

Commission for Environmental Cooperation Joint Public Advisory Committee Report

**JPAC Workshop on the Revised Guidelines for
Citizen Submissions on Enforcement Matters under Articles 14 and 15
of the North American Agreement on Environmental Cooperation**

29 January 1999

Background

During the last Regular Session of the Commission for Environmental Cooperation's (CEC) Council in June in Mérida, Yucatán, the Joint Public Advisory Committee (JPAC) received the mandate from Council to conduct a public review of the Revised Guidelines for Citizen Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC).

A public call for comments was issued by JPAC on 10 September 1998 and some 5000 individuals or organizations were contacted by electronic mail or fax and two reminders were sent. A total of 34 replies were received by the end of the 90-day review period. A consultant engaged by JPAC reviewed all of these and prepared an Executive Summary of Comments along with a detailed matrix clearly showing the proposed revisions in relation to the current text and the public comments in relation to each of these proposed revisions.

JPAC's working group then selected five representatives from each country, based on the replies, to attend a public workshop on 29 January 1999 in Montréal, Canada. The purpose of this workshop was twofold: First, it provided a representative group an opportunity to engage in a more detailed discussion of the proposed revisions and, through the workshop report, communicate directly to Council. Second, the exchange would inform JPAC and assist the committee in preparing its own Advice to Council on the matter.

In addition to the invited participants, the JPAC Working Group on Articles 14 and 15, the JPAC Chair and representatives of the National and Governmental Advisory Committees also attended as participants. Representatives from the Parties and staff of the CEC Secretariat attended as observers. A list of participants is attached.

Introductory Remarks

The Workshop Chair, Ms. Donna Tingley of JPAC, introduced the session by welcoming everyone, and underscored the importance of the day's work by reminding them of the responsibility of the participating experts on behalf of all others not present but affected by the outcome.

Mr. Peter Berle, member of the JPAC working group, then gave a brief history of the process now under review and scrutiny. The unique nature of this process has provided a model for other international organizations. The decision of the Parties to establish this process was groundbreaking in that there now exists a forum that enables citizens to challenge governments on enforcement of their environmental laws. The principles that the Parties wanted applied to the process, from the beginning, were accessibility, simplicity, and transparency. The process does not contemplate sanctions or punitive action, but rather the cleansing effect of "sunlight" which can have a tremendous impact.

He went on to suggest that in his judgement by and large the process had worked so far and it is clear that it can function and produce positive effects. It provides an opportunity for legitimate interests to be discussed in an open process that can serve to inspire confidence by government and citizens.

He concluded by reiterating the groundbreaking nature of this process and cautioning not to lose sight, when reviewing the guidelines, of the larger goal: to improve them, if necessary, from the perspective of applying the original principles of accessibility, simplicity and transparency.

Ms Tingley then described the day's challenge as the need to go beyond the written comments and reflect together in order to contribute to JPAC's advice, and, very importantly, as an opportunity to speak directly to Council. She requested that participants focus on criteria to assess the revised guidelines. She suggested that general comments be made before moving into a section-by-section review of the proposed revisions.

Introductory Comments by Participants

- Why are we doing this when the Independent Review Committee has already recommended that the guidelines not be amended?
- We should consider the purpose of the revised text as a whole, rather than going through individual comments, otherwise we will get bogged down by all comments on each proposed revision.
- What are we trying to fix here? We have tried to understand the purpose of this exercise. Maybe it is not broken. If citizens were having trouble with the process and the objective was to clarify things, this new text does not meet the objective. It is impenetrable, even by a trained lawyer. Has the Secretariat identified a need to make the internal rules more efficient and workable? If so, again the new text fails. Finally, we cannot go beyond the NAAEC, and this present text does in several important ways.

Note: A clarification was made at this point by JPAC that this process is Party-driven, not Secretariat-driven.

- Just because these revisions are on the table doesn't mean that changes have to be made.
- The text should contain a preamble and glossary of terms to make it comprehensive to the public. There should be a clear statement about what end this process is meant to serve. Whose interests are being served? The guidelines should be a tool for access and a means to communicate with government.
- Our experience so far with the process is not sufficient to support the need for reform. The text limits the discretion of the Secretariat. This will reduce the autonomy and credibility of the Secretariat and put it at risk of becoming an accused party. The text reduces the possibility of submissions by being too onerous. It gives more power to the Council and less to petitioners.

