

May 10, 2001

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Manon Pepin, Liason Officer
Joint Public Advisory Committee
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Re: Comments On Draft of JPAC's *Lessons Learned* Report on Effectiveness of NAAEC's Citizen Submission Process

Dear Ms. Vasseur and Ms. Pepin:

I am an environmental attorney with Fitzgerald, Abbott & Beardsley, and an adjunct professor at Stanford University and Golden Gate University School of Law where I teach Environmental Enforcement, Urban Environmental Policy, and International Trade and Environmental Protection. Enclosed are my comments on the *Draft Lessons Learned Report* released by the Joint Public Advisory Committee's (JPAC) of the North American Commission for Environmental Cooperation (CEC) in April 2001. JPAC's *Lessons Learned* report was requested by the CEC's Council of Ministers (CEC Council) to help assess the effectiveness of the citizen submission process under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), and to help determine how the citizen submission process can be improved. The enclosed comments are based on my independent research and analysis¹, and on my participation in JPAC's October 2000 *Lessons Learned* workshop in Washington DC and JPAC's December 2000 *Lessons Learned* workshop in Montreal, Quebec.

I. Significance of *Lessons Learned* Report

As discussed above, the *Lessons Learned* report is being prepared by JPAC. In the context of the CEC, JPAC has been assigned a unique and critical institutional role. As explained in the CEC's 2000 publication Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation, "JPAC members provide independent advice to the Council on all matters within the scope of the NAAEC. As representatives of the North American community as large, JPAC's members help ensure that public concerns are communicated to the Council."

¹ Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law after the Cozumel Reef Case*, forthcoming in the Columbia Journal of Transnational Law (May 2001).

When the NAAEC was proposed back in 1993, there was widespread concern among Canadian, Mexican and United States' environmentalists that the effectiveness of the CEC would be curtailed by the politics of the national representative serving on the CEC Council, and that a more politically autonomous organizational body within the CEC was needed to provide an independent perspective. For those environmentalists who supported the NAAEC along with the North American Free Trade Agreement (NAFTA) in 1993, this support was based in part on the assumption that JPAC would be able and willing to serve as an independent forum for proposals to improve implementation of and compliance with the NAAEC. For those environmentalists who opposed the NAAEC along with the NAFTA back in 1993, this opposition was based in part on the assumption that JPAC would not be able or willing to play a meaningful independent role in improving implementation of and compliance with the NAAEC.

The debate over the environmental merits of the NAAEC/NAFTA approach did not end in 1993, but continues to this day. The assumptions of environmentalists who supported and environmentalists who opposed the NAAEC/NAFTA approach have been tested over the past seven years, and the NAAEC's performance forms a baseline against which future environment-trade policy integration efforts in the Americas will be evaluated. For instance, in the current political controversy over the proposed expansion of NAFTA's trade provisions to other Latin American and South American nations, one of key issues is the adequacy of the NAAEC and the CEC as environmental governance models going forward. Because of JPAC's unique and critical role within the CEC, and because of the significance of the citizen submission process established by the NAAEC, the results of JPAC's *Lessons Learned* report are therefore being closely watched by North American environmentalists. JPAC's results will provide an insight into the CEC's and NAAEC's performance to date, as well as the CEC's and NAAEC's viability in the future.

Through the public comment period and public workshops held in connection with the preparation of the *Lessons Learned* report, JPAC has gone to great lengths to solicit public input. JPAC's efforts to implement a participatory and transparent information-gathering process should be commended. However, notwithstanding the procedural merits of the process by which JPAC conducted its research for the *Draft Lessons Learned Report*, the substantive merits of the *Draft Lessons Learned Report* are mixed. Although JPAC presents constructive recommendations to address some of the problems that have hindered the citizen submission process, JPAC's recommendations also ignore many other critical problems. What follows is a more detailed analysis of the strengths and weaknesses of the *Draft Lessons Learned Report*.

II. Strengths and Weaknesses of *Draft Lessons Learned Report*

The *Draft Lessons Learned Report* is divided into four sections. Section 1 provides an overview of the Article 14 and 15 citizen submission process. Section 2 describes the *BC Hydro* and *Cozumel Reef* factual records that have been released by the CEC Council. Section 3 summarizes the written and oral comments JPAC received in connection with its preparation of the *Lessons Learned* report. Section 4 presents JPAC's conclusions and recommendations for improving the Article 14 and 15 citizen submission process.

