

September 22, 2000

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: “Draft JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15

On behalf of Sierra Legal Defence Fund, I am pleased to present the following comments, which concern the draft public review procedure developed by the JPAC. SLDF is also providing comments, in a separate document, regarding “lessons learned” from previous citizen submissions. A document describing SLDF and a description of its previous involvement in CEC activities is attached to these comments.

SLDF would like to thank the JPAC for its work in the development of Resolution 00-09 and its work thus far in developing the public review process. The JPAC has always been a strong advocate for a public voice in the citizen submission process.

The JPAC has done a commendable job of creating a transparent mechanism for addressing issues arising under Articles 14 and 15 which fully employs the mandate granted to the JPAC under Resolution 00-09. The public review process, as described in the draft document, is a significant step forward in resolving the issues that arise concerning the citizen submission process. SLDF is particularly pleased to see that the public review process makes specific, detailed provision for members of the public to raise issues with the JPAC.

Regarding the draft review process, SLDF has some limited suggestions regarding issues where clarification or further guidance through guidelines would be beneficial. SLDF has further comments regarding the ability of Resolution 00-09, and the process it mandates, to fully address the public concern that led to its development. SLDF provides these comments to the JPAC in its role as the CEC’s public representative, with the hope that the JPAC will communicate these issues to the Council for consideration prior to the finalization of the public review process.

A. THE DRAFT PUBLIC REVIEW PROCESS

The draft public review process developed by the JPAC is a significant step forward. SLDF only comments relate to clarification of some aspects of the public review process would be beneficial, including:

- Further elaboration of how the JPAC will determine the form and content of any public review when the Council has referred issues to the JPAC.
- Development of criteria to guide the JPAC's consideration of whether issues referred by the public concern the implementation and further elaboration of Articles 14 and 15. Specifically, it would be beneficial for the JPAC to communicate its understanding of phrase "implementation and further elaboration" to the public. And,
- The JPAC should develop a time frame for making its determination whether an issue referred by the public concerns the implementation and further elaboration of Articles 14 and 15.

B. COMMENTS REGARDING RESOLUTION 00-09

Resolution 00-09, and the public review process it establishes, were created to address public concerns that the Parties to the NAAEC were working clandestinely to weaken Articles 14 and 15 and attempting to influence the Secretariat's handling of particular citizen submissions. Given the purpose and intent of the NAAEC and, in particular, the citizen submission mechanism, it is essential that the citizens of Canada, Mexico and the United States have confidence in the operation of Articles 14 and 15.

The management of the citizen submission process by the parties has importance beyond the context of the NAAEC. The citizen submission process is unique in the realm of international trade agreements as it provides the only mechanism allowing citizens to address the environmental effects of trade. As the Parties are well aware, public concern about the effects of free trade is high. A failure to defend the integrity and transparency of the citizen submission mechanism will simply strengthen anti-trade arguments.

It is everyone's interest that the Parties ensure that the citizen submission process is accessible, credible and vibrant. Two aspects of Resolution 00-09 raise particular concern. First, the Council has provided little indication of how the decision to refer issues to Council will be made. Second, the wording of Resolution 00-09 makes unclear the scope of the issues that may be dealt with in the public review process.

In Resolution 00-09 states that "Council may refer issues concerning the implementation and further elaboration of Articles 14 and 15 of the Agreement to the JPAC..." No further guidance or indication is given regarding how the Council will exercise its discretion to refer issues to the JPAC. It appears that implementation and application of Articles 14 and 15 could be significantly altered without any public input so long as the Parties (or at least two Parties) agree to the alteration. This, understandably, may

undercut public confidence in the citizen submission process. SLDF makes the following recommendations regarding Council referral:

- That guidelines be developed to direct when Council will refer issues to JPAC, which should include, at a minimum, the following protections:
 - that any new interpretation, policy or proposed agreement between the Parties which would change or alter previously established practices in the citizen submission process be referred to the JPAC; and
 - that any proposed directions from Council to the Secretariat regarding the Secretariat's preparation of a factual record, other than initial instruction to prepare a factual record (set out in Article 15(2)), be referred to the JPAC.

The wording of Resolution 00-09 also raises uncertainty regarding the potential scope of issues that may be addressed under the JPAC's public review process. Article 20 of the NAAEC and the Preamble of Resolution 00-09 refer to "co-operation and consultations" regarding the "interpretation and application" of the NAAEC. However, section 1 of the resolution and the JPAC's draft public review process refer to the "implementation and further elaboration of Articles 14 and 15". The wording "implementation and further elaboration" is clearly broad enough to encompass any potential issues concerning Articles 14 and 15 that might arise. However, if the use of the words "implementation and further elaboration" was intended in anyway to limit the scope of issues potentially referred to the JPAC by the Council or the public, that position should be made clear.

While it is legally correct to state that the Parties, as sovereign entities who are party to an international agreement, can interpret and amend the NAAEC as they see fit, this approach is inconsistent with the history, spirit and intent of the NAAEC. The most successful citizen submission will, at most, result in information being presented to the public. Under the NAAEC, no other consequences flow from the citizen submission process. This stands in stark comparison to Chapter 11 of the NAFTA, which has awarded "investors" millions of dollars in compensation due to the effects of environmental laws and results in the effective striking down of those laws.

The citizen submission process is only effective to the extent that its is a strong process, independent of the Council. The life that the Council gives to the citizen submission process will be a clear indication of the Parties willingness to address the issues of trade and the environment.

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.