- Many of the written comments reveal a lack of understanding and reflect a lack of knowledge about what is really going on here. Be careful about taking all these comments into account.
- JPAC should not try to validate its own advice with our discussion.
- JPAC went on record, in its last Advice to Council, that it was premature to make changes. JPAC may re-examine its advice in light of these discussions, but we will have to have compelling reasons to do so.
- Go back to Council and tell them no. The only part that needs adjusting is the timeline. There has to be public disclosure of a factual record.
- The credibility of the CEC will be negatively impacted by these revisions. The process should be allowed to evolve. The revisions make it more onerous on the Secretariat and limit its independence.
- This is a very important part of the NAAEC. The process works well now. It reflects a balance between a party and a submitter. It is not too legalistic, and therefore accessible. The Secretariat must maintain an independent role. While the Secretariat has certain administrative duties as directed by Council, in this matter it is the guardian of a process and has the responsibility to make certain decisions, independent from the Council.
- Proceed with caution. Balance exists now. Status quo is preferable to the proposed revisions. The revisions affect the independence of the Secretariat and create hurdles for submitters.
- If it is not broken do not fix it. Environmental stewardship requires openness and transparency.
- The process is working. There is insufficient experience to justify the scope of these changes. We are happy with the present guidelines. One improvement that does not require changing the guidelines could be to develop materials to enhance access; for example, to create forms/checklists to assist submitters in completing the requirements for a submission.
- The most important purpose of this process is to provide equal access to the citizens of our three countries in a way that takes into account the differences in our legal systems and cultures. In this sense, there should be no discretion. There has to be objectivity so that the rules are applicable to all citizens and there must be clarity and certainty for citizens within each country. Mechanisms must be set in place to avoid additional discretionality.
- What prompted Council to require these reforms? Why is JPAC responding to them and participating in the reform? We need to look carefully at matters of impartiality, equity and transparency and decide if these are applied equally in each country. Mexico inaugurated the process with Cozumel. Look at these experiences before deciding if reform is required.
- Because of the environmental situation in Mexico, is it more at risk in this process than Canada and the United States? Should we explore this?
- This is a process that has to do with enforcement of national laws. Laws may be different, but the process applies to all.
- The burden on the submitter has been increased. If credibility is diminished, so will the process be diminished. There have been 20 submissions in 4 years. Why make it even more difficult. If revisions are not sound, why legitimize them with a review?

- We must preserve the principles stemming from the Agreement: transparency, efficiency, and clarity. Has the process to date promoted those principles? The fact that we are engaged in this review suggests that not everyone is comfortable. We should hear from those people. The burden will be increased on the submitter. It was already hard enough. Where do they get help? The credibility of the Secretariat has to be protected. Do not touch the guidelines.
- We need an objective evaluation of the experiences to date analyzed against a set of agreed upon criteria before we can just say "it works."
- The existing guidelines run the risk of concentrating the responsibility for environmental management in the hands of a limited number of actors. The Secretariat has certain public characteristics, but is this enough to ensure equity? Is there a move towards privatization which will result in serving only a limited number of interests in each of our countries?
- In general, the public does not have access because they do not even know about this process. How can we be more proactive?
- The review would be enriched by a broader NGO participation.
- Consideration should be given to provisions for preliminary determination in the case of emergency, for example the recent waterfowl die-off in Mexico.

Specific Comments by Participants

The workshop then proceeded to discuss how best to review the text of the proposed revisions. The Chair suggested a clause-by-clause review. This led to a discussion on the process.

- Many people are saying "leave it alone"--if we change the guidelines, it could just get worse. There is acknowledgment that some provisions may need to be changed, but people are very worried about opening up the whole document. Therefore, we should be more proactive and look at improving the situation, rather than limiting damage. Look at the revisions from the perspective of: where are we backsliding? Where do changes need to be made?
- We have an opportunity to improve the guidelines. Is there justification not to recommend some changes? We should establish indicators and criteria to evaluate the performance which could cast light on the revision process.
- If someone comments on a part of the text, as was just done with the Preamble, does this mean we have a consensus because only one person commented?
- Perhaps we could use a "strongly favor, strongly oppose or neutral" approach.
- We are not representative enough to inform JPAC of the full range of public opinion on this matter. We can indicate where the problems are, but we cannot pronounce on parts or the whole by way of consensus.
- It is very important that we cover the most controversial points and explain our concerns.
- If we go paragraph by paragraph we will never finish and we will all leave frustrated. We should make a list of important points which would result in identifying areas of main concern.

It was agreed then to begin a section-by-section review.

Preamble

- It goes too far and exceeds the Agreement. The Preamble should orient the submitter but now it is creating guidelines for the Parties and Secretariat. This will create fear. The public sees Council as part of this orientation and that it can exert influence on the Secretariat.

