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Via Facsimile (514) 350-4314

Manon Pepin

JPAC Liaison Officer

Joint Public Advisory Committee

Commission for Environmental Cooperation

393 St. Jacques West

Suite 200

Montreal, Quebec H2Y 1N9

RE: Comments on Submissions History Leading to Lessons Learned

On behalf of the Sierra Legal Defence Fund (“SLDF”), I am pleased to present SLDF’s comments regarding “lessons learned” from the citizen submission process. SLDF wishes to thank the Council and the JPAC for undertaking this important initiative. SLDF is also providing comments, in a separate document, regarding the “Draft JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15”. A document describing SLDF and a description of its previous involvement in CEC activities is attached to these comments.

In considering the lessons learned from the citizen submission process, it is important to have regard to the work of the independent review committee (“IRC”), which the parties commissioned to review the operation of the NAAEC. The IRC supported the concept and design of the citizen complaint process and recommended strongly that it would be premature to significantly reform the citizen submission process. According to the IRC, the process reflected a commendable “trend toward increased citizen involvement in international mechanisms to address environmental issues”. As such, the process “belongs” to the 350 million citizens of North America “who are empowered to initiate it, and for whose benefit it was developed”. In conclusion, the IRC expressed that the “current tension” around the citizen complaint process would be reduced if the parties, instead of seeking to reform the process, worked hard to “scrupulously apply the NAAEC”, and “respected the discretion provided to the respective decision-makers at different points in the process”. We strongly agree with the IRC’s observations.

SLDF has participated as counsel or co-counsel on three CEC submissions: 97-001 (BC Hydro), 98-004 (Sierra Club, et. al) and 00-004 (David Suzuki Foundation, et. al). Based on our experiences in these submissions, we make the following observations, which are discussed more fully below:

- 1) Public confidence is critical to the success of the citizen submission procedure and is linked to the presence of a transparent process and an independent Secretariat, but neither of these objectives has been fully achieved.
- 2) There is a major unresolved issue regarding when a party may deem information “confidential” and thus refuse to provide that information to the Secretariat.

- 3) There are emerging issues regarding parties' willingness to co-operate with the Secretariat in the citizen submission process.

We believe that failure to resolve these issues has the potential to undermine the ultimate effectiveness of the citizen submission process.

1) Transparency and Independence

Under the *North American Agreement on Environmental Cooperation* (the "NAAEC"), Canada, Mexico and the United States have agreed to "effectively enforce" environmental laws (Article 5(1)). Citizens may file submissions regarding a party's failure to effectively enforce its own laws. However, a citizen submission cannot result in an order that a party must effectively enforce its laws. Rather, the citizen submission mechanism may result in the publication of a factual record that presents information regarding the alleged failure to enforce. Thus, the primary value of the citizen submission mechanism is the potential to publicly highlight instances where environmental laws are not being effectively enforced.

In addition to highlighting failures to effectively enforce environmental law, the citizen submission process also has the potential to suggest that environmental laws are being effectively enforced through, *inter alia*, the decision not to prepare a factual record or the selective presentation of information in a factual record. The parties to the NAAEC have an interest in being seen to be effectively enforcing environmental laws and at the same time have the ability to influence the citizen submission process. Any perception that a party may be able to inappropriately influence the citizen submission process will undermine public confidence. In fact, public concern over the potential that parties may have tried to influence the citizen submission process led to Council Resolution 00-09 and the process in which these comments are submitted.

Maintaining public confidence in the citizen submission process requires a transparent process and an independent Secretariat that is able to perform its functions without fear of interference or reprisal. A transparent process, respected by the parties, will ensure that the public is aware of important issues and ensures that the parties are accountable for their decisions. An independent Secretariat will assist in guaranteeing that the operation of the citizen submission process which reflects the spirit and intent of the NAAEC, rather than the interests of a party who is the subject of a citizen submission.

The CEC has made significant progress in guaranteeing transparency through Resolution 00-09 and the public review process, but there are still some outstanding issues including the determination of when the Council will refer issues to the JPAC for public review (this issue is discussed more fully in SLDF's comments regarding the public review procedure). Concerns about the independence of the Secretariat, for the most part, remain unresolved.

