

International Environmental Law Project - SEM-99-002 (Migratory Birds)

Questions:

	Yes	No	I don't know
Did the Citizen Submission procedure seem to be useful?		<input checked="" type="checkbox"/>	
Were you satisfied with the CEC's handling of your petition?		<input checked="" type="checkbox"/>	
Did the CEC's resolution of your petition seem technically and legally appropriate?		<input checked="" type="checkbox"/>	
Did the CEC's resolution seem just?		<input checked="" type="checkbox"/>	
Did the CEC's response time seem appropriate?			
How much time did the procedure take (in months)?			About 30 months
How much money did you or your organization invest in preparing and following up your petition (in C\$, Mx pesos, US\$)?			About \$2,000 to \$3,000
Did the Citizen Submission procedure seem to be useful?			No

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

My organization at the time, the Center for International Environmental Law, provided legal support and analysis to a number of groups lobbying for environmental provisions to be included in the NAFTA. Thus, we were well aware of the SEM process.

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?

Since the Center for International Environmental Law was so involved in the negotiations concerning the NAAEC, it was very easy to find information about the SEM process. In particular, it was easy to find previous decisions of the Secretariat and Council relating to the SEM process. I have always found the CEC's website easy to use.

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?

Yes, I consulted the "Guidelines" but the copy I used was not from the CEC booklet "Bringing the Facts to Light." I either received a copy from someone working at the CEC or via the internet.

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?

I do not recall with certainty, but I do not think I contacted the Secretariat prior to preparing the submission.

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

The SEM process was tailor made for our submission. Under U.S. law, citizens do not have the right to challenge decisions of agencies not to enforce law. Thus, the SEM process, which allows for investigations into failures to enforce environmental law effectively, provided a means to explore a nation-wide failure to enforce the Migratory Bird Treaty Act.

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

We were well aware that the factual record would not lead to sanctions or recommendations. We had hoped that the United States government would engage us in a constructive conversation about how it could better implement and enforce the Migratory Bird Treaty Act against loggers. That never happened.

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?

No. the United States government did not take any steps to improve implementation and enforcement of the Migratory Bird Treaty Act against loggers. We know this because, a few years after publication of factual record, we filed a request under the U.S. Freedom of Information Act seeking any information about any changes to U.S. policy resulting from the SEM process. Each agency to which we submitted the response responded by saying "no."

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?

No.

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?

No. It is possible that the continued US failure to enforce the Migratory Bird Treaty Act against loggers constitutes a total abdication of its enforcement responsibilities, and thus actionable, but the case would be very difficult to win.

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?

No. The response described a large number of things that the United States government does for birds, but it never addressed the core issue of the submission: enforcement of the Migratory Bird Treaty Act against loggers.

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?

No. See responses to questions 6 and 7.

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?

From submission to publication of the factual record, our submission took about 2.5 years. Many parts of the submission process occurred in a reasonable amount of time. For example, the Secretariat made a determination that our submission met the requirements of Article 14(1) and 14(2) within 5 weeks. In addition, the factual record was made public about 60 days after the Secretariat submitted the factual record to Council, as suggested by Article 15(7). The United States responded within about 68 days to the Secretariat's request to provide a response, a relatively quick response but still inconsistent with Article 14(3) which requires Parties to respond within 60 days.

The delay came between the Secretariat's request to prepare a factual record and the Council's vote instructing the Secretariat to prepare it. This took 331 days. Considering how frequently the Parties meet, this delay is unwarranted. If this was an isolated delay, further action would not be warranted. However, Council has frequently delayed votes instructing the Secretariat to prepare factual records. In Lake Chapala II, for example, Council took 876 days to vote. In Coal Fired Power Plants, it took 679 days. These delays are inexcusable. They significantly erode public confidence in the process. Moreover, they delay possible solutions to the problem alleged by submitters.

To improve the process, specific deadlines should be established in the Guidelines by which certain actions should take place. I recognize that the NAAEC itself does not impose such deadlines. However, to maintain public confidence in the process, Council must be willing to act by specific deadlines. There are no reasons why Council cannot

vote on a recommendation to prepare a factual record within 60 days, something it has done in several submissions such as Species at Risk, Cozumel, and BC Hydro.

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?

Yes, it would have been very helpful if the CEC could have stayed involved. Some kind of monitoring would be great, even if it was an annual request to the United States asking it to provide information on how it has followed up on the submission.

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?

I believe it cost \$2,000 to \$3,000.

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?

I don't recall receiving any assistance outside the professional staff at the Center for International Environmental Law and from other co-submitters.

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

I don't recall. Because we involved law students in the process, it took more time than it otherwise would have.

