

May 15, 2001

Via e-mail transmission (mpepin@ccemtl.org)

Commission for Environmental Cooperation
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ATTN: Manon Pepin, JPAC Liaison Officer

Re: “Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation

On behalf of Sierra Legal Defence Fund, I am pleased to submit our comments in response to the draft report “Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation”. We would like to thank the Council and the JPAC for undertaking this initiative. As legal counsel (or co-counsel) on three citizen submissions (BC Hydro, BC Mining and BC Forestry), we believe that the citizen submission process has the potential to play an important role in improving environmental enforcement in North America.

Sierra Legal Defence Fund made comments in response to JPAC’s previous call for comments regarding “lessons learned” and we will not reiterate those comments here.

Generally speaking, the Draft Report accurately characterizes the role and functioning of the CEC process, how the process has been used, and it identifies some of the benefits that have accrued from the process as well as some difficulties encountered in the process. However, as the citizen submission process has such great potential, we feel that additional information on some key issues will lead to greater insight into the process. It is in that spirit that we offer these comments regarding Part 2 (a) -- The BC Hydro Submission and Factual Record – of the Draft Report.

a) Benefits Arising from the BC Hydro Submission and Factual Record

We are happy to note that, in our estimation, the Draft Report underestimates the benefits arising from the BC Hydro Submission. Confidential documents obtained by Sierra Legal Defence Fund indicate that the BC Hydro Submission gave focus to growing public concern about the environmental effects of hydroelectric generation in BC. A “Treasury Board” funding approval request that sought a \$4.1 million financial commitment to the Water Use Planning process (“WUP process”) and approval in principle of a further \$38 to \$50 million ongoing commitment to the WUP process states:

Declining or endangered fish stocks have emerged as a major issue in B.C. In this context, all users of water, and in particular B.C. Hydro, have come under increasing public and regulatory pressure to reconsider fish values in their operating decisions at existing facilities... Public concern has been voiced in various ways including a recent submission by the Sierra Legal Defence Fund under the [NAAEC] charging that DFO/Canada is failing to enforce the Fisheries Act in light of alleged and repeated violation by B.C. Hydro.

In response to public pressures, the provincial government announced a policy to develop WUPs as a condition of existing water licences. B.C. Hydro will develop a WUP for each existing facility over the next five years, in collaboration with agencies... WUPs would recommend to the Water Comptroller allocation, and possibly re-allocation, of the water under existing water licences to reflect the full range of uses and resource values. (A copy of this document will be provided to the JPAC upon request.)

The BC Hydro Submission is the only example of “public pressure” noted in the Treasury Board document.

Although both the Factual Record and the Draft Report recognize that the WUP process, by itself, does not result in compliance with the *Fisheries Act*, both documents recognize (as the Submitters do) that the WUP process has resulted in positive environmental change at several B.C. Hydro facilities and has the potential to do so at even more facilities. The citizen submission process, in the case of B.C. Hydro, provided a venue for citizens to express their concern, and the submission was one of the motivations for funding the WUP process. The BC Hydro Submission can thus be linked to important environmental improvements.

Similarly, after the BC Mining submission was filed, positive steps were taken by the government of Canada to address problems at the three mines that were the subject of the submission. While the Submitters take the position that these efforts do not constitute compliance with the applicable environmental laws, they seem to be a step in the right direction.

b) Issues Not Addressed in the Factual Record

As the Draft Report notes, preparation of the Factual Record in the BC Hydro process did not extend to certain allegations of non-enforcement. Specifically, the Submitters alleged that Canada was failing to consider the environmental effects of electricity exports as required by the *National Energy Board Act*. The Submitters alleged that the National Energy Board had approved electricity exports without requiring any information as to the environmental effects of the proposed exports. In this respect, the BC Hydro Submission was one of the only citizen submissions that has raised issues of the effects of increased trade on the environment. The Secretariat, in its recommendation to Council, stated:

With respect to the allegations raised regarding the NEB, it is the view of the Secretariat that there is no information to suggest that the NEB's exercise of discretion was "unreasonable", and we recommend that a factual record should not be prepared in respect of this issue. (Secretariat's Recommendation, p. 2)

The Submitters take the position that there was clear evidence that the NEB was not complying with the environmental laws of Canada and that the exercise of discretion by the NEB was, in fact, unreasonable. This position has been recently vindicated by the Federal Court of Appeal of Canada. On behalf of two of the Submitters (BC Wildlife Federation and the Steelhead Society of BC) Sierra Legal Defence Fund brought a judicial challenge of an energy export permit issued to BC Hydro on grounds that the NEB did not consider the environmental effects of the proposed energy export. In a decision released March 14, 2001, Mr. Justice Rothstein, speaking for a unanimous court, found that the NEB had no evidence before it regarding environmental effects of BC Hydro's proposed export and stated that:

*I am unable to conclude that the Board reached an informed and rational conclusion...I must conclude that the Board's decision is not reasonable.
(Athabasca Chipewyan First Nation v. BC Hydro, 2001 FCA 62, paras. 27 – 28)*

It is the Submitters' view that the failure of the BC Hydro Factual Record to address the issue of energy exports is an unfortunate missed opportunity. One of the criticisms that has been leveled against the citizen submission process is that it does not address the environmental issues arising from trade agreements (*see, e.g.*, Seligman, Daniel A., "The Treaty Itself Undermines Environmental Protection", *Environmental Forum*, March/April 2001, p. 36). The BC Hydro Factual Record *could* have demonstrated that the citizen submission mechanism might be used to address trade related concerns in appropriate cases.

I would be pleased to provide further information or answer any questions regarding these submissions if it would be of assistance to the JPAC.

Yours truly,

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