

Comments on Recommendations for the SEM Modernization Task Force Draft Negotiation Text

Guideline	Discrepancy of the Amendment	Drafting Suggestion
5.6	<p>Subsection (c) of the proposed amendment states that the Secretariat is guided by whether or not “the Submitter” pursued private remedies. This addition makes the process even more burdensome on the Submitter.</p> <p>As it stands, if documentary evidence is missing from a submission that can be easily accessed, the Secretariat will not assume responsibility in collecting it. Instead, it will reject the application, dampening interest in the process, frustrating the group or individual and wasting time and resources.</p> <p>The presumption should not be that the Submitter has sufficient resources for further study or to pursue private remedies. It will be difficult for complainants to subscribe to the process if the chance of their submissions being denied at entry point is high.</p>	<p>The words “by the Submitter” should be removed from (c).</p>
6.2	<p>The time allotted for the Submitter to provide a submission has been increased from 30 days to 60 working days.</p> <p>While the additional time will likely increase the accessibility of the process, the Secretariat and Council must not impose an even greater burden on the Submitter to conduct exorbitant amounts of research and present unreasonable documentation because of the extra time allotted. In the Ontario Logging submission, for example, the Council rejected the estimated value of destroyed nests and demanded that submitters provide evidence for the actual number of nests destroyed. Essentially, the Council was requiring Submitters to prepare its own factual record in support of allegations.</p>	<p>none</p>
7.3	<p>Proposed amendment to Guideline 7.3 repeats the requirement of the Submitter to pursue private remedies prior to making a submission. The addition of the words “by the Submitter” changes the Agreement and makes the process additionally burdensome, as described above (Guideline 5.6).</p>	<p>The words “by the Submitter” should be removed from 7.3.</p>
7.5	<p>The proposed amendment to Guideline 7.5 and subsection (c) repeat the requirement of the Submitter to pursue private remedies prior to making a submission. As discussed above (Guideline 5.6), the addition of the words “by the Submitter” changes the meaning of the Agreement and unduly burdens the Submitter. Subsection (c) furthermore removes the acknowledgement that barriers to the pursuit of remedies may exist.</p>	<p>The words “by the Submitter” should be removed from 7.5 and subsection (c).</p>
9.6	<p>Proposed amendment to Guideline 9.6 states that “the Secretariat is to limit its consideration [about producing a factual record] to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record.” Furthermore, it allows the Party to provide a response to the Secretariat “at any point in the submission process.” It seems futile to have Article 14(3) and its pertaining deadlines if the Party can bring the investigation to a halt</p>	<p>The words “or at any point in the submission process” should be removed. The requirement for “the Secretariat to limit its consideration</p>

	<p>at any point it wishes. The proposed amendment further limits the discretion of the Secretariat in deciding whether or not to create a factual record. Since the SEM process already imposes a great burden on the Submitter to perform research and submit many documents (essentially making the Submitter present its own factual record), such an amendment will likely have an effect of decreasing the number of factual records produced and minimizing the importance of bringing non-enforcement to light. This proposed amendment undermines SEM’s triple goal of improved environmental quality, enhanced enforcement, and broadened environmental governance.</p> <p>The Secretariat should be given a greater role to help resolve the issues discovered during the fact finding process. The focus should be on resolving environmental enforcement problems, rather than assigning blame.</p>	<p>to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record” should be removed.</p>
9.7	<p>Proposed amendment to Guideline 9.7 states that “the Secretariat is to limit its consideration to whether the Party has included sufficient information.” This proposed amendment again (like Guideline 9.6) limits the scope of the Secretariat in deciding to produce a factual record.</p> <p>The signatory governments have treated SEM as adversarial rather than cooperative. This amendment will further allow Parties to sabotage the process. Instead, the SEM process should be recognized as a collaborative process for enhancing government outcomes.</p>	<p>The requirement that “the Secretariat is to limit its consideration to whether the Party has included sufficient information” should be removed.</p>
10.4	<p>The proposed amendment to Guideline 10.4 states that the Council can instruct the Secretariat “to prepare a factual record that varies from the Secretariat’s notification.” This proposed amendment will allow the Council to change the scope of the factual record. In the past, the Council restricted the scope of the factual records on several occasions, impeding on the Secretariat’s fact-finding role. In at least four instances (BC Mining, BC Logging, Migratory Birds and Oldman River II), the Secretariat had requested a broad-scoped investigation to consider widespread and systematic breaches by the Party. In significantly narrowing the scope of each investigation, the Council dramatically changed the nature of the factual record and excluded important issues from the Secretariat’s consideration. This was also the case in SEM-06-005, a submission asserting that the Canadian federal government was failing to enforce the Species at Risk Act (SARA). In the end, the Submitters alleged that the species were significantly narrowed and “cherry picked” to show Canada in the best light.</p>	<p>The phrase “or to prepare a factual record that varies from the Secretariat’s notification” should be removed.</p>
12.1	<p>The proposed amendment to Guideline 12.1 removes subsection (d), that the factual record will contain “the facts presented by the Secretariat with respect to the matters raised in the submission”. As this is the point of Secretariat preparing a factual record, it is unclear if the removal of subsection (d) will further restrict the substance of factual records.</p>	<p>Subsection (d) “the facts presented by the Secretariat with respect to the matters raised in the submission” should</p>

		be restored.
12.2	<p>The proposed addition of Guideline 12.2 is explicit that final factual records “are not to include conclusions regarding whether a Party is failing to effectively enforce its environmental law or recommendations relating to future Party or submitter action. Draft and final factual records are not to endorse or oppose views of experts considered by the Secretariat pursuant Article 15(4) and are to include proper citations for all such information”. While this is the case in practice, the Guidelines should not codify what is not in the Agreement and unnecessarily restrict the factual record. Preventing future environmental damage requires that past enforcement failures are not only documented in factual records, but that action steps are developed and implemented as well. Again, the process should be cooperative rather than adversarial.</p>	Guideline 12.2 should be omitted.
19	<p>The proposed addition of Guideline 19 sets forth the suggested timeframes for action. This proposed addition is a good start considering that average length of time it takes the CEC to release Factual Records is about four years and four months, a time period that effectively makes any anticipated record stale and irrelevant. Such delays have inhibited public enthusiasm to participate in the enforcement of domestic environmental laws. While it is helpful to have a list of recommended deadlines, the concern is that those set in the Guideline are unrealistic. Guideline 19.9 adds some legitimacy and accountability by requiring the Secretariat, Party, or Council unable to meet a deadline to provide written explanation of their reasons.</p>	none

Submitted by: Giselle Davidian, McGill University BCL/LLB candidate

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