

**COMMISSION FOR ENVIRONMENTAL COOPERATION
(CEC) OF NORTH AMERICA**

THE JPAC AT TEN

**A REVIEW OF THE
JOINT PUBLIC ADVISORY COMMITTEE TO THE
COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA**

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[Inside Cover]

This publication is drawn from an independent report commissioned as an input to the Commission for Environmental Cooperation's Ten-year Review and Assessment Committee (TRAC). The original independent report to the TRAC was prepared by Eric Dannenmaier, Alastair Lucas, José Juan González, and Carla Delfina Aceves, with research support from Rebekah Salguero, James Walker, Lina Uribe García, Joselle Lamoutte, Katherine Jensen, and Camiel Becker (the "original report"). The original report incorporated research on the Joint Public Advisory Committee (JPAC), the US National Advisory Committee (NAC) and the US Government Advisory Committee (GAC) by Dannenmaier, as well as papers on Canada's National Advisory Committee (NAC) by Lucas and Mexico's NAC by González and Aceves. To prepare the original report, authors and researchers conducted interviews with persons who have worked with, studied, or participated in activities of the CEC Advisory Committees, and conducted a comprehensive record review of files maintained by Secretariats to those Committees and independent press reports. In addition, the original report made reference to and relied on some of the empirical data in a discussion paper entitled "JPAC and Public Participation in CEC Activities," prepared for the TRAC by Marc Paquin and Karel Mayrand of the Unisféra International Centre (November 2003).

This publication is composed of those parts of the original report dealing with JPAC, supplemented by more recent research conducted by Dannenmaier relating to JPAC's work on the citizen submission provisions of the North American Agreement on Environmental Cooperation (NAAEC), with research support from Loren Remsberg. It was prepared at JPAC's request to create a public record of the advice provided to TRAC during the Ten-year Review. Portions relating to the NACs and the GAC have not been reproduced (although they are a part of the original report, which is on file with the CEC Secretariat).

Drafts of the original report and this publication were circulated to JPAC members and the CEC Secretariat for comment, but both documents were prepared independently. The findings and recommendations presented in this publication remain those of the author.

Acknowledgements

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Executive Summary

The Joint Public Advisory Committee (JPAC) was created with the Commission for Environmental Cooperation (CEC) under the North American Agreement for Environmental Cooperation (NAAEC)¹ when that side agreement to the North American Free Trade Agreement (NAFTA) came into effect in 1994. JPAC was conceived to advise the CEC, and it provides unique and important public perspective for the CEC and the three Parties to those Agreements. As such, it is a mechanism largely unprecedented and unparalleled in other multilateral trade agreements and institutions.

By the terms of its creation in the NAAEC, JPAC has fifteen members, with five appointed by each of the three NAAEC Parties. It works by consensus as a single, transnational body to promote North American cooperation in ecosystem protection and sustainable economic development and to ensure active public participation and transparency in the actions of the CEC.

During 2004, researchers reviewed public records, conducted interviews with key stakeholders, and examined case studies of issues that JPAC has addressed as a means to assess how effective the Committee has been in: (1) engaging the public in the CEC's work, and (2) informing and influencing the CEC's agenda as well as the North American environmental agendas of the NAAEC Parties.²

Researchers found that JPAC has adapted and consolidated its role during its first ten years and—in light of its mandate and the context in which it operates—has achieved remarkable success in a number of areas.

JPAC has provided a transparent, open, and substantive forum for public debate among citizens concerned with trade and environment issues in North America, and it has faithfully articulated public concerns to the NAAEC Parties. It has sponsored and facilitated a range of public meetings on issues identified as public priorities and fostered a sustained and informed dialogue with Council³ and the Alternate Representatives. JPAC

¹ The NAAEC is a side agreement to the North American Free Trade Agreement (NAFTA). Annex A provides relevant provisions of the NAAEC. Because Canada, Mexico, and the United States are the signatory countries of NAFTA and the NAAEC side agreement, they may be referred to in this document as Parties to either Agreement.

² The terms of reference for this study (*see* Annex B) are limited to a review of the advisory committees as a point of entry for the public, although these represent only one means of public access to the CEC. Many other public access mechanisms exist, such as the submission process of Articles 14 and 15, and the CEC Secretariat regularly organizes or facilitates public meetings and engages the public on a range of issues outside the context of the advisory committee structure. In fact, the advisory committees often participate in these other meetings and rely on these other mechanisms as a means to interact with the public or understand public interests and concerns.

³ The CEC Council is composed of the senior environmental officers of each NAFTA Party: the Minister of Environment (Environment Canada) in Canada, the Secretary of Environment and Natural Resources (Semarnat) in Mexico, and the Administrator of the Environmental Protection Agency (EPA) in the United States.

has been particularly effective in pursuing issues in cooperation with Council where collaboration among public advisors and public servants advances issues of mutual interest. Yet JPAC has not shied away from controversy or from confronting Council where opinions or interests diverge. Even where its advice is not followed or where frustrations inhere, JPAC's persistence has provided a critical barometer of public concern for the Parties and their citizens. In many areas, JPAC has provided meaningful input that has affected and strengthened policies and programs of the Council and the Parties—even in cases where progress is slow or imperceptible.

Despite its contributions, JPAC has experienced challenges and frustrations. A high level of sustained interest by environmental NGOs has characterized JPAC's public engagement, but there has been more limited participation by other regional constituencies, notably indigenous and low-income communities and the business sector. There is a sense that the general public is unaware of the JPAC (sometimes even the CEC itself), and that little or no outreach or public diplomacy occurs beyond the issue-driven meetings that JPAC attends or facilitates. Moreover, in many ways JPAC's relations with Council and the Alternate Representatives have evolved into a highly formalized, even ossified discourse. JPAC can become mired in technical details, and the challenge of fulfilling a dual role of public watchdog *and* strategic partner has led some to criticize JPAC's occasionally antagonistic approach to Council even as others challenge its willingness to collaborate and compromise. JPAC's impact on the CEC agenda has tended to be limited in the more sensitive or controversial areas that it has addressed and this has led to expressions of frustration from all quarters.

On balance, JPAC, the Council, and the Secretariat have proven that a model of positive engagement, responsible public debate, and tolerance for dissent can promote compromise and progress, and lead to greater public awareness and support for environmental policies in the context of NAFTA. While JPAC's work is in many ways preliminary—it can and should continue and strengthen its efforts in the future—its success to date cannot be discounted.

Researchers found that JPAC's success derives in great measure from the dedication and level of interest of its members, and from the openness and tolerance of Council and Alternate Representatives and their staffs. Researchers also noted the importance of consistent and meaningful support from the Secretariat, and credited the commitment and institutional memory provided by Secretariat staff. The Secretariat has been particularly important in facilitating public discourse and creating an impressive and accessible public record of JPAC's work.⁴

The NAAEC Parties have benefited from improved public understanding of their efforts, from the substantive insights provided by JPAC members, and from JPAC's ability to

⁴ With the exception of in camera sessions with Council and Alternate Representatives, records of all JPAC meetings, workshops and other public activities are available on the Web along with all correspondence to and from Council and the Parties.

serve—despite the inherent tension—as a public monitor and critic, a sounding board for trade and environment issues, and a structured public point of entry to the workings of the CEC. Key JPAC findings are set highlighted in Box 1 and detailed below on pages 17–22.

Box 1: Key Findings

1. JPAC has been an innovative debate facilitator and point of entry for the public, providing public access to information about environmental issues in North America and the work of the CEC at the same time that it brings the public into dialogue with the NAFTA Parties.
2. JPAC’s dual role as public watchdog of the Parties *and* as a strategic partner for the Council in pursuing a regional environmental agenda has created philosophical and operational challenges.
3. Early concerns about coordination and strategic vision have been addressed.
4. JPAC has been more effective when it focuses on transboundary issues rather than internal domestic concerns, although some notable exceptions exist.
5. JPAC has had limited indigenous participation in its work, but has made some progress in integrating indigenous communities.
6. The business sector has not been consistently active in JPAC activities, but has engaged where interests and priorities clearly coincide.
7. JPAC and Council have reached stalemate on certain priority issues, leading to frustration by JPAC members and officials.
8. Tolerance of discord is a critical dimension of success.
9. JPAC’s communications with Council and the Alternate Representatives have tended to be highly formalized, with little opportunity for more “organic” interaction.
10. JPAC’s relations with the Alternate Representatives have been increasingly important, but cumbersome.
11. The perception of JPAC as a quasi-governmental body can influence its relations with the public.
12. The commitment of JPAC members has been a key to JPAC’s success.
13. Coordination and support from Secretariat has historically been strong.
14. New budget limitations will begin to constrain JPAC’s core work and limit its public diplomacy role.

