' MBTA enforcement policy with respect to logging operations other than the two specific examples. For example, it excluded information regarding the effectiveness nationwide of the "non-enforcement initiatives" described in the United States' response as

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

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

[46] *Id.* at 95.

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

[48] *Id*. at 6-8.

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

protecting migratory birds; the number of migratory birds taken as a result of logging as compared to those taken as a result of other activities as to which the United States had taken enforcement or regulatory action; the ease and effectiveness of requiring or encouraging the use of best practices in the logging context as compared to other contexts; the effectiveness of leveraging enforcement resources to achieve greater levels of compliance for logging as compared to other activities; and whether the U.S. practice of only pursuing enforcement action under the Endangered Species Act in connection with threatened or endangered migratory birds taken as a result of logging activity was an effective means of achieving the goals of the MBTA.[50] The Council's resolution also excluded information regarding several examples included in the submission, aside from the two selected by the Council, as illustrations of the nationwide failure to enforce.[51]

The factual record revealed that the federal government had taken no enforcement action with respect to either of the two identified cases.[52] The Secretariat observed that "these examples are consistent with the federal government's record to date of never having enforced the MBTA in regard to logging operations."[53] However, the factual record also revealed that the state government had prosecuted these cases under state law and had imposed criminal or administrative sanctions.[54] The record discussed at length the federal government's "Petite Policy,"[55] which determines when prior state enforcement action precludes federal enforcement, suggesting that this policy provides a measure for assessing the federal government's non-enforcement of the MBTA in these cases.[56]

Oldman River II (SEM 97-006)

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

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

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[50] *Id*. at 21.
[51] *Id*.
[52] *Id.* at 63.
[53] *Id*.
[54] *Id.*
[55] *Id.* at 41-42.
[56] *Id.* at 63.
[57] SEM-97-006 (*Oldman River II)* Submission at 1 [hereinafter *Oldman River II* Submission].
[58] *See* SEM-97-006 (*Oldman River II*), Article 15(1) Notification to Council that Development of a Factual Record Is Warranted (19 Jul. 1999, at 1, *available at* http://www.cec.org/citizen/status/index.cfm?varlan=english, last visited 28 Oct. 2003) [hereinafter *Oldman River II* Secretariat's Notification].
[59] *Id*. at 3.

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

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

Summary

With respect to the four submissions discussed above, the Council has declined to instruct the Secretariat to develop a factual record investigating the submitters' allegations of widespread, systemic patterns of ineffective enforcement. Rather, the Council has instructed the Secretariat to develop factual records limited to the specific violations that submitters have included as examples of such widespread patterns. Although these

[60] SEM-97-006 (*Oldman River II*) Factual Record at 18 [hereinafter "*Oldman River II* Factual Record].
[61] *Id.* at 63.
[62] *Id.* at 74, 90.
[63] *Id.* at 76-81, 90.
[64] *Id.* at 10, 49-50.
[65] *Id* at 76-7.
[66] *Id. at* 81.
[67] *Id.* at 30-31.
[68] *Id.* at 44.

rulings are not legally binding upon the Council with respect to future submissions,[69] many commentators have expressed concern that the Council may follow consistent reasoning in future cases. At the very least, the Council's resolutions set the tone for the submissions process and provide cues to future submitters about the kinds of claims that will support the development of a factual record.

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

B) Impact of the Council's Resolutions Defining the Scope of Factual Record

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

Limiting the Usefulness of Factual Records

Submitters have openly and vociferously expressed frustration that the factual records do not adequately address the concerns that prompted their submissions.[70] One issue is that the factual records—when limited to a few specific instances—have failed to address the cumulative effects that stem from the widespread patterns of ineffective enforcement alleged by the submitters. For example, in *BC Logging*, the submitters were concerned about the cumulative effects arising from certain types of damage routinely permitted under provincial law—clearcutting stream banks, individual stream crossings, and clearcutting of landslide prone areas. The submitters noted that, "the significant environmental harm from these practices arises not necessarily from any one instance,

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

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

but more importantly, from the cumulative effects of these practices occurring on a frequent basis in widespread parts of British Columbia."[71] By limiting the scope of the factual record to two sites within a single watershed in the province, the Council's resolution precludes the consideration of such cumulative effects in the factual record.

