

Preliminary Report for JPAC Public Meeting

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

October 2, 2003

ISSUES ADDRESSED IN PRESENTATION

Defining the scope of the factual record:

- Impact of recent Council decisions defining the scope of factual records (*BC Logging, BC Mining, Oldman River II, and Migratory Birds*)
- Council's authority to define the scope of factual records

Requirements re: Sufficiency of Information:

- Impact of Council's resolution deferring consideration of Secretariat's recommendation with respect to *Ontario Logging* pending submission of "sufficient information"
- Council's authority to re-open Secretariat's determination that the submission provides "sufficient information"

DEFINING THE SCOPE OF THE FACTUAL RECORD

Report examines Council's definition of scope in *BC Mining, BC Logging, Migratory Birds, and Oldman River II*

In each case:

- Secretariat recommended investigation of alleged *widespread, systemic failures to effectively enforce*, but
- Council limited investigation to *specific examples* of the widespread failure

IMPACT OF COUNCIL'S RESOLUTIONS: OVERVIEW

- Limits usefulness of factual record
- Heightens potential for further narrowing of scope
- Undermines credibility of citizen submission process
- Diminishes ability of citizen's groups to participate in process
- Strains resources and capacity of Secretariat

IMPACT: LIMITS USEFULNESS OF FACTUAL RECORD

Failure to address cumulative effects:

- *BC Logging*: concern that harm to fish did not necessarily arise from destructive practices (e.g., clearcutting) in any one instance, but from such practices occurring frequently on widespread basis

IMPACT: LIMITS USEFULNESS OF FACTUAL RECORD, cont'd.

Failure to address broader concerns re: enforcement policies:

- *Migratory Birds*: Submitters concerned about policy of non-enforcement vis a vis logging sector (based on rarity of such prosecutions and draft policy memo)
- *BC Mining*: Submitters concerned about policy issues – e.g., reductions in enforcement staff and resources, lack of prosecutions against mines in BC, ineffective use of enforcement mechanisms other than prosecution
- *BC Logging*: Submitters concerned about non-enforcement on public lands (over 90% of land base), but factual record only focused on small fraction of private land in BC

IMPACT: LIMITS USEFULNESS OF FACTUAL RECORD, cont'd.

Harder to show ineffective enforcement by a Party:

- Allows Council to determine where to “shine the spotlight” and thus generate favorable factual record
 - *BC Mining*: Narrowed focus from 42 known or potentially acid-generating mines to “one of the few mines [the Canadian government] had shown any engagement on.”

IMPACT: LIMITS USEFULNESS OF FACTUAL RECORD, cont'd.

May make enforcement failure “more palatable” to public:

- Failure to effectively enforce on wider scale likely to raise more public outcry than failure in specific instance
- Easier for Party to attribute specific instance of non-enforcement to “reasonable exercise of prosecutorial discretion” or bona fide resource allocation decision
 - *Migratory Birds*: In 2 specific instances, state had achieved criminal/administrative sanctions under state law

IMPACT: LIMITS USEFULNESS OF FACTUAL RECORD, cont'd.

Factual records still add value, albeit limited:

- Can prompt enforcement in individual cases (e.g., remediation efforts at Britannia mine)
- Provide information about government policies that may also be at issue in other cases (e.g., Petite Policy in *Migratory Birds*, Habitat Policy in *Oldman River II*)
- Draw attention to submitters' broader allegations, and some of the evidence supporting these allegations (e.g., letters from submitters).

IMPACT: HEIGHTENS POTENTIAL FOR FURTHER SCOPING

Potential misuse of Article 14(3) (excluding from factual record matters subject to pending judicial or administrative proceedings)

- Easier to invoke Article 14(3) in context of specific instance
- *BC Mining*: Canada initiated administrative action at 2 mines after submission, removing them from scope of factual record. Submitters concerned that administrative actions would be ineffective as statute of limitation to bring summary convictions had already expired
- Potential risk of strategic use of Article 14(3) if Secretariat must accept at face value Party's notification that administrative actions have been taken

May make it more likely for submission to be seen as “aimed at...
“...to delay the process” (Article 14(1)(1))

IMPACT: UNDERMINES CREDIBILITY OF CITIZEN SUBMISSION PROCESS

- Credibility of process stems from independent fact-finding body
- Allowing Council to set terms of the fact-finding process may undercut independence of Secretariat
- Would allow Party against whom allegations have been directed to dictate—through the Council—how such allegations will be investigated (“fox guarding the chicken coop”)

IMPACT: DIMINISHES ABILITY OF CITIZENS' GROUPS TO PARTICIPATE IN PROCESS

- Requires submitters to document every specific instance in which the Party failed to effectively enforce the law in order to ensure that it will be included within scope of factual record
- May be overly burdensome to citizens' groups, who cannot recoup attorney's fees (as is possible under various domestic statutes)

IMPACT: STRAINS RESOURCES AND CAPACITY OF THE SECRETARIAT

- Each new example of non-enforcement may lead to an additional submission
- Submitters may allege extensive number of specific violations in one submission, (e.g., *Ontario Logging*) requiring Secretariat to investigate every one
- Investigating allegations of widespread, systemic failure could be less time-consuming than allegations of specific violations
 - Secretariat would not need to investigate every violation, but could look at evidence of broader patterns (e.g., number of prosecutions, internal policy memoranda, enforcement staff and resources)
 - Secretariat could identify examples that are illustrative or

COUNCIL'S AUTHORITY TO DEFINE SCOPE OF FACTUAL RECORD

- Text: “[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so”
- Issue: does Council’s authority to order Secretariat to prepare factual record include the authority to narrow its scope?

