



1616 P STREET, N.W., SUITE 200
WASHINGTON, D.C. 20036

PHONE: (202) 939-3800
FAX: (202) 939-3868
E-MAIL: law@eli.org
WEB: www.eli.org

May 11, 2001

Joint Public Advisory Committee
Commission for Environmental Cooperation

Re: Comments and Suggestions on the “Lessons Learned” Draft Report to the Council of the Commission for Environmental Cooperation.

To the Members of the Joint Public Advisory Committee:

We greatly appreciate the opportunity to submit comments on the suggestions made in Draft Report to the Council for Environmental Cooperation (CEC) that was released in April 2001. We enthusiastically support most of the findings and recommendations that were discussed in this document, and would like to commend your effort address the criticisms that were raised by commentators in regards to Articles 14 and 15 of the NAAEC. There are a few additional areas of concern that we would like to highlight, and several issues that might benefit from further attention and development

I. Improving Public Participation

The criticisms discussed in the Draft Report concerning the 30-day waiting period for public access to the recommendations made by the Secretariat have some merit. This requirement is unnecessary and undermines the intended purpose of Articles 14 and 15. Because there are no enforcement requirements in this agreement, prompt public access to relevant information is an invaluable element of the agreement. Timely public access to information can expose inappropriate environmental conduct, which in turn promotes compliance with environmental standards. For this reason, we suggest that this provision be eliminated.

Providing for an opportunity to respond to additional information that is submitted to the Council or the Secretariat by one of the Parties is also a valuable part of the process. This opportunity should be expanded beyond allowing for only a brief written reply. It is easy to imagine situations in which a more detailed response would be necessary to provide the Council with adequate knowledge of the circumstances in which their decision should be based. For this reason, we believe that an opportunity for a more extensive response should be provided.

While it may be true that expanding on the response mechanism could impose an increased burden on the Secretariat and the Council, one way to mitigate this burden could be through the development of oral proceedings. This would provide an

opportunity for the Party and the Submitter to present and directly respond to the arguments, and it would allow the Secretariat to directly question the participants. This proceeding could be a binding judicial hearing, or it could simply be a moderated discussion between the parties. The development of this forum would promote open and informed decision-making by the Council and the Secretariat, and would provide for more complete and accurate Factual Records.

Allowing third parties to comment on the data provided to the Secretariat and the Council offers another way to enhance the public participation process. It may be the case that submitters fail to capture all of the relevant facts or the strongest legal arguments in particular cases. By opening up the process to third parties, the factual and legal basis for conclusions would be strengthened because organizations that have special expertise in specific areas of interest would be incorporated into the process. This would lead to a stronger understanding of the issues in particular cases and promote sounder decision-making by the Secretariat and the Council.

II. The Expert Panel

In the *BC Hydro* case an expert panel was assembled to review compliance with the Canadian Fisheries Act. The use of an expert panel provides an important method for providing accurate and scientifically based information to the Secretariat during the preparation of a Factual Record by bringing scientists and environmental experts into the decision making process. This helps to ensure that decisions will be based on the most current data and promotes accurate and non-biased fact-finding. To strengthen this process, the procedural and operational guidelines governing the expert panel should be clearly defined, and the authority of the panel should be explicitly stated. These actions would help to limit the possibility for discrepancy or conflict during the decision-making process and help to establish the scope of the panel. Also, the development of standards for expert panels will promote consistency, accuracy, and a sound scientific basis for the determinations made by the Secretariat and the Council.

III. Sensitive Information

The need for the protection of confidential information is asserted in the document. This need at times may come into conflict with the desire for transparency in the review process. The document addresses this conflict by recommending, “opportunities to assert confidentiality should be clearly and narrowly defined” (11). Specific standards should be developed to determine whether an assertion of confidentiality is valid and necessary. These standards could easily be developed by an assembled group of independent experts, like the group that was assembled for in the *BC Hydro* case. This would help to reduce the misuse of confidentiality exemptions, and would therefore help to promote honesty and openness in the review process. Another way that these standards could be developed is by basing them on existing domestic laws.

IV. Language

We believe that the Draft Report would be strengthened if it utilized stronger and more assertive language. The adoption of this type of language would strengthen the credibility of the document and minimize the potential loopholes that may be created through the use of permissive language. For example, the use of the word “should” in recommending time limits and other procedural guidelines allows too much room for interpretation by the concerned players. Instead, such clauses should be replaced with mandatory terms like “must, shall, or should always.” Stronger language would more clearly assert the new requirements, and would minimize the potential for misinterpretation of the guidelines.

V. Conclusive Findings

The decision not to require final findings in the Factual Record is another key area of concern. As exemplified in both the *BC Hydro* and the *Cozumel Pier* cases, the current process does not encourage a determination in the Factual Record of whether a Party was in violation of domestic environmental law. We believe that a new requirement should be placed on the Secretariat to come to a conclusion in the Factual Record. This would enhance the goals of the agreement by specifically identifying Party’s that are in violation of domestic standards.

A new requirement for conclusive findings in the Factual Record would increase public access and the transparency of the process by reducing demand by the lay public for expert public interpretation of the facts in the case. A determination by the appropriate experts of whether a Party is in violation of environmental law would make the Factual Record easier to understand and interpret by the general public, and would thus facilitate openness in the process.

Articles 14 and 15 have been criticized for failing to provide the authority for enforcement if it is determined that a Party is in violation of domestic law. The need for this type of enforcement would be diminished if the requirement for conclusive findings were adopted. A specific conclusive finding would increase the public awareness of the issues by making the findings of the Council clearer and more accessible. This increased awareness will intensify pressure on the Party to rethink policies that are determined to be violations of the agreement. Since the Council lacks the authority to compel a Party to make changes to its environmental policies, this pressure will make voluntary compliance more likely, and will help facilitate substantive changes in policies that have a negative impact on the environment of North America.

Thank you for the opportunity to express our views on the revised document.

Respectfully,

Carl Bruch
Senior Attorney
Environmental Law Institute