The factual records also have failed to address the submitters' broader concerns about a Party's implementation of its enforcement policies. As illustrated most clearly in the *Migratory Birds* submission, factual records limited to a few specific instances will not reveal widespread patterns of non-enforcement. Here, in spite of the Secretariat's determination that "information provided by the United States appears to support the assertion that logging operations that violate the MBTA are rarely prosecuted, if ever," and a draft government policy memorandum indicating a policy of non-enforcement *vis à vis* the logging sector, the Council limited the scope of the factual record to two cases identified in the submission. The factual record determined that state authorities had already imposed criminal or administrative sanctions under state law in these cases, thus providing an arguably reasonable basis for the federal government's failure to prosecute within these specific instances. However, as Paul Kibel notes, these specific instances "may be part of a programmatic policy of non-enforcement that cannot properly be characterized as reasonable exercises of prosecutorial discretion or bona fide enforcement allocation decisions."[72] Due to the Council's resolution, the Secretariat was unable to investigate this issue in the factual record. The submitters nevertheless aimed to draw value from the factual record, noting that the two examples "showed how the state of California could identify and prove violations of the MBTA, something that the federal government claims is too difficult,"[73] and that the factual record demonstrated that a regulatory regime to regulate logging and conserve migratory birds is, in fact, possible.[74] However, "the result, in the context of a detailed submission of widespread non-enforcement, was presumably a rather barren one for the submitters and of little value in achieving the objectives of the NAAEC."[75]

The *BC Mining* factual record also failed to adequately address the broader policy concerns underlying the submission. Here, the submitters were concerned that a lack of prosecutions for violations of the law against mines in British Columbia,[76] the ineffective use of enforcement mechanisms other than prosecution,[77] and reductions in federal enforcement staff and resources had led to the devolution of environmental law to the provinces and a systemic failure to enforce the Fisheries Act.[78] The Secretariat determined that these allegations raised "central questions" about the effectiveness of Canada's enforcement efforts with respect to mines in British Columbia generally.[79] The Secretariat further noted that Canada's response, which pointed to the enforcement tools

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

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

[73] *See* http://ciel.org/Tae/NAFTA_MigratoryBirds_24Apr03.html

[74] *Id.*

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

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

[77] *Id.* at 17.

[78] *Id.* at 11.

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

available to Canada under its enforcement policy, failed to explain the extent to which this policy had been implemented in practice and the effectiveness of its implementation.[80] However, the factual record—limited to an investigation of Canada's enforcement with respect to one particular mine—was unable to shed light on any of these larger policy issues, except by reference to the application of the enforcement policy in the context of the Britannia mine.[81]

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

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

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

Where the scope of the factual record is limited to specific instances, it also may be significantly more difficult for submitters to show ineffective action by a Party. First,

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[80] *Id*. at 23.

[81] *See generally*, Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 October 2003 (8 Sept. 2003) (attached in Annex to this report) at 3-4.

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

[83] Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003, *supra* note 71 at 4.

[84] *Id*.

[85] *Id*.

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

[87] *Id.* at 14.

scoping allows the Council—and not the submitters—to determine where to direct the factual investigation. The Council may selectively narrow the focus to specific instances that are not representative or illustrative of its larger enforcement practices and policies. For example, in *BC Mining*, the submitters expressed frustration that the Council narrowed the scope of the factual record from the 42 known or potentially acid-generating mines identified by the submitters to focus solely on the Britannia mine—"one of the few mines [the Canadian government] had shown any engagement on."[88] Submitters alleged that looking solely at the Britannia mine would "paint an unrepresentative and inaccurate picture," thus "almost certainly ensuring Canada a favourable factual record."[89] In a process built on the principle that "sunshine is the best disinfectant,"[90] limiting transparency through scoping diminishes the potential of the factual record to trigger improved environmental enforcement by the Parties.

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

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

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

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

[91] Article 45(1) of NAAEC provides:

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

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

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

particular legal provision at issue."[94] By precluding the Secretariat from fully considering a government's overall enforcement policy and its implementation, the Council's resolutions prevent the factual record from fully shedding light on potential government abuse of prosecutorial discretion.

