

**** C O M M E N T S ****

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

ON

APPEALS, REFERENCES AND OTHER HEARINGS

May 30, 1980

COMMENTS OF CELA

APPEALS, REFERENCES AND OTHER HEARINGS

The new Regulation on clinic funding provides for the Clinic Funding Committee to function in certain circumstances as an appellate tribunal; it also functions as a policy-making body responsible for defining the parameters within which the clinic funding staff makes initial funding decisions. It also appears to maintain a supervisory role with respect to overseeing that staff decisions are made in accordance with policy directives from the Committee. The functions, in fact, encompass a much broader mandate than that of an appellate tribunal. Comments on the specific procedures in the Discussion Paper are made with this view in mind.

1. REVIEWING AND RECOMMENDING INITIAL FUNDING DECISIONS (S.148(1)(c))

We agree with the concern in the Discussion Paper over the Committee imposing additional terms and conditions without adequate input from both the staff and the clinic involved. However, the procedure suggested in the Discussion Paper seems to us unnecessarily complicated, too time-consuming, and inadequate as a mechanism for providing input from the clinic involved. A preferable approach would be for the Committee to initiate a hearing under S.150(4) and permit both the clinic funding staff and the clinic to make oral submissions. Prior to this hearing, the Committee ought to inform the clinic in writing of the new terms and conditions it wishes to impose, as well as the reasons therefor.

This procedure is preferable for a number of reasons. A clinic has an automatic right to meet with the clinic funding staff to discuss terms and conditions prior to their imposition, and the

same right ought to exist with respect to terms initiated by the Clinic Funding Committee. Second, a hearing by the Committee is explicitly authorized by the Regulation, and to follow this mechanism would simplify and streamline procedures by eliminating the necessity of making a choice between alternative routes. This would result in greater procedural consistency in the handling of funding applications. Third, the requirement of an oral hearing would function as a disincentive to the Clinic Funding Committee's imposing additional items and conditions of a minor nature. By in effect limiting this mechanism to conditions viewed by the Committee as major, decision-making would be streamlined, the ability of clinics to present their cases would be preserved, and the ability of the clinic funding staff to make initial funding decisions would be strengthened.

2. APPEALS FROM INITIAL FUNDING DECISIONS (S.148(1)(e))

We are in general agreement with the overall procedure for appeals from initial funding decisions as set out in the Discussion Paper, although there are a number of specific points with which we disagree. We are also concerned that the whole time-frame for the annual funding and appeal process is too compressed, placing unnecessary burdens on both clinics and the clinic funding staff, and allowing inadequate consideration of crucial funding issues. The question of the time frame will be discussed separately at the end of the paper, since it relates to references and review of staff decisions as well as appeals.

With respect to S.150(2) appeals, we feel that it is essential that clinics who are being defunded continue to receive funding at the

old rate until the funding mechanism is exhausted, and that this policy be formalized in some manner. We also feel that it is essential that sufficient notice of final defunding decisions be given so that Boards can notify their staff of an anticipated lay-off and staff can ensure that clients are referred to other clinics or services or the private bar, and their cases are not jeopardized by the closing of the clinic.

With respect to S.150(3) appeals, requiring leave of the Committee, we agree that routine leave is not warranted or desirable. However, the grounds for leave put forward in the Discussion Paper (an absence of policy or an ambiguous interpretation of policy) are, we feel, much too narrow and would, in effect, limit the Committee in its supervisory function over decisions of staff. Leave should also be granted in situations involving conflicting policies, funding priorities, and staff decisions which are alleged to conflict with the policies and priorities established by the Committee. If leave is granted, discussion should be confined to the issues in the written submissions, but not to the material contained therein. We see no necessity for limiting the length of time of a hearing and anticipate serious problems in that it could jeopardize the clinic's ability to present its case. We agree with the power of the Committee to direct the clinic to respond to specific aspects of the staff's position, but feel that the clinic ought to have an automatic right to reply to any of the staff's arguments. Finally, we feel that the requirement that a Board member be in attendance at the hearing is an unwarranted intrusion on the Board's prerogative to delegate a representative to speak on its behalf.

3a) REFERENCES PURSUANT TO S.149(3)(b)

This provision would be useful not only in a situation where no policy directive is applicable, but also in situations involving two or more conflicting policy directives or ambiguous policies. More significantly, however, we feel that the procedure described in the Discussion Paper fails to conform with the requirements of the Regulation, which provides that "the Committee shall hold a hearing in respect of the application" (not in respect of the policy issue independently of the application).

Although we appreciate the concern in the Discussion Paper that having the Committee make a decision with respect to the application would in effect deny the clinic a right to appeal, we feel that any appeal procedure after the Committee has heard a policy reference from the staff would be essentially illusory in any event. A preferable approach would be to have the staff meet initially with the clinic to discuss the application and, if the staff feels unable to make a recommendation, to refer the application to the Committee with written submissions to the clinic outlining the problematical issue or issues. The hearing before the Clinic Funding Committee, while not an appeal as there is no decision to be appealed from, would enable the Committee to review the application and allow the clinic to make oral submissions to the Committee on their application.

