Comments to proposed changes to the CEC's Guidelines for Submissions on Enforcement Matters

- Abbreviations:

Agreement	North American Agreement on Environmental Cooperation
CEC	Commission for Environmental Cooperation as defined in the Agreement
Council	Council of the Commission for Environmental Cooperation as defined in the Agreement
Secretariat	Secretariat of the Commission for Environmental Cooperation as defined in the Agreement
JPAC	Joint Public Advisory Committee as defined in the Agreement
Guidelines	CEC's Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the Agreement
Submission	Submission on Enforcement Matters as defined in Articles 14 and 15 of the Agreement
Party	One of the parties to the Agreement (United States of America, Canada **or** Mexico)
Parties	The three parties to the Agreement (United States of America, Canada **and** Mexico)
USA	United States of America
NGO	Non-governmental organization
Submitter	Any citizen or NGO from the Parties that files a Submission
SEM Process	The process set forth in Articles 14 and 15 of the Agreement

- **Introduction**

According with the CEC's website, "*the SEM process is neither adversarial, nor is the…Secretariat a court*" and "*the Secretariat cannot make determinations or "rulings" on the merits or demerits of assertions raised in a Submission, including whether a Party may be failing to effectively enforce its environmental law".* Moreover, the website states that the "*Secretariat is an independent and neutral body"* that will determine recommending to the Council the production of a Factual Record.

Although it mentions it is not an adversarial process, this assertion might be questionable. First of all, the Agreement does not specify the type of process it is, neither denies it as an adversarial process. Second, an adversarial process comprises at least opposing parties or interests that present evidence to an impartial decision-maker.[1] Following this train of thought, the SEM process: **1)** is started by a Submitter that presumably needs to exhaust private local remedies, **2)** establishes conditions regarding timing and standing for the Submitter and the Party, **3)** each of the parties (the Submitter and the Party) may submit evidence (the Submitter intends to evidence that the Party has not effectively enforce its environmental law and the Party intends to evidence the opposite), **3)** The Secretariat is an independent and neutral body that makes a first decision on whether recommending or not to the Council the production of a Factual Record, **4)** The process terminates with the publication of a

[1] Merriam-Webster's Dictionary of Law

Factual Record evidencing failures to effectively enforce environmental law and a description by the Secretariat with respect to the matters raised in the submission, evidence and information that might not be publicly available through other means.

Although the Agreement does not expressly refer to the SEM process as adversarial, it certainly has characteristics of an adversarial process. These characteristics require it to be fair and equitable; most of all because its actors involve a Party and a non-state actor which already represents an imbalanced situation.

In addition, it has been said that the SEM process fails to provide effective and corrective actions,[2] which is completely true. The SEM process does not intend compelling a Party to effectively enforce its environmental laws or provide a monetary compensation, injunction or even restore the conditions of a contaminated site or area. However, the Factual Record, if produced, is a first step for a Party to start a consultation under Article 22 of the Agreement.[3] Moreover, the final aim of the process is to end with a Factual Record that uses information that might not be publicly available under other circumstances.

Furthermore, it could be said the SEM process is a means of access to environmental justice understood as access to environmental information. When a Factual Record is published it provides a remedy similar to that provided by the truth commissions established for human rights violations. It sheds light on the facts and omissions of environmental authorities. Maybe today the environmental justice systems and political will are not adequate or prepared to use this information in order to enforce environmental laws but citizenship has shown that its participation (first through knowledge) is necessary to move towards such aim.

All these reasons make clear the importance of the SEM process and the need to warrant clear, fair and equitable rules established in Articles 14 and 15 of the Agreement and its Guidelines.

- **Structure of the comments**

This document consists of comments to some of the proposed changes by the Council-directed Task Force on SEM Modernization to the Guidelines. Each comment is followed by a conclusion as it is shown below:

- Comments to proposed changes
- Conclusion

[2] M. Gerrard and S. Foster, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks* (ABA Section of Environment, Energy, and Resources, 2008) 768
[3] Ibid

- **Sections 3.1 and 3.3 of the proposed Guidelines**

Comments: Filing a Submission might have been difficult as it was provided in the original Guidelines. It might have been difficult to collect all the documents and pay the corresponding fees to send the Submission to an address in Canada; most of all for citizens or NGOs with low budgets and located in small communities in Mexico (i.e. in the State of Chiapas). They simplify and enhance the participation of citizens and NGOs from the Parties, as electronic Submissions are allowed with no apparent extra cost. However, these changes do not seem enough where access to technology is limited or expensive.