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

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

Third, the factual records have generated information about government policies raised in the context of a specific case that may be useful to submitters in assessing or bringing other cases. For example, according to the submitters, the *BC Logging* factual record generated "valuable information regarding policy and funding issues impeding environmental law enforcement."[96] Similarly, the *Migratory Birds* factual record provided a detailed discussion of the federal government's "Petit Policy," governing the circumstances under which prior state enforcement action precludes federal enforcement; the *Oldman River II* factual record provided detailed information about the government's "Habitat Policy" with respect to the issuance of letters of advice. The *BC Logging* factual report also produced a set of "indicia of effective enforcement," which may be useful to citizens in assessing the effectiveness of a government's enforcement practices.[97]

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

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

[96] *Id*.

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

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

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

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

Heightening Potential for Further Scoping

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

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

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

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

drainage at the Tulsequah mine, one of the mines excluded under the Article 14(3) exemption.[101]

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

Furthermore, allegations of specific instances of ineffective enforcement "often shift[s] the focus from government conduct to the acts or omissions of a single industry, business or other entity."[104] Thus, limiting of scope to specific instances may make it more likely for a submission to be seen as "aimed at … harassing industry," within the meaning of Article 14(1)(d), thus precluding the development of a factual record.[105]

Undermining the Credibility of the Citizen Submissions Process

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

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

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

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

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

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

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

however, undermines the independence of the Secretariat, which is a key component of the Agreement and the basis for the credibility of the submissions process.[107]

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

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

Straining the Resources and Capacity of the Secretariat

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

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

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

[109] Letter from Governmental Advisory Committee to U.S. Representative for the Commission for Environmental Cooperation (19 Oct. 2001), *available at* http://www.ciel.org/Announce/Whitman_Letter_19Oct01.html (last visited 9 Sept.2003). *See also* Letter from Center for International Environmental Law to JPAC (17 Oct. 2001), *available at* http://www.ciel.org/Announce/CEC_JPAC_Letter.html (last visited 9 Sept. 2003) (noting that such an effort "is beyond the resources of non-profit NGOs[.]") *See also* Letter from Joe Scott, Northwest Ecosystem Alliance, to Joint Public Advisory Committee (attached in Annex to this report) (hereinafter "Written Comments Northwest Ecosystem Alliance") ("If the process continues to be undermined, citizens will no longer see the process as an important accountability mechanism and will justifiably cease to participate"); and Letter from Rachel Plotkin, Sierra Club of/du Canada, to Joint Public Advisory Committee (19 Sept. 2003) (attached in Annex to this report) (hereinafter "Written Comments Sierra Club Canada") ("…groups that might see the CEC as a useful tool in environmental protection will be discouraged from expending the time and resources necessary to make a submission").

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

Allegations of widespread, systemic patterns of ineffective enforcement may, in some cases, be more efficient and less time-consuming to investigate than allegations of specific violations. The Secretariat would not need to investigate every violation, but could instead examine evidence such as the number of prosecutions or internal policy memoranda regarding non-enforcement of particular laws. The Secretariat could also investigate specific examples of failures to enforce, but as several interviewees have pointed out, it would not need to investigate every violation.[111]

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

C) The Council's Authority to Define Scope of Factual Record

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

The Agreement itself does not explicitly grant or deny the Council the authority to narrow the scope of the factual record. The Agreement simply provides that "[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it

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

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

to do so."[113] It does not state whether the Council's authority to order the Secretariat to prepare a factual record also includes the authority to narrow its scope. However, several textual arguments have been made to suggest that the Agreement does, in fact, deny the Council the authority to narrow the scope of the factual record.

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

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

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

In a recent article, Professor David Markell, formerly Director of the CEC Secretariat's Submissions on Enforcement Matters unit, set forth another argument that the Council's resolutions are *ultra vires* based on the language of the Agreement. Markell argues that the Agreement does not allow the Council to act *sua sponte* to direct the Secretariat to develop a factual record. Rather, the Council is empowered to instruct the Secretariat to develop a factual record only after: (1) a submitter has identified particular enforcement practices or policies in a submission; and (2) the Secretariat has determined and recommended to the Council that a factual record is warranted to further investigate the issue. According to Markell, by narrowing the scope of the four factual records, the Council is requiring the Secretariat to develop a factual record on matters that were not the concern of the submission, and that the Secretariat may not have determined warranted the development of a factual record.[115] In effect, argues Markell, the Council is *sua sponte* directing the Secretariat to develop what is essentially a new factual record, which is not permitted under the Agreement.[116]