In light of these findings, researchers found no need for major overhauls to the manner in which JPAC functions. Instead, many recommendations focus on continuing and expanding efforts that are already ongoing. Among the principal recommendations is that

JPAC should seek a stronger, less formal dialogue with the Council and the Alternate Representatives as a means to improve mutual understanding and promote cooperation rather than conflict in work plans. This does not discount JPAC's role as a public monitor and occasional critic of the Council (indeed there are times, notably the running dialogue on citizen submissions under Articles 14 and 15, where discord serves an important function) but recognizes that progress is more likely under a framework such as the NAAEC when efforts tend toward cooperative rather than adversarial. Researchers also found that JPAC's greatest contribution, both as a facilitator of public process and as an influencer of policy, has been where it remains focused and concentrates on a defined set of issues within its manageable interest. Clearly the scope of potential issues is broad—but narrowing the field through strategic planning concentrates public attention and resources, and it increases the credibility of JPAC's arguments even where it challenges the position of the Council.

Researchers concluded that concerns about JPAC's effectiveness should be placed in the context of the NAAEC, the NAFTA, and the status of trade and environment issues in North America. Much of the frustration expressed by and about the JPAC is to an extent inherent in the nature of the institution and the functions it is asked to perform. Recommendations thus focus on overcoming some of these frustrations while recognizing the importance of JPAC's accomplishments despite the frustrations. Key recommendations are outlined in Box 2 below and described in more detail on pages 22–24.

Box 2: Key Recommendations

1. Continue to address difficult and even controversial issues through JPAC in a meaningful and responsible fashion, despite slow or imperceptible results and despite the frustration inherent in such cases.
2. Continue to focus JPAC's work plan in areas identified as priority by Council where success and impact are more certain *without abandoning* priorities identified by JPAC members themselves and members of the public—balancing any new or expanded work with resource availability and JPAC's manageable interest, and concentrating on issues that are truly transboundary in nature.
3. Expand efforts to reach out to indigenous communities and businesses, as well as low income and other marginalized communities, recognizing that interest in participation will most often correlate with issues that directly affect them.
4. Consider a broader outreach and public diplomacy role for JPAC as a means to engage the North American public more effectively in transboundary environmental issues and in the work of the CEC.
5. Promote better relations and communications among JPAC, Council and Alternate Representatives as a means to increase understanding and minimize discord while promoting cooperative and creative solutions

through more opportunities for informal interaction and through engaging individual JPAC members in their own countries.

6. Consider restoring and increasing the budget for JPAC operations and public outreach consistent with the broader needs of the overall budget for the CEC.

Background

JPAC is a fifteen-person volunteer public advisory body authorized under Article 16 of the NAAEC, and comprised of five members from each of the three NAFTA Parties. Council members, from their respective governments, nominate the Canadian and Mexican JPAC members, and the President of the United States nominates US members. The Canadian JPAC members have a three-year fixed term, and the Mexican members have no fixed term, but have in practice served for three years. US members have no fixed term.

JPAC's vision, adopted in 1994, is to promote North American cooperation in ecosystem protection and sustainable economic development and to ensure active public participation and transparency in the actions of the CEC. It works by consensus as a single, transnational body and its members act independently of the Council and do not seek or receive instruction from any government. Its agenda is formulated in part from the ideas and opinions of its members, in part from public input and in part in response to requests from Council.

General Observations

The JPAC is a unique trilateral public advisory mechanism without any direct precedent or peers among international environmental institutions. It has grown and adapted to its role during the first ten years of the NAAEC and—in light of its mandate and the context in which it operates—it has achieved remarkable success in a number of areas. JPAC has experienced both successes and failures in engaging the public and influencing the Council and regional environmental policy.

In terms of public engagement, JPAC's record has been very strong, although researchers identified concerns about integrating indigenous communities and the business sector as well as low-income communities and other traditionally marginalized groups. At the same time, JPAC has made specific efforts to engage these groups in recent years and has succeeded in cases where a particular community perceives that its interest is directly at stake. JPAC has also helped strengthen overall public access to the mechanisms of the NAAEC and the CEC, most notably through continuing attention to the operation of the Article 14/15 mechanism for citizen submissions on matters relating to failure to enforce environmental law.

In terms of impact on policy, JPAC's failures and frustrations have tended to be in more sensitive or controversial areas where the Parties are not ready, willing or able to act—often for political or technical reasons that transcend any manner or degree of public input. The greatest level of personal and public frustration attends these issues, yet it should be noted that in most cases the ability and willingness of Council to tolerate and engage in public discourse on these issues is in itself a measure of success. At the same time, researchers found that JPAC has provided meaningful input that has influenced and strengthened policies and programs. This has been particularly true where policies and

programs are most consistent with the cooperative nature of the NAAEC and involve “non-controversial” issues that the Parties are willing and able to address.

In short, JPAC is a public access mechanism, not a public panacea nor a means to substitute a citizen committee’s judgment for responsible national officials. Viewed as such, these frustrations and failures are to be expected; the key is to continue the discourse as issues evolve and solutions are sought in the longer term. (A more complete description of findings can be found at page 17 below).

Researchers also found it important that JPAC has received consistent and meaningful support from the Secretariat, and has benefited from the commitment and institutional memory provided by Secretariat staff. Through the Secretariat’s efforts, JPAC has also created a detailed public record that is easily accessible through the Internet to interested parties in all three countries. All written communications to and from Council, records of discussions and decisions, and commissioned papers are available on the Web. In addition, JPAC meetings (with the exception of *in camera* sessions with Council) are open to the public, and in many cases the Secretariat is able to fund costs associated with travel for interested parties who could not otherwise participate. This level of transparency and openness lends credibility to the work of JPAC and the CEC. It also serves an outreach function by informing the broader public of the work of the CEC and engaging the public in discourse about North American environmental issues.

Case Studies⁵

The following cases were selected as representative of some of the issues that the JPAC has dealt with during its first ten years. In each case, researchers reviewed the entire written record and assessed how the issue was managed from beginning to end (although in some cases, the issue may be ongoing). A specific set of questions and indicators was applied to each case to clarify how the public was engaged in the process and how the Council responded to JPAC’s concerns.

This set of case studies does not represent the entire universe of issues that JPAC has addressed, researchers were seeking to sample the spectrum of JPAC’s work, and it was not feasible to examine the entire record in detail. In addition, a number of issues addressed by JPAC were not analyzed through the case study assessment, but were considered by researchers through the broader analysis of JPAC’s public record and through interviews with JPAC members and key stakeholders.

1. Sound Management of Chemicals

⁵ The following provides summaries of the six JPAC case studies conducted by researchers. A description of case study selection and methodology is provided in Annex C. Complete descriptions and records are on file with the author.

The Council identified the need to focus on the Sound Management of Chemicals (SMOC) early in the life of the CEC through a resolution in October 1995 establishing a SMOC working group. The working group was tasked with developing North American Regional Action Plans (NARAPs) for priority substances. JPAC has worked with the SMOC working group both formally and informally since its inception, serving to monitor progress, encourage broader participation of NGOs and indigenous communities in the process, and promote public accountability in implementing NARAPs. Over time, the CEC has also offered detailed advice on specific chemicals as priority substances and has discussed issues such as coordination between CEC and other intergovernmental efforts on priority chemicals. JPAC has also advocated education and capacity building for the SMOC program, devoting one of its sessions to dialogue on chemical management. The SMOC program and NARAPs have taxed the capacity of the CEC, and it is reported that the program may be turned over to the Parties in the near future. But many view SMOC as one of the CEC's successful long-term programs, and JPAC has had an impact on this success through its input, oversight and engagement.

2. Children's Health

JPAC responded to a 1999 initiative of Canada's Minister of Environment, and a subsequent request for advice from Council to study the possibility of combining children's health with other CEC programs as a means to address the issue while minimizing budgetary demands. After study and public dialogue, JPAC recommended that the NAFTA Parties convoke health ministers to consider ways to support the initiative and to integrate it into other programs. Council responded in part by establishing an Expert Advisory Board on Children's Health and the Environment in June 2001 (EAB). The EAB conducted a series of public meetings, solicited public comment, and collaborated with JPAC in developing an action plan to focus on the relationship between transportation (and the use of diesel fuel) and children's health, particularly with respect to respiratory illness. Council approved the plan in 2001, calling for a pilot project at selected border crossings to gather data about possible links between emissions and respiratory illness, and for the development of indicators for gauging children's health. The plan was reported to be underway and making progress at the Council's Regular Session in 2003 and Council directed the Secretariat to prepare and publish a report on the indicators when complete. Council also called for the Secretariat to continue improving the quality of the indicators and gathering data, and to publish follow-up reports every five years.

