

Introduction

My name is Katia Opalka. I reside in Montreal, Quebec, Canada. I am an environmental lawyer and a member of the Bar of Quebec. I have worked in private practice as counsel for industry at McCarthy Tétrault LLP and Blake, Cassels & Graydon LLP, two of Canada's top law firms. From September 2001 to early 2008, I investigated environmental law enforcement as a legal officer in the Submissions on Enforcement Matters (SEM) Unit of the Commission for Environmental Cooperation (CEC). I am currently an Adjunct Professor at the McGill School of Environment, a member of the executive of the national and Quebec divisions of the Canadian Bar Association, and an international associate member of the American Bar Association. I am responding to the call for comments regarding SEM process modernization. I would be pleased to present and discuss these observations in person.

- *A solution in search of a problem?*

I have reviewed proposed changes to the SEM Guidelines. Some of them, such as the clarification that submissions may be submitted by e-mail, are welcome and long overdue. Others, including those relating to translations, add little or no value and risk paralyzing the process and monopolizing the Secretariat's already stretched human and financial resources. A better use of resources would be to focus on improving the SEM page of the website, where access to information has always been difficult and which has gotten even more opaque in the past five years. Example: why is there no clickable table of contents for factual records? Example: why are there no easy-to-use filters for listing submissions, such as by date, by country, by subject, etc.?

Guidelines should be kept short and simple. Care should be taken not to usurp the Secretariat's decision-making authority.

On a substantive level, I have not succeeded in finding a clear rationale for "SEM process modernization" in general and guidelines review in particular. Rather, the Joint Public Advisory Committee (JPAC) advice to Council on this issue seems to lament the failure of the process to achieve results for the environment when that is not and has never been its purpose.

SEM serves to shine light on environmental law enforcement. Its efficiency should be measured first by the quality of information it brings to light and second, by the speed with which it does so. Those are "results" in and of themselves. Should that not be enough, then improvements in environmental law enforcement could be a secondary indicator of success, proving that "the squeaky wheel gets the grease." Example: in 1999, Fisheries and Oceans Canada added a \$26M line item to its budget in order to enforce the *Fisheries Act* habitat protection provisions in inland waters. In doing so, in an annual report to Parliament, Fisheries and Oceans Canada specifically referenced "submissions

to the Commission for Environmental Cooperation” as a reason for ramping up habitat protection. Such an explicit acknowledgment of cause and effect is understandably rare. However, the absence of a documented acknowledgment does not mean that cause-and-effect is not at play.

As drafted, Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) exist as a vehicle for applying political pressure against governments. In other words, in the NAAEC, the public has been given a “shaming” tool instead of a legal remedy. One cannot fault SEM for failing to deliver concrete results when the NAAEC itself does not empower the Secretariat to issue binding decisions. On the other hand, there have been some results and this proves that political pressure exerted by submitters in the form of submissions can work.

The JPAC polled submitters and the answers were disappointing. Submitters feel that the process is not causing governments to improve enforcement policy and practice. Yet much of what SEM achieves is invisible to submitters because it happens behind government doors, which are closed (even to JPAC). That does not mean that submissions to the CEC do not rattle the cage. Quite the contrary: I know for a fact that governments and industry live in fear of such submissions, even if they do not have the force of a lawsuit. That is because submissions sometimes receive the same amount of media coverage as a prosecution. In addition, they alert the other NAAEC Parties to problems with a country’s enforcement practices, and factual records document those problems in great detail.

- *There’s nothing wrong with the words that can’t be fixed by a better attitude*

Having reviewed dozens of submissions and drafted one myself, I know that it takes a senior lawyer and weeks (or months) of work to put together a submission that meets the requirements of Article 14(1) and merits requesting a Party response under Article 14(2). I do not see this as an obstacle to accessing the process because advocates for environmental issues in North America are aware that there are environmental legal organizations such as CEMDA, NRDC and Ecojustice that can help with drafting submissions. And let’s face it: with the unique standing afforded groups and individuals by NAAEC Articles 14 & 15 comes a responsibility to produce a submission that is serious, well written and properly documented. And when a submission does not meet Article 14(1) admissibility criteria, out of fairness to all affected, it must be dismissed forthwith.

A big drag on the timeliness and integrity of submission review is Council interference in Secretariat functions under Article 14. For example, in *Ontario Logging*, the Secretariat asked the Council to vote on a factual record recommendation. Instead of voting, which it is mandated to do under Article 15, the Council reached back into the Article 14 process, overruled the Secretariat’s

determination under 14(1)(c) (sufficiency of information), stepped into the Secretariat's shoes and asked the submitters for more information. This created an additional ninety-day delay. It cost the submitters thousands of dollars to compile the requested information. It showed disregard for the division of responsibilities under Articles 14 and 15 and it tarnished the process.

Changing the Guidelines cannot make the process less legalistic, but it does risk making it more cumbersome. In the end, what matters is the spirit in which the CEC as a whole approaches the process. The Secretariat can be more or less flexible in its analysis of whether a submission meets particular requirements. It is open to the Parties, meeting in Council, to respect the international status of the Secretariat by adopting a resolution undertaking not to interfere with the Secretariat's role in the SEM process, including as regards analysis of submissions and scoping of factual records. At this time, such an initiative would have to come from the U.S. In fact, such an initiative would be in line with the Executive Order instructing federal agencies to honour the spirit of access to information legislation by erring in favour of disclosure.

