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Canadian Environmental Law Association
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July 26, 1995

Mr. Jacques Gerin
Chairman, JPAC
Commission for Environmental Co-operation
393 St. Jacques Ouest, Bureau 200
Montreal, H2Y 1N9

Dear Mr. Gerin:

**RE: Joint Public Advisory Committee Public Consultation on Draft Procedures
for Submissions on Enforcement Matters.**

The Canadian Environmental Law Association is a non-profit legal clinic, funded by the Ontario Legal Aid Plan, which provides legal representation to individuals and environmental groups. We also provide legal education, and promote law reform. We have been analyzing and writing about the relationship of trade agreements to the environment since 1988.

Thank you for the opportunity to comment on the Commission's Draft Procedures. Our comments are organized in accordance with the paragraph numbers of the Procedures.

3.3 We see no reason for arbitrarily limiting the length of submissions, since these matters will typically be complex, with a considerable factual history involved.

3.5 It would be helpful to have an explanation of the Secretariat's view of "the proper time" in this paragraph.

5.4(b) We recognize that the Agreement requires a focus on "promoting enforcement rather than at harassing industry." [Art. 14, (d)] However, since the complaints of "acts or omissions of a Party" will usually arise in relation to lack of compliance by "industry or particular company or business", the Secretariat can expect that these issues will be intermingled in submissions. The Procedures should not seek to exclude information about industrial actions which will be essential to an assessment of whether the Party has failed to effectively enforce environmental laws.

6.1 The Secretariat should also indicate to the Submitter the type of additional information the Submitter should submit in order to meet the criteria of Article 14(1) of the Agreement. Like Submitters, the Secretariat should decide within a specified time frame, possibly sixty days.

6.2 Given the complexity of these matters and the distances involved across three countries, together with the small resources generally available to NGOs, a 30 day timeline is too short

for response at this stage. Sixty days would provide a more fair opportunity to Submitters to acquire and transmit the additional information which may assist their submissions.

6.3 While we recognize the interest in dealing with these matters expeditiously, this proposal is drastic, as it results in complete termination of what may be a meritorious complaint. We suggest that the Procedures provide discretion for the Secretariat to provide further clarification to a Submitter in appropriate cases.

Article 7: A timeline for decision by the Secretariat should be established, possibly sixty days.

7.2 (a) Both the Agreement and the draft Procedures are unclear as to whether harm to the Submitter will be treated as a ground for complaint, or result in rejection of a submission. It would be helpful to have some clarification of the Secretariat's view of this criterion in the Procedures. More broadly, the question may be asked whether the Agreement and Procedures contemplate submissions only in the public interest, or private interest, or both.

7.2(c) The Procedures should clarify that it is not essential that every possible private remedy, available under the Party's law, be pursued before a Submitter may turn to the Commission (or Secretariat) for relief. Given the small resources of many environmental groups, some legal remedies available under domestic law may simply be unavailable for economic reasons. (Example in Canada: a mandamus action against the Crown)

8.1 Again, the Secretariat should indicate what additional information might assist it in reconsidering whether a response from the Party is merited, and the guidelines should provide at least sixty days for a response from the Submitter.

9.6 We note that the Submitter will not have the opportunity to examine and comment on the response provided by the Party. This lack of a right of reply, while perhaps consistent with the strong confidentiality provisions of the Agreement, causes these procedures to lack a fundamental element of Canadian legal processes, ie. the right of a plaintiff to reply to arguments made in reply to its claim.

The Agreement does not specifically preclude a Submitter's having access to a Party's response. Since secrecy in this context will undermine the credibility of the process with the public, we urge the JPAC to provide for release of the Party's response or a detailed summary of its substance, to the Submitter. This should be followed by the opportunity for the Submitter to comment on the Party's position.

Article 15 of the Procedures is unclear regarding whether the registry will report the Party's response (or any other information) while the submission is being processed, or only after a final determination has been made. We urge that the reporting be **during** the process, but that in any event, the Party's response be communicated to the Submitter for comment.

10.2 We have examples, in the Environmental Assessment process of Ontario, of consolidation of participants' submissions by the Environmental Assessment Board in circumstances that the participants found to be inappropriate. These examples arose when the Board failed to be aware of or to appreciate differences within submissions in which significant elements were similar.

We urge that the Procedures provide that the Secretariat shall consult with the Submitters to ensure that it is fully conversant with possible differences between the submissions and to establish whether, in the view of the Submitters, consolidation is appropriate. The rights of citizens and NGOs under the Agreement will be prejudiced if each submission does not receive appropriate consideration on its own merits.

11. Since the Agreement is silent as to whether the **draft** factual record will be made public, we urge that upon completion of the draft, the Secretariat provide it to the Submitter. The Submitter should have the right, within a specified time frame, to comment on the draft, and respond to positions or evidence within it with which the Submitter disagrees.

12. Consistent with our comments above, the facts in the final factual record should incorporate comments from the Submitter. (Art. 12.2)

15 and 16: As discussed above regarding paragraph 9.6, the Procedures should clarify whether the registry and files will be accessible to the public during the processing of the submission. We urge that this be the case.

Participant Funding

We suggest that the CEC make available a form of participant or intervenor funding to non-profit, non-governmental organizations to assist them in having access to the Commission's processes, registry, and files. In our twenty-five years of representing environmental groups, we have become aware of the importance of this type of assistance for citizen groups building a case in environmental matters. Given the legal and technical information that are typically required, few groups will have the resources to present the breadth of data necessary.

We further suggest that the terms of reference for a program of Participant Funding be the subject of consultation with groups in the three countries.

Thank you for the opportunity to comment on the proposed Procedures.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Michelle Swenarchuk
Executive Director