3. NAFTA Chapter 11

NAFTA Chapter 11 has been a concern for many in the environmental community for a number of years. In some cases, it has been interpreted to allow investors to be compensated for the "expropriation" of investments that are subjected to national or local environmental regulations, and there is concern that the provision will undermine the

ability of NAFTA Parties to regulate in the interest of the environment. The issue was raised on the record by JPAC's chair in 1998 in response to "mounting public concerns and as a result of [JPAC's] internal deliberations." In subsequent years, JPAC engaged in internal debate and study of the issue, and has engaged members of the public through its meetings, including public workshops in 2002 and 2003. JPAC has echoed concerns over the implications of Chapter 11 for environmental policy, and has urged a balance between the interests of the public and claims of private investors in the application of Chapter 11. JPAC has also called for "objective research reports" on Chapter 11 and its implications for environmental policy. The NAFTA Parties' Trade Ministers issued a statement in 2003 recognizing JPAC's work and acknowledging the need for greater public transparency regarding this issue. Yet Council seems to have foreclosed further research by JPAC, responding that JPAC's proposal for research reports on Chapter 11 "falls outside of the CEC's current work plan." To date, the Parties have taken no steps to amend Chapter 11 or address public concerns about the provision.

4. Lake Chapala, Mexico

Citizens living near Lake Chapala, Mexico have raised concerns for a number of years about water quality, water demands and water scarcity at the lake—located in central Mexico about 50 km from Guadalajara. The lake has been the subject of two NAAEC Article 14/15 claims (the first submitted in 1997 and terminated in 2000 without a factual record, and the second initiated in 2003 and pending). Citizens and NGOs have also brought the issue to the attention of JPAC during two roundtable discussions on biodiversity conservation—claiming that the lake is in "urgent" need of attention. JPAC treated the issue in a letter to the CEC executive director, emphasizing the need for immediate action. The executive director responded that the Council had agreed to undertake "collaborative work in this area" as part of a broader program on water management. To date, no direct action has been taken, and it is not clear how the Lake Chapala issue is being reflected in the water management program.

5. Transboundary Environmental Impact Assessment

Transboundary Environmental Impact Assessment (TEIA) is an issue arising from the NAAEC language in Article 10(7) that the Council "consider and develop recommendations with respect to . . . assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects." JPAC has discussed the issue a number of times, beginning as early as 1998, when it supported TEIA negotiations among the Parties. Public interventions during a number of JPAC meetings raised concern that progress on TEIA has been slow; at times imperceptible. JPAC continued to raise the issue, and to urge progress, eventually resolving to establish an internal working group on TEIA in October 2003. Despite these efforts, the issue was removed from the budget and operational plan

for 2004–2006 (over the objections of JPAC members). Researchers found that the failure of Parties to act on TEIA to date is attributed by many to a lack of political will to address the issues at the inter-state level.

6. Integration of Indigenous Communities

JPAC has recognized a need to do a better job of involving indigenous organizations in the work of the CEC at least as early as its advice to Council in August 1995, recommending that indigenous organizations be involved in the planning and implementation of projects. In subsequent advice to Council over the years, JPAC has renewed this emphasis on indigenous participation and bringing an indigenous perspective to the work of CEC—and a number of public participants in JPAC meetings have made a similar call. JPAC has also worked to bring indigenous voices into its own processes, including targeted outreach for a March 2000 workshop on North American Biodiversity Conservation. Several JPAC members have also been appointed from the indigenous community. Council has recognized the importance of engaging indigenous organizations, and has made the issue a priority in its 2004 Operational Plan. Despite the repeated calls for greater involvement, JPAC’s own self-directed efforts, and Council decisions, researchers found that many still believe more can be done.

Citizen Submissions under Articles 14 and 15

One key area of continuing attention by JPAC in its first ten years has been the citizen submission process of Articles 14 and 15 of the NAAEC. The original report on which this publication is based did not address this topic because it was explicitly excluded from the terms of reference (a separate report was commissioned by TRAC on the subject), but a publication on JPAC’s history would not be complete without a consideration of the subject. Thus, in preparing this publication, the author reviewed the public record of JPAC’s work on citizen submissions, and developed the following summary.⁶

Articles 14 and 15 of the NAAEC allow citizens of one of more NAFTA countries to file a submission where they believe a party has failed to effectively enforce its environmental laws.⁷ The CEC Secretariat manages the citizen submission process, and is responsible for conducting an initial review of all submissions to assure that they meet the requisites of Articles 14 and 15. Under prescribed conditions, the Secretariat may request a response from the party concerned, and may continue with factual investigations and the preparation of a factual record where warranted. For its part, JPAC is authorized by the NAAEC to “provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a factual record under Article 15.”⁸

⁶ It should be noted that this additional research has reinforced, rather than challenged, the conclusions and recommendations made in the original report prepared for the NAAEC Ten-year Review.

⁷ See text of Articles 14 and 15 at Annex B.

⁸ Article 16(5).

JPAC became involved in shaping the 14/15 process at an early stage, hosting public meetings and providing advice to Council on the development of submission guidelines. Guidelines were vetted through public meetings, and adopted in October 1995. In June 1997, two months after the first factual record from a 14/15 citizen submission was circulated to the Parties (concerning a proposed pier in Cozumel, Mexico), the Parties agreed to initiate a “review process of the operation of the guidelines.”⁹ JPAC later requested, and was granted, the opportunity to participate in the review.

The public record reveals little about JPAC’s position or its input during the early part of this review process, which eventually lasted two years, but it is clear that the Parties sought to further define and constrain the Article 14/15 mechanism through revisions to the guidelines. Six months into the review (and five weeks after the Cozumel final factual record was published) the Alternate Representatives to Council met and discussed “the principles that should guide the review of the Guidelines.”¹⁰ The record indicates that the Parties were concerned with the potentially adversarial nature of the Article 14/15 process,¹¹ and sensitive to public perceptions about outcomes of the submissions under Article 14/15. The Parties, for example, sought to assure that factual records would not be perceived as making “recommendations” for action that Parties might be pressured to follow.¹²

As the Parties were completing their review of the guidelines, but before revisions were made public, an Independent Review Committee (IRC) conducted a four-year review of the NAAEC and the CEC. The IRC addressed, in part, the Article 14/15 process. The IRC’s report (published in June 1998) recommended that the “citizen submission process *should continue as presently designed*, based on a scrupulous application of the Agreement and the Guidelines, respecting the limits of actions they contain as well as the discretion provided to the respective decision-makers at different points in the process.”¹³

JPAC took this recommendation as evidence that the Article 14/15 submission guidelines should not be modified and advised that Council abandon the guideline review. JPAC

⁹ Report of Regular Session of Council from 12 June 1997. Article 19.1 of the 1995 Guidelines called for a review after 18 months, and the timing of Council’s review coincides with this prescription.

¹⁰ Report of meeting of Alternate Representatives on 2 December 1997.

¹¹ The record states that the alternative representatives “discussed the nature of the Article 14 process (not quasi-judicial).” *Id.*

¹² During a May 1998 meeting, the Parties instructed the Secretariat to amend the record on a citizen submission “to delete any reference to the word ‘recommendation’ and to use the language of Article 15 of the agreement, send the amended version to the Parties and the submitters and modify the registry and public file accordingly. It was further agreed that the Parties will endeavor to select, in the course of the review of the Article 14 guidelines, a suitable noun to identify the document Council Session 98-03, 26 May 1998, Final Version prepared by the Secretariat under Article 15(1) and to replace the word ‘recommendation’ used thus far.” Record of meeting of Alternate Representatives on 26 May 1998, at 2.

¹³ Four-year Independent Review Committee report, June 1998 (emphasis added).

proposed instead that, “the present process be permitted to grow and strengthen from experience.”¹⁴

Council did not heed the IRC recommendation, or JPAC’s advice. Instead, at its annual June meeting (which corresponded with the release of the IRC Report) Council approved draft revisions to the guidelines, but did not make them public. When the draft was published several months later, Council requested a workshop to review the draft and to invite public comment. JPAC hosted the workshop in Mérida, Mexico, on 29 January, and participants conducted a line-by-line review in public sessions. On the basis of the public comments and its own review, JPAC advised that the proposed revised guidelines be rejected—asserting that they did not advance key issues of accessibility, transparency, independence, balance, and impartiality which JPAC deemed critical to the integrity of the Article 14/15 process.¹⁵ Despite the workshop results, and contrary to the advice of JPAC, Council adopted the proposed revisions five months later at its June 1999 Regular Session.

In late March of 2000, JPAC learned of another round of possible revisions to the Article 14/15 Guidelines, and wrote to Council about what it called a “revision 2” to the submission guidelines. JPAC wrote to Council and objected to its “having taken the decision to proceed with revisions despite our advice and the public view to the contrary....”¹⁶ In a later letter to Council, JPAC cited its “unease with how matters relating to Articles 14 & 15 are being managed,” and noted a “genuine concern that the credibility of the CEC was at stake.” JPAC observed that “we find ourselves, almost one year since the Banff Council Session, with a submission process totally frustrated by the inability of the Parties to resolve an ever-expanding level of confusion surrounding interpretation, conducted in private and with unclear intent.”¹⁷

At its next regular session in June 2000, Council approved Resolution 00-09 on June 13, 2000, asking JPAC to investigate Articles 14 and 15, to solicit public comment, and to give advice “supported by reasoned argumentation.” JPAC acted on the resolution, and produced a report a year later detailing its concerns and its aspirations for the submission process.¹⁸ The principal issues outlined in JPAC’s report had to do with timeliness, transparency, and the effectiveness of the Article 14/15 process (see Box 3).