Purpose of the Guidelines

- The new text makes it more difficult for the submitter. It is not necessary.
- I agree with the proposed change. It helps guarantee the impartiality and independence of the Secretariat.
- I also agree. Otherwise the Secretariat would be the judge of its own work. It correctly warns submitters that they are on their own. Make other mechanisms available to assist submitters, such as copies of other submissions, outlines, checklists, etc.
- The revisions imply a lack of confidence by limiting the Secretariat's activities. They contradict other sections of the text regarding impartiality and equity. There are many such examples throughout the text.
- Independence and objectivity are key elements. Submitters should be "kept away" from the Secretariat to ensure independence and impartiality.
- Second sentence is misplaced. This should not be in the Purpose section. Not just a drafting issue. It was put there for a reason--as a symbol. It implies that the Secretariat would be inappropriately assisting if this restraint were not there. Many people feel that since this was put up front it reflects Council's thinking and gives us an indication as to why Council wants to change the guidelines. It should be moved to the role section.

Submissions on Enforcement Matters

Article 2.1

- Implication that if the supporting information is incomplete, then the submission is considered incomplete.
- This is a procedural point, but important: Is it a submission that was rejected, or a submission that never was?
- Look at the language of Article 14.1. A submission is whatever is received. The criteria relate to whether it merits consideration, but it is a submission.

Article 4.1

- Remove address and talk about the headquarters, wherever they may be.

Article 4.3

- Should remove prohibition on fax of electronic transmission. It is too limiting.

Article 4.5

- I do not agree with the change. It sends a negative signal regarding the Secretariat.
- I agree with the change. It makes the function of the Secretariat more transparent. It does not infringe on the independence of the Secretariat.
- Coordination with the Council is essential.
- Just distracts Council when it is not yet determined whether the submission complies with 14.1 of the NAAEC.
- Have a submission placed on the public registry rather than sent to Council, then Council will monitor the registry.
- Acknowledgment of receipt by the Secretariat should be made in writing.
- In a process aimed at enhancing credibility, there should be no surprises. Everyone should know at the same time. If put on the public registry, this could mean that the first that industry, for example, hears of a submission would be by a phone call from a journalist.
- Early notification allows the state to research a proposal and recommend a remedy before the process is launched.

Article 4.8

- Best effort. What does this mean? Why 90 calendar days? Should be based on past experience.
- The 90 days should be flexible.

At this point the discussion turned general again, reflecting uneasiness on the part of some participants.

- The comments I am making are not to imply that I feel the guidelines should be changed, and certainly if they are to be changed we should not be doing it here.
- I am in a real dilemma. The group I represent supports the existing guidelines. I am being forced to go down a road of looking at change. By participating am I validating the amendment process? I am very uncomfortable.
- I have not heard much argument to compel me to open this text. Some issues were purposefully left unclear to allow us to develop experience. This new wording is prematurely prescriptive. We have had no analysis of experience with the process thus far to inform a review process.

Note: The Chair proposed the following: "Understanding that most of the participants do not favor changing the guidelines, can we continue the review by evaluating the proposed changes in function of whether they detract from or enhance the following seven criteria which were derived from the participants. accessibility, transparency, independence of the Secretariat, balance/parity between the party and submitter, impartiality, discretionality, conformity to the NAAEC?" The participants agreed.

Initial Consideration of a Submission by the Secretariat

Article 7.1

- The new text is more legalistic. Reduced access.
- "Should provide sufficient..." This should be a "must". The Secretariat must have certain things in the submission otherwise it creates a trap for submitters.

Article 7.2

- I oppose the entire text. It increases the burden on the submitter. Moving away from a fair process.
- Delete the second sentence. Goes beyond the Agreement and, in any case, is not clearly drafted.
- Delete the second sentence. There is a link being established that goes far beyond the Agreement. The burden of proof is now on the submitter to prove environmental harm.
- All the criteria are compromised here. Unfairly raises the bar for a submitter and compromises the independence of the Secretariat.
- There does need to be a link created between the activity and environmental harm. This is a legitimate requirement. Perhaps it does not have to be demonstrated in strict technical terms, but if there is not environmental impact, then this is not the appropriate recourse. NAAEC is an environmental agreement, so this is in conformity.
- A submission has to do more than allege harm. Environmental harm has to have been caused. It is not just a theoretical question of lack of application of environmental laws.

Article 7.4

- Requirement to provide all documentary evidence goes beyond the NAAEC.

Article 7.5

- It is not only industry that can cause environmental harm. Should be expanded to cover any procedure or activity that causes harm.

