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May 17, 2012

Via e-mail to: jpac@cec.org
Commission for Environmental Cooperation
393 St-Jacques Street West
Suite 200
Montreal (Quebec)
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ATTN: Joint Public Advisory Committee

Dear members of the Joint Public Advisory Committee,

RE: Comments to Joint Public Advisory Council on SEM Modernization Task Force Draft Negotiation Text

Thank you for the opportunity to comment on the SEM Modernization Task Force's Draft Negotiation Text, which would amend the SEM Guidelines.

We applaud the review initiative. Unfortunately, the proposed text falls far short of the specific and significant changes that are needed to the Citizen Submission Process to regain the confidence of the public and to restore the integrity of the process.

We do not make these comments lightly. Ecojustice (formerly Sierra Legal Defence Fund) has been involved in filing more citizen submissions than any other organization. We fully appreciated the opportunities this process provided to hold governments accountable for their conduct in enforcing, or not, environmental laws -- and thereby preventing trade distortions between the NAFTA countries. We represented, and thereby helped to educate, dozens of environmental and conservation groups across North America about the merits, and potential benefits, of the process.

When the flaws and problems in the process began to emerge we brought this to the attention of the Council, the Secretariat, and the JPAC in the form of written comments and oral presentations. Most recently, we appeared before the JPAC in El Paso, Texas to reiterate our concerns, and to propose a way forward to restore the integrity of the Citizen Submission Process. We understand that the Modernization Task Force was present at that meeting.

Lamentably, we realize, again, that our interventions have not sufficiently impacted those who have the authority to make needed changes.

Specific Comments

The most pressing concerns continue to be dissatisfaction with the long delays and Council or Party interference in the process.

When undertaking a review of a critical facet of the citizen submission process such as the Guidelines, it is important to consider the origin of the process, which was created to address trade distortions gained at the expense of the environment. In the year of Rio + 20, it is fair to evaluate whether the Citizen Submission Process has measured up to its original purposes and whether the proposed changes to the Guidelines assist in achieving those goals.

From the perspective of past and potential users of the citizen submission process, the improvements being proposed are modest at best. Many of the important weaknesses have even been enshrined in the proposed Guidelines, which would only have the effect of insulating the Council from criticism.

In other cases, they make changes that are mere window dressing: no one was clamouring for more translated documents (and the implications on the Secretariat's ability to do its job, given limited resources, are not even mentioned).

The Task Force's Draft Negotiating Text, if adopted, would emphasize the importance of timeliness in the Citizen Submission Process, but there is no enforcement mechanism for ensuring compliance with the proposed timelines. The proposed changes do nothing to promote follow-up to factual records.

Guideline 5.6: proposes revisions including that Secretariat must consider whether the SUBMITTER pursued private remedies. This is not in alignment with the NAAEC which reads "whether private remedies available under the Party's law have been pursued", which does not require that the submitter have personally pursued those private remedies.

Far worse, the proposal misrepresents the provisions of NAAEC art. 14(2) (which sets out four factors for the Secretariat to consider in deciding whether a submission merits a response from a Party). One of the factors is whether, in the words of the NAAEC, "private remedies available under the Party's law have been pursued." Art. 14(2)(c). The proposed revision would add ". . . have been pursued *by the Submitter*." This is not in the Agreement, and it would impermissibly change the meaning of the Agreement.

Ecojustice supports the recommendation of Prof. John Knox that "a far better amendment to this paragraph would be to leave the initial language ('Thus, the Submission should address') unchanged, and replace the current paraphrase with the exact words of Article 14(2)(c). Trying to paraphrase them is an endeavor that can only lead to confusion."

Guideline 7.3: This proposed provision simply repeats the exact language of Article 14(2). Like the proposed change to Guideline 5.6, such revisions would add "*by the Submitter*" after ". . . have been pursued."

Guideline 7.5: Again, the language “*by the Submitter*” is added, and again it should be removed. Other changes to this section would limit the Citizen Submission Process and should be rejected.

Guideline 9.6: The proposal would instruct the Secretariat “to limit its consideration to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record.” This change would impose a profound limitation on the Secretariat’s discretion to recommend a factual record. There is no apparent and compelling rationale for this proposal. The submissions procedure is designed to shed light on potential failures to effectively enforce domestic environmental laws and its operation should not be constrained by provisions in the Guidelines.

Guideline 9.7: This proposed change would explicitly limit the consideration the Secretariat may undertake when a party asserts that a failure to enforce environmental law represents a reasonable exercise of discretion under Article 45(1) of the *NAAEC*. This proposed amendment represents the most egregious abuse of the spirit and intent of the Citizen Submission Process in service of the illegitimate motivations of the parties. This proposal would allow a party to circumvent the entire submissions procedure whenever it chooses, merely by informing the Secretariat that its failure to effectively enforce is excused by Article 45(1). The Secretariat is not in a position to evaluate what discretion is “reasonable”, and requiring it to engage in this analysis would effectively eviscerate the Citizen Submission Process.

Guideline 10.4: This proposal would allow for a factual record that “varies” from what the Secretariat recommended. As such, it codifies one of the most significant current problems of the Citizen Submission Process and simply enshrines interference with the expert body. This practice has no basis in the *NAAEC*, and it has been strongly and repeatedly criticized by the public and by the JPAC in the past.

Guideline 11.4: The proposed recommendation would require the Secretariat to make “revisions” to a factual record rather than the current standard of incorporating comments as appropriate. This proposal risk creating the expectation that the Secretariat will change the content of its factual investigation, rather than merely provide the public with the Party’s view on a factual finding.

Guideline 15.1: This paragraph sets out the information that the Secretariat includes in the public registry. The revisions delete the information that “the final factual record has been provided to the Council.” There is no good reason not to inform the public of this information. Without it, the public will not be able to tell whether the Secretariat has met the suggested time period discussed above, or whether delays are the result of the Secretariat or the Council. In addition to opposing this change, the JPAC should suggest that the registry should also include notification of the provision by the Secretariat of the *draft* factual record.

Guideline 16.1: This proposal would require the Secretariat to translate ALL documents posted on the registry (e.g. all submissions and responses, and all determinations) in ALL three languages. This would impose significant costs on an already financially strained process. Absent a rationale for this change and provision of additional resources to the process, this change would have the practical effect of slowing and weakening the process. While additional translation is a laudable goal in a resource-unconstrained world, this is not the case for the Secretariat.

Guideline 19: The suggested timeframes for action by Secretariat, Parties and Council are a step in the right direction. However, there is no remedy for the failure to abide by the timelines. This still needs to be addressed.

We again thank the JPAC for the opportunity to make these comments.



Randy Christensen

original signed by



Will Amos