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

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

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

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

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

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

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

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

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

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

[119] *See* Chris Tollefsen, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 Yale J. Int'l. L. 141, 172-173 (2002) ("The complexity and political sensitivity surrounding the resolution of those issues would strong suggest that the Secretariat should not deal with

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

Because the terms of the treaty are silent or ambiguous on the issue of the Council's authority to narrow the scope of a factual record, it is necessary to look to the object and purpose of the Agreement in its interpretation. This is not only required under the Vienna Convention on the Law of Treaties,[121] but also contemplated in the NAAEC itself.[122] Based on such analysis, the Council's resolutions—although arguably consistent with the letter of the Agreement—seem to clearly violate the object and purpose, or "spirit," of the Agreement.

One of the fundamental objectives of the NAAEC is to enhance public participation in environmental decision-making. This is evidenced by the Agreement itself, which includes among its explicit objectives to "promote… public participation in the development of environmental laws, regulations and policies."[123] Another objective is to "support the environmental goals and objectives of the NAFTA,"[124] which specifically include public participation. In addition, the Preamble of the Agreement also emphasizes "the importance of public participation in conserving, protecting and enhancing the environment."[125] Moreover, the fact that the Agreement includes a citizen submission process and bodies such as the Joint Public Advisory Committee, the National Advisory Committees and the Government Advisory Committees indicates that the Parties intended the public to be an integral part of this process.[126] As discussed above, by requiring

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them as threshold matters.") It has also been suggested that the Secretariat does not have the mandate to determine what constitutes effective enforcement within the context of the submissions process, but simply to determine the facts surrounding allegations. As such, the definition of what entails effective enforcement in Article 45 would more relevant to the Article V sanctions process. *But see* Letter from United States Council for International Business (21 Oct. 2003) (stating that the definition of effective enforcement in Article 45 is relevant to the citizen submissions process) (attached in Annex to this report).

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

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

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

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

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

[125] *Id.* at Preamble.

[126] *See* Feretti, *supra* note 90 at 370 (noting that "Public participation was built into the structure of the Commission, not added as an afterthought."). *See also*, Raymond MacCallum, Comment, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*,

submitters to allege specific violations, the Council limits the usefulness of the factual records and imposes onerous human resource and financial constraints on citizens' groups that could limit their ability to participate in the process. As such, the resolutions may effectively cut the public out of the process and are thus inconsistent with the Agreement's public participation objectives.

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

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

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

Finally, a key purpose of the Agreement is to "promote transparency in the development of environmental laws, regulations and policies."[131] The citizen submission process is a "sunshine mechanism," and its sole mode of effecting improvements is through the disclosure of information.[132] The creation of an independent Secretariat charged with

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(1997) 8 Colo. J. Envtl. L. & Pol'y, 395, 400 (noting that a fundamental purpose of the citizen submission process was "to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective laws.")

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

[128] *See id.*

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

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

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

[132] Although the citizen submission process is simply a "sunshine" mechanism, Part V of the Agreement authorizes enforcement measures and sanctions for a "persistent failure by a Party to effectively enforce its environmental law." Some commentators have suggested that it may be the Parties' fear of being subject to

investigating the facts, immune from the "influence" of Parties,[133] appears to evidence this purpose.[134] The Council's resolutions, in interfering with the Secretariat's fact-finding process by deciding where to shine the spotlight, undermine the independence of the Secretariat and the ability of the process to enhance transparent and accountable environmental governance practices.

IV Sufficiency of Information

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

Nature and Impact of Sufficiency Requirement in *Ontario Logging*

In *Ontario Logging*, the submitters alleged that Canada was failing to effectively enforce section 6(a) of the Migratory Birds Regulations against the logging industry in Ontario.[137] To support their allegation of Canada's widespread, systemic failure to enforce, submitters (taking the cue from the prior four factual records) estimated the number of specific violations—the destruction of approximately 85,000 migratory bird nests in 59 provincial forests—that had resulted from or would result from Canada's failure to effectively enforce these regulations.[138] This estimate was based on planned harvest areas identified in forest management plans approved by the government, and information about the timing of planned cuts and the presence of migratory birds in the identified

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such sanctions for "persistent failures" that has motivated the Council's decisions to narrow the scope of factual records to specific instances. However, it is important to note that a citizen cannot bring a Part V action—only a Party can bring such an allegation against another Party. Therefore, as suggested by John Knox, the political realities are unlikely to ever give rise to a real risk of Part V sanctions.

