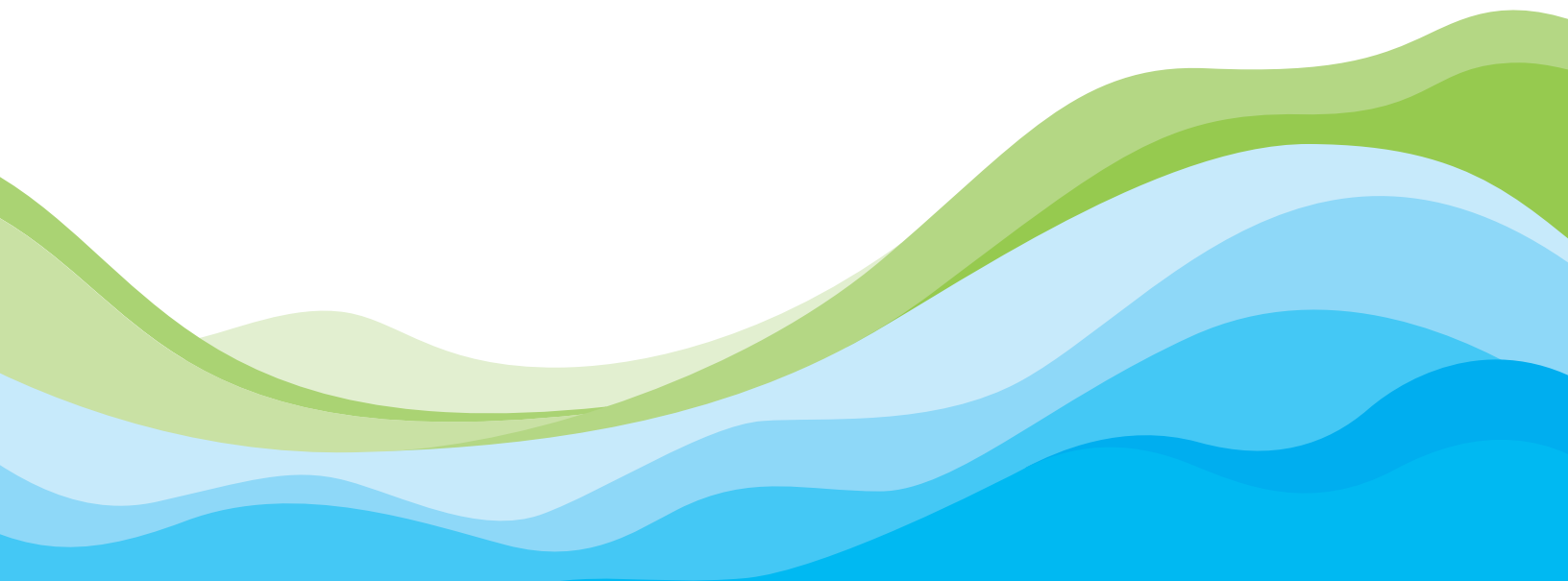




COMMISSION FOR
ENVIRONMENTAL
COOPERATION

Submissions on Enforcement Matters: What Have We Learned? A Retrospective Review of Performance

Prepared by the Environmental Law Institute for the
Commission for Environmental Cooperation





Please cite as:

CEC. 2023. *Submissions on Enforcement Matters: What Have We Learned? A Retrospective Review of Performance*. Montreal, Canada: Commission for Environmental Cooperation. 93 pp.

This publication was prepared by Environmental Law Institute for the Secretariat of the Commission for Environmental Cooperation. The information contained herein [is the responsibility of the author and] does not necessarily reflect the views of [the CEC, or] the governments of Canada, Mexico or the United States of America.

About the author(s):

The Environmental Law Institute is a nonprofit research and policy organization founded in 1969. The Institute is dedicated to making law work for people, places, and the planet.

Reproduction of this document in whole or in part and in any form for educational or non-profit purposes may be made without special permission from the CEC Secretariat, provided acknowledgment of the source is made. The CEC would appreciate receiving a copy of any publication or material that uses this document as a source.

Except where otherwise noted, this work is protected under a Creative Commons Attribution Noncommercial-NoDerivative Works License.



© Commission for Environmental Cooperation, 2023

ISBN: 978-2-89700-338-8

Disponible en français – ISBN: 978-2-89700-339-5

Disponible en español – ISBN: 978-2-89700-340-1

Legal deposit – Bibliothèque et Archives nationales du Québec, 2023

Legal deposit – Library and Archives Canada, 2023

Publication Details

Document category: Submissions on Enforcement Matters

Publication date: November 2023

Original language: English

Final Party review: July 2022 to October 2023

Project: SEM Long-term Impact Assessment

For more information:

Commission for Environmental Cooperation

700 de la Gauchetière Street West, Suite 1620

Montreal (Quebec)

H2Y 1N9 Canada

t 514.350.4300 f 514.350.4314

info@cec.org / www.cec.org

Table of Contents

List of Abbreviations, Acronyms, and Definitions	v
Abstract	vi
Executive Summary	vii
Acknowledgments	xvii
1 Introduction	1
1.1 Purpose of the Report	1
1.2 Metrics	1
1.3 Methodology	3
1.3.1 Documents	3
1.3.2 Survey of Submitters	4
1.3.3 Structured Interviews	4
1.3.4 Analysis of Data	4
2 Overview of SEM	5
2.1 Origins	5
2.1.1 NAAEC and NAFTA	5
2.1.2 USMCA/CUSMA and ECA	6
2.2 SEM Procedures	8
2.3 Evolution of the SEM Process	18
3 Presentation of Data	23
3.1 Submissions and Submitters	23
3.2 Factual Records	26
3.3 Other Dispositions	30
3.4 Timelines and Compliance	34
3.5 Subject of Submissions	39
4 Survey Analysis	43
4.1 Overview	43
4.2 Analysis	44
4.3 Comparison to JPAC Survey	48

5 Findings	49
5.1 Facilitates Meaningful Public Engagement?	49
5.1.1 Accessibility of Process	49
5.1.2 Legalistic Process	52
5.1.3 Transparency of Process to Submitter	55
5.1.4 Declining Use of SEM	57
5.2 Maintains Credibility of the Process?	58
5.2.1 Independence of SEM Process	58
5.2.2 Timelines for SEM Determinations	61
5.2.3 Disclosure of Documents	63
5.2.4 Responsibility for Factual Record	64
5.3 Produces Information Not Otherwise Accessible?	69
5.3.1 Secretariat Resources	69
5.3.2 Effect of Submission on Party	70
5.3.3 Information Generally	71
5.4 Promotes Effective Enforcement of Environmental Laws?	72
5.4.1 Environmental Enforcement Outcomes	73
5.4.2 Follow-up Activities	75
6 Recommendations	77
Annexes	82
Bibliography	87

List of Tables

Table 1. SEM steps and timelines	9
Table 2. Council votes on Secretariat recommendations	33

List of Figures

Figure 1. Number of submissions per country	23
Figure 2. Submissions by year	24
Figure 3. Type of submitter	25
Figure 4. Type of submitter by country	26
Figure 5. Number of submissions resulting in publication of Factual Record	27
Figure 6. Percentage of closed submissions that resulted in the publication of a Factual Record (by year submitted)	28
Figure 7. Total Factual Records by type of submitter	28
Figure 8. Submissions by country resulting in a Factual Record	29
Figure 9. Termination points for submissions based on date submitted	30
Figure 10. Percentage of closed submissions (and open submissions reaching at least this point) that were terminated before requesting party response	31
Figure 11. Percentage of closed submissions (and open submissions reaching at least this point) that were terminated because Secretariat decided to not recommend a Factual Record	32
Figure 12. Percentage of closed submissions (and pending submissions reaching at least this point) that were terminated because the Council instructed the Secretariat not to prepare a Factual Record	32
Figure 13. Average time from submission to termination for all closed submissions	34
Figure 14. Average time to final Factual Record publication from initial submission	35
Figure 15. Time (in months) for final Factual Record publication from initial submission	36
Figure 16. Mean time from request of Party response to complete Party response	37
Figure 17. Mean time from Party response to Secretariat determination that Factual Record is or is not warranted	37
Figure 18. Mean time from Secretariat recommendation to Council vote	38

Figure 19. Mean time from Council vote to Draft Factual Record	38
Figure 20. Content of submission	40
Figure 21. Percentage of submissions from each category that result in Factual Records	40
Figure 22. Submissions by category and country	41
Figures 23 and 24. Scope of submissions (Canada and Mexico, respectively)	42
Figure 25. Scope of US submissions	42
Figure 26. Averaged responses to Likert scale questions	44
Figure 27. Agreement with Likert scale questions based on whether survey taker submitted before or after 2012	45
Figure 28. Agreement with Likert scale questions based on whether or not a Factual Record was prepared	46

List of Abbreviations, Acronyms, and Definitions

CEC	Commission for Environmental Cooperation (established by the NAAEC and continued by the ECA)
Council	Council of the Commission for Environmental Cooperation
CUSMA	Canada-US-Mexico Agreement (also known as USMCA)
EC	Environment Committee (established by the USMCA/CUSMA)
ECA	Environmental Cooperation Agreement
EIA	Environmental Impact Assessment
Guidelines	Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environment Cooperation (last revised in 2012)
JPAC	Joint Public Advisory Committee
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NGO	Nongovernmental Organization (including nonprofit and for-profit entities)
Parties	The Governments of Canada, the United States of America, and the United Mexican States
Secretariat	Secretariat of the Commission for Environmental Cooperation
SEM	Submissions on Enforcement Matters
USMCA	US-Mexico-Canada Agreement (also known as CUSMA)

Abstract

This report assesses the performance and impact of the Submissions on Enforcement Matters (SEM) process from 1994 through 2021. The SEM process allows persons and nongovernmental organizations to file submissions with the Commission for Environmental Cooperation asserting that Canada, the United States of America, or Mexico is failing to effectively enforce its environmental laws and provides procedures for developing information concerning the asserted enforcement matters. The SEM process operated under the North American Agreement on Environmental Cooperation (NAAEC) from 1994 to June 2020 and now operates under the US-Mexico-Canada Agreement (USMCA/CUSMA) since July 2020. This report considers the objectives of the SEM process, its legal foundations, its implementation over time, and its results. The report considers the role of the process in promoting transparency, accountability, and public participation, as well as whether it has met its expected environmental objectives.

