

Ecojustice - SEM 00-004 (BC Logging) - SEM 97-001 (BC Hydro) - SEM 98-004 (BC Mining)

Questions:

	Yes	No	I don't know
BC HYDRO			
Did the Citizen Submission procedure seem to be useful?	X		
Were you satisfied with the CEC's handling of your petition?	X		
Did the CEC's resolution of your petition seem technically and legally appropriate?	X		
Did the CEC's resolution seem just?	X		
Did the CEC's response time seem appropriate?			It took longer than necessary
How much time did the procedure take (in months)?			3 years, 2 months
How much money did you or your organization invest in preparing and following up your petition (in C\$, Mx pesos, US\$)?			Nominal, excluding time
Did the Citizen Submission procedure seem to be useful?			
BC MINING			
Did the Citizen Submission procedure seem to be useful?	Yes	No	I don't know
Were you satisfied with the CEC's handling of your petition?			Somewhat
Did the CEC's resolution of your petition seem technically and legally appropriate?		X	
Did the CEC's resolution seem just?		X	
Did the CEC's response time seem appropriate?		X	
How much time did the procedure take (in months)?			5 years, 2 months
How much money did you or your organization invest in preparing and following up your petition (in C\$, Mx pesos, US\$)?			Nominal, excluding time
Did the Citizen Submission procedure seem to be useful?			It had useful aspects
BC LOGGING			
Did the Citizen Submission procedure seem to be useful?			Yes No I don't know
Were you satisfied with the CEC's handling of your petition?		X	
Did the CEC's resolution of your petition seem technically and legally appropriate?		X	
Did the CEC's resolution seem just?		X	
Did the CEC's response time seem appropriate?		X	
How much time did the procedure take (in months)?			3 years, 5 months
How much money did you or your organization invest in preparing and following up your petition (in C\$, Mx pesos, US\$)?			Nominal, excluding time
Did the Citizen Submission procedure seem to be useful?			Not at all

Note: Ecojustice's prior responses to this questionnaire pertained primarily to the Species at Risk submission SEM-06-005 and the Ontario Logging I and II submissions SEM-02001 and SEM-04-006. This response pertains to the following submissions, all but the last of which led to factual records. The approximate time from submission filing to the termination of the process is indicated in brackets):

1. BC Hydro SEM-97-001 (3 years and 2 months)
2. BC Mining SEM-98-004 (5 years and 2 months)
3. BC Logging SEM-00-004 (3 years and 5 months)
4. Pulp and Paper, SEM-02-003 (4 years and 9 months)
5. Coal-fired Power Plants, SEM-04-005 (6 years and 11 months, and still pending)
6. Devil's Lake, SEM-06-002 (5 months)

Our experience with the process has been mixed, but predominantly negative. The process was often useful for drawing attention to important environmental problems and bringing out valuable information. However, the processes did not lead to adequate resolutions of the problems. In most cases, the CEC Council substantially changed the nature or scope of the inquiries we requested. In addition, the mainstream media has greatly reduced its reporting on the submissions process in recent years. The lack of media attention limits public awareness of the problems Ecojustice has sought to highlight and resolve through the process.

The process has also become less effective with each time we have filed a submission. We attribute the increasing ineffectiveness to governments becoming more obstructionist and adept at frustrating the process.

As discussed below, Ecojustice, including when we were called Sierra Legal Defence Fund, has provided information to the JPAC and other CEC bodies in previous studies regarding the SEM process.

We also agree generally with the analysis former SEM Director Geoffrey Garver' provides in "Tooth Decay" and we specifically draw your attention to the observations at pages 35 to 38. Tooth Decay is attached for reference.

1. When and how did you learn about the citizen submission process?

We became aware of the process during the negotiations and finalization of the NAACE. We filed our first submission BC Hydro SEM-97-001 at the request of a client.

See also the previous Ecojustice response regarding the Species at Risk Act citizen submission, SEM-06-005.

2. How difficult was it to gather information on how to use the SEM process? What institutions, organizations, resources, or establishments did you consult, if any, to learn about the SEM process and how to use it?

See the previous Ecojustice response regarding the Species at Risk Act citizen submission, SEM-06-005.

3. Did you know about the “Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the [NAAEC]” (the “Guidelines”) published in the CEC booklet “Bringing the Facts to Light”? If so, did you consult them? How helpful was it? Was there any information not included in the Guidelines that might have helped you in preparing your submission?

See the previous Ecojustice response regarding the Species at Risk Act citizen submission, SEM-06-005.

4. Did you contact the CEC Secretariat prior to preparing a submission, and if so, for what reason (i.e. information gathering, questions about procedure, etc)? Was the response of the Secretariat, if any, helpful? Why or why not?

Ecojustice did not contact the CEC Secretariat prior to preparing any our submissions.

5. Why did you choose the SEM process for addressing the matters you raised in your submission?

The specific instances of non-enforcement were not amenable to redress under domestic law (For example, there is a lack of citizen suit provisions in Canadian law).