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

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

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

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

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

[138] *Id*. at 4-5.

areas.[139] Although submitters admitted that their estimate of 85,000 destroyed nests was not exact, the Secretariat found that the estimate was "compelling," and that information about the areas actually harvested and concrete information regarding destruction of migratory bird nests during logging operations "could readily be developed in a factual record."[140] The submitters also referred to e-mail statements of enforcement authorities as evidence of a general policy of non-enforcement *vis à vis* the logging sector,[141] and an access to information request which yielded no information on specific enforcement actions.[142] Based on this information, the Secretariat determined that a factual record was warranted.

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

In response to the Council's resolution, the submitters unearthed additional information to substantiate their allegations. Rather than relying on the forest management plans to estimate numbers of trees logged in each identified forest, submitters obtained actual numbers of trees logged, enabling them to provide more accurate estimates of the number of migratory birds likely taken due to the alleged failure to enforce.[145] Submitters provided this information to the Secretariat within the 120-day period set by the Council,[146] and the Secretariat recently determined that the additional information warrants a response by Canada.[147] It remains to be seen whether the Council will find that the additional information is "sufficient" to support an instruction to the Secretariat to develop a factual record.

Through its resolution, the Council may have raised the evidentiary bar that future submitters must meet in supporting their allegations. If the Council ultimately finds that the submitters have not met the "sufficiency" requirement, then many would argue that

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

[140] *Id.*

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

[142] *Id.* at 6.

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

[144] *Id.*

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

[146] *See id*.

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

the Council has made it impossible for submitters to meet this burden.[148] Moreover, by setting such a high evidentiary threshold, the Council may essentially eliminate the practical value of the citizen submission process for citizen groups. Indeed, as the submitters in *Ontario Logging* observe, "the perception may develop that to obtain a factual record under the citizen complaint procedure one must essentially provide a factual record to the CEC."[149]

Authority of the Council

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

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

The Council, on the other hand, could make the argument that its ultimate authority to accept or reject the Secretariat's determination necessarily encompasses the lesser authority to determine whether the submission has met the Article 14(1)(c) "sufficient information" requirement and to condition its decision on the provision of such information. The Council could also argue that, as the parties to the agreement, they are the ultimate authority on the meaning of its terms.[151] As the terms of the Agreement do

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

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

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

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

not explicitly deny the Council this authority, and Article 10(c) gives the Council authority to "oversee the implementation and develop recommendations on the further elaboration" of the NAAEC, it is difficult to make a strong textual argument that the Council has acted outside the scope of its authority.

However, the Council's imposition of "sufficiency" requirements does appear to be inconsistent with the object and purpose of the NAAEC.[152] As discussed above with respect to the Council's authority to narrow the scope of factual records, a key purpose of the Agreement is to enhance public participation. Many interviewees have argued that, in setting the bar for "sufficient information" too high, the Council may render it prohibitively difficult for citizens to participate in the process.[153]

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

Certainly, some evidentiary threshold is necessary to avoid frivolous or speculative allegations from submitters, particularly where such allegations could theoretically lead to sanctions under Part V of the Agreement. However, the Agreement explicitly provides the Secretariat with the mandate and authority to weed out any such "fishing expeditions" by submitters. For example, the Secretariat must ensure that the submission provides "sufficient information" and "appears aimed at promoting enforcement rather than at harassing industry." Additionally, the Secretariat must take into account whether a submission is "drawn exclusively from mass media reports." Most interviewees felt that

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[152] *See* Vienna Convention on the Law of Treaties, *supra* note 122 (providing that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.")

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

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

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

the Secretariat had thus far effectively eliminated frivolous or speculative allegations,[156] and that there was no legitimate policy reason for the Council to re-open the Secretariat's determination that the *Ontario Logging* submission met the evidentiary threshold.

