

*Comments on the Mechanism for Citizen Submissions on  
Enforcement Matters*

**A Report**  
*by the*  
**Quebec Environmental Law Centre**



Presented to the North American Commission for Environmental Cooperation

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## *The Quebec Environmental Law Centre*

The Quebec Environmental Law Centre (QELC) is a non-profit corporation with the mission of promoting environmental law as a means of protecting the public's health and natural heritage. Founded in 1989, the QELC has developed an expertise in environmental law in the following areas:

- legal analysis of laws and regulations,
- training in environmental standards and public rights, and
- legal research into public environmental protection measures.

More specifically, the QELC aims to:

- foster consensus-building among the various environmental stakeholders in such a way as to develop environmental law while respecting conservation and environmental improvement objectives;
- promote public participation in environmental decision making, especially in the development and application of environmental standards and policies, and in the environmental impact assessments of development projects; and
- recommend appropriate means to facilitate public access to legal recourse in this matter.

These objectives are pursued along six broad lines:

First, the QELC participates in governmental consultations on legislative and regulatory reform. This has resulted in over 20 reports and legal analyses for parliamentary commissions, the Senate and the ministries concerned.

Secondly, the QELC holds conferences on environmental law for environmental professionals and the general public. These can take the form of courses on questions of concern to general public, seminars on specific legal questions, or luncheons for discussing the legal aspects of important current issues.

Thirdly, the QELC acts before the courts to foster the development of progressive jurisprudence in environmental law. In this respect, the QELC's second opinion on environmental law is recognized by the Court of Quebec. The Centre has also filed a submission (SEM 97-003) under the North American Agreement for Environmental Cooperation (NAAEC). It is in light of this experience and to point out the weaknesses of the submission mechanism that the QELC has written this report.

Fourthly, the QELC develops the legal tools necessary to promote the conservation of natural habitats by individuals.

Fifthly, the QELC participates in coalitions that bring together various elements of civil society to promote and protect the environment. For example, the QELC is a member of the Quebec continental integration network (*Réseau québécois sur l'intégration continentale*—RQIC)

Finally, since 1995, the QELC has participated in international partnership projects in the area of environmental law. In this respect, the Centre has, for a number of years, worked closely with the Chilean environmental organization based in Santiago, *l'Observatorio latinoamericano de conflictos ambientales* (OLCA), to create a permanent support system for legal services in environmental matters for that country's citizens, groups and communities. The QELC provides training in environmental law to promote public participation in environmental decision-making and consultative processes, and to allow citizens to assume and claim their rights to a better quality of life. The Centre also participates in amending environmental laws and regulations. Through this type of cooperation, the QELC has created a network of contacts in South America and has been in a position to closely examine how the Canada-Chile Agreement on Environmental Cooperation is applied.

## ***Introduction***

The Quebec Center for Environmental Law would like to thank the North American Commission for Environmental Cooperation (NACEC) for its public review initiative with respect to creating a history of the submission process under Articles 14 and 15 of NAAEC, as it has been applied since its implementation. Such an initiative demonstrates NACEC's concern for this process, and the QELC is pleased to participate.

In accordance with the Draft JPAC Public Review of Issues Concerning the Implementation and Further Elaboration of Articles 14 and 15, the QELC will furnish commentary on the mechanism for submissions by citizens and non-governmental organizations. The QELC's approach will be based on both its experience during the processing of submission SEM 97-003 and an overall analysis of how NACEC has processed submissions since 1995.

At the outset, the QELC would like to state its belief that the creation of NACEC was important and has contributed in some measure to strengthening environmental cooperation between the parties to NAFTA. When NAFTA's huge commercial market was established, it was vital that some mechanism be provided to consider the environmental repercussions. For this reason, the Parties signed the North American Agreement on Environmental Cooperation (NAAEC) in parallel to the implementation of NAFTA. In creating a tripartite commission to oversee the application of existing environmental legislation, NAAEC provided both the Parties and community groups or private citizens with a unique environmental monitoring mechanism.

NACEC carries out important work in the areas of biodiversity conservation, the study of the environmental effects of NAFTA, the linkages between environment and economy trade, as well as the various activities funded by the North American Fund for Environmental Cooperation (NAFEC). With this in mind, any criticism will not be directed at the Secretariat *per se*, as the QELC believes it is carrying out its mandate to the best of its abilities with the limited resources at its disposal. Instead, they will concern the actual procedures set out in Articles 14 and 15 of NAAEC, which, as was noted at the Council sessions held in Dallas, Texas, on 12 June 2000, have demonstrated certain weaknesses over the five years they have been in place.