Executive Summary

Introduction

In 1994, Canada, the United States of America, and Mexico entered into a trade agreement, the North American Free Trade Agreement (NAFTA). At the same time, the three countries also entered into an environmental agreement, the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC established a process in which persons and nongovernmental organizations (NGOs) could file information with the organization administering the NAAEC asserting that any of the three countries was failing to effectively enforce its environmental laws.

This process is known as Submissions on Enforcement Matters (SEM). It operated under the NAAEC from 1994 to June 2020, and it continues under a new trade agreement, the US-Mexico-Canada Agreement (USMCA/CUSMA), which became effective in July 2020. This unique process is administered by the Commission for Environmental Cooperation (CEC), through its Secretariat and its governing Council.

Under the SEM process, the Secretariat initially determines if the submission meets criteria for further review. It may request a response from the government of the country that is the subject of the submission. And, if warranted, it may recommend to the Council that the Secretariat be instructed to prepare a Factual Record concerning such matters. If the Council directs that a Factual Record be prepared, the Secretariat gathers facts and presents information concerning the subject of the submission, and the Council may publish the resulting Factual Record.

This assessment report considers the objectives of the SEM process, its legal foundations, its implementation over time, and its results. The report examines the implementation of the process in promoting transparency, accountability, and public participation, as well as whether it has met its expected environmental objectives.

The findings rely on: (1) analysis of the documented record of the SEM since its inception, including the primary source documents and prior studies; (2) a survey of users of the SEM process (submitters); and (3) focused interviews with persons with a range of experiences with SEM over its history.

Overview of SEM

The objectives of the NAAEC were, among others, to foster the protection and improvement of the environment for the well-being of present and future generations; to increase cooperation among the Parties to better conserve, protect, and enhance the environment; and to strengthen, advance, and enhance compliance with, and enforcement of, environmental laws and regulations.

The SEM process promotes public participation and information disclosure related to advancing these goals.

The CEC consists of three bodies: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The Council is comprised of the highest-level authorities on environmental matters from each country (Party). The Secretariat is headed by an Executive Director who is appointed by the Council and is tasked with appointing and supervising professional staff from the three countries; it directly carries out the SEM process. The JPAC provides advice to the Council and may also provide information to the Secretariat as part of the SEM process. In 1995, the Council approved initial Guidelines for the SEM process. The Guidelines were later amended, most extensively in 2012.

The Parties renegotiated NAFTA and replaced it with the USMCA/CUSMA, effective July 2020. The SEM process was retained and several changes to the process were adopted, and it was placed directly in Chapter 24 of the USMCA/CUSMA. The Parties also negotiated the Environmental Cooperation Agreement (ECA), which replaced the NAAEC. The ECA maintains continuity of the CEC, its components and its functions. The USMCA/CUSMA also created a new Environment Committee, comprised of senior government representatives of the trade and environment authorities from each Party to serve as a forum to discuss implementation of the environment provisions of the USMCA/CUSMA.

The SEM process under the USMCA/CUSMA consists of the following steps:

1. Filing of the Submission
2. Secretariat determines whether Submission meets criteria in Article 24.27(2)
3. Secretariat determines whether to request a Party Response according to Article 24.27(3)
4. Party transmits its Response
5. Secretariat determines whether to recommend development of a Factual Record
6. Council members may instruct Secretariat to prepare a Factual Record
7. Secretariat drafts Factual Record
8. Parties comment on draft Factual Record
9. Secretariat prepares final Factual Record
10. Secretariat publishes final Factual Record unless at least two Council members instruct otherwise
11. Follow-up procedures¹

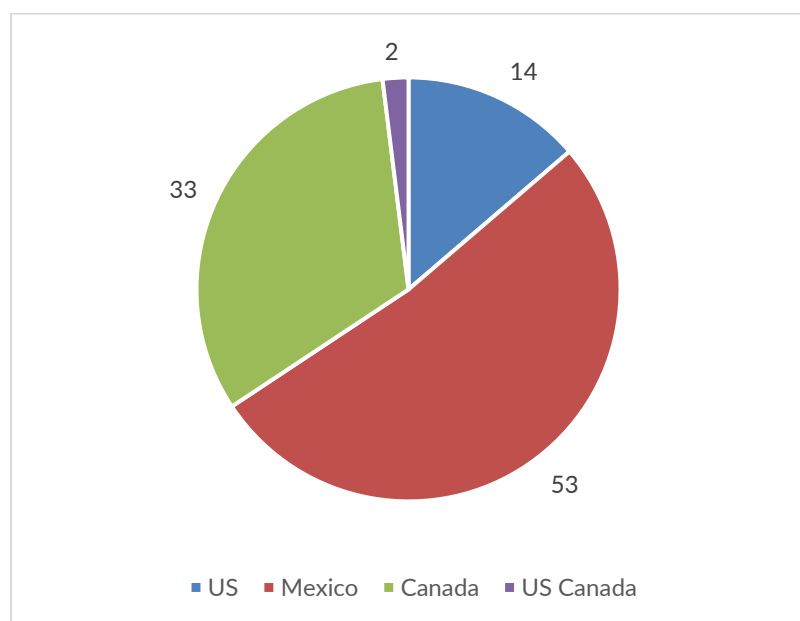
¹ "The Environment Committee shall consider the final factual record in light of the objectives of [Chapter 24] and the ECA and may provide recommendations to the Council on whether the matter raised in the factual record could

Implementation of the SEM process has been evaluated from time to time, including JPAC's *Lessons Learned* report in 2001 and the *Ten-Year Review and Assessment Committee (TRAC) Report* in 2004, as well as in the SEM Modernization process that resulted in the revised 2012 Guidelines, and some public reviews associated with the twentieth anniversary of the NAAEC in 2014.

Summary of Data on the SEM Process

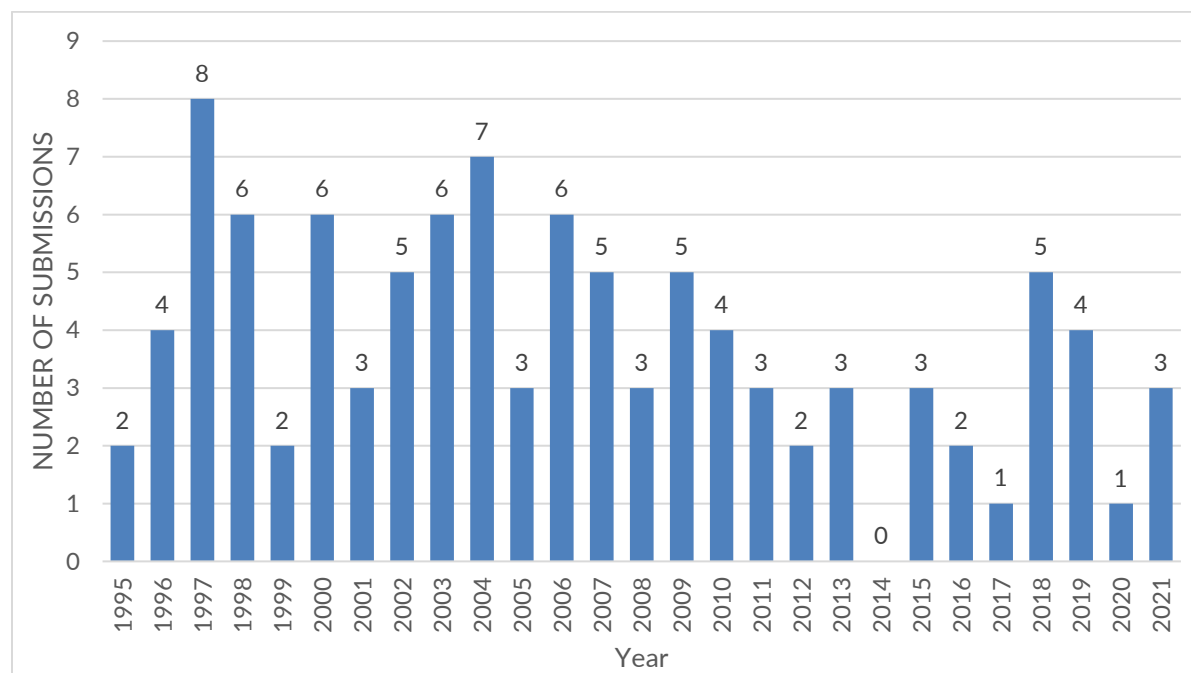
There have been 102 submissions from the inception of the SEM process in 1994 through December 2021. Mexico was the subject of a little over half of all submissions, while Canada accounts for over a quarter, and the US accounts for 14. Two submissions concerned the US and Canada concurrently.