Section 1 and Section 2 present fairly accurate summaries of the Article 14 and 15 citizens submission process and of the basic facts and legal issues involved in the *BC Hyrdo* and *Cozumel Reef* factual records, and Section 3 provides a fairly accurate overview of the written and oral comments presented to JPAC during the public comment period and workshops. As such, my comments will focus on Section 4 of the *Draft Lessons Learned Report*, in which JPAC sets forth its conclusions and recommendations.

A. Strengths

1. Call for Expedited Review of Citizen Submissions

In Section 4(3) of the *Draft Lessons Learned Report*, JPAC concludes: "To be credible with the public and to increase its effectiveness, the citizen process must also be timely. There is substantial room to reduce the time periods currently required to review, respond to and process Submissions." JPAC then goes on to recommend the adoption of the following changes to expedite review of citizen submissions: a 60 day deadline for the Secretariat's completion of the Article 14(1) and (2) review process; a 6-7 month deadline (from the date of submission) for the Secretariat to make a recommendation to the CEC Council regarding the preparation of a Factual Record; and a 90 day deadline (from the date the Secretariat forwards its recommendation) for the CEC Council to decide whether to authorize preparation of a Factual Record. JPAC's recommendations in Section 4(3) address concerns that were repeatedly and consistently expressed by those who provided oral and written comments.

In addition to the deadlines currently proposed in Section 4(3) the *Draft Lessons Learned Report*, JPAC should also consider proposing an additional deadline in the final *Lessons Learned* report that would establish a specific time period in which the CEC Council must decide whether to withhold the release of a final Factual Record. This additional deadline could provide that if the CEC does not vote to withhold the release of the final Factual Record within the specified time period, the Factual Record would then be released.

2. Call for Greater Disclosure and Transparency in Review Process

In Section 4(4) of the *Draft Lessons Learned Report*, JPAC sets forth two important proposals to improve disclosure and transparency in the CEC's review of citizen submissions.

The first proposal relates to the CEC Council's authority to reject the Secretariat's recommendation to develop a Factual Record. JPAC notes in Section 4(4) of the *Draft Lessons Learned Report*:

"The current [citizen submission] Guidelines require the Secretariat staff to indicate its reasons for a decision under Article 15(1) to recommend a Factual Record and at certain other decision-making points within the Article 14(1) and (2) reviews. These requirements provide the Parties, the Council and the public with the requisite confidence that the review is being conducted both openly and on a reasoned basis. For this reason, similar considerations should govern

any Council decision not to accept the Secretariat's recommendation to develop a Factual Record. The obligation to state substantive reasons for important governmental decisions affecting the environment should not be seen as an unreasonable burden, particularly where the Secretariat has, after investigation, indicated its reasons for recommending such a Factual Record."

This proposal responds to concerns that were raised in written and oral comments. Beyond the recommendation provided, it would also be helpful if the final *Lessons Learned* report included more specific proposals for how the CEC Council could implement this recommendation. For instance, perhaps the Article 14 and 15 Guidelines should be amended to expressly require the CEC Council to set forth the basis and reasoning upon which it is rejecting the Secretariat's recommendation regarding development of a Factual Record.

The second proposal relates to the appropriateness of the current citizen submission provision which provides that the Secretariat's recommendation to the CEC Council (regarding preparation of a Factual Record) shall not be disclosed to the submitter until 30 days after the recommendation is made. According to JPAC: "The Secretariat should inform a submitter when the Secretariat has referred a matter to the Council with a recommendation for a Factual Record. The current 30-day 'blackout' period should be either abolished or reduced...[this procedural change] would go far to alleviate concerns that were widely voiced by the public during our Lessons Learned Workshop." See Section 4(4) of *Draft Lessons Learned Report*. This recommendation should help to improve the transparency, and therefore the accountability and credibility, of the CEC's review process for citizen submissions.