¹⁴ JPAC Advice to Council 99-01 (26 June 1998).

¹⁵ JPAC Advice to Council 99-01 (25 March 1999).

¹⁶ JPAC Letter to Council of 24 March 2000.

¹⁷ JPAC Letter to Council of 2 May 2000.

¹⁸ See Report entitled “Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Final Report to the Council of the Commission for Environmental Cooperation,” (6 June 2001), available at <www.cec.org>.

Box 3
Lessons Learned
JPAC Recommendations on the 14/15 Submission Process (2001)¹⁹

Timeliness—JPAC found that the process averaged 18 months in its first five years; it recommended a 60-day Article 14(1)(2) process, with 30 to 60 days for review of the Party’s response and 60 days for Party responses (total five to six months)

Transparency—JPAC recommended abolishing the 30-day blackout period after a draft factual record is submitted to the Parties, and recommended a new procedure allowing an opportunity for submitters to respond to any new info provided by party in its response.

Effectiveness—JPAC recognized limits on enforceability that are inherent in the Article 14/15 process, but recommended that the Parties conduct some follow-up and provide a case status report one year after a factual record is complete.

In the short term, JPAC’s report and recommendations did little to change the Article 14/15 process. While Council took steps to expedite submission reviews, recommendations regarding transparency and effectiveness were not acted upon. Instead, new concerns emerged about the management of citizen submissions that proved to be even more controversial—concerns over Council’s limits on the scope of factual records reviewed by the Secretariat and its request for prior review of the Secretariat’s work plan for preparing records. These issues arose in submissions raising broad allegations of failure to effectively enforce (alleging, for example, the failure to police industrial operations within entire river basins). Council began instructing the Secretariat to narrow its review in such cases and to focus the preparation of a factual record on selected facilities. Council also asked that the Secretariat submit its work plans for developing factual records to Council prior to proceeding.²⁰ JPAC objected that this constituted an inappropriate influence on the Secretariat’s independent fact-finding role.

These new issues, coupled with continuing concerns over transparency and effectiveness, increased tensions between JPAC and the Council, and those tensions soon became apparent in the public record. In September of 2001, JPAC wrote to Council that it was “COMPELLED to express its frustration at being forced once again to advise on issues relating to Articles 14 and 15, because past agreed-upon procedures are being ignored or circumvented.”²¹ JPAC argued that Council’s position on the scope of factual records and prior review constituted a constructive amendment of submission guidelines without JPAC

¹⁹ Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Final Report to the Council of the Commission for Environmental Cooperation (6 June 2001).

²⁰ See submissions in Oldman River II, Migratory Birds, BC Mining, and BC Logging, at www.cec.org.

²¹ JPAC Letter to Council (29 September 2001) (Emphasis in original).

or public review. JPAC also argued that the Council had jeopardized the “independence of the Secretariat”²² and threatened to “undermine the credibility of the process by involving an interested party in the development of the Secretariat’s work plan.”²³

In the months that followed, JPAC reiterated its concerns and repeatedly urged Council to respond. Council did respond to one issue, rejecting JPAC’s advice that submitters be afforded an opportunity to reply to new information raised in a Party’s formal response to a submission, asserting it would “lead to exchanges . . . that will result in a more adversarial public submissions process which we do not believe would benefit the process.”²⁴ With respect to other pending issues, however, Council chose to wait. It sent a letter in February 2002 advising JPAC that it would respond only after the completion of records in the series of cases that had given rise to JPAC’s concerns.²⁵

JPAC persisted, however, sending additional letters and advice to Council in March, April, and June of 2002, and repeating its concerns about Council’s undue interference in the submission process. Council responded in June in two separate letters rejecting JPAC’s advice on the issues of access to government-held information and follow-up reporting by the Parties. On the latter issue, Council took the position that the factual record “terminates” the submission process and that any follow-up “is a domestic matter.”²⁶ Beyond these issues, Council remained silent. It still declined to address questions about the scope of factual records and prior review of Secretariat work plans.

The exchange of letters continued through the remainder of 2002 and into early 2003, but the positions of JPAC and the Council remained unchanged. JPAC commissioned a report on the scope of factual records question, and in October 2003 it hosted a workshop to review the draft report and to discuss the issue in further detail. On the basis of the report and workshop, JPAC again advised Council against narrowing the scope of records for submissions dealing with allegations of widespread failure to enforce.²⁷

Council responded in a letter of 3 June 2004, stating that it “considers carefully” each recommendation to prepare a factual record.²⁸ While Council recognized the occasional need for a broad review (noting as examples the submissions on migratory birds and Mexico’s Sierra Tarahumara) it implicitly rejected the idea that it should not narrow the scope of a record where it deems appropriate. The letter said that “Council will continue giving each submission the careful and thorough consideration it is due,” and emphasizes that it is Council’s responsibility to interpret the Agreement.²⁹ At the same time, the letter

²² Id.

²³ Id.

²⁴ Letter from Council (6 March 2002)

²⁵ Letter from Council (11 February 2002).

²⁶ Letter from Council (14 June 2002) (Note that there are two separate letters from Council to JPAC dated 14 June 2002. See www.cec.org).

²⁷ Advice to Council (17 December 2003).

²⁸ Letter from Council (3 June 2004).

²⁹ Id.

offered an olive branch. Council said it was “extremely concerned by the continuing difference of opinions between JPAC and the Council regarding the implementation of the Articles 14 and 15 submissions process,”³⁰ and pledged to “continue to work to improve communications between the JPAC and the Council....”³¹

These developments occurred as the Ten-year Review (for which the report underlying this publication was originally prepared) concluded, and tensions over the Article 14/15 submission process do not appear to have abated in the ensuing months as this publication was prepared. In some ways, the tensions are emblematic of one aspect of JPAC’s relationship with the Council: its role as watchdog. The public record reveals the reasoning in both the positions of JPAC and the Council, as well as the dynamics that inform their reasoning—Council preserving its prerogatives as a body that represents sovereign governments, and JPAC serving as a public voice that continually presses for transparency and integrity in a process that depends on both.

During interviews conducted for the Ten-year Review, JPAC members and government representatives acknowledged the frustration that these tensions can engender and some even suggested that JPAC’s persistence, even stridence, on 14/15 issues has been counterproductive. The record suggests that JPAC has “lost” more often than it has “won” its arguments on the citizen submission process. But that is not to say that JPAC or the process have necessarily lost ground by this dialogue. The record is clear that Council has been moved by JPAC’s efforts on Articles 14/15, probably in ways it would not have moved absent the determined and public positions of JPAC. In its steadfast pursuit of a more transparent and credible process, JPAC has helped assure such a process; not perfect from the standpoint of JPAC, but much better than it would be without a continuing (even if occasionally discordant) public discourse.

FINDINGS

- 1. JPAC has been an innovative debate facilitator and a point of entry for the public, providing public access to information about environmental issues in North America and the work of the CEC at the same time that it brings the public into dialogue with the NAFTA Parties**

Researchers found that JPAC has been a unique public access mechanism in international law, and with historically strong support from the Secretariat and, in coordination with the Council, it has shown a good deal of creativity and innovation in its approach to issues and in engaging the public. JPAC has been structured as an open deliberative body and has welcomed public participation in its own deliberations (although Article 16 does not specifically contemplate this operational approach) and this has made it a forum for study and a public entry point in addition to serving as a sounding board for Council. Through public meetings, workshops, commissioned

³⁰ Id.

³¹ Id.

research and publication, JPAC has proven to be a relatively robust and innovative point of entry for the public into the CEC. JPAC also provides public access to a broad array of information about environmental issues in North America and about the CEC and its work. This is accomplished through public meetings, research reports, publications, and the creation and maintenance of an impressive public record on the CEC web site that includes a running dialogue with NAFTA Parties (usually as written Advice to Council and Council responses).

2. JPAC has played a dual role as public watchdog of the Parties *and* as a strategic partner for the Council in pursuing a regional environmental agenda, and this has created philosophical and operational challenges

While each of the NAFTA Parties has interested citizens, nongovernmental organizations, businesses and other communities who follow environmental issues and monitor environmental performance at a regional level, the JPAC is in a unique position to observe and remain up-to-date on issues as they unfold. Its members also have access to the Parties through the Council—affording the ability to directly question Parties on specific topics and remind them of public attitudes and priorities. This level of vigilance helps keep the Parties responsive to their constituencies in a way that a broader, more generalized public discourse could not. The Chapter 11 case, for example, demonstrates JPAC’s ability to bring substantive opinions to a relatively complex issue that is beyond the experience of many citizens. While there is no final satisfactory resolution to the problem as yet, JPAC has helped keep the issue alive with the Council and increased the potential for a long-term solution. This “watchdog,” or monitor and critic, role is a fundamental aspect of JPAC’s work. At the same time, Council looks to JPAC as a strategic partner in pursuing a regional agenda and identifying priorities for continued attention, as the SMOC and children’s health cases illustrate. While a number of stakeholders emphasize one or the other of these roles, the JPAC is called upon to accomplish both—and thus it has a dual nature. Researchers found that some of the reported frustrations relating to JPAC (among its members and its counterparts) can be traced to differing perceptions about whether JPAC should more appropriately fulfill one or the other of these roles. For example, JPAC members who emphasize the watchdog aspect of their role are more likely to be frustrated by Council’s failure to act in cases where a stalemate is reached over issues that JPAC has identified as priorities, while those emphasizing the cooperative role tend to be more frustrated by JPAC’s persistence in light of the discord and would rather see the Committee concentrate on areas of potential agreement.

