Comité consultatif public mixte (CCPM)

Comité Consultivo Público Conjunto (CCPC)

Joint Public Advisory Committee (JPAC)

30 October 2000

Honourable David Anderson
Minister of the Environment (Canada)

Mtra. Julia Carabias
Secretary of the Environment, Natural Resources and Fisheries (Mexico)

Ms. Carol M. Browner
Environmental Protection Agency Administrator (United States)

RE: Council Resolution 00-09 / Issues 00-01

Dear Council Members:

In accordance with Council Resolution 00-09 of the North American Commission for Environmental Cooperation (NACEC), "Matters Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation," the Joint Public Advisory Committee (JPAC) hereby transmits a letter dated 27 August 2000 from The Friends of the Oldman River.

Please take note that JPAC has not yet finalized a process for the public review of such issues. We hope to do so in the near future. However, JPAC felt that the issues raised by Ms. Kostuch should be forwarded to Council without further delay.

We await your instructions.

Sincerely,

Regina Barba
JPAC Chair for 2000

c.c. Martha Kostuch, Vice-President, The Friends of the Oldman River
NACEC Alternate Representatives
Janine Ferretti, NACEC Executive Director

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August 27, 2000

Joint Public Advisory Committee
Commission for Environmental Cooperation
393 St. Jacques West, Suite 200
Montreal, Quebec H27 1N2
mpepin@ccemt1.org

RE: Comments on the Draft JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15 and the Submissions History – Lessons Learned

Dear JPAC:

With the copy of this submission that I am sending by regular mail, I am enclosing a copy of the presentation that I made to the CEC Council on June 12, 2000. I believe some important lessons can be learned from how our submission has been and is being dealt with. It is interesting that I still have had no response from the CEC Council to the presentation I made to them in June.

In early July, I made a submission to JPAC outlining the Article 14 & 15 issues that I would like them consider reviewing. Since I have not yet received acknowledgement of receipt of that submission, I will repeat the list of issues again here:

- Factual records should include conclusions.
- Factual records should include recommendations.
- There should be a requirement to make factual records public.
- The 30 day waiting period for the public (and especially submitters) to be notified after the Secretariat's recommendation regarding the preparation of a factual record has been provided to Council should be eliminated.
- The substance of the Secretariat's recommendation regarding the preparation of a factual record should not be kept secret until the Council makes its decision on whether a factual record should be prepared.

- If there are interpretive matters related to a specific submission, the submitter should have an opportunity to comment on the interpretive matters.

- Submissions should be allowed on a general failure to enforce the law.

- The Secretariat and the Council should have timelines for them to carry out their duties.

Specifically regarding the Draft JPAC Public Review Proposal, JPAC should commit to respond to the public who make submissions, raise issues, etc. within a reasonable period of time.

The draft proposal implies that JPAC can only review Article 14 & 15 issues referred to it by the Council. I do not agree. JPAC should be able to review Article 14 & 15 issues on its own initiative. JPAC should also be able to review issues brought to JPAC by the public if they feel a review is warranted.

The draft proposal indicates that JPAC can hold a public review in the form it determines necessary. What are the formats for public review that will be considered? I think the options for public review should be included in the document.

I would appreciate an acknowledgement of receipt of this submission. Please keep me on the distribution list for this important topic. I am interested in participating in future consultations regarding Articles 14 & 15.

Sincerely,

Martha Kostuch

Presentation to the CEC Council
June 12, 2000
by Martha Kostuch, Vice-President, The Friends of the Oldman River

Brief history of FOR's submission

First submission was made in October 1996. After referring that submission to the party for a response, the CEC Secretariat rejected that submission because the same matter was before the Courts. The Secretariat made it clear that it was their interpretation that only if the Party had the matter before the Courts was there an automatic rejection of a submission Never-the-less, in our specific case, they felt that the matter before the Court and FOR;s submission were so similar that they recommended that a factual record not be prepared while the matter was still before the courts.

