



SIERRA LEGAL DEFENCE FUND

September 8, 2003

Via Mail and 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: Issues Related to the Articles 14 and 15 Process – Written Comments of the
Sierra Legal Defence Fund for the JPAC Public Meeting on October 2, 2003**

Introduction and Summary

On behalf of the Sierra Legal Defence Fund's¹ British Columbia and Ontario offices, we are pleased to provide comments regarding the Articles 14 and 15 citizen submission process. At the outset, we wish to thank the Joint Public Advisory Committee (JPAC) for its continued support of the environmental goals of the North American Agreement on Environmental Cooperation (NAAEC) and in particular its strong support of the citizen submission process.

Sierra Legal's lawyers have acted as legal counsel for a wide variety of groups that have filed citizen submissions, including BC Hydro (97-001), BC Mining (98-004), BC Logging (00-004), Pulp and Paper (02-003), and Ontario Logging (02-001). We have also been involved in several efforts to preserve the integrity and utility of the citizen submission process, including attendance at the Workshop concerning revised Citizen Submission Guidelines in 1999, participation in the December 2000 workshop on the history of the Citizen Submission process in Montreal, and the submission of comments as part of the *Lessons Learned* initiative in 2001. We have also

¹ Sierra Legal, founded in 1990, is a non-profit environmental law organization that provides free legal services to the environmental community in Canada. Sierra Legal has three primary goals: to 'level the playing field' for environmental groups that simply cannot afford to go to court against large institutions when important ecological and wilderness values are at stake; 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; and to provide professional advice on the development of environmental legislation. Sierra Legal is funded by public donations and foundations grants. We currently have approximately 30,000 individual supporters across Canada.

participated in each of the last five annual Council sessions and made submissions regarding the citizen submission process at each session.

These comments present both general concerns about how the citizen submission process has been compromised by the actions of the Council and also describe the effects of Council actions on individual submissions.

On a broader level, the actions of the Council – through resolutions and orders – have broken the commitments made to the citizens of North America, eroded the credibility of the citizen submission process, undermined environmental protection, and have dramatically reduced the effectiveness and utility of the process.

These effects are clearly seen with respect to three submissions filed by Sierra Legal and are addressed in detail below. In two cases, the Council has precluded the investigation of legitimate and pressing environmental problems. The factual records for BC Mining and BC Logging have been publicly released. Both factual records are valuable documents, for which the Secretariat staff deserves great credit. However, in both cases the factual records could have been more effective and useful documents if the Council had not narrowed the investigations. In both cases, opportunities to improve environmental protection and environmental law enforcement have been squandered. The third case, Ontario Logging, is still active but has been significantly delayed by the actions of Council.²

Overarching Concerns

Among the critical promises made to the citizens of North America at the time of the NAFTA's adoption was that the NAFTA Parties would enforce their respective environmental laws. Each NAFTA Party is obligated to achieve this in Article 5 of the NAAEC. Indeed, this guarantee was fundamental to both the political and substantive character of the NAFTA system. The citizen submission process under the NAAEC is the sole means by which ordinary citizens can seek international redress if they believe this fundamental obligation has been broken.

Council resolutions including 01-11 (BC Mining) and 01-12 (BC Logging) issued November 16, 2001 and resolution 03-05 (Ontario Logging) issued April 22, 2003 threaten to negate that promise. Through the first two resolutions, the Council disregarded the recommendations of the Secretariat regarding the appropriate scope of individual factual records. The Council's narrowing of the scope of factual records prohibited valuable examination of broader enforcement efforts (or lack thereof). These actions were an incursion on the independence of the Secretariat. A similar undermining of the Secretariat's work occurred in resolution 03-05, in which the Council substituted its own view of what constitutes "sufficient information". Despite previous commitments of the three countries to support and respect the integrity of the citizen submission process, these Council Resolutions leave an impression of political manipulation and failure to respect the independence and judgment of the Secretariat.

² Our recent Supplementary Submission in Ontario Logging (August 20, 2003) contains additional information that relates to the JPAC's current study of Articles 14 and 15 and we request that it be considered in addition to this submission. See: http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf

From time to time, the citizen submission process has been subjected to efforts to restrain the independence of the Secretariat and to restrict the ability of the citizen submission process to evaluate environmental enforcement – including occasional attempts by NAFTA Parties to “revise” the Guidelines for citizen submissions. Each attempt to limit the citizen submission process has been met with strong opposition from the JPAC, citizen submitters and non-governmental organizations.