Thus, it is suggested to go further and facilitate different means to file a Submission, such as providing local offices in each of the three Parties for such purposes.

Conclusion: Modify Section 3.1 and 3.3 so as to provide the address of local offices in the three Parties, along with the possibility of electronic submissions.

- **Sections 3.4, 3.5, 3.6, and 3.7 of the proposed Guidelines**

No proposed change to these Sections.

Comments: In accordance with the proposed changes in Sections 3.1 and 3.3, it is suggested to allow the Secretariat notifying by electronic means if the citizen or NGO requests so. In this sense, Section 3.4 should allow the Submitter to appoint an email account to receive any communication from the Secretariat and expressly manifest if it is preferred to be notified through such electronic means.

In addition, the allowance of electronic submissions necessarily entails modifying Section 3.5 in order to include "electronic Submissions or communications" along with correspondence or written documents. Otherwise it could be understood that the Secretariat will only "promptly acknowledge" the receipt of correspondence or written documents, with no certainty regarding electronic Submissions or communications.

Likewise, the allowance of electronic submissions necessarily entails modifying Section 3.6 in order to include "electronic Submissions or communications" along with correspondence or written documents. Otherwise it could be understood that the Secretariat will only assess correspondence or written documents, with no certainty regarding electronic Submissions or communications.

Finally, Section 3.7 should be modified so as to include within the term *any reliable means of notification*, any electronic means if the citizen or the NGO decides to be notified through such means.

Conclusion: Modifications to Sections 3.1 and 3.3 should entail changes to Sections 3.4, 3.5, 3.6 and 3.7.

- **Section 5.6 of the proposed Guidelines**

Comments: As it is stated by John H. Knox[4] Section 5.6 makes Section 7.2 repetitive.

Conclusion: Thus, it is recommended to reject this change.

- **Section 5.6 (c) of the proposed Guidelines**

Comments: This change necessarily comprises understanding the nature and purpose of the Guidelines. As stated in page 3 of the document "Bringing the Facts to Light", the Guidelines explain Articles 14 and 15 process and the nature of the Article 14 process. In this sense, the Guidelines shall constrain to such explanation without adding or modifying the text and meaning of the Agreement.

In this sense, Article 14 (2) (c) of the Agreement states: *In deciding whether to request a response, the Secretariat shall be guided by whether… (c) private remedies available under the Party's law have been pursued*. This provision does not specify if such private remedies have been pursued by the Submitter or any other person or entity.

By adding "by the Submitter" Section 5.6 (c) goes further and entails an addition to the text and meaning of article 14 (2) (c) of the Agreement; it establishes a different guideline to be taken into account by the Secretariat. Moreover, this change is against the Agreement as any addition or modification can only be agreed by the Parties through the Amendment process established in Article 48 (1): *The Parties may agree on any modification of or addition to this Agreement*. The Council and the Secretariat do not have the faculty to carry out such amendments.

It is already difficult for a potential Submitter to meet the criteria set forth in Article 14, and even worse, the number of real Submitters per year is considerably low (three to five per year) [5]. Including this change may lead the Secretariat to limit or constrain even more the Submitters' access to the SEM process and to obtain a response from the Party.

Conclusion: Thus, it is recommended to reject this change.

- **Section 6.2 of the proposed Guidelines**

Comments: Extending the term to comply with Article 14(1) might be seen as a provision that allows the Submitter not be tied by stringent terms in order to comply with such requirements. On the other hand, this term extension up to 60 working days might be too much. Also, the Secretariat might determine that the Submission is not complete in order to gain time to render its decision in a process which is already lengthy.

[4] http://www.cec.org/Storage/137/16172_SEM-Modernization-JKnox-cmmts.pdf
[5] http://www.cec.org/Page.asp?PageID=924&SiteNodeID=541

Conclusion: Thus, it is recommended to assess whether this change should be authorized.

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- **Section 7.3 and 7.3 (c) of the proposed Guidelines**

Comments: In connection with the comments regarding Section 5.6 (c) of the Guidelines, this Section is repetitive and reasserts the mistake of changing the text and meaning of Article 14 (2) (c) of the Agreement, limiting even more Submitters' access to the SEM Process and to obtain a response from the Party.

Conclusion: Thus, it is recommended to reject this change.

- **Section 7.5 of the proposed Guidelines**

Comments: In accordance with the proposed changes in Sections 5.6 (c), 7.3, and 7.3 (c), the text of Section 7.5 was modified. As it is mentioned above, this change is against the text and meaning of Article 14 (2) (c) of the Agreement, limiting even more Submitters' access to the SEM Procedure and to obtain a response from the Party.

