



## HUMANE SOCIETY INTERNATIONAL

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*Submitted via electronic mail*

jpac@cec.org

Mr. Martín Gutiérrez Lacayo  
Chairman, Joint Public Advisory Committee  
Commission for Environmental Cooperation  
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Dear Mr. Lacayo:

Humane Society International (HSI) appreciates the opportunity to submit comments in response to your request for feedback regarding the draft changes to the CEC's Guidelines for Submissions on Enforcement Matters (SEM) under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC).

HSI operates as the international arm of the Humane Society of the United States (HSUS). Founded in 1954, The HSUS is the largest animal protection organization in the United States, and in conjunction with HSI, maintains a constituency of over 11 million. As the international arm of The HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy.

As a non-governmental organization, HSI believes the successful operation of the citizen submission process set forth in Articles 14 and 15 of the NAAEC is critical to ensuring effective enforcement of environmental laws in the U.S., Canada and Mexico. HSI is encouraged that the citizen submission process is being modernized to take into account lessons learned and improve efficiency. Our organization has specific comments regarding the proposed changes to the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC; however, we would like to make a few initial comments regarding our experience to date using the citizen submission process.

### **HSI's Experience with the Citizen Submission Process**

In the summer of 2007, HSI along with two Mexican NGOs, CEMDA and COMARINO, filed a submission with the CEC alleging that Canada was failing to enforce its environmental laws concerning the commercial seal hunt. *See SEM-07-003 (Seal Hunting)*. Although the submission

was not ultimately accepted, HSI learned about how the process works, and where there are areas for improvement.

Based on our experience, one area of concern is the transparency of CEC determinations. There are very limited guidelines for the CEC Secretariat to follow in making their determinations. Some determinations are extensively detailed, while others are brief and the reasoning of the determination is hard to discern. HSI is of the view that one way this could be remedied is to revise the working procedures to provide the CEC with a framework that will allow for consistency among determinations. We provide specific recommendations below.

HSI also believes the working procedures should require the CEC to respond to “material” arguments made by interested parties (arguments that are likely to influence the ultimate determination made). Without such transparency, determinations will be unpredictable, discouraging submitters and undermining the efficacy of the overall process. At a minimum, in the absence of a traditional appeals process, there should be a process in which submitters can request further explanation from the CEC if their submission is rejected without detailed explanation. This is also explained further below.

### **Specific Recommendations on the Proposed Changes to the CEC Guidelines**

HSI feels that many of the proposed changes will make a positive contribution to the citizen submission process by clarifying the requirements both for submitters and for the Secretariat, including clarifying the scope of review. Several changes that we believe clarify the requirements and the scope of the submission process are as follows:

- (1) In section 5.6, you proposed changing the language regarding factors for consideration from “Thus, the Submission should address” to “Under Article 14(2), the Secretariat is to be guided by.” We agree with this modification, as it provides a more flexible standard on which Submissions may be reviewed, as opposed to an exclusive, mandatory list of what must be included in each Submission.
- (2) In section 5.6(c), you proposed adding “by the Submitter.” This modification is helpful in clarifying that it is only domestic action undertaken by the Submitter, as opposed to other parties, that will be applicable to a Submission’s review process.
- (3) In sections 9.6 and 10.1, you proposed adding language requiring the Secretariat to provide a Party’s response and the Secretariat’s recommendation and reasoning regarding a factual record in all three official languages of the Agreement. This modification will greatly enhance transparency and public accessibility to these documents and the entire citizen submission process.

Several guidelines in Articles 14 and 15 outline the requirements set forth for the Secretariat in how it must proceed with its decision-making authority, including requirements for certain communications to each Party throughout the submission process. Three sections that we believe could benefit from the inclusion of language requiring that the Secretariat provide a sufficiently detailed explanation for its decisions are as follows:

- (1) Section 6.1 requires the Secretariat to promptly notify a Submitter of the reason(s) why it has determined not to consider a submission if the Secretariat finds that a submission does not meet the criteria set out in Article 14(1) or any other requirement set out in those guidelines. Such notification should provide a thoroughly detailed explanation for why the Secretariat has chosen not to consider a submission. The Secretariat should specifically identify the reasons why the submission does not conform to the requirements set out in the Agreement.
- (2) Section 7.2 states that the Secretariat's determination concerning whether or not a submission warrants the preparation of a factual record "will include, as appropriate, an explanation of how the submission meets or fails to meet each of those criteria." This explanation should be sufficiently detailed for the benefit of the Council, the Submitter, and the public. Section 7.2 requires such an explanation from the Secretariat concerning whether or not the submission merits requesting a response from the Party concerned. That clause specifies that the notification should include an explanation of the factors that guided the Secretariat, "including each consideration set forth in Article 14)(2)."
- (3) Section 9.8 similarly requires that in the event the Secretariat determines that the submission does not warrant development of a factual record, the Secretariat is to promptly notify a Submitter of the factors that guided that decision. We support the inclusion of the proposed language requiring such an explanation, but would add that the explanation should be sufficiently detailed, and specifically should address the material arguments of each Party.

Further comments on specific proposed language are addressed as follows:

- (1) Under Section 7.5, which sets forth guidelines for the manner in which the Secretariat is to consider whether the Submitter has pursued private remedies available under the Party's law, you have proposed modifying the language in subsection (c) to remove "...bearing in mind that barriers to the pursuit of such remedies may exist in some cases." Subsection (c) provides that the Secretariat should consider whether "reasonable actions have been taken by the Submitter to pursue such remedies prior to making a submission." We think that the deleted language should be left in the text of that section in order to avoid an unnecessarily rigid constraint on the submission process.
- (2) Under Section 9.4, you have proposed adding language that identifies the ways in which a Party may explain in its response to a submission why it is not failing to effectively enforce its environmental law pursuant to Article 45(1)(a) or (b). That section states that in such a situation, "the Party response should provide information sufficient to explain how the Party's action or inaction: (a) reflects a reasonable exercise of discretion in respect of investigatory, prosecutorial, regulatory, or compliance matter; or (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities." The inclusion of this language has the potential to introduce a level of unpredictability to the submission process. This language does not provide with specificity how the

Secretariat is to evaluate the Party's response. It is unclear how the Secretariat is to measure "a reasonable exercise of discretion" or "a bona fide decision." While a Party may be the authority regarding the interpretation of its domestic law, there must be some specific evaluative factors and guideposts whereby the Secretariat may evaluate a Party's claim that a submission is not warranted based on one of these two factors.

HSI is hopeful that the suggestions outlined above will greatly add to the success of the submissions process, and we welcome any questions.

Respectfully submitted,

/s/

Sarah Stewart  
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Humane Society of the United States