This report will attempt to demonstrate that it is now necessary to redefine NACEC's scope of action and, especially, to rethink the submission mechanism under Articles 14 and 15 of NAAEC. To do so, NACEC's application of this process will first be analyzed. Next, its primary weaknesses will be highlighted, which will form the basis for the recommendation of concrete solutions.

## ***I. Analysis of NACEC's Criteria for Applying Articles 14 and 15***

Since 1995, NACEC has received 28 submissions,<sup>1</sup> 11 of which are still being studied. Only two of the 17 submissions processed thus far have resulted in the development of factual records. Over the years, the Secretariat has developed a sort of "jurisprudence" for the application of Articles 14 and 15 of NAAEC.

In general, NACEC systematically analyzes the submissions received by citizens or non-governmental organizations. This system will be described here step by step in order to comment on the analytical criteria identified.

### **A. Reception: Secretariat's application of Article 14(1)**

Every submission received by the Secretariat is examined under Article 14(1). This article stipulates:

The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.<sup>2</sup>

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<sup>1</sup> *Executive Director's Report to Council*, North American Commission for Environmental Cooperation, June 2000, p. 3-12; information was also taken from the NACEC's official Internet site (<<http://www.cec.org>>) and is current as of 15 September 2000.

<sup>2</sup> *North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the Mexican States and the Government of the United States of America*, 1993, which took effect on 1 January 1995, (hereafter referred to as NAAEC).

Article 14(1) thus identifies six main criteria that a submission must satisfy before it may be considered by the Secretariat.<sup>3</sup> While paragraphs a), b) and f) pose no particular problems, others are worthy of closer examination. NACEC specifically points out that “Article 14(1) is not intended to place a heavy burden on submitters”.<sup>4</sup> The QELC supports this position because this step should not stonewall submitters; rather, it should allow NACEC to weed out submissions that are frivolous or outside the scope of NACEC’s powers. Unfortunately, the Secretariat’s analyses have too often been overly brief, making it sometimes impossible to determine how Articles 14 and 15 were applied.

1. Paragraph 1: “The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law”

This paragraph essentially refers to two definitions—“environmental law” and “failure to effectively enforce environmental law.”

a) *Definition of “environmental law”*

“Environmental law” is defined in Article 45(2) of NAAEC.<sup>5</sup> Under this article, the Secretariat’s definition for considering submissions is relatively broad.<sup>6</sup> And while the QELC agrees with this definition, several questions remain with respect to international treaties and agreements on the environment. Even though the Secretariat has twice been confronted with this problem, it has yet to offer a clear-

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<sup>3</sup> As set out in the submission guidelines:

“4.1 The Secretariat may only consider a submission on enforcement matters if that submission meets the criteria set forth in Article 14(1) of the Agreement, specified in these guidelines.”

*Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, June 1999, Montreal, NACEC.

<sup>4</sup> SEM 98-007, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, 6 March 2000.

<sup>5</sup> “(a) **“environmental law”** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through

(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,  
(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or  
(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

(b) For greater certainty, the term **“environmental law”** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.” *Article 45(2)*, NAAEC.

<sup>6</sup> See, for example, the relationship between Mexico’s Federal Penal Code, Law on International Extradition, and General Law on Ecological Balance and Environmental Protection, in SEM 98-007, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, 6 March 2000.

cut solution.<sup>7</sup> The Secretariat should regard international environmental agreements as environmental law under NAAEC and amend the definition of environmental law in Article 45 of NAAEC.

*b) Effective enforcement of environmental law*

On the other hand, the concept of effective enforcement is problematic. Article 45 offers some details; however, they do not completely clarify the matter.<sup>8</sup> First of all, NACEC's actions may only concern non-enforcement of a law, not the law's effectiveness. This nuance, repeatedly affirmed by the Secretariat, is one of the NAAEC's primary limitations.<sup>9</sup> This will be dealt with later on.

Secondly, it would appear that the Secretariat favors submissions that deal with systematic non-enforcement of legislation rather than those that deal only with alleged cases of non-enforcement involving a single incident.<sup>10</sup> However, this has not consistently been the case, and the Secretariat should clarify this point.