COUNCIL'S AUTHORITY TO DEFINE THE SCOPE, cont'd.

Textual/structural arguments: Council does NOT have the authority to narrow the scope:

- Article 14 contains limitations on the scope of the process—if parties had intended to limit scope to particularized incidents, would have done so
- David Markell: Agreement does not allow Council to act *sua sponte* to direct Secretariat to develop factual record
- Article 15: No standards to guide Council's review of Secretariat's determination—suggests that Council is to defer to Secretariat's decision
- Article 11(4): prohibition against influencing members of the Secretariat

COUNCIL'S AUTHORITY TO DEFINE THE SCOPE, cont'd.

Counter-arguments:

- Greater authority includes the lesser authority
- Parties to Agreement are the ultimate authorities on interpretation of its terms

COUNCIL'S AUTHORITY TO DEFINE THE SCOPE, cont'd.

Although arguably consistent with letter of Agreement, Council's resolutions violate object and purpose (or "spirit") of Agreement

- Inconsistent with Agreement's public participation objectives
- Inconsistent with Agreement's transparency objective
- Inconsistent with broad and ambitious goals of Agreement
 - e.g., "foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations"

SUFFICIENCY OF INFORMATION

Separate but related issues:

- Can a widespread systemic pattern of ineffective enforcement be the subject of a factual record? (raised in *Migratory Birds*, *BC Mining*, *BC Logging*, *Oldman River II*)
- If yes, what kind of information must Submitters present in support of such an allegation? (raised in *Ontario Logging*)

SUFFICIENCY OF INFORMATION, cont'd

Ontario Logging Submission:

- Alleged failure to effectively enforce Migratory Birds regulations against logging industry in Ontario
- Estimated number of specific violations—destruction of 85,000 migratory bird nests in 59 forests—that would result from widespread failure to enforce
- Estimate based on planned harvest areas identified in forest management plans

Secretariat's Recommendation:

- Found estimate “compelling,” and that information about actual destruction “could readily be developed in a factual record”

SUFFICIENCY OF INFORMATION, cont'd

Ontario Logging Council's Resolution:

- Found that submission did not contain “sufficient information”—gave submitters opportunity to provide additional information to support their allegations

Supplemental Submission:

- Obtained actual numbers of trees logged, provided more accurate estimates of number of migratory birds taken
- “The perception may develop that to obtain a factual record under the citizen complaint procedure one must essentially provide a factual record.”

COUNCIL'S AUTHORITY TO DETERMINE SUFFICIENCY OF INFORMATION

Text:

- Article 14(1): “The Secretariat may consider a submission...if the Secretariat finds that the submission...provides sufficient information to allow the Secretariat to review the submission”
- Article 15(2): “[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so”

Issue: Does Council's authority to instruct Secretariat to prepare factual record include authority to determine what constitutes “sufficient information” to support a factual record, to require additional information to meet this standard, or to

COUNCIL'S AUTHORITY TO DETERMINE SUFFICIENCY OF INFORMATION, cont'd

Textual/structural arguments: Council does NOT have the authority

- “Sufficient information” standard located in Article 14(2), which lists threshold criteria for the Secretariat to consider. No “sufficiency” standard found in Article 15(2) which gives Council the authority to order Secretariat to prepare a factual record. Lack of any criteria for Council’s review suggests that *de novo* review is not intended
- Article 11(4) prohibition against seeking to “influence” the Secretariat

COUNCIL'S AUTHORITY TO DETERMINE SUFFICIENCY OF INFORMATION", cont'd

Counter-arguments:

- Greater authority necessarily encompasses the lesser authority
- Parties to the Agreement are the ultimate authority on the interpretation of its terms

COUNCIL'S AUTHORITY TO DETERMINE SUFFICIENCY OF INFORMATION, cont'd

Although arguably consistent with letter of Agreement, Council's imposition of "sufficient information" requirements inconsistent with object and purpose (or "spirit") of Agreement

- High evidentiary bar inconsistent with public participation objectives
- Inconsistent with transparency objectives—evidentiary bar for a "sunshine" mechanism should not be as high as for proceeding involving enforcement measures/sanctions

CONCLUSION

If current trends continue:

- Council unlikely to approve development of factual record on allegations of widespread patterns of ineffective enforcement, beyond specific examples detailed in the submission
- Evidence of widespread patterns of ineffective enforcement— e.g., lack of prosecutions, governmental memoranda stating policies of non-enforcement, enforcement staff and resource shortages—are not “sufficient” to support development of factual record
- Is evidence of an extensive number of specific failures to enforce “sufficient” to support the development of a factual record on allegations of widespread failure to enforce?
Currently being tested in *Ontario Logging*

CONCLUSION, cont'd

Result: Citizen's submission process less useful, less credible

- Does not address patterns of non-enforcement, governmental policies underlying such patterns, and cumulative impacts of failures to enforce – the concerns that give rise to submissions
- Diminishes very purpose and function of “sunshine” mechanism: to shed light on widespread enforcement failures and thus compel change
- Limits public's ability to participate in the process
- Undermines independence of Secretariat and thus credibility of process

CONCLUSION, cont'd

Council's authority to define the scope and set sufficiency requirements:

- Arguably consistent with letter of the Agreement
- But contravenes the spirit of the Agreement (public participation, transparency)

Process requires some limits on scope/evidentiary threshold, but Secretariat—not Council—has the independence, mandate and expertise to make necessary determinations