

Wednesday, April 23, 2008

The Honourable John Baird
Minister of the Environment
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10 Wellington Street, 28th Floor
Gatineau, Quebec K1A 0H3

Administrator Stephen L. Johnson
US EPA Headquarters
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Mail Code 1101A
Washington, DC USA 20460

Juan Rafael Elvira Quesada
Secretario
Secretaría de Medio Ambiente y
Recursos Naturales
Periférico Sur No. 4209,
6° piso Colonia Jardines en la Montaña 14210,
México D.F., México

Dear Mssrs. Baird, Johnson, and Elvira,

Re: Political interference with the Commission for Environmental Cooperation

We the twenty undersigned groups or individuals from Canada, Mexico, and the U.S.A. believe the *Commission for Environmental Cooperation* (CEC), particularly the crucial citizen submission process, has reached a critical point with its future threatened by ongoing political interference.

The creation of the CEC played a key role in the passage of the *North American Free Trade Agreement* (NAFTA) by the U.S.A., Mexico, and Canada. In fact, the *North American Agreement on Environmental Cooperation* (NAAEC), a side-agreement to NAFTA which established the CEC, was an important condition for public acceptance of NAFTA's passage. A failure, therefore, to respect the integrity of the NAAEC and the CEC undermines the legitimacy of NAFTA itself.

The citizen submission process is a key element of the CEC, especially since the governments have failed to implement the dispute resolution mechanism in Part V of the NAAEC. The submission process allows the public to request investigations into allegations that a party is failing to effectively enforce its environmental laws. This process, set out in Articles 14 and 15 of the NAAEC, is intended to bring failures of effective enforcement to light and thereby prevent a party from gaining economic advantage through lax enforcement. A well-functioning citizen submission process can reduce trade distortions.

Investigations, known as *factual records*, that are recommended by the CEC Secretariat and the

publication of completed factual records can proceed only upon approval of the CEC Council, which is comprised of the top environment official in each NAFTA country. In addition, the NAFTA governments have the opportunity to review factual records and provide comments before such records are made public.

The effectiveness of the citizen submission process was reviewed by the CEC's independent *Ten-year Review and Assessment Committee* (TRAC) in June 2004. Its report concluded that the process brought transparency to environmental enforcement practices and prompted improvements in environmental protection. The same committee found, however, that the effectiveness of the process was limited by interference from the parties and the perception that the parties were in a conflict of interest when attempting to constrain the process. The Committee urged the parties to respect the citizen submission process.¹

We believe that the citizen submission process has yielded some valuable information to date but that repeated interference by the parties has seriously undermined the process. These actions of the parties include:

A. The Council's failure to hold votes to approve the Secretariat's recommendations for the preparation of factual records or to approve the release of completed factual records. The effect of such failures is not simply delay in conducting investigations, but rather the subversion of the objectives of the citizen submission process. Without a transparent voting system the credibility of the citizen submission process is further undermined and public confidence in NAFTA is weakened because the ministers are not required to (and usually do not) account for their conduct.

We note the following current and recent examples (among the total of 23 factual records that have been recommended since the CEC was established):

- *Coal-fired power plants* (SEM 04-005): No vote to date on a factual record recommended **in December 2005** relating to an allegation that the U.S. EPA is failing to enforce its *Clean Water Act* against power plants for mercury emissions contaminating shared water bodies;
- *Lake Chapala II* (SEM 03-003): No vote to date on a factual record recommended **in May 2005** relating to an allegation that Mexico is failing to enforce environmental laws to protect the Lerma-Chapala-Santiago-Pacífico basin.
- *Ontario Logging* (SEM 02-001 and SEM 04-006) and *Pulp and Paper* (SEM 02-003): **Seven months to approve** (in February 2007 -- and only after media scrutiny) **the release** of factual records, even though votes on publication are normally required within 60 days. Similarly, the release of the *Tarahumara* (SEM 00-006) factual record occurred a full five months after the factual record was provided to Council. Finally, the ALCA-Iztapala (SEM 03-004) factual record was completed on November 17, 2007 but has yet to be published.

There are many additional examples of the failure to make timely decisions to approve the preparation of factual records. This constitutes a course of conduct that erodes the legitimacy of the NAAEC and NAFTA:

- *Quebec Automobiles* (SEM 04-007) 405 days

¹ http://www.cec.org/files/PDF/PUBLICATIONS/TRAC-Report2004_en.pdf at p. 54

- *BC Hydro* (SEM 97-001) 642 days
- *Metales y Derivados* (SEM 98-007) 489 days
- *Aquanova* (SEM 98-006) 469 days

In order to file a submission with the CEC, non-government groups must generally dedicate significant resources to assemble the necessary evidence. The failure to make decisions discourages public participation and, since Council communication usually takes place behind closed doors, promotes public distrust and suspicion. This is especially true given that one of the parties involved in making a decision on whether to approve an investigation is effectively both the judge and the accused.

Equally important, the failure to move cases forward creates the potential for unfair trade advantages gained at the expense of the environment to continue for years. Finally, obstructing investigations deprives citizens and governments from knowing the facts about failures to enforce and thereby delays action that may be necessary to remedy offending conduct.