3. Early concerns about coordination and strategic vision have been addressed

In the Four-year Review, concerns were expressed about coordination of JPAC with the Secretariat and Council, and about the strategic vision. These issues have been addressed through the Secretariat and Council and through a long-term strategic planning cycle that has helped JPAC define issues and focus its work.

4. JPAC has been more effective when it focuses on transboundary issues rather than internal domestic concerns, although there are some notable exceptions

JPAC has had particular difficulty responding to public concerns that are domestic in nature and have no real transboundary implications (such as the Lake Chapala issue). This is consistent with JPAC's mandate and the scope of the NAAEC, but it has led to some perceptions of failure by interested communities. Where JPAC has focused on transboundary issues such as SMOC and children's health, it has been more successful in part because the mechanisms of the NAAEC are more relevant. Researchers noted exceptions for issues such as the application of Chapter 11 and TEIA—which are regional in scope but have proven elusive for JPAC (*see* the fuller discussion of the stalemate on certain priority issues above).

5. JPAC has had limited indigenous participation in its work, but has made some progress in involving indigenous communities

Concerns have been raised about a perceived failure of JPAC to engage indigenous communities in its work, and it is true that indigenous participation has not been a strong point for JPAC. Only about five percent of participants in JPAC meetings have been from indigenous communities.³² At the same time, JPAC has made deliberate efforts to reach out to indigenous communities and indigenous persons have served (and continue to serve) on JPAC. In cases where meetings or workshops concerned indigenous issues, outreach has been particularly focused and attendance has reflected the interest of the community. In addition, JPAC has made a point of seeking greater indigenous participation not only in its own work but also in that of the CEC more generally. Some progress can be reported, but more can probably be done.

6. The business sector has not been consistently active in JPAC activities, but has engaged where interests and priorities clearly coincide

Concerns have also been expressed about the relative lack of business sector engagement with and through JPAC, and records show that only about seven percent of the persons who have attended JPAC meetings and workshops are from the for-profit sector. At the same time, a number of JPAC members have been drawn from the business sector and the Secretariat has made an effort to identify and invite business community members to become more fully engaged. To some extent the relative lack

³² Researchers examined participant lists for all public meetings or workshops sponsored or facilitated by JPAC, and sought to classify participants by their affiliation—finding that participants could be broken down as follows: NGOs (55 percent), academia (19 percent), national governments (8 percent), the private sector (seven percent), and indigenous communities or groups (five percent)—with the remainder not affiliated or not easily determinable. Note that these participants attended at least one meeting, and in some cases they attended more than one, but multiple meeting attendees were counted only once. While there are dangers inherent in any such classification system that seeks to establish affiliation, it provides at least some idea of sector participation.

of business participation (relative to NGOs) may be understandable where issues addressed by JPAC do not fall within areas that are perceived as priorities for businesses. JPAC's work on children's health and indigenous peoples, for example, may be viewed as outside the mainstream of Chamber of Commerce concerns. At the same time many of the issues JPAC addresses, such as SMOC and Chapter 11 investor disputes, are central to business interests. While the business community has become engaged where this coincidence is clear, it would appear that more could be done to bring the coincidence of interests into focus. Thus, engaging the business community more broadly is a continuing concern.

7. JPAC and Council have reached stalemate on certain priority issues, leading to frustration by JPAC members and officials

JPAC members and government officials have expressed great frustration (both on and off the record) where JPAC has offered advice or sought to engage on issues that are "controversial" in that the Parties are not willing or able to move forward on the issue (such as the case with transboundary environmental impact assessments) or where the Parties take a position that is inconsistent with public sentiment as JPAC perceives and expresses it (such as the case with Council's decisions to narrow the scope of factual records for some citizen submissions under Article 14 and 15). Some have described JPAC's process and interaction with Council as "extremely bureaucratic," lacking in meaning and an "exercise in futility." Others report JPAC members to be frustrated and isolated. Research suggests that despite these concerns, there remains a good deal of optimism about JPAC and the importance of its work. Research also suggests that cases where JPAC is perceived as "ignored" should not be seen as a failure of JPAC, the Council or the process, but rather a natural product of a public participation mechanism in a multilateral context where priorities differ or where issues among state parties are not yet settled. In some cases, the Parties themselves are simply not ready to move forward on an issue and public participation through a regional body will not necessarily affect this dynamic. In other cases, the Parties have taken a decision that cannot be reconciled with the opinion of the advisory body. While these circumstances are certainly frustrating, they can be seen as a necessary byproduct of public discourse and will not disrupt the functioning of JPAC as long as the discourse remains civil and responsible and as long as all remain tolerant of divergent views.

8. Tolerance of discord is a critical dimension of success

Some concerns have been expressed that the Council and Alternate Representatives do not "take JPAC seriously." There are certainly frustrations expressed by and about JPAC, Council and Alternate Representatives (in all directions), and there are even reports that some government representatives have been privately dismissive of JPAC in certain cases. Yet the continuing ability of Council to listen to JPAC, to tolerate discord, and to take JPAC members seriously is the most important dimension of JPAC's work. Despite frustrations and isolated reports of intolerance, a degree of

respect has underpinned the relationship to date—even where Council disagrees with JPAC and rejects its advice (actively or passively). The importance of this dynamic cannot be discounted in the past and future success of the Committee.

9. JPAC’s communications with Council and the Alternate Representatives have tended to be highly formalized, with little opportunity for more “organic” interaction

JPAC has established a laudable and transparent written record of communication with Council and the Alternate Representatives on issues of concern, and this serves an important function in clarifying the position of JPAC and creating a public record. But there is little opportunity for JPAC to interact less formally with Council or the Alternate Representatives. Aside from periodic *in camera* meetings with Council and the Alternate Representatives, and occasional individual conversations, there is little opportunity for JPAC members and their governmental counterparts to meet informally and exchange ideas or to gain a greater awareness of each other. At one point, Mexico’s Alternate Representative reportedly reached out to JPAC members from Mexico to discuss issues informally off the record, but this was a limited experience not yet repeated. While this overture drew some concern from JPAC members from other countries (who were concerned that the JPAC’s own process of deliberation and consensus not be subverted) others applauded the move and lamented the lack of similar opportunities for the JPAC as a whole or for nationals from one or another party.

10. JPAC’s relations with the Alternative Representatives have been increasingly important, but cumbersome

Because the Council members are the most senior environmental officials of the NAFTA Parties, their time is necessarily limited. In practice, the Alternate Representatives and the General Standing Committee oversee the regular operations of the CEC, and the Alternate Representatives are themselves senior officials capable of managing a range of issues of importance to the JPAC. Nevertheless, researchers noted that the Alternate Representatives can be slow to respond to JPAC communications and concerns, and that the importance of relations with the Alternate Representatives has not been fully explored or addressed strategically.

11. The perception of JPAC as a quasi-governmental body can influence its relations with the public

Because of JPAC’s structure and procedures (opening its meetings to the public, maintaining public records through a Secretariat, funding citizen travel and participation, and engaging the Council through written advice and *in camera* dialogue), it has been perceived by some NGOs and members of the public as more akin to a governmental body than a citizens’ advisory board. Whether or not this

perception is accurate, it is true that the “special access,” public accountability and even the status of JPAC members as government appointees (in the case of US, presidential appointees) creates a dynamic that can influence how JPAC operates, and how it interacts with the public.

12. Commitment of members

JPAC members have for the most part shown an extraordinary commitment to the work of the Committee—taking their work plan seriously and fulfilling their role as counselors to the Council and sounding board for the public. Some concern has been expressed that personalities play a large role in JPAC’s success, and research suggests that this is to some extent true. But this is to be expected in a governmentally appointed public advisory body where personal relationships and individual capacity are critical dimensions. Personalities can have a positive impact where they are dynamic and engaged, and this has often been the case with JPAC members and has contributed to some of the Committee’s success. Where Committee members are apathetic or less engaged, the professional support staff at the Secretariat has to some extent ameliorated the impact.

13. Coordination and support from Secretariat has historically been strong

JPAC has been well served by the Secretariat, which has provided substantive and logistical support, publication and recordkeeping services, and institutional memory. The tenure and dedication of Secretariat staff have made a particular contribution to JPAC’s work, and the relationship between the Secretariat’s liaison and JPAC has been an important and positive institutional feature.