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

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

V Council Resolution 00-09 on Matters Related to Articles 14 and 15 of the Agreement

Overview: Council Resolution 00-09 in Context

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

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

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

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

Defining the scope of authority of the Council, the Secretariat, and the public with regard to the submissions process has been a controversial issue since inception of the CEC.[159] This balance of authority is a central issue, and one that has the potential to influence the effectiveness of the citizen submissions process as a tool for improving enforcement.[160] A great deal of authority is granted both to the public, in choosing which issues should be the focus of submissions, and to the Secretariat, which is meant to be a neutral forum for evaluating such submissions and the fact-finding process. The Parties maintain an oversight role, through the Council, in determining whether a factual record should be developed in a particular case and whether that record, once completed, should be made public.[161] The Parties' dual role, as both custodians of the process and potential targets of specific submissions, inevitably creates tension regarding the appropriate level of oversight versus the independence of the Secretariat.[162] This tension initially reached a peak during closed-door negotiations in 1999 and 2000, in which the Parties discussed the prospect of revising the Guidelines in order to scale back the role of the Secretariat in the process, and consequently to facilitate a larger oversight role for the Council.[163] The Guidelines to the submissions process were drafted by JPAC with public notice and comment, and adopted by the Council in 1995. At its 1997 Regular Session, the Council agreed to initiate a review process for the Guidelines, which would include submitting the proposed revisions to JPAC for a 90-day public review.[164] In 1998, in accordance with Article 10(1)(b) of NAAEC, which mandated review of the operation and effectiveness of the Agreement four years after its entry into force, an Independent Review Committee (IRC) was appointed to conduct the review and report its findings.[165] Among the IRC's findings was a recommendation that "[t]he existing review of the operation of this [submissions] process should be completed after more submissions have been processed, including factual records when appropriate, in order to provide a greater body of experience to draw upon."[166] Despite this recommendation, the revised Guidelines were released to JPAC for the public review process. In its Advice to Council No. 99-01,

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

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

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

[162] Letter from Paul S. Kibel, *supra* note 19, at 33; IELP Written Comments, *supra* note 92, at 4.

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

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

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

[166] *Id.* at Rec. 11.

JPAC noted that, "[b]y far the majority of those members of the public who provided written comments…held the view that the case had not been made to support the revision process."[167] Nonetheless, the Council adopted revised Guidelines in June 1999.[168]

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

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

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

Interpreting Council Resolution 00-09

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

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

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

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

[170] Sierra Legal Defense Fund, Written Comments for JPAC Public Meeting on 2 Oct. 2003, *supra* note 72.

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

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

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

The language itself clearly preserves the Council's discretion regarding whether to refer these issues to JPAC for public review on its own initiative. The Council "may" take this action, but is not obligated to do so. When an issue related to implementation or further elaboration of the submissions process is brought to the Council's attention by JPAC itself, or by a member of the public through JPAC, the Council does not retain this discretion. The plain meaning of the language of Council Resolution 00-09 is that the Council is obligated to ("shall") refer "any such issues as it proposes to address" to JPAC for public review. In other words, if the Council is approached regarding an issue it is in the process of addressing or is proposing to address, the Council's clear intention was always to hold a public review through JPAC on the matter. Although what "proposes to address" means remains open to interpretation, the prospective connotation indicates that the Council need not be in the process of addressing an issue when it is brought to the Council's attention by JPAC or others.

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

[172] *Id.*

reasoning underlying any final decision would be made public, was therefore a great step in principle towards alleviating those concerns by improving the transparency and participatory quality of the process.

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

Actions Taken Pursuant to Council Resolution 00-09

Lessons Learned

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

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

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

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

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

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

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

[178] Letter to Jon Plaut (JPAC Chair), 6 Mar. 2002, *available at* http://www.cec.org/files/PDF/JPAC/L_Coun-6mar2002.pdf (last visited 7 Sept. 2003). JPAC had

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

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

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

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

Following the Council decision to move forward with "scoping," JPAC formally requested that the Council authorize a public review, pursuant to Council Resolution 00-09, of the matters of limiting the scope of factual records and of the requirement for preparing a work

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requested that when a Party's response to a submission contained new information, or if the Party simply provided such additional information, that the submitter be notified and given the chance to respond. The Council felt that considerations of timeliness outweighed the need for transparency in these situations. Additionally, JPAC recommended that there be instituted an opportunity for a Party to follow up on the release of a factual record with a report to the Council on actions taken to address the matters addressed in the factual record. The Council responded that this would be beyond the scope of the 14/15 process, and that follow-up to the process was a domestic policy matter.