In June 2000, it appeared that the Council had undertaken to respect the citizen submission process. Through Resolution 00-09, Council expressed its strong support of the citizen submission process and authorized the JPAC to undertake a public process concerning “further implementation and elaboration” of Articles 14 and 15, as well as a review of the “lessons learned” from the citizen submissions filed to date. The overwhelming message arising from these efforts was that the NAFTA Parties must, and would, respect the citizen submission process and the independence of the Secretariat. The JPAC report from the *Lessons Learned* process states:

The professional independence and competence of the Secretariat is indispensable to a credible and properly functioning Articles 14 and 15 process. The Secretariat must, of course, continue to have adequate resources to attract and retain consistently high quality staff and, where needed, specialized consultants. However, the Secretariat must also have (and be perceived to have) the independence to exercise its best professional judgment with respect to Submissions, the adequacy of Party responses, recommendations to Council and development of factual records.³

Unfortunately, the Council, through its most recent resolutions concerning factual records, seems to have moved away from the consensus of the public, the government and national advisory committees, and the JPAC. What damage the Council refrained from doing through a revision of the Guidelines it has now done, on a case-by-case basis, through Council resolutions.

In light of the actions of Council, citizens will almost certainly have less confidence that the citizen submission process can achieve its purported objective – to bring facts to light – as it is clear that the Council will act to limit factual record investigations simply to avoid meaningful scrutiny of environmental enforcement efforts. The actions of the NAFTA parties demonstrate that despite rhetoric to the contrary, the parties are far more concerned about preventing political embarrassment than protecting the environment. Unfortunately, the structure of the citizen submission process provides no real safeguards against the bad faith actions of the parties.

The resolutions of the Council concerning individual citizen submissions contradict the spirit and intent of the NAAEC and the Council’s own resolutions, and contravene the strong recommendations of the JPAC, national advisory committees and the public. Most importantly, the Council’s actions threaten to strip the citizen submission process of its integrity, utility and legitimacy. In addition to undermining the effectiveness of the Commission for Environmental Cooperation and creating distrust about the NAFTA, the end result may well be to further reduce public support for economic integration efforts. Fears that such efforts run roughshod over the environment and public participation will be confirmed.

³ http://www.ccc.org/files/PDF/JPAC/rep11-e-final_EN.PDF, at page 15.

Effects on Individual Submissions

BC Mining

The BC Mining submission identified the systemic failure of the Government of Canada to enforce section 36(3) of the *Fisheries Act* to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. In particular, the submitters alleged that Canada was ignoring the ongoing environmental destruction caused by abandoned mine sites in British Columbia. While the submission focused primarily on three mines (the Tulsequah Chief, Mount Washington and Britannia mines) the submission also noted nearly 40 other acid-generating mines in BC where violations of the *Fisheries Act* either may have occurred or may be occurring without any enforcement action being taken.

Environmental contamination from abandoned mines is a chronic problem in BC and throughout Canada. It is estimated that there are more than 10,000 abandoned mines across the country. Despite the widespread problem of abandoned mines and the chronic failure to enforce the *Fisheries Act*, the Council limited the factual record investigation to one mine site – Britannia Mine.

As it relates to the Britannia Mine, the factual record is a thorough, well-written and useful document. It will almost certainly assist in environmental protection and remediation efforts at that site. However, the larger and more pressing issue is the failure of Canada's environmental law enforcement at many other mine sites throughout BC, and this issue was not explored in the factual record. Environmental protection would have been dramatically improved if the Secretariat had been able to examine and report on this systematic failure. An opportunity to improve environmental law enforcement was lost and for no other reason than Canada wanted to avoid embarrassment related to its enforcement record and succeeded in utilizing the Council's role to achieve that goal.

BC Logging:

The BC Logging submission alleged that the Government of Canada was in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection by systematically failing to enforce the *Fisheries Act* against logging activities undertaken in British Columbia.

The primary concern of the submitters was the failure of the Canadian government to enforce the *Fisheries Act* on public lands, which comprise over 90% of the land base in BC. The submitters also noted a similar concern with regard to logging on private land, however, this was clearly not the focus of the submission. Further, the public obviously has a greater interest in the management of public lands when those lands are held in trust for the larger public interest.

In addition, it is important to note that the Submitters also focused on activities that are not always individually significant (e.g., individual stream crossings; clearcutting the banks of smaller streams) but cumulatively are a source of considerable environmental damage.

The Council limited the BC Logging factual record investigation strictly to two instances of logging activities on private land. Given the central concerns of the submission – logging on public lands and the cumulative damage of common logging practices – the effect of the Council resolution was to direct the Secretariat’s attention away from the concerns of the submitters, and, we believe, the concerns of greatest environmental importance.