Conclusion: Thus, it is recommended to reject this change.

- **Section 7.5 (a) of the proposed Guidelines**

Comments: In accordance with the proposed changes in Sections 5.6 (c), 7.3, 7.3 (c), 7.5, the text of Section 7.5 (a) was modified. As it is mentioned above, this change is against the text and meaning of Article 14 (2) (c) of the Agreement, limiting even more Submitters' access to the SEM Procedure and to obtain a response from the Party.

Conclusion: Thus, it is recommended to reject this change.

- **Section 7.5 (c) of the proposed Guidelines**

Comments: In accordance with changes carried Sections 5.6 (c), 7.3, 7.3 (c), 7.5, and 7.5 (a) the text of Section 7.5 (c) was modified. As it is mentioned above, this change is against the text and meaning of Article 14 (2) (c) of the Agreement, limiting even more Submitters' access to the SEM Procedure and to obtain a response from the Party.

The context of each of the Submitters varies from one case to another and even from one Party to another. It shall be considered the Submitters' capacities to use the environmental justice machinery in its own country, if any. Such capacities might be limited by, *inter alia*, by location, economic means, culture and traditions, religion, gender, education, authorities' corruption, and security situation of the country. These factors make reasonable to guide the Secretariat so as to *bear in mind that barriers to the pursuit of private remedies may exist in some cases*.

Nonetheless, the change proposed in this section eliminated this consideration, which it is believed to make even more stringent the requirements to request a response from the Party.

Conclusion: Thus, it is recommended to reject this change.

- **Section 9.5 of the proposed Guidelines**

Comments: The change proposed in Section 9.5 is against the text and meaning of the Agreement. Article 14 (3) (a) of the Agreement establishes that the Party shall advise in its response whether the matter of the submission is subject of a pending judicial or administrative proceeding in which case the Secretariat shall proceed no further. In this sense, the explanation of Section 9.5 should be limited to such text. Nonetheless, the proposed changes allow the Party to advice the Secretariat at any point of the Submission process. This may lead the Secretariat to terminate a SEM procedure after the party has rendered its response or even when a factual record has already been drafted.

The proposed change will make the Secretariat to carry out a double effort. In the event of a "late" advice (after the response), the Secretariat would have already admitted the Submission, determined if it merits a response and a Factual Record, drafted a Factual Record, and submitted it to the Council.

Moreover, it is inequitable to request the Submitter a prior and direct pursuance of private remedies in Sections 5.6 (c), 7.3, 7.3 (c), 7.5, 7.5 (a) and 7.5 (c) of the Guidelines, whereas the Party may terminate the procedure by advising the Secretariat of a pending judicial or administrative proceeding pursued by anyone. Articles 6 and 45 (3) of the Agreement provide the following:

Article 6: Private Access to Remedies	**Article 45 (3) of the Agreement**
1. *Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.* ***2.*** *Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or*	*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*

Article 6: Private Access to Remedies	Article 45 (3) of the Agreement
judicial proceedings for the enforcement of the Party's environmental laws and regulations. ***3.*** *Private access to remedies shall include rights, in accordance with the Party's law, such as:* *(a) to sue another person under that Party's jurisdiction for damages;* *(b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;* *(c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or* *(d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.*	*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* *(b) an international dispute resolution proceeding to which the Party is party.*

A comprehensive interpretation of articles 6 and 45 (3) makes clear that pursuing a private remedy entails starting one or more of the proceedings described in 45 (3), this means the following imbalance is proposed:

Presumed requirements to request a Party's response	Presumed requirements for SEM procedure to be terminated
Pursuance of private remedies **by the Submitter.**	Advising the Secretariat if whether the matter is the subject of a pending judicial or administrative proceeding (including pursuing private remedies) are still pending, **pursued by anyone**.

Conclusion: It is recommended to reject the changes in Sections 9.5, 5.6 (c), 7.3, 7.3 (c), 7.5, 7.5 (a) and 7.5 (c) of the Guidelines.

- **Section 9.6 of the proposed Guidelines**

The proposed change in Section 9.6 is against the text and meaning of the Agreement. Article 15 (1) of the Agreement establishes the following:

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.*

The explanation of Section 9.6 should not make a distinction or limit the Secretariat's consideration to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record. As it is asserted by John H. Knox, the Secretariat should also consider whether potential failures to effectively enforce local environmental laws exist.[6]

Conclusion: Thus, it is recommended to reject this change.