2) Confidentiality

Under Article 21 of the NAAEC, parties have agreed to provide information required by the Secretariat. However, the reliance of parties on the confidentiality provisions of Articles 39 and 41, which related to confidential and proprietary information and concerns of national security, is increasing. Claims of confidentiality have been asserted related to a number of citizen submissions, including SEM 97-001 (BC Hydro) and SEM 98-005. Canada's assertions of confidentiality in the BC Hydro process caused considerable delay and public concern.

Articles 39 and 41, as written, address legitimate concerns of the parties. However, the purpose and intent of the NAAEC require that the confidentiality provisions be reasonably interpreted to prevent a party from withholding information that is relevant to a factual record simply because it is harmful to the position of the party. The effectiveness of the citizen submission process demands that parties not abuse the confidentiality provisions and that the Secretariat is given the ability to closely scrutinise claims of confidentiality.

3) Cooperation of Parties

The preparation of the BC Hydro factual record raised serious concerns regarding the parties' commitment to upholding the spirit and intent of the citizen submission mechanism. During the process, Canada refused to meet with the "expert group" assisting in factual record preparation despite numerous requests, which ultimately interfered with factual record preparation. The Secretariat stated:

...the Secretariat contacted the government of Canada on several occasions to schedule meetings with knowledgeable government officials in order to make the Factual Record as comprehensive and accurate as possible. Such meetings never occurred and the Secretariat developed as accurate and complete a Factual Record as possible under the circumstances. (BC Hydro Factual Record, p. 25, emphasis added)

Canada was also unwilling to provide information requested by the expert group in the BC Hydro factual record process. Although the submitters of SEM 97-001 were generally pleased with the citizen submission process, Canada's reluctance to cooperate undermined the ultimate effectiveness of the process. The expert group commented:

Lack of well researched, quantifiable information appears to be the primary obstacle to reviewing the effectiveness of Canada's enforcement actions. In virtually all instances in which the Expert Group requested hard technical information, little or none was provided. (BC Hydro Factual Record, Appendix 8, p. 58)

The functioning of the NAAEC is premised on support for the purposes and objectives of the Agreement and the willingness of the parties to tolerate scrutiny of their environmental performance. The failure of parties to cooperate in good faith with the citizen submission mechanism is the biggest potential threat to the mechanism's

continuing viability. It may be necessary to address this issue through guidelines or amendment of Article 21 to increase the information gathering powers of the Secretariat.

Respectfully submitted,

Randy L. Christensen

THE SIERRA LEGAL DEFENCE FUND AND ITS INVOLVEMENT WITH THE CEC

The Sierra Legal Defence Fund (SLDF), founded in 1990, is a non-profit environmental law organization that provides free legal services to the environmental community in Canada. SLDF has three primary goals:

- 1) To 'level the playing field' for environmental groups that simply cannot afford to go to court against large institutions when important wilderness values are at stake;
- 2) To bring carefully selected cases with the ultimate goal of establishing an aggregate of strong legal precedents that recognize the vital importance of environmental values;
- 3) To provide professional advice on the development of environmental legislation.

SLDF is funded by public donations and foundations grants. We currently have over 17,000 individual supporters across Canada.

SLDF has provided support and assistance to several organization and individuals interested in filing citizen submissions with the Commission for Environmental Cooperation (CEC). Randy Christensen, the Sierra Legal Defence Fund's representative to the June 2000 Council session, is counsel of record for three Citizen Submissions:

1. Submission 97-001, filed on behalf of the BC Aboriginal Fisheries Commission, the British Columbia Wildlife Federation, the Trail Wildlife Association, the Steelhead Society of British Columbia, Trout Unlimited (Spokane Falls section), Sierra Club (US), the Pacific Coast Federation of Fishermen's Association, and the Institute for Fisheries Resources. Submission 97-001 is the first submission from Canada or the United States to proceed to the Factual Record development stage. The Factual Record for BC Hydro was released in June, 2000.
2. Submission 98-004, filed on behalf of the Sierra Club of British Columbia, the Environmental Mining Council of British Columbia and the Taku Wilderness Association.
3. Submission 00-004, filed on behalf of the David Suzuki Foundation, Greenpeace Canada, the Sierra Club of British Columbia, the Northwest Ecosystem Alliance and the National Resources Defence Council.

Mr. Christensen has also attended previous CEC functions, including the January 1999 JPAC meetings regarding proposed changes to the Guidelines for Citizen Submissions, the June 1999 Council session in Banff, Alberta, where Mr. Christensen gave a short presentation to Council members, and the June 2000 Council meeting in Dallas.