Thirdly, the submission process can only be initiated in cases of non-enforcement of a law that is in force at the time of the submission. Thus, if a law has failed to be enforced but is subsequently replaced with a new law, the submission will be rejected. This was the case, for example, with submission SEM 97-004. According to NACEC, this submission was filed too late—three years after the fact. The Secretariat also stated that there was no concomitance between the infraction and the complaint and pointed out that the law had been superceded and was no longer in force.<sup>11</sup> It would therefore appear that the Secretariat has introduced a limitation period for submissions—a highly questionable position because it prevents using the submission process as a means of access to information concerning steps taken by the Party to remedy the infraction referred to in the submission.

The Secretariat has qualified this stance, however. It will not confer a retroactive effect on NAAEC; yet, in certain decisions it has stated that events or acts prior to

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<sup>7</sup> See SEM 00-004, *Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, 8 May 2000, p.10.

See also SEM 97-005, *Determination pursuant to Article 14(1) of the American Agreement on Environmental Cooperation*, 26 May 1998.

<sup>8</sup> Article 45(1) states:

“1. For purposes of this Agreement:

A Party has not failed to "**effectively enforce its environmental law**" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or

(b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities [...].”

<sup>9</sup> See, for example, SEM 00-004, *Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, 8 May 2000, p.8.

<sup>10</sup> SEM 97-006, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, 19 July 1999, p.12.

<sup>11</sup> SEM 97-004, *Secretariat's Determination under 14(1) of the North American Agreement on Environmental Cooperation*, 25 August 1997.

NAAEC “may create conditions or situations which give rise to current enforcement. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.”<sup>12</sup> While the QELC agrees with this latter approach, it vehemently opposes the Council’s position that a submission on the non-enforcement of an environmental law may not lead to the development of a factual record simply because the law in question was replaced while the submission was being processed, especially when delays in processing the submission—in particular those caused by the Party in question—exceed three years.<sup>13</sup> Indeed, with regard to submission SEM 97-003, there is no evidence to suggest that the new legislation has corrected the situation from an environmental standpoint. It would also be pertinent to determine why the old law was not enforced. Furthermore, NACEC’s position penalizes the authors of the submission, who worked to correct the non-enforcement within a reasonable timeframe.

Finally, according to the Secretariat, the non-enforcement must have taken place to be considered. A submission cannot deal with a possible future failure to enforce or a proposed action.<sup>14</sup> The QELC agrees that submissions should not be used to make frivolous complaints; however, from an environmental standpoint, there are certain actions that cannot be reversed after the fact. The Secretariat should allow for submissions that deal with imminent non-enforcement in cases where, in weighing the evidence, it appears with certainty that the Party will not enforce an environmental law.

2. “c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based”

The submission guidelines refer to a succinct account of the facts and documentary evidence on which the submission may be based.<sup>15</sup> The Secretariat states that the submission must include specific information without making this criteria a rigid requirement; in practice, however, it would appear to be strictly

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<sup>12</sup> SEM 96-001, *Recommendation of the Secretariat to Council for the of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, 7 June 1996; Same in SEM 97-001, *Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental*, 27 April 1998;

See also SEM 98-007, *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, 6 March 2000.

<sup>13</sup> NACEC, *Council Resolution: 00-01*, 16 May 2000

<sup>14</sup> SEM 00-003, *Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, 12 April 2000.

<sup>15</sup> Article 5.3 states: “Submissions must contain a succinct account of the facts on which such an assertion is based and must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.” *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*.

applied.<sup>16</sup> The QELC feels the Secretariat should specify, by amending its submission guidelines, the documentary evidence required so that submissions are not rejected for failing to meet this criterion.<sup>17</sup>

3. “e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any;”

The QELC feels this stipulation is completely justified. Paragraph 5.5 of the submission guidelines specify that:

The submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question and indicate the Party’s response, if any. The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question<sup>18</sup>

Nevertheless, several submission have not fulfilled this criterion.<sup>19</sup> The Centre feels that instead of being a strict requirement, this paragraph should serve as an indicator of how serious the submitters are. Because replies from the relevant authorities often take a great deal of time, people or organizations should not be forced to unreasonably delay making submissions while waiting for such replies. Under no circumstances should the relevant authorities’ failure to reply hurt a submission’s admissibility.

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<sup>16</sup> SEM 00-003, *Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, 12 April 2000, p.4.