Despite the limitations imposed by the Council's resolution, the Secretariat staff nonetheless produced a valuable factual record. The Secretariat's investigation uncovered deficiencies in the procedures of Fisheries and Oceans Canada, which the agency subsequently sought to address. Further, the Secretariat provided valuable information regarding policy and funding issues that are impeding environmental law enforcement.

Although we recognize the value of the BC Logging Factual Record, the Council’s prohibition against considering the issues raised by the Submitters clearly undercuts environmental protection and prevents scrutiny of one of the largest environmental problems in British Columbia. The Factual Record itself states:

... the scope of this factual record is different from the scope of both the factual record requested in the submission and the factual record that the Secretariat considered to warrant development in its Article 15(1) notification.. After Council Resolution 01-12 was released, the Submitters stated:

Resolution 01-12 of the Council, issued November 16, 2001, raises serious concerns about the handling of the BC Logging Submission and the integrity of the citizen submission process generally. The BC Logging Submission was intended to highlight issues of widespread nonenforcement of the federal Fisheries Act engendered by the operation of provincial laws regulating the conduct of logging operations in British Columbia. Specifically the BC Logging Submission was intended to highlight three particular types of damage routinely permitted under provincial law: clearcutting the riparian areas of certain fish bearing streams; falling and yarding of logs across fish bearing streams; and the clearcut logging of areas that have been determined to be highly prone to landslides. The significant environmental harm from these practices arises not necessarily from any one instance, but more importantly, from the cumulative effects of these practices occurring on a frequent basis in widespread parts of British Columbia. Resolution 01-12 narrows of [sic] the scope of the factual record for the BC Logging Submission, contrary to the recommendation of the Secretariat, and only allows the examination of factually isolated instances and precludes examination of logging conducted under the provincial Forest Practices Code. The result is that the factual record that will be prepared in this matter will not address the environmental concerns that prompted the filing of the Submission.

As the Factual Record itself makes clear, investigation of the larger and more pressing environmental issues was precluded. Specifically, at pages 22 and 23, the Factual Record lists a number of issues that would have been considered in the absence of Council interference. These inquiries would have shed light on number of violations occurring across the province, policies decisions made to stop pre-approval review of logging proposals, and the interrelationship and

harmonization of provincial and federal environmental policies. The Factual Record scope proposed by the Secretariat would have more fully achieved the goals and objectives of the NAAEC.⁴

Ontario Logging

In February 2002, eight prominent environmental groups from Canada and the U.S.A. alleged that Canada was failing to effectively enforce regulations under the *Migratory Birds Convention Act*. The petition relied on government bird census data and approved clearcut-harvesting plans to estimate that tens of thousands of bird nests were being destroyed during logging operations on an annual basis. This evidence was supplemented by information, obtained through an *Access to Information* request, showing that the destruction of bird nests was simply considered "incidental" to logging operations by relevant government authorities and that Canada had never investigated a single case or charged a single logging company with destroying a migratory bird nest⁵ on any of the 210,000 hectares of forest logged in Ontario each year. The submitters limited their petition to areas in the province of Ontario where clearcut logging was permitted under provincial forest management plans.

In November 2002, the Secretariat recommended that a factual record be prepared within the parameters set out in the petition. In April 2003, the Council resolved to defer the matter and required that additional evidence be provided to avoid a termination of the file. The Council said that the submitters had failed to "provide facts related to cases of asserted failures to enforce environmental law".⁶

The context of the case is noteworthy. In November 1999, various environmental groups had filed a similar petition⁷ with the CEC alleging that the US Wildlife Service was failing, on a widespread basis, to enforce their own migratory bird protection laws. In that case, the Council ordered a factual record but limited it to two examples of nest destruction, contrary to the

⁴ Another downside to narrowly scoped factual records is that any discussion of the overall context surrounding a particular incident under investigation becomes open to criticism by other interests. For example, the submission to JPAC by the Forest Products Association of Canada dated September 5, 2003 takes issue with aspects of the factual record which it believed strayed too far from the incident in question. Similarly, Norine Smith of Environment Canada expressed concern about alleged 'superfluous' contents in the factual record (see page 10 of the submission to JPAC of Paul Kibel dated September 8, 2003). Further disputes about what should or should not be contained in narrowly scoped factual records could be avoided by Council refraining from artificially limiting the scope of records to areas of inquiry that inevitably give rise to such disputes. If Council were to respect the Secretariat's view that both narrow and wide scope reviews are contemplated by the NAAEC (it should be noted that the Secretariat's view is in accord with the actual wording of the NAAEC) then unproductive debates such as those arising from BC Logging will be avoided. Attention should be redirected to the important allegations raised by the submitters and not to interpreting just how narrow a factual record a brief Council resolution was meant to contemplate. Council should respect the expertise of the Secretariat and proceed with approving the preparation of a factual record according to the scope contemplated by the Secretariat itself (unless the Secretariat had acted in a patently unreasonable manner).