Article 7.6

- Changes access, makes more difficult. It adds new language which does not conform to the NAAEC.
- All the criteria are compromised.
- "In accordance with applicable laws" implies that a submitter would have had to exhaust all other options which is not the intention of the Agreement.
- What does "demonstrate" add here other than to make it more unworkable.

- Terminology is important here (law, legislation, regulation). The language has to be consistent with the Agreement.
- Determination Whether a Response from the Party Concerned is Merited

Article 9.1

- Wording is unclear. Does it restrict consideration only to that information and prohibit consideration of other information. Too ambiguous.
- A link should be made between the alleged harm and lack of enforcement of environmental laws.
- The revised text is acceptable and should be retained. All other remedies available to the submitter should be exhausted.

Article 9.3

- This goes beyond the Agreement. It draws the Secretariat into the role of independent fact-finder.

Article 9.5

- The whole provision is unclear. Private remedies are difficult to define particularly in and between our countries. This takes the Secretariat way beyond its expertise. Should be deleted.
- This is one of the main concerns of the group I represent. The submission process is unique. It cannot duplicate private remedies. For the Secretariat to interfere in these matters would be very dangerous. Should be deleted.
- A submitter should demonstrate that all other remedies have been exhausted.
- The proposed changes are acceptable. Must take into account whether or not all other remedies have been exhausted. It is the right of each of our countries to demand this standard. The submission process is not meant to be a means to circumvent national laws and to create a super-national body which would interfere with national laws and sovereign matters.
- The word in the text is not "exhausted", it is "pursued" We are going down a slippery slope. Already, the text is being misinterpreted.
- Where is this notion of exhaustion coming from? The word is "pursue". Forcing exhaustion of all other remedies would make it impossible for most everyone to make a submission.

Article 10.1

- Goes beyond 14.2 of the NAAEC and contravenes criteria of access and transparency, especially since other factors are not enumerated. It creates a "star chamber" for submitters.
- The proposed text is much too vague.

Article 10.2

- Means of notification required.
- Ambiguous. Determinations should be made in writing, stating reasons.
- The original text was preferable with regards to consolidating submissions. Could be more efficient to do so.

Article 11.1

- Puts an additional burden on the Secretariat. Should be limited to simply a notification without having to provide an explanation.

Article 11.2

- This compromises balance and parity. It also goes beyond the Agreement. For the sake of impartiality the submitter should also be allowed to respond. Gives unfair consideration to the interests of a party.
- All of the criteria are compromised by this provision.
- The proposed text should be deleted.

Article 11.3 (b) - (i)

- Have to identify the nature of the disposition of these past proceedings, as this could influence next steps.

Article 11.4

- Proposed wording is acceptable. It improves balance.

Article 11.5

- This gives unfair advantage to a party. Submitter should also have an opportunity for rebuttal.
- A party should not have the ability to cut off the process by just stating that another process is pending. They must show that this is the case. Also, submitters must also have an opportunity to rebut.

Article 11.6

- Submitter should also have an opportunity to argue the case.

Article 11.8

- A submitter is limited to 15 pages, while a party is directed to be as concise as possible. This is not equitable.

Determining Whether a Submission on Enforcement Matters Warrants Preparation of a Factual Record.

Article 12.2

- The new wording "in accordance with those instructions" gives Council too much discretion.
- This is a public process. The proposed wording gives the Council too much power.
- Compromises the independence of the Secretariat. The Council cannot determine parameters for this the preparation of a factual record.
- First sentence should be deleted entirely. It detracts from the independence of the Secretariat, gives too much discretion to the Council and is not in conformity with the Agreement. The implication is unacceptable.
- This is another example of an attempt to tie the hands of the Secretariat. It is in direct conflict with the Agreement.
- The independence of the Secretariat should not be subject to interpretation; however, it should not be fully independent from Council. There needs to be a close association with the Council.
- These changes insert government, via the Council, regarding the preparation of a factual record. The language is very broad. The instructions could include anything.
- Any changes to the guidelines (and all of part 12 is troublesome for that reason) should not shift the delicate balance which we feel now exists between the Secretariat and the Council. In some areas there may need to be some limits on independence, and others may require discretion.
- The last sentence increases transparency by requiring Council to explain its reasons to the public
- The last sentence is acceptable. The requirement to provide reasons improves transparency.

Article 12.3

- Detracts from balance. A press release should equally be shown to the submitter. It is not fair if a party can vet a press release and not the submitter.
- In full agreement that the press release also be made available to the submitter.
- This is very important. Full autonomy of the Secretariat will reduce its credibility. It should be limited in its functions with the media.
- This is an example of Council micro-managing the process.