In October 1997, after the case dealing with the same matter had been withdrawn from the courts, FOR made another submission. There were considerable delays in dealing with FOR's second submission.

The first reason the Secretariat gave for the delays was a lack of manpower and resources.

The next reason the Secretariat gave for the delay was questions of interpretation. The Secretariat hired outside legal council to give them legal opinions on the interpretation question. We were never informed what the interpretation issues were nor were we provided any opportunity to provide any input or give our opinion on the interpretation issues.

Finally, on July 19, 1999, the Secretariat recommended to Council that a factual record be prepared. Unfortunately, the Council at their annual meeting in Banff in June 1999 revised the rules and required the Secretariat to keep the fact that they had made their recommendation to Council a secret for 30 days. I guessed when the Secretariat made their recommendation because the Secretariat stopped talking to me.

Even in August when the Secretariat finally made the fact that they had sent their recommendation to Council, the substance of the recommendation itself was still kept secret except for the fact that they recommended that a factual record be prepared.

On May 16, 200, the Alternates (I think they should be called ghosts) made a decision and after over two and a half years since FOR's 2nd submission was made, the decision to defer making a decision was that finally the full text of the Secretariat recommendation was released.

Key Elements of FOR's Submission

FOR's submission alleges that there is a general failure by the Government of Canada to apply with and enforce the *Fisheries Act* and the *Canadian Environmental Assessment Act* or CEAA.

FOR provided evidence of the general failure of the Government of Canada to enforce these Acts.

In 1990-1001, over 12,000 Fisheries Act Section 35(2) authorizations were issued. In 1995, in a clear attempt to avoid triggering CEAA which came into effect in January 1995, the Department of Fisheries and Oceans released a Directive allowing letters of Advice to be issued. In 1995-96, less than 350 Fisheries authorizations were issued.

In May 1997, in the Sunpine case which was later withdrawn from Court, the Honourable Justice Muldoon stated in reference to the use of Letters of Advice.

"This is a transparent bureaucratic attempt at sheer evasion of binding statutory imperatives. It is neither cute nor smart and this court is not duped by it."

The judge went to indicate that DFO was circumventing the environmental laws which they decline to obey.

Review of the Secretariat's Recommendation Report

The Secretariat understood that the Sunpine case that is still before the Courts is dealing with different legal issues than the Sunpine case which was used as an example in FOR's submission.

The Secretariat also understood that FOR's submission dealt with the general failure of the Government of Canada to enforce the *Fisheries Act* and CEAA and not a specific case.

In its recommendation report, the Secretariat states, "In the Secretariat's view the submission raises matters whose further study would advance the goals of the NAAEC, notably the effectiveness of a Party's various enforcement practices under one of the most important environmental laws of that Party."

The Alternates Decision

The Alternates were wrong to make a decision to defer making a decision on the need to prepare a factual record.

In the Resolution passed by the Alternates on May 16, 2000, the Alternates use the excuse that the Sunpine case is still before the Courts.

FOR's submission alleges a general failure to enforce the *Fisheries Act* and CEAA, not a failure in relation to any specific case. Secondly, the Sunpine case currently before the Courts deals with different legal issues than FOR's submission. After a lengthy review, the Secretariat understood these two points. Unfortunately, the Alternates did not.

Either that or the Alternates are saying that citizens can not make submissions alleging a general failure of a Party to enforce their laws. If so, I believe that is contrary to the purpose of NAAEC.

Request of Council

I ask the Council to immediately refer FOR's submission to the Secretariat for the preparation of a factual record.

Comments on Council's Review/Interpretation of the Submission Process

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 should go out of its way to be seen as not interfering or tampering with the submission process.

The Council is undermining the integrity of the public submission process.

The Council is tying the hands of the Secretariat and limiting the Secretariat's ability to carry out its responsibilities under Articles 14 and 15.