

**REVISED GUIDELINES FOR CITIZEN SUBMISSIONS ON ENFORCEMENT
MATTERS UNDER ARTICLES 14 & 15 OF THE
NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION**

A Submission to the Joint Public Advisory Committee

By

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Edmonton, AB Canada**

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Introduction

The Environmental Law Centre (ELC) is a non-profit charitable organization which has operated in Alberta since 1982. The ELC believes in making the law work to protect the environment and in support of this objective provides services in environmental law education and assistance, environmental law reform and environmental law research. Funding is provided to the ELC in part by the Alberta Law Foundation and through the generous support of the public. The ELC also accepts private and government research contracts for work relevant to and consistent with the ELC's objectives.

The ELC has participated in numerous public consultation processes dealing with federal, provincial and international environmental law and policy. In proposing reforms, we have pursued 3 objectives: one that *good* environmental laws are enacted; two, that members of the public are provided with an adequate opportunity to participate in the development of new statutory instruments and in environmental decision-making; and three, that the rules of public participation establish a "level playing field" so that the public can participate effectively in legal processes.

We appreciate the opportunity to provide our comments on the draft Revised Guidelines. As with all of our law reform efforts, we attempt to provide constructive comments and useful suggestions to improve the draft document.

General Comments

At the outset, we should observe that most of the proposed changes in the Revised Draft are inoffensive. It is apparent that an effort is being made to clarify the wording in the text, and as tempting as it is to offer further comment in this regard, we will resist.

It is also apparent that the drafters of the Revised Text attempted to open up the submission and assessment process through requirements that additional information about the process and decision making is made public. This is a commendable sentiment that we support.

In reviewing this text we were struck by two things: one, the Guidelines are in fact more than guidelines for submitters; they are also guidelines for the parties who respond to submissions and the Secretariat who assesses submissions. Second, the Guidelines are exceedingly complex and as such, are not, in their present form, easily accessible to the general public. Our suggestion is that the CEC prepare a separate companion document, written in plain language, describing the submission process and information requirements for those who might make submissions.

Comments

The following are the ELC's comments respecting the specific text in the Revised Guidelines. References to section numbers are to the numbers in the Revised Test.

- 2.1** We notice that the Revised draft uses the word “supporting” information rather than “sufficient” information, which is the word, used in the Agreement. We believe that “sufficient” is preferable. “Supporting” may imply the need to append considerable information to the submission; this should not necessarily be the case.
- 4.3** Why does the Secretariat not accept submissions by fax? In Alberta, court documents can be filed by fax and some foresee the day when they will be filed by e-mail.
- 7** These sections are difficult to understand and may not give readers a clear understanding as to what information is to be included in a submission. We recommend that this section relate directly to article 14(1) and provide advice, if any, as to how the submission should be presented. We think that it is fair to say that the submitter should address the criteria listed in article 14(2), but it is not clear that s. 7.2 does this.
- 11.1** In this section, the Secretariat is to provide an “explanation of the factors that guided” its decision merits requesting a response. This is quite ambiguous. It would be clearer to ask the Secretariat to provide its “reasons” for its decision.
- 11.2** As the submitter must demonstrate that the matter has been communicated appropriately, should not the party in this instance be required to demonstrate in some fashion that the matter was previously the subject of a judicial or administrative process.
- 12.1** Normally we would support a provision that requires that a decision-maker provide reasons. Unfortunately, the NAAEC agreement is not clear on the

Secretariat's decision making process at this stage. Presumably, the Secretariat will find that a submission will warrant a factual record where the submission and response demonstrate that a party is failing to effectively enforce its environmental law and the matter is not the subject of a pending judicial or administrative proceeding. (Perhaps the Guidelines should make reference to articles 5 and 7 of the NAAEC which establish a common standard for environmental law enforcement.) We would support a requirement that the Secretariat give its "reasons", but we think that it is going too far to ask the Secretariat to "provide sufficient explanation of its reasoning to allow Council to make an informed decision". This is consistent with the wording in s. 12.2.

- 12.2** Given the position of the Secretariat in this process, both acting impartially in the submission process and also providing technical, administrative and operational support to the Council, it may be difficult in practice for them to avoid being unduly influenced by the Party's comments on the press release. Either the news release should not be provided in advance to the Parties or the same courtesy should be afforded to the submitters.
- 12.3** This provision refers to the matter of whether private remedies are available to the submitter and whether they have been or are being pursued. Although it is taken from the text of the Agreement, it is still ambiguous. For example, what are "private remedies"? It is our understanding that the availability of certain remedies may differ from one country to another. For example, in Canada, a private informant with knowledge of an alleged offence may swear an information. However, it is the practice of the Alberta Attorney General, for example, to take over any environmental private prosecution and either stay the proceedings or prosecute the offence. In these circumstances, how is anyone to judge whether private remedies are available to the submitter. If clarification is possible, it could be done in the Guidelines.
- 13.2** Submitters should be advised expressly to submit the names of experts to be contacted in support of their submissions.
- 16.2** It is not clear to us why the submitter should be able to withdraw a submission after the response from the Party is received by the Secretariat. Submissions to the Secretariat concerning the non-enforcement of environmental laws are not private disputes. Once the Secretariat determines that a submission merits a response, it should be the Secretariat that makes the decisions respecting whether the matter proceeds any further through the submission process. Any failure to enforce environmental laws by a Party is a public concern that should be directed by the Secretariat once a concern is brought to its attention.
- 16.3** Further explanation as to the meaning of "withdrawal of the submission shall be without prejudice to any further steps ..." is required. The implications of this term should be spelled out in the Guidelines.

16.4 How is this provision to be reconciled with article 11.7 of the NAAEC which obligates the Secretariat to provide the public with information on where they may receive technical advice and expertise with respect to environmental matters. We think that this new provision should be omitted. It would be better to rely on the good judgement of the Secretariat's professional staff to determine the appropriateness of certain advice rather than to try to specify limits in the Guidelines.