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

In some ways, yes, the SEM process was useful. For example, the factual record noted that California implements and enforces a state law similar to the Migratory Bird Treaty Act against loggers. The factual record provided examples of exactly how California does so. This was very useful. We had hoped that the United States government would use this information to improve implementation and enforcement of the Migratory Bird Treaty Act.

Overall, however, the factual record was not useful. This is primarily because Council reduced the scope of the factual record significantly. We had alleged that the United States had a nation-wide policy of not enforcing the Migratory Bird Treaty Act against loggers on both private and public land. We supported our allegations with a number of examples as well as other information showing that this failure to enforce resulted in an enormous number of birds being killed annually. However, Council allowed the Secretariat to investigate a failure to enforce the Act only with respect to two relatively insignificant instances involving the deaths of a small number of birds on private

land. Thus, the much more significant allegations were never explored: that the United States had a policy not to even investigate possible violations of the Migratory Bird Treaty Act against loggers.

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

Yes. As noted above, specific deadlines should be required by which Council must vote to instruct the Secretariat to prepare a factual record and vote to make a factual record public. In addition, it would be helpful to have specific deadlines for the Secretariat to determine whether submitters have met the requirements of Article 14(1) and 14(2). While this was not an issue in our submission, imposing specific deadlines would give submitters the assurance that their submission will be reviewed in a timely manner.

On the substance, many things could be done, including the following:

The Guidelines should make clear that the Secretariat alone has the authority to define the scope of the factual record.

The Guidelines should clear that the Secretariat alone has the authority to determine whether the submitters have provided “sufficient information” to allow the Secretariat to review the submission. While this was not at issue in the *Migratory Birds* submission, it has in others. Article 14(1) clearly grants this authority to the Secretariat but Council has usurped this authority in some submissions.

As has been recommended by many scholars, the factual record could include recommendations for improving enforcement if there is in fact a failure to enforce environmental law effectively. I note that this is required by Article 17.8.8 of the United States-Dominican Republic-Central America Free Trade Agreement.

In addition, it would be useful to determine, after some period of time, whether enforcement has improved.

Of course, it is possible that the adoption of these recommendations will only make the Parties and Council more adversarial in their approach to submissions. It may be that the entire process needs to be re-thought. For example, the US National Advisory Committee (NAC) has proposed to the U.S. Environmental Protection Agency a non-adversarial, cooperative mechanism for the resolution of environmental problems identified by citizens (Advice 2007-1, (May 24, 2007)). This “problem-solving” process would allow citizens to approach the Secretariat with issues unrelated to enforcement failures and would not seek to assign blame for the specified environmental concern. Instead, the process would help resolve environmental problems. As the US NAC wrote:

[T]he Secretariat would work with the requestors and the Party or Parties concerned to resolve the issue. The Secretariat’s functions would vary depending on the nature of the

issue. It would seek to identify technology, information, financing, or other resources and catalyze resolution of the problem. (Those resources could be available through governments, businesses, academic institutions, non-profit institutions, international organizations, etc.) In some cases, it might simply pass on such information to the requestors; in others, it might facilitate direct contacts between the requestors and other interested parties; in still others, it might prepare a short report outlining an approach that all interested parties might consider taking. Finally, in some cases it might determine after further consideration that it cannot assist with resolution of the problem.

At its core, this proposal attempts to address the central issues that matter to citizens: that their voices are heard and that officials respond to their concerns in a meaningful way. The proposal upends the nature of the citizen submission process by altering the nature of the process. Instead of an allegation that the government has failed to enforce environmental law, the process seeks ways to resolve specific environmental concerns. As such, the proposal would help renew the spirit of cooperation that has been lost in the NAAEC. This could perhaps be implemented through Article 13 of the NAAEC.

Another possible approach would focus the submission process on the scale effects of free trade. Under this approach, citizens could seek review of the effects of trade liberalization on the environment. As with Article 13 reports under the NAAEC, the Secretariat could assemble experts to ascertain whether the environmental impacts were, in fact, caused by trade. If they were, then the Secretariat could propose measures, including recommendations for capacity building and technology, to mitigate those impacts. As with the previous NAC's proposal, this proposal seeks to eliminate the hostility that pervades the current submissions process by changing the focus of the process. This proposal does not cast blame on any particular agency, official or company for environmental wrongdoing. Rather, it asks whether a particular policy or measure is adversely affecting the environment.

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

All my experiences with Secretariat staff involving the submissions process have been positive. Secretariat staff have been helpful and courteous. Also, my review of a substantial number of Secretariat responses and factual records indicates that the Secretariat has implemented the SEM process with great diligence and fairness. I see no bias towards governments or submitters. As my comments make clear, I hope, my misgivings with the process are directed at Council.