14. New budget limitations will begin to constrain JPAC’s core work and limit its public diplomacy role

Funding was adequate in the past, but the failure to expand JPAC’s operational budget over time (as with the overall CEC budget) has begun to impede its ability to do its work. Recent budget cuts and currency fluctuations have a highly negative potential effect on JPAC, and will undermine its ability to perform as the Parties expect.

Recommendations

1. Continue to address difficult and even controversial issues through JPAC in a meaningful and responsible fashion, despite slow or imperceptible results. Expect more measurable “progress” in areas where Council is predisposed toward action, but do not abandon more difficult issues even where impact may be less realistic. This is one of the most important process functions of JPAC even where its work may not lead to concrete and identifiable policy changes.

2. Continue to focus JPAC's work plan in areas identified as priority by JPAC members themselves and by members of the public as well as by Council—balancing any new or expanded work with resource availability and JPAC's manageable interest, and concentrating on issues that are truly transboundary in nature. Researchers found the most measurable results in areas where JPAC responds to Council interests and requests, and this part of the JPAC's work plan cannot be discounted. But this should not discount the importance of incremental results and impact in more controversial areas. The process should remain a two way street, with JPAC pursuing priorities that its members perceive or that the public has identified.
3. Continue and expand efforts to reach out to indigenous communities and businesses, as well as low income and other marginalized communities—recognizing that the interest of these groups in participating will correlate with elements of the JPAC work plan that directly affect them. While JPAC must remain open to the participation of these constituencies, and a program of generalized outreach should be sustained, there is a greater likelihood of engaging communities where their interests are identifiably at stake—and also a greater urgency in bringing them into the process in these circumstances. Resources should thus be aimed at concentrated outreach in relevant cases even as a basic policy of openness is continued.
4. Consider a broader public diplomacy role for JPAC as a means to reach out more broadly to the public in North America on transboundary environmental issues and on the work of the CEC. As public debate about the utility and impact of NAFTA continues in all three countries, JPAC's public outreach role can help address misperceptions about the trade/environment link and demonstrate one of the more positive aspects of NAFTA to constituents of all three governments. JPAC is one of the only structured mechanisms to take trade and environment discourse off of the streets and out of the realm of rhetoric. Having its members engaged as knowledgeable and responsible public participants in a key trade accord would have substantial potential benefits.
5. Recognize the dual nature of JPAC as a critic and collaborator, working to strengthen the ability of JPAC, Council and Alternate Representatives to increase understanding and minimize discord, and to find cooperative and creative solutions where their positions are at odds. This might be accomplished in part by taking a more strategic approach to the relations between JPAC members and the Alternate Representatives. Without minimizing the importance of access to council, JPAC and the Alternative Representatives should work to establish a meaningful, timely and responsive mutual working relationship. JPAC's dual role can also be strengthened through more opportunities for informal interaction among JPAC members and government counterparts (as a means to build working relationships and common understanding), or through the efforts of individual JPAC members at

a national level. Engaging JPAC members at a national level is not meant to supplant or duplicate the role of the NACs, but rather to improve relationships and open lines of informal communication among JPAC members and the Parties. This emphasizes JPAC's role as a strategic advisory body over its role as monitor and critic—but it can be done to strengthen the former without diminishing the latter.

6. Consider restoring and even increasing the budget for JPAC operations and public outreach consistent with a broader review of the overall budget for the CEC.

ANNEX A

Article 16 of the North American Agreement on Environmental Cooperation

Article 16: Joint Public Advisory Committee

1. The Joint Public Advisory Committee shall comprise 15 members, unless the Council otherwise decides. Each Party or, if the Party so decides, its National Advisory Committee convened under Article 17, shall appoint an equal number of members.
2. The Council shall establish the rules of procedure for the Joint Public Advisory Committee, which shall choose its own chair.
3. The Joint Public Advisory Committee shall convene at least once a year at the time of the regular session of the Council and at such other times as the Council, or the Committee's chair with the consent of a majority of its members, may decide.
4. The Joint Public Advisory Committee may provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement, and may perform such other functions as the Council may direct.
5. The Joint Public Advisory Committee may provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a factual record under Article 15. The Secretariat shall forward to the Council copies of any such information.
6. The Secretariat shall provide to the Joint Public Advisory Committee at the time they are submitted to the Council copies of the proposed annual program and budget of the Commission, the draft annual report, and any report the Secretariat prepares pursuant to Article 13.
7. The Council may, by a two-thirds vote, make a factual record available to the Joint Public Advisory Committee.

Annex B

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

Article 14: Submissions on Enforcement Matters

1. The Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

Where the Secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and
- (b) of any other information that the Party wishes to submit, such as
 - i) whether the matter was previously the subject of a judicial or administrative proceeding, and
 - ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.

Article 15: Factual Record

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

3. The preparation of a factual record by the Secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information:

- (a) that is publicly available;
- (b) submitted by interested nongovernmental organizations or persons;
- (c) submitted by the Joint Public Advisory Committee; or
- (d) developed by the Secretariat or by independent experts.

5. The Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.

7. The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

Annex C

Terms of Reference and Methodology

Under the terms of reference for preparing the original document for the Ten-year Review and Assessment Committee, the research team studied and reported on the “effectiveness” of the public advisory committees. Researchers defined effectiveness for purposes of this work as:

1. Effective in **integrating the public** into the work and discourse of the CEC (in essence, assessing the committees’ *process*); and
2. Effective in **informing and shaping the agenda** of the CEC and of the NAAEC Parties as it relates to North American environmental issues (in essence, assessing the committees’ *impact*).

Assessment Parameters

Assessment focused on four basic parameters:

1. **Basic Structure and Function.** The operational mechanics of advisory committees were outlined in brief—highlighting with whom the advisory committees interact, and how.
2. **Public Outreach and Engagement.** Specific mechanisms for outreach were described and assessed through indicators that are primarily quantitative (e.g. number of publications, percent of budget, number of web site hits, and attendance at meetings).³³
3. **Impact and Efficacy (Case Studies).** Case studies sought to measure advisory committee effectiveness for two basic aspects—1) efficacy *as a point of entry* for engaging the public in the work of the CEC, and 2) efficacy *as an advocate* for public issues before the Council. Both aspects were measured through case studies that identified specific issues (concerns raised by the members of the public, advisory committee members or others) dealt with by the advisory committee during the past ten years. The “life cycle” of each issue was traced from the point of origin through resolution³⁴ to determine how the issue was managed (through, e.g., internal debate, public hearings or expert reports), and interpreted through the advisory committee process—and how the public (both immediately affected or interested parties, and the public at large) was engaged.

³³ Qualitative measurement indicators (e.g., ease of web site access, coincidence of reports and programs with public priorities, favorability of press coverage and references on key stakeholder web sites) should be developed for future study, but are beyond the scope of this review.

³⁴ In some cases, issues were not finally resolved at the time the research was conducted.

4. **Perception and Criticism.** A review of public perception was conducted through literature reviews and press reports.³⁵ Perceived strengths and weaknesses will be reported. Where possible, reported weaknesses were tested through the outreach and impact assessments described above.³⁶

Case Studies

Case studies were conducted for the following issues addressed by JPAC:

1. Sound Management of Chemicals
2. Children's Health
3. NAFTA Chapter 11
4. Lake Chapala, Mexico
5. Transboundary Environmental Impact Assessment
6. Integration of Indigenous Communities

These cases were chosen to provide a representative view of issues addressed by JPAC that were perceived as both successes and failures—and with a view to selecting issues that had advanced to the point of resolution. Time did not permit a broader or more comprehensive view, but researchers believe they found a fair representative sample to measure JPAC strengths and weaknesses. To supplement the case studies, researchers also conducted interviews with committee members and stakeholders to address broader questions about the operation and impact of JPAC and to gauge perceptions.

³⁵ Because of time constraints, an independent perception survey was not possible.

³⁶ In addition to issues raised in the context of the six case studies, researchers concentrated on specific concerns raised by TRAC coordinators regarding outreach to business and indigenous communities, frustration among JPAC's members regarding relations with ministers and senior officials, and reliance on electronic communications.