See also the previous Ecojustice response regarding the Species at Risk Act citizen submission, SEM-06-005.

6. What outcome did you expect from the SEM process at the time of your submission? Sanctions? Recommendations? Conclusions?

Our hope was and is that information provided through the process and will lead to improved enforcement and compliance efforts that would address the broad areas of weakness we identified: inadequate protection of fish habitat affected by dams; inadequate protection of fish habitat and stream quality impacted by logging on Crown and private land in British Columbia; inadequate protection of fish-bearing waters impacted by acid mine drainage at numerous mines sites in British Columbia; complete inattention to severe impacts on migratory birds from clearcut logging in Ontario; and weak enforcement of pulp and paper effluent regulations in Eastern Canada.

See also the previous Ecojustice response regarding the Species at Risk Act citizen submission, SEM-06-005.

7. Did the processing of your submission in any way affect or impact the situation you were addressing, and if so, how? Was this impact consistent with your hopes and expectations?

The processing of submissions had limited to no impact beyond confirming Canada's weak enforcement of environmental laws as alleged in the submissions. None of the submissions led to the meaningful reforms in enforcement and compliance of the relevant legislation. The CEC's 2004 TRAC report identifies some modest results from the BC Hydro, BC Logging and BC Mining submissions (p. 46). Of these, BC Hydro had the biggest impact. We attribute the impact from the BC Hydro case mostly to the attention that the filing of the submission brought to the issues. The factual record has also been useful in ongoing provincial proceedings such as the "Water Use Planning Process". The scope of the BC Logging and BC Mining factual records was so limited by the CEC Council that they no longer respond to the overarching concerns we raised in our submissions; And the problems raised still persist.

CEC Council action on the Ontario Logging submissions led to a new standard for submissions that essentially requires submitters to prepare mini factual records in support of their allegations. The Council required us to include evidence of destroyed birds or nests from clear cuts in remote forests with difficult access. Given that the collection of this kind of evidence should be a basic element of the enforcement of migratory bird rules by the government, the process should place this burden on the government, not on submitters. Publication of the Ontario Logging factual record has had no discernible impact in resolving persistent negative impacts of clearcut logging on migratory birds in Ontario.

With the Pulp and Paper submission, the Council in effect created an incentive for governments to delay the process as much as possible. The Council did this by limiting the scope of the factual record to violations of the federal pulp and paper effluent regulations as of 2000, the latest year that we had data for. However, it took two years to obtain information through freedom of information requests and so we did not file the submission until May 2002, and the factual record was authorized in December 2003. When the factual record was published in February 2007, the Canadian government effectively said that any problems revealed were from too long ago to be of concern. The extensive evidence supporting our submission should have been sufficient to authorize the Secretariat to present up-to-date factual information on ongoing violations and the government's response to them. The CEC Council's resolution authorizing the factual record made it very difficult to present current factual information on violations and responses.

We were disappointed that the CEC Secretariat decided not to proceed with the Devil's Lake submission. Processing of the Coal-fired Power Plant submission has taken an inexcusably long time, with no factual record nearly 7 years after the submission was filed.

8. Has the outcome of the SEM process with respect to your submission helped you to understand the relevant environmental law(s) and the government's decisions with respect to enforcing those laws? If so, in what way?

Not significantly, although the CEC Secretariat has done a commendable job explaining the laws and enforcement policies to the extent they are relevant to the restricted factual records the Council has authorized. Overall, the Canadian government appears determined to delay and limit the process, and to prevent rigorous, independent and objective scrutiny of its enforcement performance. The following media release links provide additional information relevant to this question:

Ontario Logging - <http://www.ecojustice.ca/media-centre/press-releases/naftacommission-confirms-canadian-failure-to-enforce-wildlife-law-against-loggingcompanies/?searchterm=CEC>

Pulp and Paper - <http://www.ecojustice.ca/media-centre/pressreleases/independent-inquiry-exposes-canadas-lax-enforcement-on-waterpollution/?searchterm=CEC>

9. Did you pursue any domestic legal options regarding the matters raised in your submission? If not, why not? If so, why did you also file a submission?

A factor in our filing of several submissions, especially the BC Hydro, BC Logging and BC Mining submissions, is the practice of the Canadian government to take control of private prosecutions and then close them. In light of this routine practice, we were not confident that private prosecutions were a viable avenue for many of our concerns.

10. If the government Party filed a response to your submission, was the response helpful in understanding the Party's positions and decisions with regard to the matters you raised, and if not, why? Did the response provide information that you were seeking?

The Canadian government's responses have provided some useful information, but in general the responses were too, obstructive and intended to obfuscate. For example, Canada provided some helpful information in connection with the Pulp and Paper submission, but it was limited in time to the period ending in 2000. With Ontario Logging, Canada should have been able to provide more extensive information regarding its enforcement activities and regarding Ontario timber management practices that impact migratory birds. The U.S. response to the Coal-fired Power Plant submission was extensive but did not adequately address the concerns raised in the submission.