⁵ Neither in the Canadian Response to our petition nor at a meeting with the Canadian Wildlife Service has the evidence that logging companies have never been investigated or charged for destroying a migratory bird nest been contradicted.

⁶ In response to the Council resolution we provided, on August 20, 2003, further evidence consisting of data about actual clearcuts. In other words, the passage of time had allowed us to revise projected data regarding approved harvesting for 2001 to actual data about clearcuts that were undertaken in 2001 --- data that a factual record would have obtained anyway (and that was unavailable at the time of the original submission).

⁷ SEM-99-002, *Migratory Birds*.

recommendation of the Secretariat. The factual record eventually found that those two cases --- one involving four trees and the other several hundred trees --- had already been locally investigated. In other words, the petition to investigate widespread failure to enforce produced a factual record that was of little or no value in the context of the actual widespread problem. This should provide an important lesson for the Council when it considers the Ontario Logging file again in the near future. The Council should use the current JPAC forum for discussion to take stock of the many adverse effects caused by 'downscoping' the US Migratory Birds factual record. It should then use the Ontario Logging file as an opportunity to examine how a factual record with a wider scope on a similar topic can better achieve the goals of the citizen submission process and the NAAEC as a whole.

Ontario Logging is also a good example of a case where the integrity of the CEC process is at significant risk because one of the decision-makers on the Council, namely Environment Canada's Minister, is, to use a legal analogy, at the same time the accused *and* the judge and jury. Environment Canada, through the Canadian Wildlife Service (CWS), is responsible for enforcing the *Migratory Birds Convention Act*. Therefore, we might ask: "Is the Minister of Environment Canada (or another decision-maker within the Minister's office or the Environment Canada bureaucracy) likely to objectively decide that a factual record of his own ministry should be ordered?" The answer is predictable and therefore problematic if the integrity of the CEC is to be maintained. In fact, our most recent *Access to Information* request revealed that the head⁸ of the relevant CWS unit at the time of our petition (who, given his position and as revealed in documents obtained under *Access to Information*, was a key official in the preparation of the original Party response) was still being asked for his input on matters concerning the Council decision on a factual record mere weeks before the Council was to make its decision.⁹ One possible solution to this problem is for each Party to ensure that the individuals involved in the first stage are not involved in the second stage.

⁸ Steve Wendt was the "Chief, Migratory Birds Conservation, Canadian Wildlife Service, Environment Canada", at the time of our petition. In more recent ATIP-requested correspondence he is shown as "A/Director Wildlife Conservation, Canadian Wildlife Service, Environment Canada".

⁹ Following an overly lengthy amount of time without any Council response to the Secretariat's November 12, 2002 Notification in the Ontario Logging file, on April 2, 2003, Sierra Legal wrote a letter to the CEC Council urging them to accept the recommendation of the Secretariat. On April 22, 2003, a Council resolution with little specific guidance required the submitters to provide "further information" within 120 days or the file was to be terminated. In an *Access to Information* request filed on April 28, 2003 with Environment Canada, we asked for documents related to the Ontario Logging file. The response package, received in September 2003 (after our supplementary submission was due and filed), included a message from Steve Wendt to a Policy Advisor with Environment Canada regarding the letter sent by Sierra Legal to the Council. He writes on April 3, 2003 "I have a docket for input – from Sierra Legal Defence Fund – the incoming letter is a plea for the CEC Ministers [sic] agree on the preparation of a factual record in the Ontario logging/birds case....I do not think the CWS has new input, our views have already been communicated ...". In addition, just prior to a meeting of the Alternate Council representatives for Ontario Logging in March 2003, Norine Smith (the Canadian Alternate on Council) is being advised by her staff to have a short meeting with Mr. Wendt. These records confirmed our fear that officials within Environment Canada were putting themselves in a conflict of interest position by first 'advocating' a particular position in the Party response and when those positions did not persuade the Secretariat, the same officials were allowed to offer behind closed-doors input into the Council's decision-making process. This conflict of interest was suspected, based on the similarity of the Party response and the Council resolution as highlighted in our supplementary submission on Ontario Logging (see page 15 of our August 20, 2003 supplementary submission on Ontario Logging). Since that supplementary submission, the new ATIP documents have confirmed our suspicion that officials were improperly involved in both the 'advocacy' stage of the Party Response and the 'decision-making' stage of the Council Resolution process.

