

January 31, 2001

Joint Public Advisory Committee
North American Commission for Environmental Cooperation
Montreal, Canada

Re: Public Comments related to the Citizens Submission Process Under Articles 14 and 15 of the NAAEC - Historical Perspective/Lessons Learned

Dear JPAC Members:

The Environmental Health Coalition (EHC) welcomes the opportunity to comment on the submission processes under articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC). The following brief comments are based on our experience as Petitioners under the Article 14 and 15 process. Because of time constraints, the following is only a brief outline of the key issues that we would like to address to you. We will supplement this statement at a later date with greater specificity if time and protocol will allow. Still, it is our hope that our comments and recommendations serve to the critical analysis regarding the effectiveness and efficiency of the citizen submission process.

On October of 1998, EHC, along with Comité Ciudadano Pro Restauración del Cañón del Padre, filed a submission under articles 14 and 15 of the NAAEC. The purpose of the submission was twofold. First, the petition implored a determination by an independent entity, whether a Party to the agreement had effectively enforced its environmental laws with regards to an abandoned lead smelter, which would in turn lead to the clean up and acutely dangerous toxic site. Second, the petition sought to publicly test the efficiency and effectiveness of the petition process, a mechanism regarded by its supporters as a viable tool to ensure greater governmental accountability against environmental neglect.

For more than two years, EHC has carefully followed and documented the submission process as it pertains to its own petition. The attached chronology summarizes the history of EHC's submission but more importantly, it illustrates how lengthy and complex this process has been to date.

The following issues are only briefly discussed and merit more extensive analysis. Yet, based on EHC's experience, they constitute perhaps the greatest challenges that must be addressed and resolved in order to ensure a more efficient and effective public mechanism.

Confidentiality of a Party

In the submission filed by EHC and Comité, the Party of Mexico asserted confidentiality with respect to any and all information provided by Mexico to the Secretariat. The assertion was based on Article 16 of Mexico's Federal Code of Criminal Procedure, Article 39(1) of the NAAEC and Article 17.3 of the Submission Guidelines. EHC opposed Mexico's claim and requested the Secretariat to make a determination on the issue. See attached Letter in Opposition to Mexico's Confidentiality Assertion. Despite EHC's efforts to resolve this issue, the matter was never resolved.

The issue of confidentiality and whether a Party can or cannot assert it, requires careful and serious analysis. In the case of EHC's petition, this issue has raised serious concerns as to the process' transparency and fairness. As the attached letter states, **provisions on confidentiality in the NAAEC and the Guidelines should be narrowly interpreted and applied only in specific instances, rather than having a broad application.**

Timeliness

Another fundamental challenge that has been very obvious in EHC's petition is the mechanism's ability to respond to petitions in a timely manner. In the case of EHC's submission, more than 2 years have passed since the filing of it without final resolution. Again, careful analysis must be made in order to ensure timely response and adjudication of the submission and avoid undue or unreasonable delays. See Chronology of Submission.

Citizens Time and Effort vs. Actual Results

In the case of EHC's submission, the Petitioners have invested considerable time and resources thus far in order to maintain the submission active. Generally, organizations and individuals interested in using this mechanism when confronted with an environmental issue, do not count with sufficient resources to adequately and properly bring a submission before the Commission. Presently, the submission process requires great energy and effort on the part of the citizens and provides little results or responses to the asserted claimants. Many submissions have been denied because of procedural errors, others have been denied on their merits, and only a handful have made it to the end of the process.

Over time, if the process remains highly complex and demanding, less groups and individuals will be inclined to consider this process as a viable option to address environmental problems in North America from the perspective of the citizens.

As stated above, due to time constraints, this document only touches upon some of the most pressing issues but by no means the list is exhaustive. Other issues that require attention and analysis include: how to make the process more accessible to the non-legal person or organization, how to ensure that the Secretariat maintain an independent role in the analysis and results of the preparation of factual records, how to separate the different roles of the Council as representatives of the Parties and as well as the decision makers of preparation and publication of submissions.

Finally, EHC has achieved some important gains as the result of filing a submission. Most importantly has been the level of visibility that the process has brought to the issue raised in this case. As a result of filing this petition, EHC has seen some efforts on the part of both Mexico and the United States to try to resolve the case of Metales y Derivados. More importantly, since the filing of the submission, people affected by this problem have gained a new sense of hope that the site will ultimately be cleaned and that they will no longer be exposed to the health threats associated with toxic waste.

Thank you for your time and consideration.

Cesar Luna, Esq.
Environmental Health Coalition

**CEC SUBMISSION CHRONOLOGY
METALES Y DERIVADOS**

- 10/22/98 EHC/Comité files Metales y Derivados Submission before the Secretariat for the CEC. (SEM 98-007)
- 10/30/98 Secretariat formally acknowledges receipt of the petition and the commencement of the review process.
- 10/28/98 Letter from U.S. Congressman Bob Filner to the CEC in support of Metales Petition.
- 12/09/98 EHC requests the assistance to the U.S. EPA National Environmental Justice Advisory Committee in support of Petition.
- 01/21/99 No response by Secretariat. EHC requests a status report of the review process.
- 02/25/99 No response by Secretariat. EHC request a second status report. (4 months after filing)
- 03/05/99 Secretariat accepts Petition as meritorious and formally requests Mexico to respond to the Petition within 30 days as prescribed by the Agreement.
- 03/31/99 Mexico requests the CEC to extend the time to file its response. It gives no justifications to extend filing deadline.
- 04/05/99 Secretariat grants Mexico's request for extension. Gives Mexico until June 1st, 1999 to respond (in excess of the 30 days as prescribed by the Agreement).
- 04/06/99 EHC formally opposes Mexico's extension of time and asserts that Mexico did not have a legitimate reason (no exceptional circumstances) to justify additional response time pursuant to the Side Agreement. EHC requests the Secretariat to make a determination to the formal opposition.
- 06/04/99 Letter by Secretariat to EHC summarizing EHC's opposition. Letter does not say anything more.
- 06/14/99 Mexico files response to the Petition with the Secretariat. Mexico requests that the response be kept confidential in its entirety. Secretariat acknowledges receipt and requests Mexico to provide a summary of the response in order to respect Mexico's request for confidentiality.
- 07/20/99 Mexico rejects the Secretariat's request to prepare a summary of its response to the Petition and asserts full confidentiality to the entire response based on Mexico's Code of Criminal Procedure.
- 08/26/99 EHC formally opposes Mexico's confidentiality claim and asserts that Mexico does not have legal basis to withhold the response from public view. EHC requests the Secretariat to make a determination and disclose Mexico's request.
- 09/28/99 No response from the Secretariat. EHC makes a second request to the above point.