<sup>17</sup> See SEM 99-001: the submission does not specifically explain the purpose of the appendices in making the case against the alleged non-enforcement. The relationship between the appendices and the submission is not clear. *Secretariat of the Commission for Environmental Cooperation Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, 30 March 2000, p. 4.

<sup>18</sup> *Guidelines for Submissions on Enforcement Matters under Articles 14 15 of the North American Agreement on Environmental Cooperation*.

<sup>19</sup> See, for example: SEM 00-001, lack of evidence that the matter was communicated in writing to the relevant authorities *Secretariat’s Determination under Article 14(1) of the North American Agreement on Environmental Cooperation*, 25 April 2000, p.4; SEM 00-003, the correspondance must specifically show that the authors of the submission have alerted the relevant authorities to the concerns that form the basis of the submission. *Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, 12 April 2000, p. 5; SEM 00-005: submission does not indicate that the matter was communicated in writing to the relevant authorities, *Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation*, 13 July 2000, p. 5.

## **B. Analysis: Secretariat's application of Article 14(2)**

Once the submission has successfully completed the reception stage, the Secretariat determines if it warrants a reply from the concerned Party. Article 14(2) stipulates:

Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.<sup>20</sup>

This paragraph contains a number of subparagraphs. Only the criteria that are problematic or that have led to a submission's rejection will be dealt with.

### **1. The concepts of "harm" and "matters whose further study in this process would advance the goals of this Agreement"**

Paragraph 7.4 of the submission guidelines states:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

- (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
- (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.

The Secretariat's definition of harm is a broad one. Indeed, it believes that submissions can be admissible even if the authors of the submission have not alleged particularized, individual harm, recognizing that the importance and

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<sup>20</sup> NAAEC, Article 14(2).

character of the natural resource in question or its public nature can make the submission a matter whose further study would advance the goals of NAAEC.<sup>21</sup> This position has allowed several submissions to be admissible under Article 14(2), giving non-profit organizations created to protect the environment access to the submissions mechanism.

## 2. The condition that private remedies made available by the Party must have been pursued

This is a delicate point in NAAEC. Paragraph 7.5 of the submission guidelines specify:

In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:

- (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and
- (b) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.

The submission guidelines indicate that it is preferable to pursue private recourse before initiating the submission process under Articles 14 and 15. Several submissions give examples of private recourse: a hearing before Alberta's Court of Queen's Bench,<sup>22</sup> as well as the *denuncia popular* administrative procedure in Mexico.<sup>23</sup>

Nevertheless, the submission guidelines give the Secretariat latitude to determine whether requesting a response to a submission is appropriate if the creation of a factual record may duplicate or hinder any private recourse pursued by the submitters. Exactly how a submission may hinder private recourse previously pursued is not clearly explained.

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<sup>21</sup> SEM 96-001, no personalized or individual harm alleged, however, the coral reef's natural importance and public nature of marine resources recognized, *Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, 7 June 1996; Also, SEM 99-002, *Secretariat of the Commission for Environmental Cooperation Determination pursuant to Article 14(1) and (2) of the North American Agreement on Environmental Cooperation*, 23 December 1999

<sup>22</sup> SEM 96-002, *Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 28 May 1996

<sup>23</sup> Private recourse was pursued and have ended, thus, requesting a response from the Party is warranted, SEM 96-001, *Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, 7 June 1996.

Furthermore, even if private recourse has not been pursued, this lack should not necessarily be grounds for terminating the submission. Nothing in either NAAEC or the Guidelines for Submissions indicates this. On the other hand, the Secretariat will not request a response from the Party if private recourse is pending. This interpretation is clear and has been implemented by NACEC.<sup>24</sup>

### **C. Concerned Party's response: application of Article 14(3)**

Once the Secretariat has requested a response from the concerned Party, the latter can counter by invoking Article 14(3), affirming that the matter is pending a judicial or administrative proceeding. In such cases, NACEC interrupts the submissions process. Article 14(3) states:

The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and of any other information that the Party wishes to submit, such as
  - i) whether the matter was previously the subject of a judicial or administrative proceeding, and
  - ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.

The definition of “judicial or administrative proceeding” is given in Article 45(3):

For purposes of Article 14(3), “**judicial or administrative proceeding**” means:

- (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and

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<sup>24</sup> Submission terminated because of recourse pending before the Court of Queen's Bench, SEM 96-002, *Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 28 May 1996.