We disagree with the proposal in the Discussion Paper to confine the use of the reference procedure to applications considered other than during January to March each year; the effect of this practice would be to negate the intent of the provision, since it is during the annual funding process that the majority of policy issues will arise. Moreover, if staff were to make funding decisions in areas in which

policy directives were either conflicting, unclear, or non-existing, rather than use the reference mechanism to obtain directives from the Committee in these circumstances, they would in effect be presuming on the policy-making function specifically empowered to the Committee under S.148(1)(b) of the Regulation.

Finally, we disagree with the provision that only the clinic whose application is under consideration should have standing before the Committee with a general notification of a reference being given to all clinics if they may all be affected by a policy directive.

Although the Committee must, in our view, deal with both the policy issue and the specific application which gave rise to the reference, any clinic which wishes to make representations on the policy issue should be entitled to do so. The presumption that the general notification may assist that clinic in organizing its presentation for a hearing places an unfair onus on that clinic to represent the views of other clinics as well as its own. It also fails to take into consideration the fact that this procedure may place a particular clinic in a conflict position if it is expected to represent both its own views and those of other clinics which may vary from its own.

3b) REFERENCES PURSUANT TO S.148(1)(f)

We support the current practice of the Committee of circulating draft policies to the clinics for their comments prior to making final policy decisions and feel that this ought to be continued. In addition, we feel that clinics should be afforded the same opportunity to make references for policy-making purposes that are granted to the staff. We strongly disagree with the suggestion in

the Discussion Paper that staff be required to refer an issue raised by the clinics only in an instance where at least two-thirds of the clinics make the request. This requirement, rather than making the policy workable, would make the procedure extremely difficult to implement and virtually impossible with respect to issues which affect only a small number of clinics, however important. It would also give the staff a very broad discretion to determine what policy issues go to the Clinic Funding Committee and consequently severely restrict the ability to clinics to speak to the Committee on policy issues. Finally, it would place the burden on clinics who feel a need for a policy directive to spend excessive amounts of time lobbying other clinics in order to have the issue raised before the Committee. While it may be necessary to implement some guidelines with respect to references, so that the Committee does not become inordinately bogged down with them, the suggestions in the discussion Paper are so sweeping as to make it virtually impossible for clinics to address the Committee on general policy issues.

4. HEARINGS TO RESOLVE DISPUTES BETWEEN CLINICS AND CLINIC FUNDING STAFF (S.148(1)(g))

We are in general agreement with the procedure for dealing with disputes between the staff and clinics. However, if the Committee decides to determine the dispute, we recommend that oral hearings be held automatically at the request of either the clinic or the Clinic Funding Staff.

5. HEARINGS INITIATED BY THE CLINIC FUNDING COMMITTEE (S.150(4))

We are in general agreement with the observations of the Discussion Paper, although we would include an express stipulation that the clinic funding staff and the clinic exchange written submissions

prior to the oral hearing. We would recommend that the Committee use this procedure (initiate an oral hearing) in any circumstance in which they wish to impose terms and conditions on a clinic other than those agreed to with the clinic funding staff, since a decision by the Committee to hold a hearing into and review the initial decision of the staff in respect to an application for funding under S.150(4), would presumably be with a view towards possibly imposing additional terms and conditions, as it is empowered to do under S.148(1)(c). Certainly there is nothing in the Regulation to indicate under what circumstances the procedure proposed in the Discussion Paper would be appropriate rather than a hearing under S.150(4). Rather than having two mechanisms for dealing with an application which appears to the Committee to be potentially problematical, a simpler, clearer approach would be to adopt the procedure authorized by the Regulation in S.150(4).

6. NOTES ON PROCEDURES

There are a number of references throughout the Discussion Paper to the crucial nature of timing involved in the annual funding process, and the need for the Committee to impress upon the clinic Boards the time constraints of the annual funding process in order to ensure their availability. We are in agreement with the view that the Committee should ascertain the time-frame for the decisions by the staff and by the Committee, and should notify the clinics well in advance so that the application process can work smoothly and efficiently. Our comments on this issue generally will be included in our response to the Discussion Paper on Funding. Two specific areas of concern require comment here, however.

The first area of concern is the requirement that a clinic respond to a funding decision by the clinic funding staff within 10 days, and submit any written documentation in support of appeals, references and hearings within 14 days. These periods of time are extremely short when dealing with decisions which must be made by full-time paid staff. In the clinic system these decisions must be made and implemented by volunteer Boards who carry this responsibility on their own, often very limited time. With the civil litigation rules applied, a clinic has, in effect, less than a week to respond to funding offers by the staff. The severe constraints are acknowledged in the Discussion Paper where it is explicitly presumed that the hand-delivery of letters may be necessary. A system which presumes this as a necessity would be undesirable if it applied to an area in which this were geographically feasible; for a system covering the entire province, it is totally unjustifiable. We feel that whatever timetable is established must allow substantially greater time to clinic Boards to respond to initial funding decisions and prepare written submissions for hearings.

Our second specific concern relates to the suggestion that the reference procedure not be implemented during the annual funding process because of these same time constraints; however, it is during the annual funding process that these policy issues will almost certainly arise and have to be dealt with. The appropriate would be, once again, to alleviate the severe time restraints of the annual funding process, and not eliminate the reference procedures.