



September 8, 2003

ELECTRONIC MAIL

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

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

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

Dear Mr. Alanis-Ortega and Mr. Pepin:

I am an environmental attorney with Fitzgerald Abbott & Beardsley, and an Adjunct Professor at Golden Gate University School of Law where I have taught an LL.M. seminar on *Trade and the Environment* for the past six years. In response to the request of the Joint Public Advisory Committee (JPAC) of the North American Commission for Environmental Cooperation (CEC), enclosed are my comments on the matter of recent actions by the CEC Council of Ministers (CEC Council, composed of the environmental ministers of Canada, Mexico and the United States) to limit the scope of factual records prepared by the CEC Secretariat pursuant to the citizen submission process established under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). The enclosed comments are based on my independent research¹ and analysis regarding NAAEC's citizen submission process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The Committee was most disturbed to learn that the United States is proposing a conditional approval of the MBTA [Migratory Bird Treaty Act] submission that would confine the CEC Secretariat to investigating the particular events that were identified in the submission as illustrative examples...

We have considered the integrity of the citizen submission process extensively in our previous meetings, and our earlier advice reflects the Committee's commitment to maintaining the consistency and transparency of the process. The Committee's advice of May 24, 2001 stated that we recommend that the U.S. government maintain its position to support the preparation of factual records "to the greatest extent possible" when the Secretariat finds that a factual records is warranted.

Consistent with that advice, we strongly recommend that the United States approve the development of a factual record of the MBTA submission without conditions..."

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

The *Migratory Bird* submission alleges that the U.S. has failed to effectively enforce U.S. environmental laws by historically failing to pursue any criminal prosecutions of the Migratory Bird Treaty Act for non-threatened or non-endangered species. It is our understanding that the U.S. intends to vote yes on the Secretariat proceeding with a factual record for this submission, but only if it is limited to a review of the facts associated with the two anecdotal violations identified in the submission...

We are concerned that, by allowing a Party to a submission the latitude to define the scope of the factual record, as currently advocated by the U.S., the independence historically exercised by the Secretariat in the submission process will be eviscerated. The U.S. would undercut this independence by limiting the factual record to the two examples provides in the submission, where a broader pattern was adequately alleged. If the Secretariat's independence is undercut in the manner proposed by the U.S., there will be no future credibility to the submission process...

There is no affirmative requirement in the Agreement that a petitioner lists all instances of a Party's failure to effectively enforce an environmental law to consider these events within the scope of factual record. And such an interpretation flies in the face of the plain language of the NAAEC, which contemplated a submission where a pattern and practice of ineffective enforcement exists, as opposed to an isolated failure by a Party to the Agreement...

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

B. Prosecutorial Discretion and Allocation of Enforcement Resources

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

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

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

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

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

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

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

A. April 2003 *Migratory Bird* Factual Record

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

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

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

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

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

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

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

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

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

B. August 2003 *BC Logging* Factual Record

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

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

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

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

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

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

Section 5.4 [of the *BC Logging* factual record]...is problematic. This section raises concerns about the scope of the Factual Record. Canada does not believe the Secretariat should attempt to establish a set of "criteria" to determine what could be considered "effective enforcement." This section goes beyond the Council Resolution, which authorized the Secretariat to examine whether or not Canada is "in fact" failing to effectively enforce its environmental laws. Therefore, we request that this section be removed...

With regards to Section 4 [of the *BC Logging* factual record] entitled "Scope of the Factual Record", Canada considers the discussions surrounding the Secretariat's review of the Council's instruction regarding the scope of the Factual Record to be superfluous... We suggest that the Secretariat limit this discussion to the information that will be the subject of the Factual Record...

Also, Section 4 [of the *BC Logging* factual record] includes a summary of the comments provided by the submitters, which were in reaction to Council's instruction to the Secretariat. The NAAEC is very clear that the Council is the ultimate authority for determining the scope of a Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue. Therefore Canada requests that this information be removed...

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

III. Conclusion: A Process Made Hollow

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

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

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

Very truly yours,

FITZGERALD, ABBOTT & BEARDSLEY LLP

A handwritten signature in black ink, appearing to read "Paul S. Kibel". The signature is written in a cursive, somewhat stylized font.

Paul S. Kibel