Annex D
JPAC Advice to Council

DOCUMENTS ARE AVAILABLE ON THE CEC WEB SITE AT WWW.CEC.ORG

Year	Date	Advice
2004	04-05	Building the Renewable Energy Market in North America
	04-04	New Directions for the Commission for Environmental Cooperation of North America
	04-03	Review of the Operation Resolution 00-09 on Matters related to Articles 14 and 15 of the Agreement
	04-02	Future Directions for the North American Agreement on Environmental Cooperation
	04-01	Securing the Long-term involvement of Indigenous Peoples in the Activities of the Commission for Environmental Cooperation
2003	03-06	Preventing and Controlling Invasive Species in North America
	03-05	Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation
	03-04	The Environmentally Sound Management and Tracking of Hazardous Wastes and Hazardous Recyclable Materials
	03-03	Proposed Operational Plan for the Commission for Environmental Cooperation (CEC) of North America for 2004–2006
	03-02	Second North American Symposium on Assessing the Environmental Effects of Trade
	03-01	Seeking Balance between the Interests of the Public and Investors in the application of chapter 11 of the North American Free Trade Agreement (NAFTA)
2002	02-13	Continuing Innovations on Work in Financing for Sustainable Development
	02-12	Re-energizing the Transboundary Environmental Impact Assessment negotiations
	02-11	Commission for Environmental Cooperation Proposed Program Plan and Budget for 2003–2005

	02-10	The CEC and the Management of Freshwater in North America
	02-09	The Commission for Environmental Cooperation (CEC) of North America and the North American Free Trade Agreement (NAFTA) Chapter 11
	02-08	Capacity Building and Education Opportunities within the Sound Management of Chemicals (SMOC) Program
	02-07	Work plan issue related to Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation
	02-06	Private Sector Cooperation and Financing
	02-05	Executive Director of the Commission for Environmental Cooperation
	02-04	The Commission for Environmental Cooperation (CEC) of North America and the North American Free Trade Agreement (NAFTA) Chapter 11
	02-03	Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15
	02-02	The North American Fund for Environmental Cooperation (NAFEC)
	02-01	Children's Health and the Environment in North America
2001	01-10	Public Portion of the Council Session
	01-09	Request to conduct a public review of two issues concerning the implementation and further elaboration of Articles 14 and 15 of NAAEC
	01-08	Sound Management of Chemicals Program of the CEC
	01-07	Citizen Submissions on Enforcement Matters under Articles 14 & 15 of NAAEC
	01-06	2002–2004 Proposed Program Plan and Budget of the North American Commission for Environmental Cooperation
	01-05	2002–2004 Work Program Outline of the CEC
	01-04	Climate Change
	01-03	Protection from the Spread of Communicable Diseases
	01-02	Free Trade Area of the Americas Agreement (FTAA)
	01-01	North American Trade and Transportation Corridors

2000	00-07	Advice on the Draft CEC Planning, Monitoring and Evaluation (PME) plan
	00-06	A North American Regional Action Plan (NARAP) for lead
	00-05	Children's Health and the Environment
	00-04	The North American Fund for Environmental Cooperation (NAFEC)
	00-03	Guidance Document for Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems
	00-02	DRAFT Guide: Elements for Improving Environmental Performance and Compliance through Effective Environmental Management Systems
	00-01	Strategic Directions for the Conservation of Biodiversity
1999	99-12	Methods to Improve the Public Portion of the Council Session
	99-11	North American Agenda for Action: 2000–2002 Proposed Program Plan for the North American Commission for Environmental Cooperation
	99-10	Promoting the Involvement of Indigenous Peoples in the Work of the Commission for Environmental Cooperation
	99-09	Regional Solutions to Global Issues of the Next Millennium
	99-08	Article 10(6) of the North American Agreement on Environmental Cooperation NAAEC: Process for Cooperation between the Council of the Commission for Environmental Cooperation (CEC) and the North American Free Trade Agreement (NAFTA) Free Trade Commission (FTC)
	99-07	The Negotiations Toward a North American Agreement on Transboundary Environmental Impact Assessment (TEIA)
	99-06	Draft Framework for Public Participation in the Commission for Environmental Cooperation's Activities
	99-05	Expanding the Involvement of the North American Public, including Indigenous Peoples in the work of the Commission for Environmental Cooperation
	99-04	The Sound Management of Chemicals Program of the CEC
	99-03	Follow-up to the Four-year Review of the North American Agreement on Environmental Cooperation: The Report of the Independent Review

	Committee
	99-02 Environmental Management Systems and Compliance Report
	99-01 Revised Guidelines for Citizen Submissions on Enforcement Matters under Articles 14 & 15
1998	98-10 Executive Director of the Commission for Environmental Cooperation
	98-09 Enforcement Issues — Compliance Indicators
	98-08 Article 10(6) of the North American Agreement on Environmental Cooperation
	98-07 The CEC Proposed Annual Program and Budget for 1999 (Version 2)
	98-06 Draft Public Participation Guidelines of the Commission for Environmental Cooperation
	98-05 North American Agenda for Action: 1999-2001 — A Three-year Program Plan for the Commission for Environmental Cooperation
	98-04 Executive Director of the Commission for Environmental Cooperation and Vacancies on the Joint Public Advisory Committee
	98-03 Recommendations for Improvements to the 1997 Commission for Environmental Cooperation (CEC) Annual Report
	98-02 The North American Fund for Environmental Cooperation (NAFEC)
	98-01 Proposed Annual Program and Budget for 1998 of the Commission for Environmental Cooperation (CEC)
1997	97-04 Rule of Procedure of the JPAC
	97-03 Assessment of the First Three Years of the Agreement
	97-02 Views Regarding CEC Public Consultations
	97-01 Substantial Issues for the CEC
1996	96-09 Election of Joint Public Advisory Committee Chair
	96-08 Charter of Best Practices
	96-07 Term of office for Joint Public Advisory Committee (JPAC) Members
	96-06 Review of Guidelines on Enforcement Matters under NAAEC Articles 14 and 15

	96-05	North American Fund for Environmental Cooperation (NAFEC)
	96-04	Proposed Annual Program and Budget for 1997 of the CEC
	96-03	Public Presentations to the Council Session
	96-02	JPAC Budget
	96-01	Review of Guidelines on Enforcement Matters under NAAEC Articles 14 and 15
1995	95-08	1996 Program and Budget of the Commission
	95-07	Silva Reservoir Report
	95-06	North American Environment Fund
	95-05	Procedures for Submissions on Enforcement Matters under Article 14 and 15
	95-04	Guide on Factual Submissions
	95-03	Financial Contribution of the Parties
	95-02	Observers at JPAC meeting
	95-01	Expansion of NAFTA
1994		Vision Statement

Annex E
JPAC Advice to Council—By Topic

DOCUMENTS ARE AVAILABLE ON THE CEC WEB SITE AT WWW.CEC.ORG

Subject	Date	Advice
Article 10(6)	99-08	Article 10(6) of the North American Agreement on Environmental Cooperation NAAEC: Process for Cooperation between the Council of the Commission for Environmental Cooperation (CEC) and the North American Free Trade Agreement (NAFTA) Free Trade Commission (FTC)
	98-08	Article 10(6) of the North American Agreement on Environmental Cooperation
Articles 14 and 15	04-03	Review of the Operation Resolution 00-09 on Matters related to Articles 14 and 15 of the Agreement
	03-05	Limiting the scope of factual records and review of the operation of CEC Council Resolution 00-09 related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation
	02-07	Work plan issue related to Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation
	02-03	Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15
	01-09	Request to conduct a public review of two issues concerning the implementation and further elaboration of Articles 14 and 15 of NAAEC
	01-07	Citizen Submissions on Enforcement Matters under Articles 14 & 15 of NAAEC
	96-06	Revised Guidelines for Citizen Submissions on Enforcement Matters under Articles 14 & 15
	96-06	Review of Guidelines on Enforcement Matters under NAAEC Articles 14 and 15
	96-01	Review of Guidelines on Enforcement Matters under

		NAAEC Articles 14 and 15
	95-05	Procedures for Submissions on Enforcement Matters under Article 14 and 15
	95-04	Guide on Factual Submissions
Budget & Proposed Program Plan	03-03	Proposed Operational Plan for the Commission for Environmental Cooperation (CEC) of North America for 2004–2006
	02-11	Commission for Environmental Cooperation Proposed Program Plan and Budget for 2003–2005
	01-06	2002–2004 Proposed Program Plan and Budget of the North American Commission for Environmental Cooperation
	01-05	2002–2004 Work Program Outline of the CEC
	99-11	North American Agenda for Action: 2000–2002 Proposed Program Plan for the North American Commission for Environmental Cooperation
	98-07	The CEC Proposed Annual Program and Budget for 1999 (Version 2)
	98-05	North American Agenda for Action: 1999-2001 — A Three-year Program Plan for the Commission for Environmental Cooperation
	98-01	Proposed Annual Program and Budget for 1998 of the Commission for Environmental Cooperation (CEC)
	96-04	Proposed Annual Program and Budget for 1997 of the CEC
	95-08	1996 Program and Budget of the Commission
CEC in General	04-04	New Directions for the Commission for Environmental Cooperation of North America
	02-05	Executive Director of the Commission for Environmental Cooperation
	00-07	Advice on the Draft CEC Planning, Monitoring and Evaluation (PME) plan