[179] *See also* Letter from Paul S. Kibel, *supra* note 19, at 29.

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

plan prior to development of a factual record.[181] The Council responded that JPAC should proceed with public review of the work plan issue, but postpone review of the scoping issue until the factual records were completed. As a result, the Council stated, review would be "based on actual experience, an important value-added in what has been a difficult topic."[182]

Textual Analysis of the Council's Actions

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

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

The Council expressed its conviction that the delay would add value to the process. JPAC, on the other hand, argued that waiting for completion of the factual records would effectively eliminate any meaningful opportunity for public input into this process.[183] When the Council's decision is considered in light of the recognition in Council Resolution 00-09 of the need to "increase transparency and public participation *before* decisions are made regarding the implementation and further elaboration" [*emphasis added*] of Articles 14 and 15, as well as the prospective nature of the requirement that the Council refer any such issue it "proposes to address," it appears that the Council's decision to delay the public review contravened of the object and purpose of Council Resolution 00-09 and of the NAAEC.

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

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

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

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

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

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

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

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

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

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

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

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

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

[189] *Id.*

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

The commentators also unanimously stated that the Council's decisions should be viewed in light of the controversy leading to adoption of Council Resolution 00-09, the commitment of the NAAEC and of the Resolution to transparency and public participation, and the very nature of the submissions process as a "sunshine" mechanism. Given this context, they felt the Council's decision to leave the impetus for public review up to JPAC was in contravention of the spirit and purpose of the Agreement and the Resolution. In the words of one commentator, refusing to allow public involvement in these decisions "guts the process."

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

VI Conclusion

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

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

The submitters in *Ontario Logging* have again alleged widespread patterns of non-enforcement—but, based on the experiences with the earlier four factual records, have

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

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

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

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

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

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

[192] *Ontario Logging* Secretariat's Notification, *supra* note 136 at 11

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

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

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

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

Annex: Written Comments Received

http://www.cec.org/who_we_are/jpac/comments/comments_0301.cfm?varlan=english

- Academia Sonorense de Derechos Humanos, A.C. - Reunión del Comité Consultivo Público Conjunto
- Canadian Nature Federation - Article 14 Citizen Submission process
- Canadian Parks and Wilderness Society - JPAC Review of Citizen Submission Process
- Comité Pro Limpieza del Rio Magdalena - Opinión respecto a la aplicación de los Artículos 14 y 15 del Acuerdo de Cooperación Ambiental
- Forest Products Association of Canada - Submission on Issues Related to Articles 14 and 15
- Hydro-Québec - Comment concerning public consultations on issues related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation
- International Environmental Law Project (IELP) - Comments on Issues Relating to Articles 14 & 15 of the North American Commission on Environmental Cooperation
- Lindberg, Chris - Request for Public Comments on the preliminary report for JPAC public meeting on issues related to Articles 14 and 15
- Northwest Ecosystem Alliance - JPAC Review of Citizen Submission Process
- Paul S. Kibel - Comments to JPAC on CEC Actions Limiting Scope of Factual Records Prepared Pursuant to Articles 14 & 15 of the NAAEC
- Sierra Club of Canada - JPAC Review of Citizen Submission Process
- Sierra Legal Defence Fund - Issues Related to the Articles 14 and 15 Process - Written Comments of the Sierra Legal Defence Fund for the JPAC Public Meeting on October 2, 2003
- Sierra Legal Defence Fund - Supplementary Written Comments Related to the Articles 14 and 15
- The Friends of the Oldman River - JPAC Review of Citizen Submission Process
- Transboundary Watershed Alliance - JPAC Review of Citizen Submission Process
- United States for International Business - Response to the JPAC request for comments on issues related to the implementation and further elaboration of Articles 14 and 15
- US National Advisory Committee - Advice 2003-13: The Article 14/15 Citizen Submissions Procedure
- Wildlands League - JPAC Review of Citizen Submission Process
- Wildlands League - Further comments on Articles 14 and 15