B. The Council's practice of scoping or limiting recommended investigations to particular facts. This practice masks the breadth and extent of the failure to effectively enforce environmental laws. This is counterproductive given the purpose of the citizen submission process and public expectations of a full investigation.

See for example:

- *Migratory Birds* (SEM 99-002), where an allegation of a nation-wide failure to enforce was converted by the Council into a rather meaningless investigation of two forest stands only mentioned in the petitioners' footnotes. It should be noted that a similar attempt to limit the scope of *Ontario Logging* was averted, narrowly.
- *BC Logging* (SEM 00-004), where a submission focused primarily on the failure to enforce logging regulations on public lands was limited by the Council to an investigation about logging on private land.
- *BC Mining* (SEM 98-004), where the Secretariat recommended a factual record for over 40 abandoned mines throughout British Columbia, but the Council narrowed the scope of the investigation to only one mine.

C. The Council's conduct in limiting the timeframe of an investigation or otherwise **attempting to prescribe the type of evidence** the CEC Secretariat may consider. This conduct potentially masks important contextual issues that would shed light on a particular problem. The Secretariat must be allowed to provide up-to-date information on matters addressed in factual records so that ineffective enforcement and trade distortions are brought fully into public view.

See, for example:

- *Pulp and Paper* (SEM 02-003), where restricting the investigation from considering a more recent timeframe allowed the party to devalue CEC findings as being old news.

In combination, we believe that the actions described above undermine the legitimacy of NAFTA. It also undermines the principles of environmental accountability, transparency, and public participation that the NAAEC was intended to bring to the NAFTA arena.

The CEC initially held significant promise as a model for trade agreements. As the *Ten-year Review and Assessment Committee* noted:

The Commission was the first of its kind in the world in linking environmental cooperation with trade relations.

... The NAAEC stands out for its provisions for public participation and for the unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws. These provisions make the CEC an international model.²

Unfortunately, this initial promise is being squandered. Interestingly, Canada and the U.S.A. have included CEC-type models, albeit weaker versions, in trade agreements since NAFTA, including some now being negotiated. We believe that the CEC can still be a useful model for international trade agreements if it is allowed to work in an independent, transparent, and timely way.

CEC scrutiny of the environmental conduct of a NAFTA party is a small price to pay by the parties in exchange for public confidence in, and legitimacy for, NAFTA. Instead the conduct of the NAFTA parties has simply reinforced public cynicism about the willingness of trading partners to properly respect environmental and other social values.

In fact, Canada, Mexico, and the U.S.A. seem intent on further diminishing the role of the CEC by promoting the *Security and Prosperity Partnership* (SPP), which includes some of the environmental responsibilities that the CEC is best-suited and designed to take on. This is particularly troubling because the SPP is hardly built on the principles of transparency, accountability, and public participation that are key to the NAAEC and the CEC.³

We therefore call on the Council to henceforth:

1. Respect the independence and expertise of the CEC Secretariat and its decisions, and approve its recommendations unless exceptional circumstances indicate that doing so would not be in accordance with the NAAEC;
2. Make decisions on approving the Secretariat's recommendations for factual records or the release of factual records, within 60 days, except in exceptional circumstances based on established criteria; and
3. Discontinue the practice of scoping or limiting in time the factual records that have been recommended by the CEC Secretariat.

Sincerely,

[Signatures on original. The list of signatories is attached.]

cc. Felipe Adrián Vázquez-Gálvez, Executive Director, Commission for Environmental Cooperation
Jane Gardner, Chair, Joint Public Advisory Committee

² TRAC report, at p. ix.

³ The TRAC, by contrast, had urged the NAFTA parties "to strengthen and renew publicly the commitment of their governments and themselves to the CEC as their institution of choice for trilateral environmental cooperation. See p. xi.

LIST OF SIGNATORIES

Centro Mexicano de Derecho Ambiental, A.C. (CEMDA) Gustavo Alanis	Jonathan Graubart Associate Professor, Political Science San Diego University
Earthroots Amber Ellis, Executive Director	Noah D. Hall, Assistant Professor, Wayne State University Law School and Executive Director, Great Lakes Environmental Law Center
Ecojustice Canada Albert Koehl, Staff Lawyer Randy Christensen, Staff Lawyer	John H. Knox Professor of Law Wake Forest University School of Law North Carolina
Friends of the Earth Canada Beatrice Olivastri, Chief Executive Officer	Mark Squillace Director, Natural Resources Law Center University of Colorado
Interamerican Association for Environmental Defense (AIDA) Astrid Puentes, Legal Director	Stepan Wood Associate Professor Osgoode Hall Law School York University
Magdalena Baykeeper (Mexico) Julio Solis	Paul Stanton Kibel Director, Policy West and Visiting Professor, Golden Gate University School of Law
Nature Canada Julie Gelfand, President	
Ontario Nature Caroline Schultz, Executive Director	
Sierra Club of Canada Jean Langlois, National Campaigns Director	
Waterkeeper Alliance (U.S.A.) Scott Edwards, Legal Director	
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