

May 15, 2001

Joint Public Advisory Committee
Commission for Environmental Cooperation
393, rue St-Jacques Ouest
Bureau 200
Montréal, Canada

Dear Committee Members,

CIEL appreciates this opportunity to review the “Lessons Learned” report. We commend JPAC for its efforts to identify “practical reforms” that can be drawn from the history of submissions. We believe these suggestions, if accepted by the Council, will foster greater transparency and accountability in the citizen submissions process. In support of these efforts, we offer the following more detailed comments on this report.

Section 1. Description of 14/15 process

Page 4 – Describes that development of a factual record requires Council approval of the Secretariat’s recommendation.

The report should note also that (1) the Council need not make public its reasons for dismissing the Secretariat’s recommendations when it votes against development of a factual record, and (2) the Council has no deadline for its decision.

Section 2. BC Hydro and Cozumel Pier Factual Records

While the review of the two submissions for which factual records have been developed is interesting and useful, we believe the Council directive to JPAC requires a broader evaluation of submissions. Given that over sixty percent of submissions have been terminated, development of a factual record in response to a submission is more the exception than the rule. Clearly, lessons can be learned from both “successful” and “terminated” petitions; many of the public comments described in the subsequent section relate to submissions that have been terminated. An evaluation of several of the terminated submissions is necessary to provide a context for understanding public comments as well as JPAC conclusions.

We suggest that for each category of submissions identified the report describe the history of one of the submissions. For example, we suggest the report describe the following:

- (1) One of the six submissions that were terminated because they did not satisfy the formal requirements of Article 14(1);
- (2) One of the three submissions that were terminated because they did not satisfy the formal requirements of Article 14(2).
- (3) One of the five submissions for which the Secretariat did not recommend the preparation of a Factual Record.
- (4) The one submission for which the Secretariat recommended preparation of a Factual Record but the Council refused to accept the recommendation.

The final category, which relates to the Quebec Hog Farms submission, is a rich source of information for a “lessons learned” report. This submission was found by the Secretariat to have met all requirements of Articles 14 and 15 - successfully negotiating obstacles nine other submissions were unable to negotiate – and yet was terminated by the Council for non-substantive reasons and without public scrutiny. We believe the process under which the Council acted to terminate the submission lacked the “openness” and “accountability” this report seeks to foster. We note that JPAC in Conclusion 4. likewise finds a lesson learned from this case.

In addition to lessons learned from an evaluation of submissions are lessons learned from an evaluation of activities of the Council – also part of the “history” of submissions. We believe the report is lacking in a description of Council attempts to modify the Articles 14 and 15 submissions process. The most recent attempt, reflected in the March memorandum, “Position of the Government of the United States of America on Legal Issues Relating to Submissions on Enforcement Matters and Preparation of Factual Records under the North American Agreement on Environmental Cooperation (NAAEC or “Agreement”)” evidences efforts to weaken the process. The Council’s ability to modify the process, as well as its willingness to do so when the process appears to be serving its stated purpose to highlight a Party’s ineffective enforcement of environmental laws, is, in our opinion, the factor with the greatest potential to undermine the credibility and integrity of the citizen submissions process. While we recognize that Council Resolution 00-09 is intended to dispel fears that the Parties will weaken the process, we remain unconvinced of their commitment to greater transparency and accountability. We suggest that one conclusion to be drawn from the Parties’ previous attempts to weaken the process is that attempts to “interpret” the agreement through a modification of the process must be subject to approval by an “independent” body whose charge is to insure that existing principles of the NAAEC are not violated by the proposed changes.

Section 4. Conclusions

We support JPAC’s conclusions and suggestions. We believe an evaluation of all submissions and activities of the Parties indicate the following lessons not described in the report: (1) the Secretariat has not been biased in favor of submitters – it can be trusted to act thoughtfully and independently to address submission issues (this conclusion would fit under JPAC conclusion 2.); (2) factual records can serve a useful function but one that is very limited – Party fears related to public dissemination of facts are inflated; (3) independent review and approval of Party “interpretations” of the NAAEC is warranted to ensure that changes comply with NAAEC principles.

Sincerely,

Anne M. Perrault
Center for International Environmental Law (CIEL)
1367 Connecticut Avenue, Suite 300
Washington, D.C. 20036-1860
Tél. : (202) 785-8700
Télé. : (202) 785-8701
E-mail: aperrault@ciel.org