3. Call for Increased Secretariat Funding and Resources

In Section 3(a) of the *Draft Lessons Learned Report*, JPAC observes: "It was noted by commentators that the efficiency of the Secretariat is greatly diminished because of a lack of human and financial resources...[W]ith the increasing number of Submissions, the time for review and processing became longer, leading to the current backlog of Submissions.... Only two staff members in the Secretariat are assigned to the submissions unit. Two people probably cannot promptly dispose of the stream of Submissions that will be filed in the next few years...[T]he current resources of the Secretariat are insufficient." In Section 4(2) of the *Draft Lessons Learned Report*, JPAC then goes on to conclude that "The Secretariat must [] have adequate resources to attract and retain consistently high-quality staff and, where needed, specialized consultants." The general point of JPAC's recommendation here seems warranted and on point in light of concerns raised during the public comment period and workshops. This recommendation, however, would benefit from greater specificity. It appears that JPAC is essentially contending that the Canadian, Mexican and United States' federal governments (acting through their representatives on the CEC Council) are failing to provide the CEC Secretariat with sufficient staff and resources to fulfill its obligations and duties under the NAAEC. If this is JPAC's conclusion, then JPAC should be more straightforward in its expressing its position, and more specific in identifying the increases in Secretariat staffing and funding that are needed.

B. Weaknesses

The weaknesses of the *Draft Lessons Learned Report* have less to do with the substance of what was recommended, than with JPAC's omission of recommendations regarding several critical issues that were identified as critical in the public comments and workshops. Of particular importance, JPAC refused to provide any findings or recommendations which consider whether there are changes to the provisions of Article 14 and 15 of the NAAEC that would increase the effectiveness and integrity of the citizen submission process. This point was repeatedly voiced in oral and written comments. For instance, at the December 7, 2001 workshop in Montreal, former JPAC member Michael Cloghesy stated that the widespread frustration with the citizen submission process indicated that a redrafting of Articles 14 and 15 of the NAAEC is required (see page 3, *CEC Summary of Workshop on the History of Citizen Submissions Pursuant to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, hereinafter *CEC Workshop Summary*). Similarly, at this same workshop Gustavo Alanis of the Mexican Center for Environmental Law stated that Articles 14 and 15 needed to be amended since the current citizen submission process established by these provisions is inequitable (see page 5, *CEC Workshop Summary*).

The avoidance of such critical issues in JPAC's recommendation's renders the *Draft Lessons Learned Report* incomplete, and suggests a reluctance on JPAC's part to independently address many of the core problems that are undercutting the effectiveness of the citizens submission process. JPAC's inclusion of findings and recommendations regarding the issues identified below would enhance the value of the final *Lessons Learned* report.

1. Absence of Conclusions Regarding the Need to Include Findings and Recommendations in Factual Records

Section 3(c) of the *Draft Lessons Learned Report* notes: "[Many] commentators believed that Factual Records should be able to reach conclusions where the facts warrant, as to a Party's 'effective enforcement of its environmental law' in the matter under consideration and should also include recommendations for further actions by a Party to impose the effectiveness of such enforcement. Others, however, believed that JPAC should not support such an approach since the Parties believe that the purpose of Factual Records is not to reach 'conclusions of law' and will resist these proposals."

This issue of whether findings and recommendations should be included in Factual Records was raised and discussed in several oral and written comments presented to JPAC. For instance, at the December 7, 2000 workshop in Montreal, the Chair of the United States National Advisory Committee to the CEC, John Knox, clarified that the CEC's position on whether to include recommendations in Factual Records is a political rather than a legal question, because the contents of Factual Records are not defined in the NAAEC (see page 4, *CEC Workshop Summary*). Martha Kostuch, Vice President of The Friends of Oldman River suggested that Factual Records should contain conclusions, including conclusions of law, as well as recommendations (see page 8, *CEC Workshop Summary*). Similarly, my previous written and oral comments submitted to the JPAC maintained that the legitimacy and effectiveness of the CEC would be enhanced by the inclusion of findings and recommendations in Factual Records,

and explained that this approach is consistent with the provisions of the NAAEC. As I explained in my December 27, 2000 comment letter to JPAC:

The CEC Secretariat's holding and recommendations in previous Article 14 submissions evidence its integrity and professionalism. Moreover, it should also be emphasized that in evaluating whether these previous submissions satisfied the procedural requirements of Article 14, the CEC Secretariat did not merely collect and summarize the arguments presented by the different parties. Rather, the CEC Secretariat made its own independent assessment of these procedural arguments, and made a specific recommendation to the CEC Council regarding whether a factual record should be prepared. There is every reason to presume that the CEC Secretariat would demonstrate similar sound judgment and impartiality when providing an independent assessment of substantive allegations and responses.