Article 12.4

- This is misplaced. It limits consideration to particular factors. It is better to rely on reference points found in the Agreement.

Preparation of a Factual Record

Article 13.2.

- The requirement to consult with all the experts named in a submission is too onerous.

- This is too onerous and at the same time too restrictive. Secretariat should not be limited to those expert names. Should have more latitude.

Article 13.5

- A visual timeline is required. This should be made public and be a standing decision.
- Being able only to submit at a Council session, and then only if on the agenda, is a procedural trick. The Council controls the agenda.
- The requirement that the submission be on a Council agenda is totally unacceptable. Too much power to the Council to control the process.
- Does "at a Council session" mean only once a year at the Annual Regular Session of Council?

Article 14.1 (a)

- The requirement to prepare an executive summary is an improvement.
- Should add a requirement that the reasoning of the Secretariat also be made explicit and available.

Article 14.2

- Changing to the word "shall" is yet another example of how everything is becoming compulsory. Also, the new wording gives the party full discretion whether to post on the registry or not. Detracts from transparency.
- There should be no discretion allowed regarding posting of the party's comments.
- The factual record should equally include submitter comments to assure balance and impartiality.
- Remove "as appropriate". All comments should be incorporated and made available.
- All players should have the same opportunities and the same obligations.

Article 15.2

- There should be very clear reasons for not making a factual record public. If the Council decides otherwise, that is acceptable, but reasons must be given.

Article 15.3

- Why is there a possibility for JPAC to receive a factual record once it has been denied to the public?

Withdrawal of a Submission

- A balance is required. Withdrawal should not be the result of unfair treatment.

Article 16.4

- Contradicts the Agreement. The Secretariat has to be permitted to "connect the dots". If on the one hand a submitter has to first pursue other remedies, why should the Secretariat be restricted in giving advice to a submitter on this matter?

Public Access to Information

- This section has to conform to national laws on access to information and the nature of privileged and confidential information. Clarification is also required on how information will be managed.
- The registry should be available on the Internet. The Internet has revolutionized access to information. Obviously not everyone has access to the Internet, but even fewer people have access to hard copy.

Confidential Information

- The Alternate Representatives are the real rulers of the confidentiality issue and we should be very concerned about this.
- The old 19.1 should not be deleted.

Article 19.2

- The proposed changes detract from transparency and go beyond the Agreement. They allow a party to make a blanket declaration of confidentiality. This does not comply with the Agreement.
- This matter needs very careful review and attention.

Article 19.3

- The word "encouraged" should be changed to "required."

Concluding Remarks

All of the concluding remarks were prefaced by an expression of appreciation for the opportunity this workshop created.

- The case has not been made to warrant revision at this time. Some important cultural issues have emerged in this discussion, for example the nature of confidentiality rules with governments, and also the different concept that each country attributes to the word "discretionality." Council should continue to involve JPAC as this evolves.
- It was important that we had an opportunity to hear differing views about some important matters. Diversity is to be expected since we all represent difference constituencies. Perhaps what is required is that the Agreement be reformed. There were several examples today where perhaps the revisions go beyond the Agreement but this may point to a need for it to be amended. The Parties have the power to do this.

- Any guidelines have to reflect a process that is clear, balanced and not open to interpretation.
- Aside from some very minor adjustments that could be made to improve the process, the guidelines should be left alone. As they are now proposed, the revisions make the process much more difficult for both submitter and the Secretariat.
- We are exploring a very complex area. We are trying to create and integrate a multi-national process to manage common property while at the same time representing civil society. This is a major challenge. We have to remain alert to national sovereignty while at the same time taking decisions in the name of civil society. This is very risky indeed. Nevertheless, this was a rewarding experience and we have constructively agreed to disagree.
- The proposed revisions add six new steps in the process making it more onerous and cumbersome, therefore linking accessibility and transparency.
- The openness and accessibility of the submission process is the CEC's biggest strength and gives the organization its legitimacy. Do not compromise this.
- We never got an answer to the first question that was asked today: Why are we doing this? The case for revision is not made. I only hope that this exchange will contribute to increased transparency.
- The rapporteur informed the participants that she would prepare a detailed summary of all comments made but would not undertake an analysis. That having been said, however, she noted that there was "general" agreement that the guidelines not be changed at this time, although in a few specific cases the changes were improvements.

JPAC Session of Working Group

The JPAC working group then met to agree on a draft position on the proposed advice to Council, which will be shared with JPAC members and then prepared for Council.

Prepared by Lorraine Brooke