Figure ES-1. Number of Submissions per Country



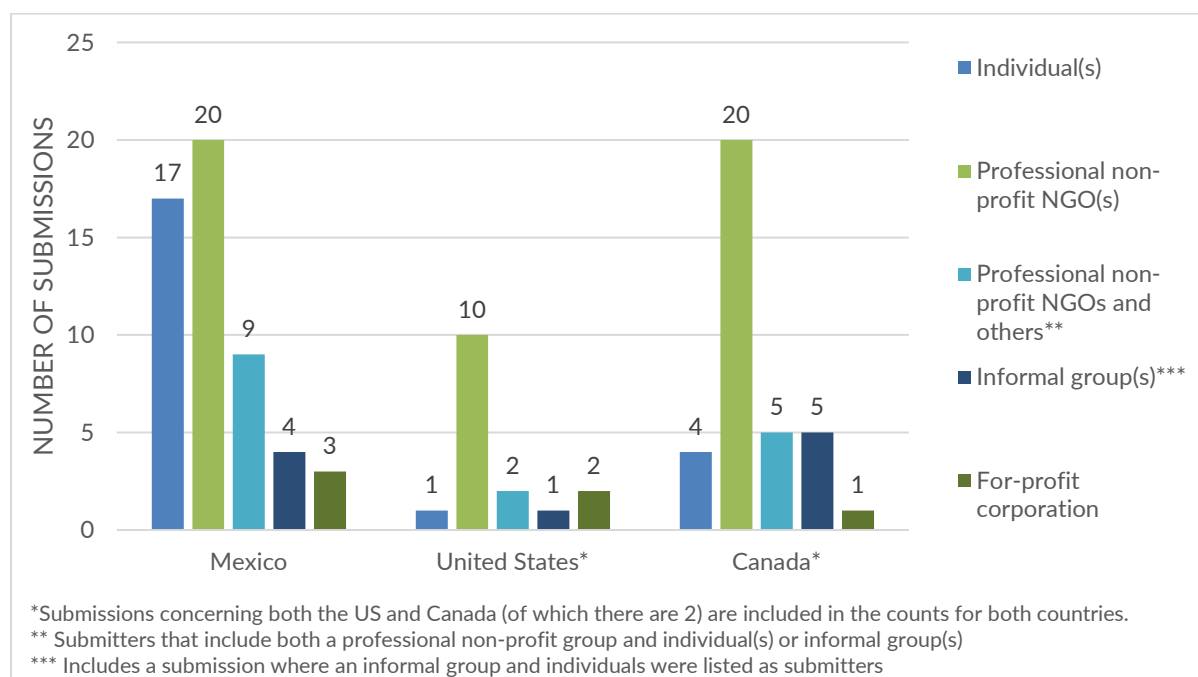
benefit from cooperative activities." USMCA art. 24.28(7). Also, "Parties shall provide updates to the Council and the Environment Committee on final factual records, as appropriate." USMCA art. 24.28(8).

Figure ES-2. Submissions by Year



Non-profit NGOs with paid professional staff members (professional non-profit NGOs) have made the greatest use of the SEM process. Taking into account submissions with multiple submitters, these have been involved in nearly two-thirds of all submissions. Other NGOs include informal and community groups and for-profit corporations. While professional non-profit NGOs have been the most frequent users of the submission process in all three countries, they have accounted for a higher proportion of submitters in Canada and the United States than in Mexico. Almost all the submissions filed by individuals have concerned Mexico.

Figure ES-3. Type of submitter by country



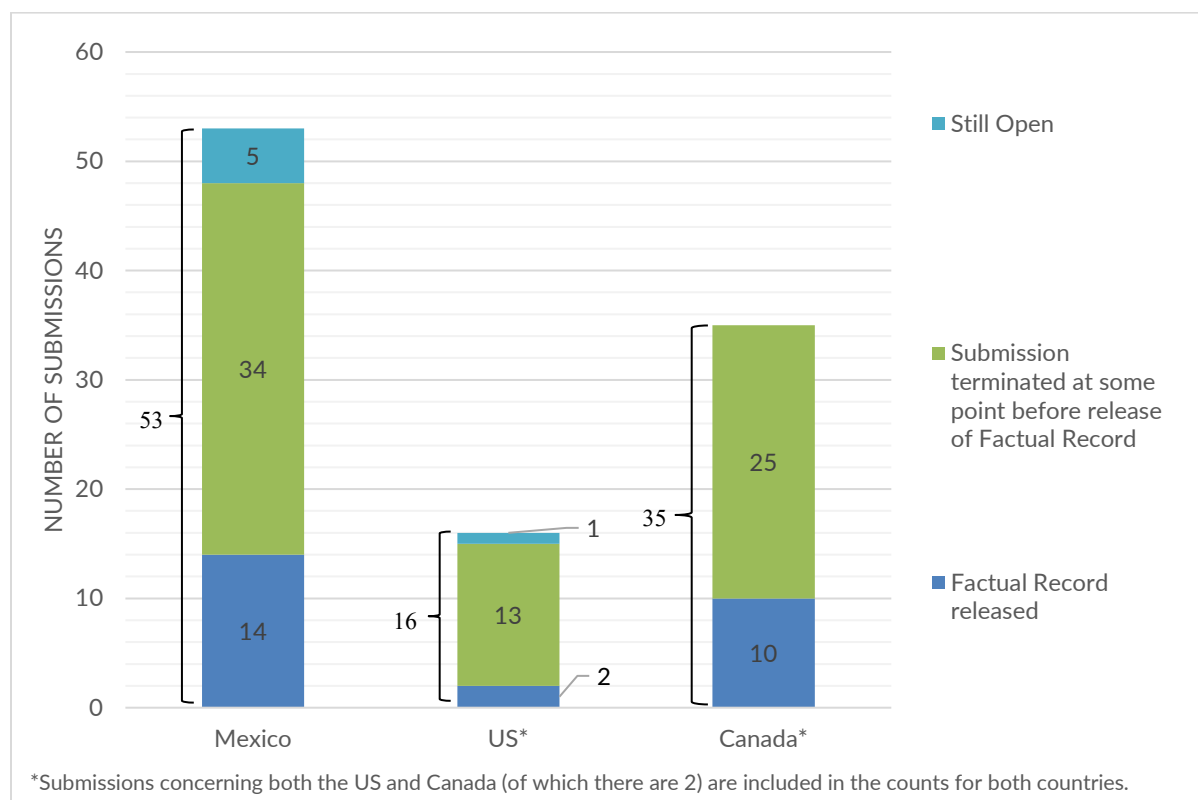
Since the process began, the CEC has produced 24 Factual Records, regarding 26 submissions. Six submissions filed before termination date of this study are still open; the Secretariat is preparing draft Factual Records for two of these, and two more are awaiting Council action.

While the likelihood of a submission resulting in a Factual Record is close to one in four historically, the likelihood has fluctuated over time. In fact, submissions in the first 12 years of the process were much more likely to result in a Factual Record than since then. For the submissions filed between 1995 and 2000, 11 of 28 resulted in a Factual Record (or 39 percent). For those filed from 2013-2018, only 2 of 14 have resulted in a Factual Record (or 14 percent). Two submissions initiated between 2013 and 2018 are still open. The Secretariat is currently preparing a Factual Record for one of these, and the Secretariat has advised the Council that preparation of a Factual Record for the other one is warranted. If both of those submissions progress to publication of a Factual Record, the percentage for that period would be 28 percent.

Over the entire history of SEM, professional non-profit NGOs have filed 73 percent of all submissions that progressed to Factual Records. Individuals, on the other hand, account for filing 21 percent of all submissions but only 15 percent of Factual Records have resulted from their submissions.

There have been 14 Factual Records with Mexico as the subject Party, 10 with Canada, and 2 with the United States. About 29 percent of submissions involving Mexico and Canada resulted in a Factual Record, and 20 percent of those concerning the United States.

Figure ES-4. Submissions by country resulting in a Factual Record

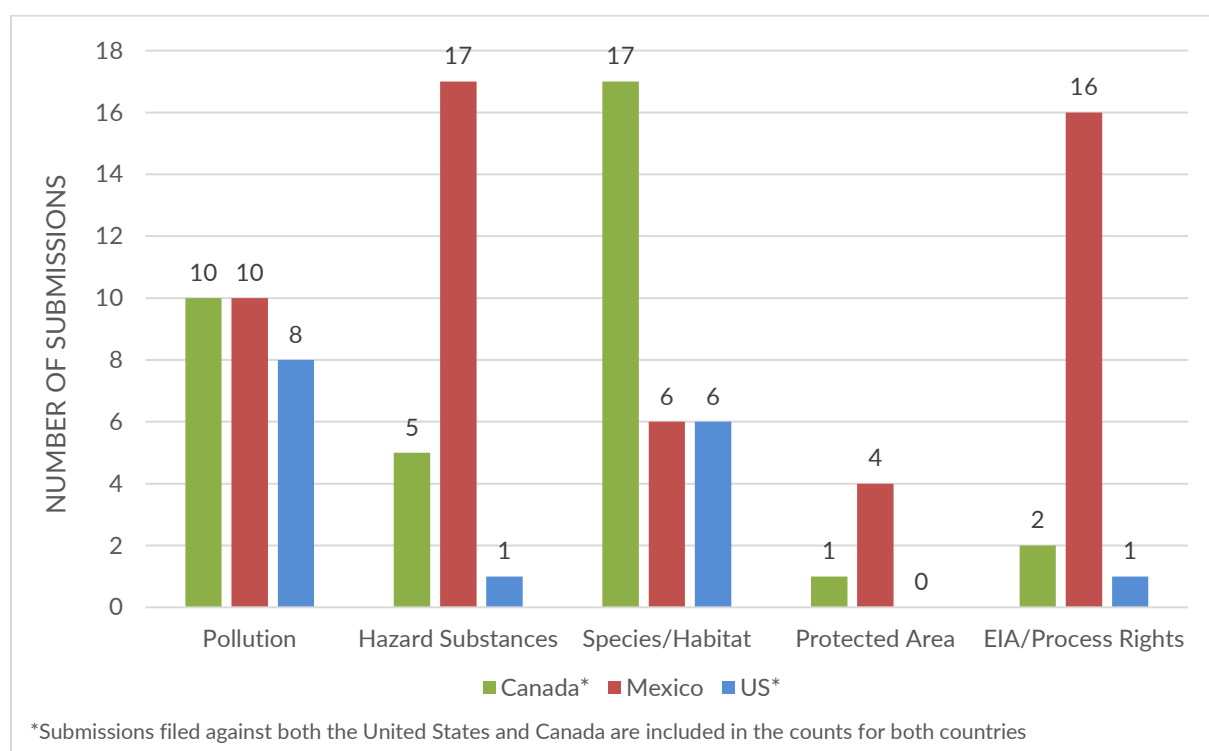


The timing of Council votes to instruct the Secretariat whether or not to prepare a Factual Record has varied substantially. The 2012 Guidelines under the NAAEC call for the vote to occur “normally within 60 working days of receiving the Secretariat’s recommendation” or just under three months. For submissions filed between 2000 and 2006, the Council took an average of over two years to vote on whether to instruct the Secretariat to prepare a Factual Record. While that timeline improved dramatically (to approximately 7.5 months) for submissions filed between 2007 and 2012 (a period when Council instructed the Secretariat not to prepare Factual Records for 3 out of 5 recommendations), timelines have lengthened again since that time to 9-15 months.