The appropriateness of including such findings and recommendations in NAAEC Factual Records is further supported by the fact that such findings and recommendations are already included in written decisions issued by the North American Free Trade Commission and Arbitration Panels established under NAFTA. If such findings and recommendations are appropriate in decisions involving application of North American trade law, then they should also be appropriate in decisions involving application of North American environmental law. To decide otherwise would suggest that Canada, Mexico and the United States have an obligation to comply with North American trade law, but not with North American environmental law.

Clearly, JPAC should make its own independent assessment of whether the effectiveness of the citizen submission process would be strengthened by the inclusion of findings and recommendation in Factual Records. However, what is troubling and discouraging is that it appears that JPAC is avoiding making any assessment of this issue because such a recommendation might be resisted by the CEC Council. This concern is not a proper basis for JPAC to withhold a recommendation, and reliance on such a basis only bolsters the claims of the NAAEC's critics that JPAC is unable or unwilling to play a meaningful independent role within the CEC institutional framework.

2. Absence of Conclusions Regarding the Need for Procedures to Remedy Non-Enforcement Identified in Factual Records

Section 3(c) of the *Draft Lessons Learned Report* states that the following reservation was expressed about the effectiveness of the citizen submission process:

A citizen submitter has no direct ability to force a Party to effectively enforce its environmental laws. A citizen submitter must hope that another party chooses to act on the Factual Record and pursue the claim under the NAAEC dispute resolution and enforcement provisions. Even though a citizen Submission may prove that a Party is failing to effectively enforce its

environmental laws, the violation may never be redressed.

Section 3(c) of the *Draft Lessons Learned Report* also noted that several commentators "agreed that there was a need for a more adequate remedy plan, and argued that such a plan should be based on the Factual Record and contain both preventative and corrective programs. This section also noted that "Another suggestion was that a Party found not to effectively enforce its environmental laws should commit to do so under monetary penalty. It was also suggested that there should be a mechanism to effectively suspend a project when the Council has instructed the Secretariat to prepare the Factual Record.

The frustration, criticism and suggestions discussed above were prompted in part by the experience with the Cozumel Reef Factual Record. In this case, construction of the Consorcio pier continued throughout the CEC's preparation of the Factual Record, and the pier was completed notwithstanding the release of a final Factual Record which provided strong evidence that Mexico was failing to enforce its environmental laws.

The issue of the need for procedures to remedy non-enforcement identified in Factual Records was addressed by JPAC in Section 4(5) of the *Draft Lessons Learned Report*, entitled "Factual Record Follow-Up." Disappointingly, this section did not provide meaningful conclusions or recommendations. Instead, Section 4(5) provided the following analysis:

The Articles 14 and 15 process does not currently include provisions for enforcement or follow-up of a completed Factual Record, even when a Party's failure to enforce its environmental laws is clearly established by the Factual Record. While we received a number of comments addressed to this issue, many of the suggestions went beyond the scope of our study or suggested significant amendments to the NAAEC itself. We believe that the present Articles 14 and 15 procedure can comfortably lend itself to increased oversight, by both the public and the CEC, of the steps that a Party takes (or fails to take) to remedy any enforcement failures identified in a Factual Record...The initial, and in many ways the most important, role in monitoring post-Factual Record conduct is that played by the submitters and by those NGOs most interested in the controversy giving rise to the factual record. Presumably, this on-going monitoring role of citizens will continue, as it did prior and during the Article 14 and 15 review process. If, following a Factual Record showing a serious failure of enforcement, a Party were to repeat that pattern, presumably a subsequent Submission could be brought to the Secretariat's attention with a reasonable expectation for prompt review (emphasis added).

The above-quoted analysis and conclusions are unsatisfactory for at least three reasons.

First, JPAC does not explain why certain suggestions to remedy non-enforcement were beyond the scope of the *Lessons Learned* study, or why JPAC excluded consideration of suggestions that proposed revisions to the NAAEC.

Second, JPAC does not explain how the current citizen submission procedures "lend themselves" to increased oversight of non-enforcement identified in Factual Records. In fact, the oral and written comments submitted to JPAC suggested just the opposite, that current citizen submission procedures do not provide a mechanism for this oversight. Perhaps JPAC is suggesting that additional oversight or monitoring mechanisms are needed, and that Articles 14 and 15 of the NAAEC are flexible enough to permit the creation of such additional mechanisms. If this is the case, then JPAC should be clearer and should specify what types of additional mechanisms it believes are needed.