I believe Secretariat determinations still begin with the words "Article 14(1) is not meant to be an insurmountable procedural obstacle", yet the last determination I read was 35 pages long. Ten years ago, seven to ten pages would have been considered appropriate. I believe that this development is the result of Secretariat concern that it somehow needs to justify to Council why a submission meets the requirements of Article 14 (1) (particularly 14(1)(c) – sufficiency of information) and merits requesting a response under Article 14(2). Providing reasons is not the same as providing a justification. It can be done using far fewer words.

On the subject of disclosure, I know from experience that submitters rely on robust access to information programmes in order to gather information needed to produce submissions. When Parties deny access requests made by submitters and then claim that submitters have failed to support their allegations, this works against the spirit of the NAAEC. The same can be said when a Party claims that Secretariat requests for information pursuant to the NAAEC are subject to the exemptions and exclusions of the Party's access to information statute, such as those for information related to law enforcement and information subject to solicitor-client privilege. Such a narrow interpretation of the NAAEC effectively shuts down the SEM process, since the process is about enforcement and enforcement usually involves lawyers. Furthermore, the Party – Canada, for example - that refuses to disclose information about specific cases is normally also the one claiming that allegations in submissions may not be general in nature and must be focused on specific cases. **Good faith is needed if SEM is going to work.**

- *Practical Considerations*

Finally, I agree that timelines for processing submissions should be spelled out. Everything but factual record production can be done within the timeframes found

in the draft revisions to the SEM Guidelines and these revisions are welcome. This is especially so regarding the thirty day timeframe for dismissing a submission at the 14(1)-(2) stage.

Factual records normally take six to eight months to research (including waiting for information requested from a Party; beware Christmas and summer holidays!), and three to write. Translation adds about two more months, followed by up to a month for review of translations. I know this because I researched and wrote, and corrected the translations for, the factual records for *BC Mining*, *Oldman River*, *Tarahumara*, *Ontario Logging* and *Montreal Technoparc*.

A reasonable approach for assessing SEM Unit work would be to expect a factual record to go to translation within a year of the Council vote ordering the factual record. This takes into account the fact that very few submissions reach this stage, meaning that producing a factual record, if and when one is ordered, should involve a significant fact-gathering effort aimed at producing a very high quality, thoroughly researched and complete document. Note that for *BC Mining*, Canada commended the Secretariat on the quality of its recounting of the facts. The fact-gathering effort I refer to is directed at gathering information relevant to considering whether a Party is failing to effectively enforce its environmental law and if so, why. Parties know all too well that the answer can be extremely complicated – in general and in specific cases. Letting people know about the manifold factors involved in administering environmental laws serves an important public education function. An informed public is more likely to support sound public policy on the environment.

A factual record, then, should let the reader see what actions have been taken by way of enforcement and if there have been none, why there haven't been any. The little extra part (and if there have been none, why) covers the possibility that a Party has reasons, as spelled out in Article 45, for not enforcing or not effectively enforcing the law. Again, an informed public is more likely to support policies that may not seem "green" at first blush.

Finally, I would like to draw attention to factors that have a direct effect on the efficiency of the SEM process. I am fluently trilingual in English, French and Spanish. When I joined the SEM Unit, my colleagues were bilingual and had a good grasp of the third language. This meant that we could all read submissions in the original language (and discuss them as a team), review and comment on each other's work, review translations, and speak to submitters, the public, government officials and the media in the three languages. In the SEM Unit, missing one (and worse, two) of the languages is a big obstacle to getting work done.

Another factor that affects the expediency of the SEM process is the Unit's ability to do the work itself. In other words, time and money are saved if the director and legal officers have the required knowledge of domestic environmental law and enforcement policy and practice to write determinations, issue notifications,

and produce factual records with minimal reliance on outside consultants. In fact, outside consultants should be used strategically and only for very specific purposes.

For example, in *Montreal Technoparc*, I hired Environment Canada's former director of enforcement – who happened to have personal knowledge of the history of the Montreal Technoparc site – to help me understand the issues related to that site. His input was incredibly valuable and helped make the record much more informative. In *Tarahumara*, which involved indigenous groups from the mountains of Chihuahua State, I had the benefit of being advised by someone who grew up in Chihuahua City, held a PhD in natural resources management from Cornell, had written her master's thesis regarding integrated resource management in the Chihuahua mountains, and knew many key people in environmental government agencies in Chihuahua and the capital. It goes without saying that this kind of assistance is priceless.

The Secretariat should not fritter away its budget on hiring consultants for routing submissions analysis. Determinations, notifications and factual records should be drafted in-house. Consultants should add a lot of value at the tail end of the process and their credentials must be stellar.

Conclusion

In closing, I would like to underscore that the SEM process was never meant to solve North American environmental and public health problems. It is a spotlight remedy intended to help the public draw attention to a Party's apparent failure to adhere to its commitment, made in the NAAEC, to effectively enforce its environmental laws. I know that it works. Now lets hope it does not get "modernized" out of existence, leaving the public with the same old access to information problems and environmental law enforcement, in Canada at least, more understaffed and underfinanced than ever.