The subject matter of submissions concerning the Parties varies. Both the NAAEC and USMCA/CUSMA define “environmental law” as falling into four general categories: pollution, hazardous substances and related information, species and habitat protection, and protected

natural areas. A submission must identify laws, regulations or legal provisions fitting into one or more of these categories. In practice, submitters have often also asserted a failure to effectively enforce a procedural right as the main claim. However, even submissions focused on these procedural rights (referenced here as Environmental Impact Assessment (EIA)/process rights) must connect to the agreement definitions. We classified all submissions in accordance with these categories to discern how the SEM process has been used. Submissions most often have addressed pollution and species/habitat enforcement. These submissions also have the highest success rate in producing Factual Records.

Figure ES-5. Submissions by category and country

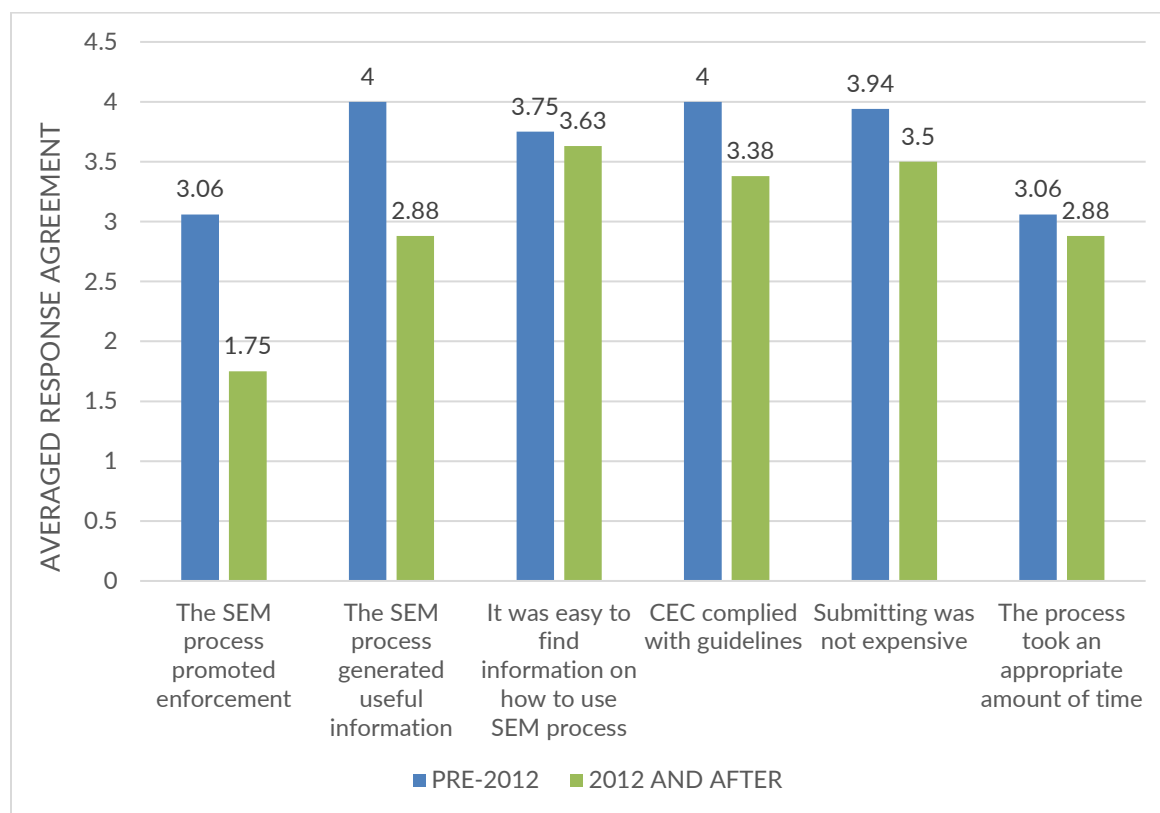


The CEC provided contacts for all submitters for whom the Commission had up-to-date information, using a process to maintain confidentiality for submitters who had requested confidentiality. At least one point of contact was identified for 86 of the 102 total submissions and these were sent a link to complete a survey in their preferred language. The survey yielded 13 responses, but many of the respondents had filed multiple submissions so the results represent 24 submissions. Survey responses reflected eight submissions filed in or after 2012 (36 percent of submissions in that time period) and 16 before 2012 (or 21 percent of submissions from that time period).

Submissions on Enforcement Matters: What Have We Learned?

Six survey questions used a five-point Likert scale (strongly disagree = 1, disagree = 2, neutral = 3, agree = 4, strongly agree = 5). The closer a number is to five, the more respondents agreed with a statement.

Figure ES-6. Agreement based on submission before or after 2012



Summary of Findings

Based on review of CEC documents related to SEM, data analysis of the 102 submissions, the survey responses, structured interviews, and prior literature and evaluations, we assessed the performance of the SEM process with respect to four characteristics, and present findings on each:

- Has the process facilitated meaningful public engagement?
- Has the process maintained institutional credibility?
- Has the process produced information not otherwise accessible?
- Has the process promoted effective enforcement of environmental laws?

Meaningful Public Engagement – The SEM process has facilitated meaningful public engagement. It has also presented some obstacles to such engagement.

- *Accessibility of Process* – The process is generally regarded as accessible to individuals and informal groups as well as to NGOs.
- *Legalistic Process* – The SEM process has become unnecessarily oppositional, especially at the early stages. While the Secretariat is generally given high marks for its responsiveness and providing information to potential submitters, the submissions process has frequently become an exercise in legal pleading.
- *Transparency of Process to Submitter* – The SEM process has become increasingly transparent with the posting of documents online on the Registry, and the Secretariat's Compliance Tracker indicating decision point status and timelines. Nevertheless, some aspects of the process are somewhat opaque to the submitter.
- *Declining Use of SEM* – There have been modest declines in the use of SEM by eligible submitters.

Maintaining Institutional Credibility – The credibility of the SEM process with the Parties and the North American public is a critical aspect of its continued utility. This credibility depends, in turn, upon whether the CEC adheres to well-understood procedures, and whether the procedures are understood to provide fairness to potential users. The administration of SEM has reflected both difficulties and incremental process changes.

- *Independence of SEM Process* – The SEM process is not generally perceived as independent of the interests of the Parties that oversee it.
- *Timelines for SEM Determinations* – SEM timelines have improved, especially since the 2012 Guidelines, but the Council has not consistently met its time commitment from the Guidelines for voting on whether to instruct the Secretariat to prepare a factual record within 60 working days of receiving a recommendation.

Submissions on Enforcement Matters: What Have We Learned?

- Disclosure of Documents – Prompt posting and disclosure of documents, decisions, and reasoning on the Registry has improved understanding of the SEM process.
- Responsibility for Factual Record – The Council has closely managed the authorization and contents of Factual Records in ways that lessen public confidence in the SEM process.

Producing Information Not Otherwise Accessible – The SEM process produces useful information. However, Parties' responsiveness to Secretariat requests for information can be improved.

- Secretariat Resources – In order to generate useful information, it is essential that the CEC (and the Parties) provide sufficient resources to enable the SEM unit to produce high quality work over short periods of time.
- Effect of Submission on Party – Information provided by the Parties is critically important to the value of the SEM process. Improvements can be made both in the content of Party responses and in the timely provision of information for the preparation of Factual Records.
- Information Generally – SEM information has value to the submitters and the public.

Promoting Effective Environmental Enforcement – The SEM process has provided a means for focusing attention on governmental actions or inactions with some positive outcomes. Additional follow-up activities are needed if better environmental outcomes are to be recognized.

- Environmental Enforcement Outcomes – There is not sufficient evidence to indicate that the SEM process has consistently produced improved environmental enforcement outcomes.
- Follow-up Activities – The Parties can implement consistent approaches to activities following up on the publication of Factual Records.

Recommendations

- The CEC should promptly update the Guidelines governing the SEM process.
- The CEC should improve communications with the submitters during the SEM process.
- The CEC should find ways to provide flexibility for meeting certain time frames in the SEM process in light of exceptional circumstances to enhance both feasibility and timeliness of action.
- The CEC should consider developing guidance regarding actions following the publication of a Factual Record.
- The CEC should establish a standardized approach to follow up on Factual Records.
- JPAC should continue its active role on SEM.

Acknowledgments

This report was prepared by the Environmental Law Institute (ELI) for the Commission for Environmental Cooperation. ELI staff contributing to the report were Carl Bruch, James McElfish, Rebecca Ramirez, Georgia Ray, and Elissa Torres-Soto. ELI appreciates the guidance and assistance from CEC staff, Paolo Solano Tovar, Caitlin McCoy, Doris Millan, and Léa Neumark-Gaudet.

We thank the following individuals for their valuable insights into the SEM process: Gustavo Alanís Ortega, Jocelyn Adkins, Agusti Bordas-Cuscó, Wilehaldo Cruz Bressant, Rodrigo García Galindo, Geoff Garver, Lisa Goldman, Tracy Hester, Nadtya Hong, John Knox, Enrique Lendo Fuentes, Dale Marshall, Robert Moyer, Raul Pacheco Vega, David Silva Bonales, and Sarah Uhlemann.

ELI is solely responsible for the contents of this report.