(b) an international dispute resolution proceeding to which the Party is party.

This definition reduces somewhat the concerned Party's opportunity to invoke Article 14(3) in its defense. Nor is the submission process necessarily interrupted automatically if the matter is pending judicial or administrative proceeding. Four criteria are considered: the matter must be taken i) by the Party, ii) in a timely fashion, iii) in accordance with the Party's laws, and iv) comprise one of the prescribed categories of activities.<sup>25</sup> According to the Secretariat, the definition of "judicial and administrative proceeding" should be limited to "proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time"; it also excludes "[a]ctivities that are solely consultative, information-gathering or research-based in nature, without a definable goal". Moreover, termination of the submission under Article 14(3) is not applicable if the judicial proceeding has ended, even if the proceeding was ongoing at the time of the submission's filing.<sup>26</sup>

Nonetheless, the Secretariat does not consider the criteria set out in Article 45(3) of NAAEC to be cumulative. Thus, even if a judicial or administrative proceeding was not undertaken by the Party itself, the Secretariat Article 14(3) may still be applied:

Since the current matter before the Canadian court was initiated and is being pursued by a private entity, and not a "party" as that term appears to be employed in Article 45(3)a), the Secretariat may consider other factors in its review of the submission at this stage.<sup>27</sup>

The QELC finds this interpretation very questionable. The Centre believes that the purpose of Article 14(3) is to interrupt the submission process at the request of the concerned party if it can prove it has initiated judicial or administrative proceedings to correct the situation condemned in the submission. The fact that the submitters have chosen to take action on both the international stage and domestic courts should not be considered at this stage of the procedure. The State should only be allowed to avoid the development of a factual record if it can prove that it has undertaken concrete measures to ensure the effective enforcement of the environmental law.

This position should also be taken in cases where international dispute resolution proceedings in which the Party is involved are pending. However, the Secretariat interrupted analysis of the dual submissions SEM 99-001 and SEM 00-002

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<sup>25</sup> SEM 97-001, *Notification from the Secretariat to the Council of its Reasons for Considering that the Development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation is Warranted*, 27 April 1998, p.9.

<sup>26</sup> *Ibid.*, p. 10.

<sup>27</sup> SEM 96-003, *Secretariat Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 02 April 1997.

because of a pending arbitration proceeding under Chapter 11 of NAFTA, which was initiated by the author of the submission, not by the concerned Party.<sup>28</sup>

#### **D. Developing a factual record**

Under Article 15 of NAAEC, the Secretariat is directed by the Council to develop a factual record. The Article states:

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.
2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

The submission guidelines are of little use because they do not set out any concrete criteria to guide the Council in its decision. Thus, the Council may go against the Secretariat's recommendation to develop a factual record. Of the four recommendations to Council by the Secretariat to develop a factual record, this has happened once, in the case of submission SEM 97-003.

The QELC believes that Council's discretionary power to disregard a recommendation by the Secretariat to develop a factual record—a power which appears to be absolute—is one of the major problems with the submission procedure under Articles 14 and 15. This situation begs several questions: Under what authority does Council have the last word? While Council does direct NACEC, should it be permitted to disregard the Secretariat's conclusions? Is not the Secretariat, which examines and analyzes submissions, better placed to decide whether a factual record should be developed?

Admittedly, Council should play a role in the submission process; however, the fact remains that the State acts as both judge and defendant because Article 15(2) requires a two-thirds majority to develop a factual record. The fact that the State named in a submission is still allowed to have a vote during this process is contrary to the principle of separation of powers. If impartiality cannot be guaranteed, there can be no hope that Council's decisions will be respected.

Moreover, one cannot help but notice that Council's reasons for its findings are decidedly concise. At the very least, Council should show some justification for disregarding the Secretariat. While NACEC has recently made progress by requiring Council to make public the reasons for its rejections, the questions of

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<sup>28</sup> SEM 99-001 and 00-002, *Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation*, 30 June 2000.

impartiality and Council's powers remain. Indeed, Council can decide to not make public a final factual record.<sup>29</sup> Again, under what authority?

## ***II. Efficiency of the Procedure Under Articles 14 and 15***

Now that the various steps of the submission mechanism under Articles 14 and 15 have been reviewed, what follows are general remarks concerning the true efficiency of this process.