11. Did you have any contact with the government Party regarding the matters raised in your submission during or after conclusion of the SEM process, and if so, was this contact helpful? If not, would such contact have been helpful?

Contact with a Party only occurred during the BC Hydro process where a joint meeting was scheduled by the Secretariat as part of Factual Record preparation.

12. How long did it take for your submission to be processed? Include the time from the point that you submitted the petition to the factual record or other final decision. Do you believe that this is a reasonable amount of time for processing of submissions? If not, what recommendations would you make for improving the timeliness of the process?

This information is provided above. The length of time that it takes to process submissions is a significant shortcoming. Unfortunately, process times have increased in recent years. Although a strict set of time limits at each stage of the process might not be appropriate in light of the wide variability in the subject matter of submissions, we believe the following general timelines are reasonable: initial analysis under Articles 14(1) and (2) should normally occur within one month; the analysis under Article 15(1) should be normally occur within three months; votes on factual record recommendations should take no longer than 90 days; and draft factual records should normally be prepared within one year.

13. What action have you undertaken with regard to the matters raised in your submission after the conclusion of the SEM process? Do you expect or wish that the CEC continued to be involved following the conclusion of the process, and if so, how?

In the case of BC Hydro, Ecojustice and its clients participated in a process known as Water Use Planning that addressed many of the concerns raised in the submission.

It would have been helpful with all submissions to have the CEC review the situation at some point after the factual record had been prepared (perhaps 3 – 5 years) to determine if any material changes have occurred.

14. How costly was it for you to use the citizen submission process? Were the costs in line with the benefits you received from the process?

In general, preparation of the submissions was time consuming. For example, the supplementary information required for the Ontario Logging and Coal-fired Power Plant submissions took enormous effort. For Pulp and Paper, the government sought to assess large fees related to freedom of information requests needed to gather the underlying data. Much of this information, including pulp and paper mill self-reported discharge monitoring data, should be freely available online.

15. What kind of assistance, if any, did you receive in preparing your submission? If you did not receive assistance, what kind of assistance do you wish you had received, if any?

Ecojustice often prepares and files citizen submissions on behalf of other groups. In many cases, those groups provided scientific expertise.

**On some occasions, the JPAC provided support through trying to convince the Council to respect the Citizen Submission process. For example:
<http://www.cec.org/Page.asp?PageID=122&ContentID=1897&SiteNodeID=362> and**

http://www.cec.org/Page.asp?PageID=122&ContentID=1002&SiteNodeID=296&BL_ExpandID=91

16. Approximately how much time went into the preparation of your submission?

Preparing the initial submissions in the cases of BC Hydro, BC Logging and BC Mining took approximately 100 hours each. In each case, an equivalent or greater amount of time was spent trying to determine the status of submissions and engage in activities attempting to move the process along.

17. Overall, was the citizen submission process a useful forum to raise the matters you highlighted in your submission? Why or why not?

Overall, our answer is no. Ecojustice has devoted an enormous amount of human and financial resources to gather information to support submissions and to file them, with little to show for it.

18. Bearing in mind your experience with the article 14 and 15 process, do you think this mechanism needs to be revised and amended?

We reiterate our previous response re: the SARA submission: Article 14 and 15 are honoured more in breach than observance. The process is hollow and creates a form over substance process that, as currently manipulated by Canada, is not credible.

19. Do you have any other comment or recommendations regarding the citizen submission process?

Our intention in filing submissions with the CEC was to make this innovative tool work to its full potential to provide rigorous, independent information on the enforcement performance of Canada, Mexico and the U.S. Given the very modest results of the process, the CEC Council's ongoing attempts to limit its effectiveness, the long delays in processing submissions, and the progressive decline in media attention given to the process and to the CEC in general, Ecojustice is finding it increasingly difficult to justify using the process. Given our conclusion that the withdrawal of the SARA submission was necessary to prevent the process from actually causing harm, extensive reform of the process is needed for us to see it as a useful forum again. Above all, these reforms should insulate the process from self-serving actions by the governments, give greater weight to the independent determinations of the Secretariat, and improve timeliness.

Over the years, Ecojustice has worked at trying and improve the process. This has included:

- **making submissions about the "inherent conflict of interest" given the role of the Parties being the subject of an investigation while making critical**

decisions about the conduct and potential termination of the process. Our submission provided recommendations for resolution of that conflict;

- authoring an article for the *Journal of Environmental Law and Practice* describing experiences and noting needed improvements and reforms;
- filing a “Petition” with the Canadian Commissioner on Environment and Sustainable Development raising concerns about the Government of Canada’s actions in relation to the process; and
- organizing a coalition of groups that presented a letter to Council regarding interference in the CEC process.

Documents related to all of these steps are attached.