1 Introduction

1.1 Purpose of the Report

This report assesses the performance and impact of the Submissions on Enforcement Matters (SEM) process from 1994 through 2021. The SEM process was created and has been maintained under successive multilateral agreements among the United States, Canada, and Mexico. The SEM process was created by the North American Agreement on Environmental Cooperation (NAAEC),² which applied from 1994 through June 2020. The SEM process has been continued by the US-Mexico-Canada Agreement (USMCA/CUSMA),³ which became effective in July 2020.

These agreements authorize persons and nongovernmental organizations to file a submission with the Secretariat of the North American Commission for Environmental Cooperation (CEC) asserting that any of the Parties is “failing to effectively enforce its environmental laws.” The respective agreements authorize the CEC to create and publish Factual Records concerning such matters if warranted.

This assessment report considers the objectives of the SEM process, its legal foundations, its implementation over time, and its results. The report considers the role of the process in promoting transparency, accountability, and public participation, as well as whether it has met its expected environmental objectives.

1.2 Metrics

The performance of the SEM process is best evaluated in connection with the goals the Parties expressed for it. SEM was created by Articles 14 and 15 of the NAAEC, which entered into force immediately after the entry into force of the North American Free Trade Agreement (NAFTA).⁴ The Parties intended the NAAEC, by its terms, to advance environmental protection, public participation, transparency, and access to information.⁵ The SEM process supports each of these objectives. The focus of SEM on “effective enforcement” also supported the Parties’ substantive commitment under the NAAEC that each Party “shall effectively enforce its environmental laws and regulations,” with the “aim of achieving high levels of environmental protection and compliance.”⁶ The Parties reiterated this commitment in the USMCA/CUSMA, affirming that “No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties....”⁷ Additionally, they agreed that “Each Party shall strive to ensure that its

² North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 8-14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

³ Agreement Between the United States of America, the United Mexican States, and Canada, (18 Dec. 2018) [hereinafter USMCA].

⁴ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) [hereinafter NAFTA].

⁵ NAAEC, arts. 1- 5. The SEM process is in Articles 14 and 15.

⁶ NAAEC, art. 5(1).

⁷ USMCA, art. 24.4(1) (internal citations omitted).

environmental laws and policies provide for, and encourage, high levels of environmental protection, and shall strive to continue to improve its respective levels of environmental protection.”⁸

In 1995 the CEC approved the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. The Guidelines were subsequently updated in 2012 (2012 Guidelines). The Introduction to the 2012 Guidelines provides additional insight into the functions of the SEM process. It describes the SEM process as a “unique and empowering tool” that:

- Facilitates public participation,
- Supports government transparency, and
- Promotes the effective enforcement of environmental law in North America.⁹

The 2012 Guidelines further state that the SEM process was established “to provide the North American public with timely and relevant information regarding the enforcement of domestic environmental law” and “to provide valuable information to the Parties as they act to fulfill their obligations under the Agreement.”¹⁰ Although the Guidelines were written in relation to the NAAEC, the ECA provides that the “Commission will continue to operate under the modalities in place...including its ... guidelines ... to the extent these modalities are consistent with this Agreement.”¹¹ The metrics we use in this assessment report are informed by these objectives as expressed in the governing agreements and by the CEC in its Guidelines.

We also integrate metrics applied in prior official reviews of the SEM process. The Joint Public Advisory Committee (JPAC), a constituent body of the CEC, in its 2001 *Lessons Learned* report examined SEM in terms of: timeliness, openness, accountability, and effectiveness.¹² The Ten-Year Review Assessment Committee, in its 2004 report to the CEC, *Ten Years of North American Environmental Cooperation*, focused on two questions, one procedural and one substantive:

⁸ USMCA art. 24.3(2).

⁹ COMM’N FOR ENVTL. COOPERATION, *SEM Guidelines for Submissions on Enforcement Matters Under Articles 14 And 15 of the North American Agreement on Environmental Cooperation* (11 July 2012), available at <<http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf>> [hereinafter 2012 Guidelines].

¹⁰ *Id.*

¹¹ ECA art. 2(3) (“The Commission will continue to operate under the modalities in place as of entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this Agreement. The Council shall adjust, as required, these modalities to reflect and implement the provisions of this Agreement. If there is an inconsistency between these modalities and the provisions of this Agreement, the provisions of this Agreement shall prevail.”)

¹² COMM’N FOR ENVTL. COOPERATION JOINT PUBLIC ADVISORY COMMITTEE, *Lessons Learned: Citizen Submissions Under Articles 14 And 15 of the North American Agreement on Environmental Cooperation, Final Report to The Council of The Commission for Environmental Cooperation* (6 June 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/3253_rep11-e-final_EN.PDF> [hereinafter *Lessons Learned*].

whether the SEM process has been implemented as the NAAEC requires, and has the process benefitted the North American environment?¹³

We also considered metrics offered in the literature, including an influential academic review of the SEM process published in 2012, which applied four metrics.¹⁴ These were the following: the extent to which citizens use the process (as an indicator of its perceived value); procedural justice and timeliness of the process; impact on the effectiveness of enforcement of domestic environmental laws; and whether the process has contributed to deeper or more extensive and helpful civic engagement.

Drawing upon all of these sources, we developed four metrics for this retrospective review of the SEM process. This report examines whether the implementation of the SEM process:

1. Facilitates meaningful public engagement.
2. Maintains credibility of the process.
3. Produces information not otherwise accessible.
4. Promotes effective enforcement of environmental laws.

1.3 Methodology

This study relies on (1) analysis of the documented record of the SEM since its inception, including the primary source documents and prior studies; (2) a survey of users of the SEM process (submitters); and (3) focused interviews with persons with a range of experiences with SEM over its history.

1.3.1 Documents

Core documents are the North American Agreement on Environmental Cooperation (especially Articles 14, 15, 45), the USMCA/CUSMA (especially Articles 24.1, 24.27, 24.28), and related agreements and institutions.¹⁵ Our review included the Guidelines, as adopted and as amended from time to time – most substantially in 2012. Other source documents we reviewed include the submissions, determinations, government responses, Secretariat recommendations, Council votes and statements of reasons, and Factual Records, available on the CEC website. The data analysis draws also on the SEM Registry and Compliance Tracker, and additional information where available. We also reviewed published reports, relevant academic literature, Council

¹³ TEN-YEAR REVIEW AND ASSESSMENT COMMITTEE, *Ten Years of North American Environmental Cooperation*, at 44 (15 June 2004), available at <<http://www3.cec.org/islandora/en/item/11382-ten-years-north-american-environmental-cooperation-report-ten-year-review-and-assessment-en.pdf>> [hereinafter TRAC Report].

¹⁴ Markell, D.L., Knox, J.H. *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L.J. 505, 507 (2012).

¹⁵ See e.g. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Dominican Republic-Central America Free Trade Agreement, United States-Colombia Trade Promotion Agreement, United States-Panama Trade Promotion Agreement, United States-Perú Free Trade Agreement, World Bank Inspection Panel, Compliance Advisor Ombudsman for the International Finance Corporation and the Multilateral Investment Guarantee Agency.

Resolutions, JPAC Advice to Council and other reports, and publications focusing on both the process and outcomes of the SEM.

1.3.2 Survey of Submitters

We conducted an online survey in September and October 2021 (using a Google Forms survey tool). We contacted by email all past submitters for whom contact information could be obtained. Confidential submitters were contacted using means to maintain their confidentiality. Each potential respondent was contacted three times to encourage participation. The survey invitation and instrument were provided in English, Spanish, and French to submitters based on the language used in their submissions, and we received responses in all three languages.

The survey solicited both ranked responses and narrative information, including submitters' use of the SEM process, the information available to them, timing of procedural stages, outcomes of the process, and any concerns. Survey questions examined what goals and expectations submitters had in initiating the SEM process; what was expected and unexpected about the process; and how transparent the procedural steps were. Submitters were asked for their views on resolution of the submission and whether the SEM aided in achieving submitters' objectives. If a Factual Record was prepared, submitters were asked to identify to what extent it did or did not advance the understanding of the subject of the submission by the affected government, the submitter, or the public. Submitters were asked for additional comments or recommendations. Survey results were reviewed together with the results of a similar survey conducted by JPAC in 2011, to obtain fuller coverage and enable comparison where relevant.

The survey instrument is reproduced in the Annex.

1.3.3 Structured Interviews

We conducted interviews of 16 individuals experienced in the SEM process. These included former CEC officials, current and former government officials from the three Parties, past submitters, and academic experts.

These interviews were designed to elicit additional views and information bearing on expectations for the SEM process, the effectiveness of the SEM process, usefulness of the Guidelines, administrative and technical considerations, interpretive issues, and recommendations. The interview topics for all four categories of interviewees are summarized in the Annex.

Seven interviewees were government or former government officials, three were former CEC officials, four were academic experts, and four were past submitters (representing submissions involving all three Parties). The total adds to 18 as two interviewees occupy two of the interview categories. Each interview was structured to occur over one hour.

1.3.4 Analysis of Data

Using these sources of data, we identified trends, practices, and experiences. In Chapter 4 of this report, we review the information with respect to each of the four performance metrics. This

analysis identifies strengths and weaknesses of the SEM process over time, and forms the basis for our findings. In Chapter 5, we offer some recommendations that may be of value as the CEC implements the USMCA/CUSMA.