- **Section 9.4 and 9.7 of the proposed Guidelines**

Comments: The proposed changes in Sections 9.4 and 9.7 may lead the termination of the SEM process by the mere report from the Party stating it has not failed to enforce its environmental law under the excuses of Article 45 (1) which primarily refer to the use of discretionary faculties. The text of Article 45 (1) provides the following:

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;

How will it be determined if a Party falls within the scope of this provision? The proposed changes provide a poor and deficient assessment to be applied by the Secretariat. The Secretariat will just take into account if the information provided by the Party is sufficient. This is another example of a change that would be against the Agreement as it adds new requirements not included in the text and meaning of Article 15 (1).

Moreover, even in the event these changes were not against the Agreement, such changes would make the SEM process not fair and equitable. The Secretariat should take into account the evidence provided by both, the Submitter and the Party and then assess if the evidence provided by both merits preparing a Factual Record. In addition, it is not clear what should be understood by "sufficient information" so as to prove a discretionary faculty.

Conclusion: Thus, it is recommended to reject this change.

- **Section 10.4 of the proposed Guidelines**

[6] http://www.cec.org/Page.asp?PageID=924&SiteNodeID=541

Comments: The proposed changes in Section 10.4 are against Articles 10 and 15 of the Agreement. According with such articles, the Council does not have the faculty to modify the Factual Record. Moreover, the text and spirit of Article 15 is to assign the Secretariat as an independent and neutral body in charge of deciding to prepare the Factual Record and later, if authorized by the Council, to draft such Factual Record. The present structure of the Council (consisting of cabinet-level or equivalent representatives of the Parties) impedes any drafting by the Council to be neutral and independent.

Conclusion: Thus, it is recommended to reject this change.

- **Section 11.4, 19.5 and 19.6 of the proposed Guidelines**

Comments: The proposed change in Section 11.4 regarding the translation of the draft of the Factual Record will increase the workload of the Secretariat. At the same time, by reading the proposed changes in Sections 11.4, 19.5 and 19.6 it is not clear the time-frame that the Secretariat will follow to send the draft and its translations to the Parties. In addition, it is not clear if the 180 working days term in Section 19.5 includes the time needed to translate the draft and its sending to the Parties. Thus, it is recommended either to specify that the 180 working days term includes the translated draft or to specify a term for such translation and sending in Section 11.4 . Otherwise, the Secretariat could take as much time as needed and maybe extending too much the process with no certain deadlines.

Conclusion: Modifications to Section 11.4 should entail specifying in Section 19.5 the time-frame to translate the draft of the Factual Record.

- **Section 12.1 (d) of the proposed Guidelines**

Comments: The proposed change in Section 12.1 (d) is against the Agreement. Article 15 (3) (d) of the Agreement established the following:

In preparing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information:
(d) developed by the Secretariat or by independent experts.

The proposed change eliminates from the content of the Factual Record the facts presented by the Secretariat with respect to the matter raised in the Submission. This change would make article 15 (3) (d) irrelevant as there is no sense to consider the information developed by the Secretariat if its own facts will not be part of the content of the Factual Record. Moreover, the considerations of the Secretariat regarding the matters raised in the submissions intend to be an objective view of the Submission's facts.

Conclusion: Thus, it is recommended to reject this change.

- **Section 12.2 of the proposed Guidelines**

Comments: The proposed change in Section 12.2 is against the Agreement. The present Agreement do not prohibit the Secretariat to conclude whether a Party is failing to effectively enforce its environmental law or recommendations relating to future Party or submitter action. However, the proposed changes intend to do so. The purpose of the Factual Record is to provide some guide on effective compliance of environmental laws. The sole description of the facts or evidence rendered by the Submitter and the Party may not be enough to become such guidance. If the SEM Procedure is to provide a remedy similar to those of the Truth Commissions, an analysis of the evidence provided by the parties is required. Otherwise, the Secretariat would become just a body of information gathering.

Conclusion: Thus, it is recommended to reject this change.

- **Section 15.1 (g) of the proposed Guidelines**

Comments: The elimination of part of the information to be published regarding the SEM process turns it secretive and non-transparent. The decisions of the Council and the Secretariat regarding the preparation of a Factual Record and its publication are important in order to guarantee that the process is being carried out according to the Agreement and its Guidelines and avoid discretionary decisions.

Conclusion: Thus, it is recommended to reject this change.