Third, there is no substance to JPAC's comment that monitoring (of efforts to remedy non-enforcement identified in Factual Record) is basically the responsibility NGOs, who can file another citizen submission with the CEC if they believe that a Party is still not enforcing its environmental laws. This comment implies that, because it is properly the role of NGOs, additional CEC mechanisms for monitoring or enforcement are not needed. As such, this comment is non-responsive to the concerns that were raised in oral and written comments submitted to JPAC.

3. Absence of Conclusions Regarding CEC Council's Unchecked Authority to Refuse to Prepare or Release Factual Records

In Section 3(c) of the *Draft Lessons Learned Report*, JPAC notes that "Some commentators criticized the role of the Council because it has absolute discretion to decide whether or not to instruct the Secretariat to prepare a Factual Record" and that "Another issue regarding Council accountability was the absence of any appeal when the Secretariat or the Council has decided not to proceed with the preparation of a Factual Record."

The above-quoted statement in Section 3(c) of the *Draft Lessons Learned Report* is supported by oral and written comments submitted to JPAC. Former JPAC Member Michael Cloghesy expressed concern about the increasing "politicization" of the citizen submission process by the three national governments, which are represented on the CEC Council (see page 3, *CEC Workshop Summary*). Gustavo Alanis of the Mexican Center for Environmental Law remarked that Article 15 permits a Party to vote on whether to prepare a Factual Record even though a Party is a respondent in the citizen submission proceeding, and that this places the Party in an inherent conflict of interest situation (see page 9, *CEC Workshop Summary*). Martha Kostuch, Vice-President of The Friends of Oldman River commented "The Governments' have a conflict of interest. The Governments should separate their responsibilities as members of the CEC Council from their interests as Parties subject to review...The Council is undermining the integrity of the public submission process (see Kostuch Letter to JPAC, dated June 12, 2000, included in *Written Comments on the Public History of Submissions Made Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*)."

The commentators above raised serious concerns about the integrity of the current citizens submission process wherein a government alleged to be violating its own environmental law is entitled to vote on whether the CEC should investigate this allegation. Concerns about the inappropriateness of this arrangement once again find support by comparison with the review process established under NAFTA. Under NAFTA, when a complaint is filed by a private corporation with the North American Free Trade Commission or an Arbitration Panel, the private party is not required to secure approval from 2 out of the 3 NAFTA signatory nations before its claim can go forward. Under NAFTA, private corporations are entitled to unilaterally initiate binding dispute resolution procedures. The disparate treatment of the environmental rights of non-profit organizations and the trade law rights of private companies is an issue that is central to the debate about the appropriateness of NAFTA/NAAEC as a model of governance.

Notwithstanding the comments and considerations discussed above, JPAC does not directly address this issue in Section 4 of the *Draft Lessons Learned Report*. It should be noted that, in Section 4, JPAC does recommend that the CEC Council should be required to disclose the basis for its decision to not prepare a Factual Record. This recommendation, although commendable, does not address the *structural* and *conflict of interest* concerns that were raised in oral and written comments submitted to JPAC.

In the final *Lessons Learned* report, JPAC should make its own independent assessment as to whether the legitimacy of the citizen submission process is impacted by the CEC Council's current role in deciding whether to proceed with preparation of a Factual Record. If it is JPAC's independent conclusion that the CEC Council's current role adversely impacts the legitimacy of the citizen review process, this conclusion should be set forth, along with JPAC's recommendations to remedy these adverse impacts.

III. Conclusion: Critical Issues Remain Unaddressed

In connection with the *Lessons Learned* report, JPAC has designed and successfully implemented a comprehensive information-gathering process. This process has provided JPAC with information about the strengths and weaknesses of the current Article 14 and 15 citizen submission procedures. Unfortunately, the *Draft Lessons Learned Report* did not provide conclusions or recommendations that were responsive to many critical concerns identified in oral and written comments presented to JPAC. Hopefully, the final version of the *Lessons Learned* will address these concerns.

All best,

FITZGERALD, ABBOTT & BEARDSLEY LLP

Paul S. Kibel

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