2 Overview of SEM

2.1 Origins

2.1.1 NAAEC and NAFTA

Twenty-seven years ago, the governments of United States, Mexico, and Canada (Parties) entered into the NAAEC, the environmental side agreement to the NAFTA. The objectives of the NAAEC were, among others, to foster the protection and improvement of the environment for the well-being of present and future generations; to increase cooperation among the Parties to better conserve, protect, and enhance the environment; and to strengthen, advance, and enhance compliance with, and enforcement of, environmental laws and regulations.¹⁶

The NAAEC established the CEC to implement the Agreement. The CEC is comprised of three institutional bodies: the Council, the Secretariat, and the JPAC.¹⁷ The Council is the governing body of the CEC, comprised of the highest-level authorities on environmental matters from each respective Party.¹⁸ The Council stands as a forum to discuss environmental matters and is tasked with overseeing implementation of the Agreement, overseeing the Secretariat, developing recommendations, and promoting cooperation between the Parties on environmental issues.¹⁹ Originally under Article 10 of the NAAEC and now under ECA Article 4(1)(d), the Council has authority to “address questions and differences that may arise between the Parties regarding the interpretation or application” of the Agreement.²⁰ The Council meets at least once each year in regular session.²¹

The Secretariat is headed by an Executive Director who is appointed by the Council and is tasked with appointing and supervising professional staff from the three countries.²² A vital function of the Secretariat is its administration of the SEM process under Articles 14 and 15 of the Agreement.²³

The SEM process is a mechanism created by the NAAEC to promote public participation in environmental decision-making and to ensure the effective enforcement of environmental law by each Party. The NAAEC provided that any person or non-governmental organization (NGO) residing or established in the territory of the United States, Mexico, and Canada can file a

¹⁶ NAAEC, art. 1.

¹⁷ *Id.* at art. 8.

¹⁸ *Id.* at art. 9(1), 10(1).

¹⁹ *Id.* at art. 10.

²⁰ *Id.* at art. 10(1)(d); ECA art. 4(1)(d).

²¹ *Id.* at art. 9(3).

²² *Id.* at art. 11.

²³ *See Id.* at arts. 14-15.

submission asserting that a Party is “failing to effectively enforce its environmental law.”²⁴ The Secretariat was tasked with determining whether the submission met the requirements of the NAAEC, and if it did, the Secretariat could request a response from the relevant government or governments. After fully considering a Party’s response to the submission, the Secretariat could determine that a Factual Record was warranted and recommend that the Council instruct it to develop a Factual Record on the issues raised in the submission. The Council votes on whether to instruct the Secretariat to develop a Factual Record.²⁵

Under NAAEC, JPAC was comprised of fifteen Members, appointed equally from the three Parties.²⁶ In addition to providing advice to the Council, the JPAC may provide scientific and technical information to the Secretariat for the purpose of developing a Factual Record.²⁷

In 1995 the Council exercised its Article 10(1) authority to assist the Parties in interpreting the NAAEC by approving the initial SEM Guidelines.²⁸ These were subsequently amended by the Council, most extensively in 2012.²⁹

2.1.2 USMCA/CUSMA and ECA

The Parties renegotiated NAFTA and replaced it with the USMCA/CUSMA, which entered into force in July 2020. The Parties also negotiated the Environmental Cooperation Agreement (ECA)³⁰ in parallel with the USMCA/CUSMA. The ECA replaces the NAAEC, with the SEM process being moved into Chapter 24 of the USMCA/CUSMA. The ECA maintains continuity of the CEC, its components and its functions.³¹ The ECA further defines the relationship of the Council and the Secretariat, stating that the Council will not only “oversee” the Secretariat, but will also “direct and approve its activities.”³² The ECA reduces the size of the JPAC to nine members and adds that the JPAC is charged with helping the Secretariat to “promote and enhance public participation in the implementation” of the Agreement.³³

The SEM process was retained and was placed directly into the USMCA/CUSMA, in Articles 24.27 (Submissions on Enforcement Matters) and 24.28 (Factual Records and Related Cooperation).³⁴ Submissions begun under the NAAEC that were not concluded as of July 2020

²⁴ *Id.* at art. 14(1).

²⁵ *See Id.* at art. 15.

²⁶ *Id.* at art. 16(1).

²⁷ *Id.* at art. 16(5).

²⁸ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 95-10* (13 Oct. 1995), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-95-10-en.pdf> [hereinafter Council Resolution 95-10].

²⁹ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 12-06* (11 July 2012), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-12-06-en.pdf> [hereinafter Council Resolution 12-06].

³⁰ Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada, (18 Dec. 2018). [hereinafter ECA].

³¹ ECA, arts. 1, 2(3).

³² *Id.* at art. 4(1)(c). Cf. NAAEC, art. 10(1)(c).

³³ *Id.* at art. 6.

³⁴ *See generally* USMCA, arts. 24.27-24.28.

Submissions on Enforcement Matters: What Have We Learned?

“continue in accordance with the procedures established under Articles 14 and 15 of the NAAEC,” unless the Council determines otherwise.³⁵

The USMCA/CUSMA did not significantly change the SEM process except in four areas: First, the USMCA/CUSMA narrows the scope of environmental laws that submitters can raise in their filing from “any statute or regulation of a Party” to those “enforceable by action of the central [or federal] level of government.”³⁶ Second, the USMCA/CUSMA redefines eligible submitters from “any non-governmental organization or person”³⁷ to “a national of a Party” or an enterprise “constituted or organized under the law of a Party.”³⁸ Third, where the USMCA/CUSMA itself establishes a timeline, including for certain SEM functions, the USMCA/CUSMA specifies the use of “calendar days” rather than “working days” as had been the practice under the 2012 Guidelines.³⁹ Fourth, the USMCA/CUSMA changes the language around authorizing the Secretariat to prepare a factual record from when there is a “two-thirds vote” by “the Council” to when “at least two members of the Council instruct” the Secretariat to do so.⁴⁰

The 2012 Guidelines continue to be used by the CEC in administering SEM, where not inconsistent with the new agreements. Article 2(3) of the ECA provides that the CEC will continue to operate under the “modalities” previously in place, including “rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this agreement.”⁴¹

USMCA/CUSMA Chapter 24 also creates a new Environment Committee, comprised of senior government representatives of the trade and environmental authorities from each Party.⁴² The Environment Committee provides a forum to discuss implementation of the Chapter and is tasked with providing input for consideration by the Council relating to submissions on enforcement matters.⁴³ The Environment Committee must meet at least once every two years.⁴⁴

³⁵ ECA, art. 2(4).

³⁶ NAAEC, art. 45(2)(a); USMCA, art. 24.1.

³⁷ NAAEC, art. 14(1).

³⁸ USMCA, art. 1.5. A “national” also includes a natural person who is a “permanent resident of a Party.” *Id.*

³⁹ *Id.*

⁴⁰ Compare NAAEC art. 15(2) (“The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.”) and USMCA art. 24.28(2) (“The CEC Secretariat shall prepare a factual record if at least two members of the Council instruct it to do so.”).

⁴¹ ECA, art. 2(3).

⁴² USMCA, art. 24.26(2).

⁴³ *Id.* at art. 24.26(3)(d).

⁴⁴ *Id.* at art. 24.26(4).

2.2 SEM Procedures

The SEM process was intended to increase transparency and public awareness of environmental issues in North American communities and complements the Parties' NAAEC Article 5 and USMCA/CUSMA Article 24.4 commitments that each government would “effectively enforce its environmental laws.”⁴⁵

The steps of the SEM process are outlined below. The description of each step also identifies where changes have been made over the course of the implementation of SEM under the respective agreements. Table 1 summarizes the prescribed timing under the agreements and the 2012 Guidelines for each of the procedural steps after the filing of a submission, which is Step 1.

⁴⁵ NAAEC, art. 5(1)(“each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action”); USMCA, art. 24.4(2)(“No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.”).

Submissions on Enforcement Matters: What Have We Learned?

Table 1. SEM steps and timelines

SEM Steps	NAAEC	2012 Guidelines	USMCA
Step 1. Filing of a Submission			
Step 2. Secretariat Determines Whether Submission Meets Basic Criteria		"normally within 30 working days" ⁴⁶	Within 30 calendar days
Step 3. Secretariat Determines Whether to Request a Party Response		"normally within 30 working days" ⁴⁷	Concurrently with prior step ⁴⁸
Step 4. Party Response	Within 30, or in exceptional circumstances, 60 days. ⁴⁹	Within 30, or in exceptional circumstances, 60 "working days" ⁵⁰	Within 60 calendar days ⁵¹
Step 5. Secretariat Determines Whether to Recommend Development of Factual Record		"normally within 120 working days" ⁵²	Within 60 calendar days ⁵³
Step 6. Council Members Instruct Secretariat to Prepare Factual Record		"normally within 60 working days" ⁵⁴	No timeline specified "normally within 60 working days" per 2012 Guidelines ⁵⁵
Step 7. Secretariat Drafts Factual Record		"normally within 180 working days" ⁵⁶	Within 120 calendar days ⁵⁷
Step 8. Parties Comment on Draft	"within 45 days" ⁵⁸	"within 45 working days" ⁵⁹	Within 30 calendar days ⁶⁰
Step 9. Secretariat Prepares Final Factual Record		"normally within 45 working days" ⁶¹	"promptly" ⁶² "normally within 45 working days" per 2012 Guidelines ⁶³
Step 10. Council Members Instruct Whether to Publish Factual Record	"normally within 60 days" ⁶⁴	"normally within 60 working days" ⁶⁵	"normally" within 30 calendar days ⁶⁶

⁴⁶ 2012 Guidelines, para. 19.1; *See also Id.* at para 6.2 (stating that a submitter will have 60 working days to amend a non-conforming submission).

⁴⁷ 2012 Guidelines, para. 19.1.

⁴⁸ USMCA, art. 24.27(3). The Secretariat now has 30 days to complete both Step 2 and Step 3.

⁴⁹ NAAEC, art. 14(3).

⁵⁰ 2012 Guidelines, para. 19.2.

⁵¹ USMCA, art. 24.27(4).

⁵² 2012 Guidelines, para. 19.3.

⁵³ USMCA, art. 24.28(1).

⁵⁴ 2012 Guidelines, para. 19.4.

⁵⁵ COMM'N FOR ENVTL. COOPERATION, *SEM Compliance Tracker*, available at <<http://www.cec.org/submissions-on-enforcement/sem-compliance-tracker/>> [hereinafter Compliance Tracker]; *See also* 2012 Guidelines, para. 19.4

⁵⁶ 2012 Guidelines, para. 19.5.

⁵⁷ USMCA, art. 24.28(5).

