

September 7, 2000

To: Manon Pepin

JPAC Liaison Office  
North American Commission for Environmental Cooperation  
393, rue St-Jacques Ouest, Bureau 200  
Montreal, Quebec  
CANADA H2Y 1N9

### **Comments on Our Experiences With A Citizen Submission to CEC**

On May 27, 1998, the Department of the Planet Earth and eight other groups and experts submitted a "citizen submission on enforcement", asserting that the US Environmental Protection Agency has failed to enforce its laws and treaty obligations with regard to solid waste and medical incinerators - whose air pollution crosses the border of Canada and also contaminates the Great Lakes. (SEM-98-003)

We want to make several comments about our experience so far:

#### **1) Able to Draft A Citizen Submission Without a Lawyer:**

We used the guidelines laid out in Johnson and Beaulieu's book, *The Environment and NAFTA* published by Island Press in 1996. The general format allows a citizen group without legal help to make a presentation on a lack of enforcement matter. And we had no difficulty in drafting a petition without the assistance of a lawyer or law firm. This should be considered a successful part of the process at CEC, and should not be changed.

We also found the staff at the CEC to be very helpful and friendly, and that has continued to be true over several years.

#### **2) Limitations of the CEC Program Known in Advance:**

In drafting our citizen submission, relating to incinerator pollution, we were well aware that the Citizen Submission on Enforcement process of NAFTA, adopted by Executive Order in the United States rather than in the text of the treaty, requires no action from any government - but only written analysis.

- The citizen submission process cannot force any government to carry out any substantive change to its policies and programs.
- It can only be effective by persuading governments that the facts are correct, and secondly, by bringing public attention and the attention of the other two governments to the issue.

### **3) Narrow Definitions of Enforcement and Environmental Law Limits Usefulness of the CEC Program:**

In the context of the fact that the CEC citizen submission on enforcement process can never compel a government to act, but can only persuade with a factual approach, we have been concerned by the extremely narrow view and definitions of enforcement and environmental law that have been taken by CEC. This seems to stem from a basic policy determination by the Council and Secretariat.

Such narrow definitions tends to winnow down citizen submissions to the point where the primary issues are obscured - even to the point where many wonder whether it is useful to spend taxpayer money supporting CEC.

We would like to suggest that in setting such tight substantive definitions of what is eligible to be considered in a citizen submission, CEC is running the risk of being viewed as useless. In the long run, that perception by citizens may not a good development for the three governments if they wish to succeed in the promotion of trade and the development of further trade treaties.

### **4) The Wining Down Process in Our Own Case**

To examine this idea further, let us go through the actual winnowing down steps that were taken by CEC in the case of our own citizen submission to determine whether our submission was eligible to be considered by the Secretariat:

#### **A. Extremely Narrow Definition of Environmental Law That Excludes Treaty Obligations**

In its first review of our citizen submission on incinerator pollution, CEC took a very narrow view of the definition of "environmental law". Specifically, treaty obligations like those of the Great Lakes Water Quality Agreement were excluded as being law of the land, even though under American law, treaties are ratified by the US Senate and take precedence and are indeed controlling when domestic statutes conflict. As the determination concluded:

"We do not reach the issue of whether the international agreements here qualify as 'environmental law' for purposes of Article 14 because of our interpretation of the term 'enforcement'. Furthermore, the Secretariat, by its determination, is not in any way questioning the importance of the environmental and public health issues the submission raises. Instead, again, the determination only reflects the Secretariat's judgement that Article 14 is not the appropriate forum in which to raise these issues, at least not in the context in which the submission raises them."

Fortunately in our case, some of these treaty obligations were referenced and written into the US Clean Air Act in a way that was later viewed as a statutory requirement. We will return to that later.

#### **B. Extremely Narrow View of Enforcement**

CEC excludes from consideration any citizen submission that focuses on government "standard setting", and did so in our case, even though the thrust of our citizen submission involved the "pollution prevention" provisions of the Clean Air Act, the Pollution Prevention Act, and the Great Lakes Water Quality Agreements.

Pollution prevention does not generally involve standard setting, but rather lays out a process for prevention of the generation of pollution in the first place, by redesign of operations, products, and materials at the front end, rather than controlling pollution emissions at the end of the pipe.

This is a very different concept than "standard setting". Nevertheless, CEC rejected our initial citizen submission on the grounds that the submission involved "standard setting" (which we argued in the amended submission was an incorrect interpretation).

Under this extremely narrow interpretation of what is law and what is "standard setting", it would have been impossible to ever to use the citizen submission process of CEC to complain about any toxic pollution issue in the future. All enforcement of pollutant statutes could be seen as "standard setting" and therefore, beyond consideration by CEC - closing out pollution issues forever for future citizen submissions.

It is hard to see why it is in the interest of either the CEC or the three governments to close out citizen submissions on pollution issues. That gives the impression that the CEC is a useless governmental body - unworthy of taxpayer support. It also undermines public support for future trade negotiations.

We would suggest that CEC needs to take a look at this issue, and at the pollution prevention issue particularly, and develop some controlling policy.

### **Amendment of Our Citizen Submission - Only Two Issues Accepted by CEC**

CEC rejected our initial citizen submission on December 14, 1998. On January 5, 1999, we amended the petition to again stress the failure of the United States to enforce provisions of the Clean Air Act and the Pollution Prevention Act, of 1990, and the Great Lakes Water Quality Agreements and the related documents of the International Joint Commission, which lay out requirements for "pollution prevention", and specifically how to handle incinerator pollution by preventing it through materials policy.