### **A. Inefficiency due to procedural delays**

First, it is quite obvious that delays in processing submissions are incredibly long. For example, in the case of submission SEM 97-003, three years elapsed between the time the submission was filed and Council's decision to not develop a factual record. This delay is greater than that of cases before domestic courts.

An analysis of the submissions reveals that these delays are caused by the concerned Parties, which take months to reply to the Secretariat. Submissions deal with environmental problems related to the enforcement of environmental law. Thus, the nature of the infractions often require rapid intervention by public authorities if the consequences of the pollution are to be remedied. Occasionally, the damage becomes permanent if action is not taken in time.

Even though deadlines are set out, they are rarely respected. Thus, the QELC recommends that strict deadlines be implemented requiring submissions to be processed within one year.

### **B. The unjustified role of Council**

As shown above, Council holds discretionary control with respect to the development of a factual record. This life and death power over the ultimate outcome of the submission procedure—essentially a form of “political guardianship”—is unacceptable. NACEC should free itself from the political control of State representatives by removing Council's decision-making authority with respect to the submission procedure. NACEC could create an independent body within the Commission, such as a submissions processing committee, in which Council would play a purely consultative role.

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<sup>29</sup> NAAEC, Article 15(7): “The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.”

### **C. The effectiveness of factual records as sanctions**

When all is said and done, what, in concrete terms, does the development of a factual record accomplish? Can it be said that the Secretariat's actions are effective? At the national level, regulation has increasingly given way to self monitoring or agreements reached with industry. This makes NACEC's job of overseeing the enforcement of a state's environmental laws more and more difficult.

Moreover, the QELC questions the true willingness of the three Parties to commit to a policy of sustainable development. Indeed, not once has one State ever filed a complaint alleging that another State has systematically failed to enforce its environmental laws. Furthermore, the States disassociate themselves from the contents of factual records, openly refusing to recognize the work of the Secretariat.<sup>30</sup> This is hardly an attitude of environmental cooperation—one of the cornerstones of NAAEC.

Thus, the sanctions resulting from submissions are inadequate. The final outcome of the submission procedure is the development of a factual record—a largely symbolic penalty. In the end, the submission procedure is only of interest insofar as the development of a factual record results in an official complaint by one Party against the State implicated in the factual record. Without such subsequent actions by the States, the process under Articles 14 and 15 does not amount to much.

Ultimately, the submission procedure should include financial sanctions or result in the mandatory filing of an official complaint by the other States if a factual record finds the implicated Party has not enforced its environmental law.

### **D. Relationship with NAFTA and the FTAA**

As for the future of the submission process, the implementation of NAFTA, and in particular Chapter 11, has demonstrated the difficulty of reconciling free trade with protecting the environment. The arrival of the Free Trade Area of the Americas (FTAA), which will certainly be in effect by 2005, will require a mechanism to ensure that it will not be created to the detriment of the environment. The number of countries involved in this project will necessitate a structure that is independent and efficient. However, without a doubt, the current process, which needs to be redefined to place meaningful restrictions on the Parties, has failed to live up to the expectations placed upon it

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<sup>30</sup> NACEC, *Factual Record for Submission SEM-97-001*, 11 June 2000, 118p.

## ***Conclusions***

In light of the comments made above, the citizen submission procedure should be modified in order to give it an effectiveness that, to date, it has never had. Such changes would necessarily require changes in NACEC's structure. To this end, the QELC proposes the following:

- Above all, NACEC should free itself from political control by State representatives by removing Council's decision-making power in the submission procedure.
- Delays in processing submissions should not surpass one year.
- NACEC should modify or clarify its rules for interpreting certain concepts analyzed above, in particular, the concepts of "environmental law," "effective enforcement of environmental law," "private recourse," and "judicial and administrative procedures."
- Finally, if a factual record concludes that an environmental law has not been enforced, an official complaint procedure should automatically be set in motion by one of the other States in order that concrete remedial measures or meaningful pecuniary sanctions be applied.

The QELC believes that these changes will give the citizen submission mechanism more substance. Nevertheless, in the end, NACEC should be fully independent. It should have the authority to impose coercive and financial sanctions in carrying out its mission to oversee the Parties' enforcement of their environmental laws and policies and, above all, to involve the public through a mechanism that fosters active participation. Only in this way can it serve as a model for the organization that should be created within the framework of the implementation of the FTAA—an organization which would ensure that the development created by this agreement would be equitable and sustainable for all societies in the Americas and respectful of the environment.