10/22/99 Case reaches 1 year Anniversary since its inception.

10/29/99 No response from the Secretariat. EHC makes a third request.

11/11/99 No response from the Secretariat.

06/24/00 Commission authorizes the Secretariat to prepare a factual record on the case.

01/31/01 Factual Record still pending.

August 26, 1999

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NAAEC Submission No.:SEM-98-007

Re: Letter of Opposition to Mexico's Request for Confidentiality Based on Article 16 of the Mexican Federal Code of Criminal Procedure, Article 39(1) of the NAAEC and Article 17.3 of the Submission Guidelines.

Petitioners oppose the Party of Mexico's position in maintaining its response to the above named submission confidential. Mexico's latest refusal to disclose its response lacks legal basis but more importantly constitutes a serious threat to the efficiency, credibility and overall purpose of the Article 14 submission process. Consequently, Petitioners request that the Secretariate carefully review this important issue and recommend to the Commission to require Mexico to make its response available and to provide specific guidelines with respect to the strict application and review of confidentiality claims by Parties.

1. Mexico's response cannot be legally subject to confidentiality in its totality. On June 14, 1999, Mexico issued a response to the Secretariate's request to identify the reach of the confidentiality claim and to provide a summary of the parts in its response to be kept confidential. On July 20, 1999, Mexico responded to the Secretariate's request and asserted confidentiality to the totality of its response pursuant to Article 16 of Mexico's Federal Code of Criminal Procedure, Article 39(1) of the NAAEC and Article 17.3 of the Submission Guidelines.

Article 16 of the Code of Criminal Procedure prohibits governmental officials to publicly disclose information pertaining to criminal preliminary investigations except to the accused, his/her representative, and the victim or victims and their legal representative. **However, the present citizen submission is based on three different claims, two of which are not criminal in nature and therefore, outside the scope of Article 16.** Mexico has failed to take the proper safety measures to prevent the Metales y Derivados site from posing an imminent risk to the ecological balance and to public health, and has failed to take appropriate actions to control or prevent soil contamination in and near the Metales y Derivados site in violation of Articles 170 and 134 of the General Law respectively. These two claims are administrative in nature and are not subject to any confidentiality protection.

Article 39(1) of the NAAEC protects a Party from disclosing information that will either "impede its environmental law enforcement or is protected by its law governing business or proprietary information, . . .". **The above mentioned arguments do not interfere or impede environmental law enforcement. Rather, they are direct assertions that the Party of Mexico, and not the owner**

of Metales y Derivados, is failing to effectively enforce Articles 170 and 130 of the General Law. Absent any other legal justification, Mexico must disclose its response at the very least with respect to these two claims.

2. The provisions on confidentiality in the NAAEC and the Guidelines should be narrowly interpreted and applied only in specific instances. The NAAEC provide for only two types of information that are traditionally treated as confidential or proprietary to be withheld from disclosure. Article 39(1) contains narrowly crafted exceptions to public disclosure: enforcement-confidential information; national security information, and information that is protected from disclosure under domestic law because it is business-confidential, proprietary, relates to personal privacy. Therefore, **all information gathered or prepared by the Commission, including information gathered or prepared as part of the submission on enforcement matters, must be disclosed to the public unless the information falls within the specific exceptions under Article 39(1) of the Agreement.**

Furthermore, Article 17.3 of the Guidelines only applies to information that is exempt from disclosure under the terms of the Agreement. The provisions in the Guidelines that control the implementation of the submission under Article 14, are subordinate to the overarching requirements of the NAAEC. Therefore, Mexico cannot claim total confidentiality of its response under Article 17.3 of the Guidelines if the information does not conform to the specific exemptions enunciated in Article 39(1) of the NAAEC.

3. Mexico's position on confidentiality in this case effectively hinders the original intent of the Citizens Submission Process under Article 14 of the NAAEC. The principal purpose of the citizen submission process is to help determine whether a Party is effectively enforcing its environmental laws. So long as Mexico's response remains confidential, the Commission will be prevented from carrying out its mandate under the NAAEC. In essence, even if the Commission does decide to prepare a factual record in this case, the record will be incomplete because it will not contain Mexico's information. Petitioners submit that the treatment of confidential information by a Party as in this case, seriously threatens the credibility and effectiveness of this process.

Therefore, for the reasons stated above, Mexico must make its response publicly available. The Commission must safeguard the integrity, credibility and efficiency of the citizens submission process by ensuring its transparency. Petitioners now request that the Commission, through the Secretariat, issue a formal response to this letter of opposition, within thirty (30) calendar days, and make a determination on the treatment of information deemed confidential by a Party by incorporating the points raised above. Petitioners will not consider mere summaries of issues as a formal response.

Sincerely,

César Luna, Esq.

Border Environmental Justice Campaign