SIERRA LEGAL DEFENCE FUND

October 23, 2003

Via Electronic Mail (mpepin@ccemtl.org)
Joint Public Advisory Committee
North American Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal, Québec, Canada H2Y 1N9

Dear Members of the Joint Public Advisory Committee:

Re: Supplementary Written Comments Related to the Articles 14 and 15

Once again, we wish to thank the members of the JPAC for their ongoing efforts concerning the citizen submission process and for the opportunity to participate in the October 2, 2003 meeting in Montreal. We have some brief additional comments concerning issues that were raised and discussed at that meeting, including:

- lessons from the BC Hydro factual record process;
- the need for a review standard or guidelines for Council decisions regarding recommendations regarding factual records; and
- how restricting factual records to narrow factual instances limits the effectiveness and utility of the process.

The BC Hydro Process

We were co-counsel for submitters on the BC Hydro factual record process. With regarding to the ongoing dispute concerning the narrowing of issues that may be investigated in factual records, it is instructive to examine the BC Hydro process. There, the Secretariat's recommendation for a factual record did not include all issues put forward by the Submitters. The most important lessons that may be drawn from the BC Hydro process is that the Secretariat is able and willing to narrow legal and factual issues as appropriate and that submitters and the public will accept those decisions, primarily because of the perceived independence of the Secretariat.

The original submission in the BC Hydro process asserted a failure to enforce the *Fisheries Act* (which was ultimately the subject of a factual record) and also challenged decisions under the *National Energy Board Act* that allowed power exports that the submitters alleged were environmentally damaging. Regarding that power export issue, the Secretariat stated:

> *Where an environmental law grants discretionary decision-making power, a Submitter must adduce evidence that under the circumstances the Party acted "unreasonably" in exercising discretion in respect of such matters. The Submitters have failed to meet this standard. As a result, the preparation of a factual record with respect to the allegations concerning the* NEB *Act is not warranted.*[1]

While the Submitters may disagree with the Secretariat's determination on its merits, the Submitters accepted this decision without challenge because the reasons for the decision were adequately set out and the Submitters were not concerned that the determination reflected anything other than a good faith assessment of the issues and evidence.

This may be contrasted with subsequent submissions such as BC Mining, BC Logging and Ontario Logging where the Submitters did not feel that Council decisions regarding the scope of factual records or sufficiency of information were adequately explained and where there was a clear perception that the Council decisions were driven by the objective of avoiding scrutiny, rather than a good faith assessment of the issues.

The specific factual instances investigated in the BC Hydro factual record were also narrowed by the Secretariat. There, the Submitters alleged that there was a failure to enforce the *Fisheries Act* at 33 separate BC Hydro facilities. The Secretariat recommended, and the Council approved, the preparation of a factual record regarding those allegations. However, once the Secretariat began to develop its work plan, it asked the Submitters whether it was necessary to consider all 33 facilities, or whether a representative sample could be investigated. Based on conversations with both the Submitters and the Government of Canada, a list of six facilities was developed. Again, the Submitters and the public accepted this decision as it reflected a legitimate concern about limited resources and there was not a perception of an attempt to avoid scrutiny of issues or factual instances.

In BC Mining, BC Logging and Ontario Logging, the Council's decisions limiting the factual instances to be investigated or questioning the sufficiency of information did not include any consultation with submitters and there is a clear perception that the decisions were driven by a desire to avoid scrutiny of certain issues and factual instances.

Because of the nature of the citizen submission process -- where a member of Council will also be the subject of the citizen submission -- there is a risk that the pubic will perceive Council's decisions as guided by the self-interest of parties rather than the spirit and purpose of the agreement. It is for this reason that decisions about narrowing factual records or determining the sufficiency of information should be made at the Secretariat level. The BC Hydro process shows that the Secretariat is both willing and able to undertake this task.

A Review Standard for Article 15(1) Recommendations

Under the NAAEC, the Secretariat performs the initial assessment of citizen submissions and makes a recommendation to Council regarding whether a factual record is warranted. As was

[1]Secretariat's Recommendation under Article 15(1); http://www.cec.org/files/pdf/sem/97-1-adv-e.pdf.

noted at the October 2 meeting in Montreal, there is no consensus regarding how much deference the Council should give to the Secretariat's assessment and recommendations.