⁵⁸ NAAEC, art. 15(5).

⁵⁹ 2012 Guidelines, para. 19.6.

⁶⁰ USMCA, art. 24.28(5).

⁶¹ 2012 Guidelines, para. 19.7.

⁶² USMCA, art. 24.28(5).

⁶³ 2012 Guidelines, para. 19.7.

⁶⁴ NAAEC, art. 15(7).

⁶⁵ 2012 Guidelines, para. 13.1.

⁶⁶ USMCA, art. 24.28(6).

Step 1. Filing of the Submission

Under the NAAEC, any NGO or person established or residing in the territory of the United States, Mexico, or Canada could file a submission with the Secretariat asserting that a Party is “failing to effectively enforce its environmental law.”⁶⁷ As noted above, the USMCA/CUSMA now provides that a submission may be filed by “[a]ny person of a Party”⁶⁸ defined as “a national of a Party” or “an enterprise constituted or organized under the law of a Party.”⁶⁹

The submission must identify an environmental law as the subject of the submission. Under the NAAEC an “environmental law” meant “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:

1. the prevention, abatement or control of the release discharge, or emission of pollutants or environmental contaminants;
2. the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or
3. the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory.”⁷⁰

The NAAEC definition excluded any statute or regulation, or provision thereof, directly related to worker safety or health; and any statute, regulation, or provision thereof, the primary purpose of which was “managing the commercial harvest or exploration, or subsistence or aboriginal harvesting, of natural resources.”⁷¹

The USMCA/CUSMA now limits the environmental laws that can be the subject of a submission to those adopted and enforceable by the national government of each Party.⁷² Under USMCA/CUSMA, “statute or regulation” means an (1) Act of Congress (for Mexico and the US) or of the Parliament of Canada; or (2) regulation promulgated pursuant to an Act of Congress (for Mexico and the US) or made under an Act of the Parliament of Canada; that is (3) enforceable by action of the federal level of government (Mexico) or by action of the central level of government (for the US and Canada).⁷³ These include enactments that implement the Party’s obligations under specifically identified multilateral environmental agreements, but not the treaty or agreement obligations directly.⁷⁴

⁶⁷ NAAEC, art. 14(1)(a)-(f).

⁶⁸ USMCA, art. 24.27(1).

⁶⁹ *Id.* at art. 1.5.

⁷⁰ NAAEC, art. 45.2(a)(i)-(iii).

⁷¹ *Id.* at art. 45.2(b).

⁷² Under NAAEC provincial and municipal legislation was sometimes considered. In Canada, only Quebec, Manitoba and Alberta were signatory provinces under NAAEC Annex 41 “On the date of signature of this Agreement...Canada shall set out in a declaration a list of any provinces for which Canada is to be bound in respect of matters within their jurisdiction...”

⁷³ USMCA, art. 24.1.

⁷⁴ *Id.* at art. 24.1; *See Id.* at art. 24.8(4).

The USMCA/CUSMA retains the NAAEC exclusions of statutes, regulations, or provisions that are “directly related to worker safety or health,” or that have a “primary purpose” of “managing the subsistence or aboriginal harvesting of natural resources.” But the USMCA/CUSMA removes the NAAEC’s exclusion of laws regulating “commercial harvest or exploitation” of natural resources.⁷⁵

Step 2. Secretariat Determines Whether Submission Meets Basic Criteria

The NAAEC stated in Article 14(1) that the Secretariat would consider any submission that was written in “a language designated by the Party in a notification to the Secretariat;” identified the person making the submission; provided sufficient documentation/information for the claim to be reviewed; had the intention of “promoting enforcement rather than harassing industry;” and indicated whether the relevant Party authorities have been contacted and includes the Party’s response, if any.⁷⁶

The 2012 Guidelines provided the Secretariat with 30 working days to issue a determination on whether a submission met the basic criteria.⁷⁷ A submitter was notified by the Secretariat if the submission does not meet the criteria of Article 14(1) of the Agreement and has 60 working days to provide a revised submission.⁷⁸ The Guidelines also specified that a submission must be limited to fifteen pages,⁷⁹ include a mailing address,⁸⁰ and identify which environmental law is not being enforced.⁸¹ Additionally, they provided that the “Secretariat may at any time notify the Submitter of any minor errors of form in the submission in order for the Submitter to rectify them.”⁸²

The USMCA/CUSMA did not change the substantive requirements of this step, but it made some minor changes to the language, refining the requirements. Submissions must be “in writing in English, French, or Spanish”, “clearly identif[y] the person making the submission”, provide “sufficient information to allow for the review including any documentary evidence on which the submission may be based, “as well as provide” identification of the environmental law of which the failure to enforce is asserted”, which was not explicitly included under the NAAEC but is now stated under the USMCA/CUSMA.⁸³ Submissions must also “indicate[] whether the matter has been communicated in writing to the relevant authorities of the Party and the Party’s response, if

⁷⁵ *Id.*

⁷⁶ NAAEC, art. 14(1)(a)-(e).

⁷⁷ 2012 Guidelines, para. 19.1.

⁷⁸ *Id.* at para. 6.2.

⁷⁹ *Id.* at para. 3.3.

⁸⁰ *Id.* at para. 3.4.

⁸¹ *Id.* at para. 5.2.

⁸² *Id.* at para. 3.10.

⁸³ USMCA, art. 24.27(2)(a)-(c). The original language referred to “in writing in a language designated by that Party in a notification to the Secretariat”, “clearly identifies the person or organization making the submission”, “provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based”, and “indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any” NAAEC, art. 14 (1) (a)-(d).

any.”⁸⁴ The timelines for review of the submission are compressed, as described in Step 3 below. However, where the Secretariat determines that a submission does not meet the initial criteria, the Secretariat provides the submitter 60 calendar days to provide a revised submission.⁸⁵

Step 3. Secretariat Determines Whether to Request a Party Response

The NAAEC provided in Article 14(2) that the Secretariat shall determine whether the submission merits requesting a response from the Party. The 2012 Guidelines provided that the Secretariat has 30 working days after its Article 14(1) determination to issue a determination on whether to request a Party response.⁸⁶ If the Secretariat requested a response, it was to forward the submission and supporting documents to the Party.⁸⁷ In making its decision to request a response from the Party, the Secretariat was to consider whether:

- “the submission alleges harm to the person or organization making the submission;”
- the submission raises issues whose understanding would advance the goals of the Agreement;
- “private remedies available under the Party’s laws have been pursued;” and
- whether the submission “is drawn exclusively from mass media reports.”⁸⁸

The USMCA/CUSMA did not significantly change the substantive requirements of either this step or the preceding step. However, it changed the timeline by requiring the Secretariat to make both the step 2 and step 3 determinations within the same 30 *calendar* days.⁸⁹

Step 4. Party Response

Under Article 14(3) of the former NAAEC and now as per Article 24.27(3) of the USMCA/CUSMA, the Party is to provide its response to the Secretariat within a specific time period. Under the NAAEC, the Party was to provide its response within 30 days or in exceptional circumstances, within 60 days of delivery of the request,⁹⁰ interpreted as “working days” by the 2012 Guidelines.⁹¹ The USMCA/CUSMA states that a Party shall provide its response to the Secretariat within 60 calendar days.⁹²

⁸⁴ *Id.* at USMCA art. 24.27(2)(e); NAAEC, art. 14(1)(e).

⁸⁵ *Cf.* 2012 Guidelines, para. 6.2, but using calendar days for consistency with USMCA/CUSMA timelines for early steps.

⁸⁶ *Id.* at para. 19.1.

⁸⁷ NAAEC, art. 14(2)

⁸⁸ *Id.* at art. 14(2)(a)-(d).

⁸⁹ USMCA, art. 24.27(3).

⁹⁰ NAAEC, art. 14(3).

⁹¹ 2012 Guidelines, para. 19.2.

⁹² USMCA, art. 24.27(4).

Under the former NAAEC and now as per USMCA/CUSMA, the Party advises the Secretariat whether “the matter is the subject of a pending judicial or administrative proceeding,” and if it is, “the Secretariat shall proceed no further.”⁹³

“Judicial or administrative proceeding” was defined in NAAEC Article 45(3) as a “domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprised: 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 a judicial or administrative forum, and the process of issuing an administrative order; and [...] an international dispute resolution proceeding to which the Party is party.”⁹⁴ Unlike the NAAEC, the USMCA/CUSMA provides no definition for “judicial or administrative proceeding.”

The USMCA/CUSMA states that the Party may also submit to the Secretariat any other information including “whether the matter was previously the subject of a judicial or administrative proceeding” and whether private remedies in connection with the matter are available to the submitter and whether they have been pursued.⁹⁵ The USMCA/CUSMA adds that a Party may also submit “information regarding the enforcement of the environmental law at issue including any actions taken in connection with the matter.”⁹⁶

Step 5. Secretariat Determines Whether to Recommend Development of the Factual Record

Under Article 15(1) of the NAAEC, the Secretariat informed the Council whether, in light of the response provided by the Party, the preparation of a Factual Record was warranted and provided its reasons to the Council.⁹⁷ The 2012 Guidelines stated that the Secretariat should issue its determination “normally within 120 working days of receiving” the Party’s response.⁹⁸

If the Party informed the Secretariat that its actions or inactions do not constitute a failure to effectively enforce its environmental law as alleged by the submitter, the Guidelines provided that “the Secretariat is to consider whether the Party has included sufficient information.”⁹⁹ If the Secretariat considered that the Party’s response does not provide sufficient information, the Secretariat could determine that development of a Factual Record is warranted with respect to the relevant matters.¹⁰⁰ The Guidelines explained that the Secretariat considers whether “central questions of fact” remain open that could be addressed in a Factual Record.¹⁰¹

⁹³ NAAEC, art. 14(3)(a); USMCA, art. 24.27(3).

⁹⁴ NAAEC, art. 45(3).

⁹⁵ *Id.* at art. 14(3)(b); USMCA, art. 24.27(4)(b)(ii)-(iii).