The role of the head of the government unit under scrutiny in a citizen submission is no exception in the decision-making process. Indeed, it appears that throughout the course of our CEC submission there is no actual distinction between the handling of the file by Environment Canada staff and the Minister's Office. The Minister's Office made no attempt to avoid the perception of bias and indeed actively created actual bias and conflict of interest situations. And in any case, the underlying problem is that the Environment Minister is ultimately being asked to authorize an investigation of his/her own Department. This will naturally lead to a perception of bias and impartiality and thereby undermine the CEC.¹⁰ A possible solution to this problem is that when an allegation of non-enforcement pertains to the actual department overseen by the Minister who sits on Council (which was the case in Ontario Logging), a neutral alternate representative that is not involved with the work of that Minister or the Minister's department would be appointed. Similar processes are used within government when potential conflicts like those that may arise under the NAAEC manifest themselves. This helps promote a sense of fairness and helps abide by the legal requirements associated with bias and conflict of interest.

Conclusion

As recommended in the *Lessons Learned* Report, it is essential that the citizen submission process be *timely, open, equitable, accountable* and *effective*.

The fact that "*timeliness*" has been put at risk is most obvious in the Ontario Logging file. A great deal of time passed between the Secretariat's Notification and the Council resolution, which itself created yet another delay by requiring further information. With the Council apparently attempting to re-do the work of the Secretariat, and doing its own review of what it believes to be sufficient information (including apparently requiring that information that was not available at the time of the original submission be produced), a significant delay has occurred. Indeed, two full breeding bird seasons (along with more clearcutting and more violations without enforcement) have passed since the original submission and we still await a revised Party Response. Had the Secretariat's work been respected, we would already be at the factual record preparation stage.

As is evident from the above discussion, the Council's recent decisions to "second-guess" the Secretariat and make decisions on "scope" or "sufficient information" issues behind closed-doors – and indeed in one case (Ontario Logging) actually involving the officials involved in the previous Party response – the concept of "*openness*" has been lost from the citizen submission process. Key decisions are being made in a forum that is anything but open. The process has become politicized and open to allegations of conflict of interest.

Related to the openness question, it is also clear that "*equity*" has been sacrificed as well. A process in which the submitters and the Party are allowed to "make their case" before an independent Secretariat has now largely been undermined by the creation of a situation in which the Party is able to achieve at Council what it unsuccessfully sought before an independent agency (without any involvement from the submitter). A level playing field has been replaced with an inequitable one that is being used in a way that satisfies the political desires of the Party

¹⁰ A broader discussion of the conflict of interest issues that can arise under the NAAEC is found in the submission of Paul Kibel to JPAC dated September 8, 2003.

but undermines the principles of fairness, the work of the CEC, and the spirit and requirements of the NAAEC.

The citizen submission process is at its core, about "*accountability*". It was a key element in the NAFTA development process vis-à-vis the public and the environment. That accountability has been steadily eroded by the recent actions of Council. A desire to ensure that citizens can openly call into question important matters of non-enforcement (be they broad or narrow) has been replaced by a "bunker" mentality in which Council seeks to insulate the three governments from any possibility that systemic issues of non-enforcement will be brought to light and corrected. Public accountability has been replaced with political expediency. The casualties of this recent "evolution" of the citizen submission process include public confidence in the CEC, NAAEC and NAFTA as a whole. The Council should seriously consider the broad ramifications that its actions have had on the notion of public accountability.

Finally, with particular reference to 'downscoped' files such as BC Logging, BC Mining, and US Migratory Birds the recent actions of the Council have significantly reduced the citizen submission process' ability to "*effectively*" examine critical situations of widespread non-enforcement. In usurping the independent role of the Secretariat in those files as well as Ontario Logging, the Council has jeopardized the effectiveness of the citizen submission process and the Secretariat.

We concur with the need to ensure that the process is timely, open, equitable, accountable and effective. The recent experience has not only failed to foster those important objectives but in many ways, run directly contrary to them. Despite the significant problems raised in this submission, we are encouraged by the fact the JPAC is examining this issue and that the Council is supportive of this inquiry. At a minimum, the recent experiences in the five citizen submissions under study should provide some key lessons – lessons that will allow the process to be reinvigorated.

Sincerely,

Original signed by...

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