The Great Lakes Quality Agreements clearly address pollution prevention. The IJC has called for "zero discharge" and "virtual elimination" which can only be achieved through approaches such as product redesign. In addition, IJC has called for the phase out of many of the incinerators in the Great Lakes region.

In the words of the Pollution Prevention Act, which are echoed in parallel wording of the US Clean Air Act relating to management of solid waste:

"The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be

prevented should be recycled in an environmentally safe manner, whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner."

To summarize, if the US Environmental Protection Agency was actually enforcing its laws, many fewer incinerators would be operating on the border of Canada or in the air shed of the Great Lakes. The closing of a number of medical incinerators in favor of alternative non-polluting approaches in recent years, such as steam sterilization, underscore the type of law enforcement concept that is really required by the US domestic statutes. Canadian citizens would be very happy if this would take place, since they are the recipients of much of this incinerator air pollution.

We also presented a study of actual incinerator inspections by the US Environmental Protection Agency - finding that most US incinerators have either been inspected only once during the initial test burn, or never at all.

This second amended citizen submission was accepted by CEC in a determination dated September 8, 1999, but again with a further winnowing down of eligible issues. Only two issues were accepted by CEC as meeting the eligibility test in a citizen submission:

1. The Clean Air Act provides that whenever the Administrator of EPA receives reports from any duly constituted international agency like CEC or IJC that air pollution or pollutants emitted in the United States can "be reasonably anticipated to endanger public health or welfare in a foreign country", the EPA Administrator must notify the Governor of the State in which the emissions originate.

This notification is considered a "finding" and requires action by the Governor to abate the hazardous pollution. The CEC found this provision of the Clean Air Act to have a "clear, quite specific legal obligation".

2. CEC also found that the assertion about lack of incinerator inspection, based on a published report by Webster and Connett, was an acceptable matter for consideration. Those authors found that most solid waste incinerators in the United States have been inspected only once, during their initial test burn, usually under the best conditions. And some incinerators have never been inspected.

And so, all the issues presented in the first and second citizen submission have come down to just two. Pollution prevention was dismissed as a CEC matter in the following words:

"The Submitters' assertion appears to be that EPA is not effectively enforcing these laws because the agency has 'failed to propose source reduction and pollution prevention as a mandatory component with regard to incinerator. With respect, the Secretariat does not believe that this is a matter of 'enforcement' for the purposes of Article 14."

As already noted, we suggest that CEC and the three governments should revisit the matter of pollution prevention, and issue some controlling policy on the issue. Pollution prevention should be an eligible issue for citizen submissions.

### **Extremely Legalistic Response to CEC's Determination By The US Environmental Protection Agency Should Be Discouraged**

It must be stressed again that the CEC citizen submission process is a dead end - and allows no opportunity to force governments to change their programs. It relies solely on the power of persuasion with the facts, and any publicity that might flow from that.

In this light, the extreme legalism of the US Environmental Protection Agency response on December 3, 1999 must be seen a matter of concern, because it threatens the entire citizen submission process. Indeed, this EPA submission was so difficult and legalistic that CEC had to employ an expert on pollution law to handle it.

Should the EPA approach prevail, a non-profit organization like ourselves would have to hire a law firm to make a citizen submission. Indeed, EPA proposed at one point in their long response that we should have sued them first before making a citizen complaint. While they may eventually get their wish, we seriously disagree with their concept with regard to citizen submissions. Negotiation, arbitration, and other approaches that avoid lawsuits are proven alternatives with good track records.

We hope that CEC and the three governments will insist that the citizen submission process remain a non-legalistic one, and discourage future responses by the legal departments of the agencies of the three nation governments like that of the Environmental Protection Agency in our case.

There is a substantial need for the three governments to agree to a degree of civility with regard to the citizen submission process of CEC, and to hammer out a better approach to reception and resolution of citizen complaints. And we make several suggestions:

1. Since neither the determinations of CEC nor factual reports can ever be binding on governments, we would suggest a need to open up the process to allow consideration of both treaty obligations and a greater range of law.
2. Citizen complaints based on facts almost always involve legitimate issues. The present policies on what constitutes an "enforcement" matter and what does not has been interpreted so narrowly, that it is almost impossible to submit a citizen petition that would be accepted when it comes to pollution issues.
3. Pollution prevention issues, particularly when laid out by statute and by treaty, are legitimate enforcement matters. CEC and the three governments need to open up the citizen submission process to pollution prevention.

4. And so, we would suggest that the three governments need to hammer out a procedural agreement on non-legalistic negotiation approaches, that go beyond the writing of a factual report - and are aimed at resolution of genuine citizen complaints rather than stonewalling them.
5. This is fitting, because the three governments have allowed very aggressive interpretations of NAFTA - including the use of taxpayer money to reimburse companies for not polluting and even compensation for the exercise of free speech in criticism of the safety of a product in a democracy. This we saw recently in the case of the Ethyl Corporation and its MMT gasoline additive. In short, NAFTA is having some dramatically adverse effects on democracy and the environment.
6. It is in the self interests of the three governments to open up the process. Failure to do so carries a lot of risk of adverse public opinion that could hinder expansion of the present NAFTA treaty, and hinder the success of negotiations of future trade treaties. It is also in the interest of CEC. Loss of public support means loss of taxpayer support.

We hope that the above analysis of our experience to date with the CEC citizen submission on enforcement process will be helpful.

Prepared by Erik Jansson  
Executive Director  
Department of the Planet Earth  
Box 15309, S.E. Station  
Washington, D.C. 20003  
Phone: (202) 543-5450  
Fax: (202) 543-4791  
[planetearth@erols.com](mailto:planetearth@erols.com)