However, it seems reasonable that the Council is neither bound to wholly accept the Secretariat's recommendation, nor is it likely intended that Council should have no regard for the Secretariat's position. It is possible to articulate standards or principles somewhere between these extremes that ensure respect for the role and independence of the Secretariat, also respect the role of the Council as the ultimate decision-maker and that are consistent with the NAEEC's goals of openness and transparency.

The analogy in the Canadian judicial system is known as the "standard of review". Canadian courts, when reviewing the decisions of lower courts or administrative bodies, analyze a number of factors to determine the appropriate deference to be given to the decision under review. Depending of the circumstances of the case, this may range from no deference (a *de novo* review) to very high deference (no interference with the decision unless it is "patently unreasonable"). We have addressed this issue in our submissions regarding the Ontario Logging submission, which are excerpted below:

> *Although we are providing the information required by the Council in its April 2003 Resolution, we believe there are both legal and public policy reasons which suggest that limiting the factual record to particular instances, as was done in the US Migratory Bird submission[28] and as appears to be suggested here, both goes beyond the Council's authority under the NAAEC and will potentially lead to a factual record that has little or no value in furthering the goals of the NAAEC.*
>
> *First, the NAAEC sets out the various powers of the Council but nowhere gives it the authority to order a factual record that is by its nature wholly different from the factual record recommended by the Secretariat. The Council is only empowered to recommend or reject the Secretariat's recommendation. This is as it should be in that the Secretariat is the expert body mandated to report to the Council. The Council's role is not that of a new or de novo panel charged with the task of determining whether the Article 14 or 15 requirements have been met.*
>
> *Second, from a public policy point of view, there is a serious danger that any interference with the Secretariat's recommendation will undermine respect for the institution of the CEC. In this case, for instance, the public will be mindful of the fact that Canada's Minister of the Environment is one of the Council members being asked to decide whether the CEC should undertake a factual record of the very ministry for which he is responsible. For this reason, a departure from the recommendation of the Secretariat should not occur, except, for example, if the Secretariat has acted in a patently unreasonable way. Allowing or encouraging the Environment Minister, his delegate, or his staff to reargue, at the Council level, the positions it took in the Party (government) response to the Secretariat is inappropriate and threatens to undermine the credibility of the CEC and the important independent role of the Secretariat.* (internal citations omitted)[2]

[2] Ontario Logging, supplemental submission; http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf, pg. 15

Given the issues that have arisen with a number of citizen submissions, we believe that it is necessary to develop a review standard or principles that appropriately and transparently set out the manner that Council uses to assess recommendations of the Secretariat.

Limiting the Scope of Factual Records Limits the Utility of the Mechanism

The Council has taken the position, with respect to numerous factual records, that only "narrow" factual instances may properly be the subject of factual records as opposed to wider patterns of non-enforcement. This approach both limits the effectiveness of the mechanism and has the practical effect of limiting the geographic scope where the mechanism may be used.

Prohibiting the examination of wider patterns of non-enforcement makes is much less likely that the lessons that may be drawn from a factual record will prompt environmentally positive changes. First, it is almost always possible to explain a failure to enforce in a particular case (e.g., inadequate evidence of a violation of law or baseline data; limited resources; characterizing the incident as an anomaly). However, when that same failure is demonstrated multiple times, failures of enforcement are not so easily dismissed. Moreover, it is more likely that a factual record's observations about patterns of enforcement will influence future, prospective decision, preventing environmental damage.

As a practical matter, the most environmental laws in the United States contain "citizen suit" mechanisms that allow its citizen's to challenge the failure to enforce law in a particular instance. What is unavailable in US law is the ability to challenge a wider pattern of non-enforcement. This raises concerns about discrepancies in of rights of public participation and of discrepancies in the level of environmental protection. But is also means that almost all citizen submissions will be directed at the governments of Canada and Mexico. The current position of Council will make the United States effectively immune from the citizen submission process, which will ultimately undercut the credibility of the process.

Sincerely,

Original signed by…

Randy Christensen
Sierra Legal Defence Fund
#214 – 131 Water St.
Vancouver, BC
V6B 4M3
CANADA

Jerry DeMarco
Sierra Legal Defence Fund
30 St. Patrick Street, Suite 900
Toronto, ON
M5T 3A3
CANADA