	98-10	Executive Director of the Commission for Environmental Cooperation
	98-04	Executive Director of the Commission for Environmental Cooperation and Vacancies on the Joint Public Advisory Committee
	98-03	Recommendations for Improvements to the 1997 Commission for Environmental Cooperation (CEC) Annual Report
	97-01	Substantial Issues for the CEC
Chapter 11	03-01	Seeking Balance between the Interests of the Public and Investors in the application of chapter 11 of the North American Free Trade Agreement (NAFTA)
	02-09	The Commission for Environmental Cooperation (CEC) of North America and the North American Free Trade Agreement (NAFTA) Chapter 11
	02-04	The Commission for Environmental Cooperation (CEC) of North America and the North American Free Trade Agreement (NAFTA) Chapter 11
Children's Health	02-01	Children's Health and the Environment in North America
	00-05	Children's Health and the Environment
Compliance and Enforcement	03-04	The Environmentally Sound Management and Tracking of Hazardous Wastes and Hazardous Recyclable Materials
	00-03	Guidance Document for Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems
	00-02	DRAFT Guide: Elements for Improving Environmental Performance and Compliance through Effective Environmental Management Systems
	99-02	Environmental Management Systems and Compliance Report
	98-09	Enforcement Issues — Compliance Indicators
Indigenous Peoples	04-01	Securing the Long-term involvement of Indigenous

		Peoples in the Activities of the Commission for Environmental Cooperation
	99-09	Promoting the Involvement of Indigenous Peoples in the Work of the Commission for Environmental Cooperation
	99-05	Expanding the Involvement of the North American Public, including Indigenous Peoples in the work of the Commission for Environmental Cooperation
JPAC Administration	97-04	Rules of Procedure of the JPAC
	96-09	Election of Joint Public Advisory Committee Chair
	96-07	Term of office for Joint Public Advisory Committee (JPAC) Members
	96-02	JPAC Budget
NAAEC	04-02	Future Directions for the North American Agreement on Environmental Cooperation—move to
	99-03	Follow-up to the Four-year Review of the North American Agreement on Environmental Cooperation: The Report of the Independent Review Committee
	02-02	The North American Fund for Environmental Cooperation (NAFEC)
	00-04	The North American Fund for Environmental Cooperation (NAFEC)
	98-02	The North American Fund for Environmental Cooperation (NAFEC)
	96-05	North American Fund for Environmental Cooperation (NAFEC)
	95-06	North American Environment Fund
NAFTA in General	97-03	Assessment of the First Three Years of the Agreement
	95-01	Expansion of NAFTA
Public Participation in General	01-10	Public Portion of the Council Session

	99-12	Methods to Improve the Public Portion of the Council Session
	99-06	Draft Framework for Public Participation in the Commission for Environmental Cooperation's Activities
	98-06	Draft Public Participation Guidelines of the Commission for Environmental Cooperation
	97-02	Views Regarding CEC Public Consultations
	96-03	Public Presentations to the Council Session
	95-02	Observers at JPAC meeting
Sound Management of Chemicals	02-08	Capacity Building and Education Opportunities within the Sound Management of Chemicals (SMOC) Program
	01-08	Sound Management of Chemicals Program of the CEC
	00-06	A North American Regional Action Plan (NARAP) for lead
	99-04	The Sound Management of Chemicals Program of the CEC
Transboundary Environmental Impact Assessment	02-12	Re-energizing the Transboundary Environmental Impact Assessment negotiations
	99-07	The Negotiations Toward a North American Agreement on Transboundary Environmental Impact Assessment (TEIA)
Other	04-05	Building the Renewable Energy Market in North America
	03-06	Preventing and Controlling Invasive Species in North America
	03-02	Second North American Symposium on Assessing the Environmental Effects of Trade
	02-13	Continuing Innovations on Work in Financing for Sustainable Development

02-10	The CEC and the Management of Freshwater in North America
02-06	Private Sector Cooperation and Financing
01-04	Climate Change
01-03	Protection from the Spread of Communicable Diseases
01-02	Free Trade Area of the Americas Agreement (FTAA)
01-01	North American Trade and Transportation Corridors
00-01	Strategic Directions for the Conservation of Biodiversity
99-10	Regional Solutions to Global Issues of the Next Millennium
96-08	Charter of Best Practices
95-07	Silva Reservoir Report
95-03	Financial Contribution of the Parties
1994	Vision Statement

Annex F
JPAC Records of Discussion

DOCUMENTS ARE AVAILABLE ON THE CEC WEB SITE AT WWW.CEC.ORG

Date	Subject	Location
27–29 October 2004	Joint Public Advisory Committee Session No. 04-03	Montréal, Québec
22 - 23 June 2004	Joint Public Advisory Committee Regular Session 04-02	Puebla, Mexico
21 June 2004	JPAC Public Workshop on Future Directions for the North American Agreement on Environmental Cooperation (NAAEC)	Puebla, Mexico
12 March 2004	Joint Public Advisory Committee Session No. 04-01	Oaxaca, Mexico
4 December 2003	Roundtable on “An Unwelcome Dimension of Trade: The Impact of Invasive Species in North America”	Miami, Florida
4 December 2003	Joint Public Advisory Committee Session No. 03-04	Miami, Florida
3 October 2003	Joint Public Advisory Committee Session No. 03-03	Montréal, Québec
2 October 2003	Joint Public Advisory Committee Public Meeting on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC)	Montréal, Québec
23–25 June 2003	Joint Public Advisory Committee Session No. 03-02	Washington, DC
23 June 2003	Public Plenary Session on CEC North American Environmental Enforcement and Compliance Cooperation Program	Washington, DC
24 June 2003	JPAC Workshop on CEC Assessments of Transboundary Air Issues	Washington, DC
24 March 2003	Public Workshop on Chapter 11 of the North American Free Trade Agreement	Mexico City, Mexico

27 March 2003	Joint Public Advisory Committee Session No. 03-01	Mexico City, Mexico
10 December 2002	Joint Public Advisory Committee Session No. 02-04	Monterrey, Nuevo León
3 October 2002	Public Workshop on Freshwater Issues in North America	Albuquerque, New Mexico
4 October 2002	Joint Public Advisory Committee Session No. 02-03	Albuquerque, New Mexico
17–19 June 2002	Joint Public Advisory Committee Session No. 02-02	Ottawa, Ontario
8 March 2002	Joint Public Advisory Committee Session No. 02-01	Mexico City, Mexico
30 November 2001	Joint Public Advisory Committee Session No. 01-04	San Diego, California
22–23 October 2001	Joint Public Advisory Committee Session No. 01-03	Montréal, Québec
27–29 June 2001	Joint Public Advisory Committee Session No. 01-02	Guadalajara, Jalisco
16 March 2001	Joint Public Advisory Committee Session No. 01-01	Winnipeg, Manitoba
7–8 December 2000	Joint Public Advisory Committee Session No. 00-04	Montréal, Québec
13–14 October 2000	Joint Public Advisory Committee Session No. 00-03	Washington, DC
11–13 June 2000	Joint Public Advisory Committee Session No. 00-02	Dallas, Texas
23–24 March 2000	Joint Public Advisory Committee Session No. 00-01	Guadalajara, Jalisco
16–17 September 1999	Joint Public Advisory Committee Session No. 99-04	Montréal, Québec
27–29 June 1999	Joint Public Advisory Committee Session No. 98-03	Banff, Alberta

8 May 1999	Joint Public Advisory Committee Session No. 99-02	Anchorage, Alaska
25–26 March 1999	Joint Public Advisory Committee Session No. 99-01	Mexico City, Mexico
3–4 December 1998	Joint Public Advisory Committee Session No. 98-05	Washington, DC
3–4 September 1998	Joint Public Advisory Committee Session No. 98-04	Montréal, Québec
24–26 June, 1998	Joint Public Advisory Committee Session No. 98-03	Mérida, Yucatan, Mexico
7 May 1998	Joint Public Advisory Committee Session No. 98-02	El Paso, Texas
22–23 January 1998	Joint Public Advisory Committee Session No. 98-01	Montreal, Quebec
11 December 1997	Joint Public Advisory Committee Session No. 97-05	Tucson, Arizona
23 October 1997	Joint Public Advisory Committee Session No. 97-04	Montréal, Québec
13 June 1997	Joint Public Advisory Committee Session No. 97-03	Pittsburgh, Pennsylvania
16 May 1997	Joint Public Advisory Committee Session No. 97-02	Vancouver, British Columbia
21 March 1997	Joint Public Advisory Committee Session No. 97-01	Mexico City, Mexico
7–8 November 1996	Joint Public Advisory Committee Session No. 96-05	Montréal, Québec
2 August 1996	Joint Public Advisory Committee Session No. 96-04	Toronto, Canada
18 July 18 1996	Joint Public Advisory Committee Session No. 96-03	San Diego, California
20 June 1996	Joint Public Advisory Committee Session No. 96-02	Montréal, Québec

7–8 March 1996	Joint Public Advisory Committee Session No. 96-1	Montréal, Québec
23–24 August 1995	Joint Public Advisory Committee Session No. 95-03	Montréal, Québec
27–28 April 1995	Joint Public Advisory Committee Session No. 95-02	Montréal, Québec
11–13 January 1995	Joint Public Advisory Committee Session No. 95-01	Montréal, Québec
25–26 July 1994	Joint Public Advisory Committee Session No. 94-01	Washington, DC
