

May 15, 2001

Manon Pepin  
Joint Public Advisory Committee Liaison Officer  
Commission for Environmental Cooperation  
393 St. Jacques West, Suite 200  
Montreal, Quebec H2Y 1N9

**Re: Comments on LESSONS LEARNED: Citizens Submission under Article 14 and 15 of the North American Agreement on Environmental Cooperation**

Dear JPAC Members:

Environmental Health Coalition (EHC) welcomes once again the opportunity to comment on the *LESSONS LEARNED: Citizens Submission under Article 14 and 15 of the North American Agreement on Environmental Cooperation* draft report to the Council of the CEC. The following comments reflect our experience as current petitioners under the Article 14 and 15 process.

As you are well aware, in October of 1998, EHC and *Comité Ciudadano Pro Restauración del Cañon del Padre*, filed a submission regarding Mexico's failure to properly address the case of *Metales y Derivados*, an abandoned lead smelter located in Tijuana, Mexico. That petition is still pending. Our goal in filing the submission was twofold: call into question Mexico's effective application of its environmental laws as it pertained to the *Metales y Derivados* case and, test the efficiency and effectiveness of Article 14 and 15 submission process or better termed "NAFTA's approach" to address environmental issues.

For more than two years, EHC has carefully followed and documented the submission process through the *Metales y Derivados* case. Regrettably, we now submit to you that thus far this process has not only been a true disappointment, but is now becoming a symbol of NAFTA's broken promises.

Nevertheless, EHC continues to strive to make the Articles 14 and 15 submission process an effective and useful public mechanism to ensure government accountability regarding environmental protection. It is our hope that our comments and recommendations serve to increase the effectiveness and efficiency of this tri-national citizen submission process.

**General Comments on the Conclusions Reached by the JPAC on its Report on the NAAEC's Citizens Submission Process:**

Overall, the Report's conclusions accurately list the most important issues affecting the effectiveness and efficiency of the process. However, this list is not exhaustive. It covers only the most pressing issues currently affecting the submission process. Therefore, to this effect, **the report must indicate to the Council the need to address each and every single issue raised in its conclusions rather than selecting only some of them.** We submit that all of the points outlined in the report's conclusions must be resolved at the bare minimum in order to preserve the submission process as a credible and useful public mechanism.

### **Citizen Submissions Play and Essential Role in Achieving the Goals of the NAAEC.**

EHC recognizes the importance of the citizen submission process in environmental enforcement in North America. This process allows for greater public oversight and increased government accountability with respect to environmental protection. Therefore, the process must ensure equal access and fairness to all parties involved similar to most dispute resolution systems currently in place in all three countries.

Additionally, Council must strive to make an effective and practical and not obfuscate it in legal theory and procedural complexity. To date, filing a petition before the Council is a highly complex and resource-intensive endeavor and thus relatively inaccessible. Little was mentioned on what will be done to make the process less complex and more accessible and "user friendly" to individuals and organizations so that fewer submissions are denied because of procedural errors. The Council must therefore modify the process in order to truly make it simpler, effective and more accessible to the public.

### **Secretariat Independence and Resources.**

EHC supports the report's conclusion that the Secretariat must have the independence and resources to "exercise its best professional judgement with respect to Submissions." More specifically, EHC is very concerned with the Secretariat's ability to obtain relevant information from countries in order to properly prepare factual records. For example, in the *Metales y Derivados* case, one principal problem as to why its factual record has not been completed to date, is the Party of Mexico's unwillingness or inability to produce information related to the case as requested by the Secretariat.<sup>1</sup>

The Secretariat must therefore be vested with the necessary independence, authority and resources to ensure proper compliance from governments as well as submitters and other parties involved in a submission process.

### **Review of Articles 14 and 15 Submission must be Expedited.**

EHC supports the report's recommendation to substantially reduce the time it takes for a submission to be resolved. However, EHC believes that the suggested goal to reduce the time that it takes to process articles 14 and 15 to be completed within two years from filing the petition is still too long. The Secretariat should be able to develop a factual record in 6 months or less and not 12 months as recommended by the report. In the case of EHC's submission, two years and 7 months have passed since the its original filing and one year since the Council directed the Secretariat to prepare a factual record. To date there is no time frame for a final resolution of the case. Clearly in this instance, the unreasonable amount of time taken to process this case is plainly unfair and unacceptable, particularly when we consider that public health is at risk as in the *Metales y Derivados* case.

### **Open, Informed and Reasoned Decision-making.**

EHC supports the JPAC's recommendation to open up the process. As mentioned above, the submission process must be premised under fundamental notions

---

<sup>1</sup> Information obtained at the U.S. National Advisory Committee Meeting held in Washington, D.C. on May 3-5, 2001.

of fairness and justice. The process must not only ensure equal access but also fairness and objectivity. In addition to the suggestions made in point 4 of the report, the Parties (subject to the particular submission) as well as the submitters must not have independent communications with the Secretariat without the other party's knowledge. A party to a submission must notify the other party by serving a copy of the communication when contacting the Secretariat. This does not affect the Secretariat's capacity as a fact finder. Rather, it legitimizes its objectivity in gathering and analyzing information relevant to a factual record. In essence, the process must strive to achieve outmost transparency.

#### **Factual Record Follow-up**

The JPAC's conclusion that "the role in monitoring post-Factual Record conduct is that played by the submitter and by those NGOs most interested in the controversy" goes at the heart of problem with the Article 14 and 15 process: It admits that as a mechanism for citizens to seek government accountability and environmental protection, it fails because it falls short of direct enforcement or follow-up. The three countries either jointly or independently have the obligation to follow-up with actions after a factual record is produced. If a citizen or NGO is left with the task of further pressing for effective enforcement of environmental laws by a government after a factual record is produced, it consequently renders the entire submission process meaningless.

In summary, the only positive outcomes as a result of the *Metales y Derivados* case filed by EHC have been the increased the level of visibility of the problem and the submission process. Originally, community residents directly affected by the abandoned lead smelter were hopeful that they and their children would soon no longer be exposed to the health threats associated with toxic waste. Two and a half years later, the submission is still not resolved. To date, the citizen submission process has failed the people affected by *Metales y Derivados*.

The proposed recommendations offer a good faith attempt by all who have been involved in this review period, to improve the effectiveness, efficiency and credibility of the process. EHC welcomes and appreciates this effort. However, in order to truly make the submission process a viable and useful public tool to ensure government accountability and greater environmental protection, the Council must address each and every issue presented in the report. The report must clearly recommend the Council to further direct specific changes to all issues presented and not just part of them. This effort is required in order to save the process from greater public unacceptance and lack of credibility it now faces.

Respectfully submitted,

Cesar Luna, Esq.  
Environmental Health Coalition  
Border Environmental Justice Campaign  
1717 Ketter Bld. Suite 100  
San Diego, CA 92101  
(619) 235-0281  
(619) 232-3670 fx  
[cesarl@environmentalhealth.org](mailto:cesarl@environmentalhealth.org)  
[www.environmentalhealth.org](http://www.environmentalhealth.org)