⁹⁶ USMCA, art. 24.27(4)(b)(i). Cf. 2012 Guidelines, para. 9.3.

⁹⁷ NAAEC, art. 15(1).

⁹⁸ 2012 Guidelines, para. 19.3.

⁹⁹ *Id.* at para. 9.5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at para. 9.7.

Submissions on Enforcement Matters: What Have We Learned?

Under the USMCA/CUSMA, the Party is to inform the Secretariat of any information it wishes to provide “such as information regarding the enforcement of the environmental law at issue, including any actions taken in connection with the matter in question.”¹⁰² Then, “[i]f the CEC Secretariat considers that the submission, in light of any response provided by the Party, warrants developing a factual record, it shall so inform the Council and the Environment Committee within 60 days of receiving the Party’s response and provide its reasons.”¹⁰³

Both the NAAEC (formerly) and the USMCA/CUSMA (now) provide that a Party has not failed to “effectively enforce its environmental law” where its action or inaction “reflects a reasonable exercise of ...discretion” with respect to “investigatory, prosecutorial, regulatory or compliance matters”; or results from “bona fide decisions” to allocate resources with respect to other environmental matters in accordance with the Party’s enforcement priorities.¹⁰⁴ Assessing a Party’s action or inaction according to these standards is not part of preparing a Factual Record, nor is it the purpose of a Factual Record. According to the Guidelines, “The purpose of a factual record is to provide an objective presentation of the facts relevant to the assertion set forth in a submission and to allow the readers of the factual record to draw their own conclusions regarding a Party’s environmental law enforcement.”¹⁰⁵

The Secretariat provides the Council with its reasoning for a determination that a Factual Record is warranted, together with the submission, supporting information, and any other relevant information.¹⁰⁶ If the Secretariat determines that the submission does not warrant a Factual Record, it will so notify the Council and submitter that the submission is terminated. and provide its reasons.¹⁰⁷

The USMCA/CUSMA provides that the Secretariat must provide notice and its reasons to both the Council and the Environment Committee.¹⁰⁸ The timeline for this step has been shortened to 60 calendar days from receipt of the Party’s response.”¹⁰⁹

¹⁰² USMCA art. 24.27(4)(b)(i).

¹⁰³ USMCA art. 24.28(1).

¹⁰⁴ Compare NAAEC art. 45(1)(a)-(b) with USMCA, art. 24.4(2) (The NAAEC refers to “environmental matters determined to have higher priorities” while the USMCA/CUSMA says “in accordance with priorities for enforcement of its environmental laws.”).

¹⁰⁵ Introduction to 2012 Guidelines.

¹⁰⁶ USMCA, art. 24.28(1).

¹⁰⁷ *Id.*

¹⁰⁸ USMCA, art. 24.28(1).

¹⁰⁹ *Id.*

Step 6. Council Votes to Instruct (NAAEC) or Council Members Instruct (USMCA/CUSMA) Secretariat to Prepare Factual Record

Article 15(2) of the NAAEC stated that the Secretariat shall prepare a Factual Record if the Council instructs it to do so by a two-thirds vote.¹¹⁰ The 2012 Guidelines instructed the Council to vote “normally within 60 working days of receiving the Secretariat’s recommendation.”¹¹¹

The USMCA/CUSMA now contains similar requirements for this step, but rather than calling for a two-thirds vote of the Council, it provides that the Secretariat shall prepare a Factual Record “if at least two members of the Council instruct it to do so.”¹¹² The CEC is continuing to represent that it will use the 60 working day timeline provided for in the 2012 Guidelines.¹¹³

Step 7. Secretariat Drafts Factual Record

Under Article 15(3) of the NAAEC, the preparation of a Factual Record was to be done without prejudice to “further steps that may be taken with respect to any submission.”¹¹⁴ This provision was reproduced in the USMCA/CUSMA.¹¹⁵

The 2012 Guidelines stated that the “Secretariat should conclude the preparation of the draft factual record normally within 180 working days” after the Council’s instruction.¹¹⁶

In preparing the Factual Record, the 2012 Guidelines provided that “the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: that is publicly available; submitted by interested non-governmental organizations or persons; submitted by the Joint Public Advisory Committee; or developed by the Secretariat or by independent experts.”¹¹⁷

¹¹⁰ NAAEC, art. 15(2).

¹¹¹ 2012 Guidelines, para. 19.4.

¹¹² USMCA, art. 24.28(2).

¹¹³ See Compliance Tracker; See also SEM-20-001 (*Loggerhead Turtle*), Submission pursuant to USMCA: *Secretariat Notification to Council under Article 24.28(1) of the CUSMA/USMCA* (27 July 2020), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-adv_en.pdf> (applying a 60 working day timeframe); See generally SEM-20-001 (*Loggerhead Turtle*), Submission pursuant to USMCA (17 Dec. 2020), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/loggerhead-turtle/>> [hereinafter *Loggerhead Turtle*].

¹¹⁴ NAAEC, art. 15(3).

¹¹⁵ USMCA/CUSMA, art. 24.28(3).

¹¹⁶ 2012 Guidelines, para. 19.5.

¹¹⁷ *Id.* at art. 15(4)(a)-(d).

The USMCA/CUSMA reduces the timeline for this step to 120 calendar days.¹¹⁸ The USMCA/CUSMA also says that when preparing a Factual Record, the Secretariat may consider any information “submitted by national advisory or consultative committees”¹¹⁹ or “developed under the ECA.”¹²⁰

Step 8. Parties Comment on Draft

The NAAEC in Article 15(5) stated that after the Secretariat submits a draft Factual Record to the Council, “[a]ny Party may provide comments on the accuracy of the draft” within 45 days.¹²¹ The 2012 Guidelines interpreted the timeline for this step as 45 working days.¹²² The USMCA/CUSMA now provides the same comment opportunity in Article 24.28(5), but reduces the timeline to 30 calendar days.¹²³

Step 9. Secretariat Prepares Final Factual Record

The NAAEC directed the Secretariat to incorporate, as appropriate, Party comments in the final Factual Record and submit it to the Council.¹²⁴ Pursuant to the 2012 Guidelines, the Secretariat provided to the Council the final Factual Record and a version indicating changes made, “normally within 45 working days of receiving Party comments.”¹²⁵ The draft and final Factual Records contained: a summary of the submission; a summary of the concerned Party’s response; any other relevant factual information considered by the Secretariat.¹²⁶

The USMCA/CUSMA does not significantly change this step. It does however provide that the Secretariat “shall” incorporate Party comments into the final Factual Record and “promptly” submit it to the Council.¹²⁷ The USMCA/CUSMA does not provide a timeline for this step, but the Secretariat is continuing to use 45 working days, as provided for in the 2012 Guidelines.¹²⁸

Step 10. Secretariat Publishes Factual Record Unless Council Members Instruct Not to Publish (USMCA/CUSMA)

Under Article 15(7) of the former NAAEC, by a two-thirds vote, the Council may make the final Factual Record publicly available, “normally within 60 days following its submission.”¹²⁹ In practice, all final Factual Records have been published via unanimous vote. This is the last step in the SEM process provided for under the NAAEC. The 2012 Guidelines clarified the timeline as

¹¹⁸ USMCA, art. 24.28(5).

¹¹⁹ *Id.* at art. 24.28(4)(c).

¹²⁰ *Id.* at art. 24.28(4)(f).

¹²¹ NAAEC, art. 15(5).

¹²² 2012 Guidelines, para. 19.6.

¹²³ USMCA, art. 24.28(5).

¹²⁴ NAAEC, art. 15(6).

¹²⁵ 2012 Guidelines, para. 11.4, 19.7.

¹²⁶ *Id.* at para. 12.1.

¹²⁷ USMCA, art. 24.28(5).

¹²⁸ 2012 Guidelines, para. 19.7

¹²⁹ NAAEC, art. 15(7).

60 working days, and provided that the final Factual Record should be made public as soon as it is available in the three official CEC languages.¹³⁰ The 2012 Guidelines added that “[i]ndependent of any Council decision with respect to the public availability of the factual record, the Council may, by a two-thirds vote, make a factual record available to the JPAC.”¹³¹

The USMCA/CUSMA shortened the timeline for publication of the final Factual Record to “normally within 30 [calendar] days.”¹³² Under the new Agreement, the final Factual Record shall be made publicly available unless two members of the Council instruct the Secretariat *not* to publish it.¹³³ The scenario where only JPAC receives the Factual Record is not provided for in the USMCA/CUSMA.

Step 11. Follow Up Procedures

Neither the NAAEC nor the 2012 Guidelines provided any instructions for following up with respect to a submission after the final Factual Record is completed or published, although NAAEC Article 15(3) provided that preparation of a Factual Record is without prejudice to any “further steps,” a provision continued in USMCA/CUSMA Article 24.28(3).

In 2014, in response to advice from JPAC, the Council in a Ministerial Statement began the practice of the Parties providing updates on such matters to the Council and JPAC in closed session during the Council’s annual meeting.¹³⁴

The USMCA/CUSMA now includes two opportunities for the CEC to follow up on a completed Factual Record. First, the Environment Committee “shall consider the final factual record in light of the objectives of [Chapter 24] and the ECA and may provide recommendations to the Council on whether the matter raised in the factual record could benefit from cooperative activities.”¹³⁵ There are 27 areas of cooperative activities described in Article 10 of the ECA. These include strengthening environmental governance; reducing pollution and supporting strong, low emissions, [and] resilient economies; conserving and protecting biodiversity and habitats; promoting the sustainable management and use of natural resources; and supporting green growth and sustainable development.¹³⁶ Second, the agreement expressly provides that “Parties shall provide updates to the Council and the Environment Committee on final factual records, as appropriate.”¹³⁷

¹³⁰ 2012 Guidelines, para. 13.1

¹³¹ *Id.* at para. 13.3.

¹³² USMCA, art. 24.28(6).

¹³³ *Id.*

¹³⁴ COMM’N FOR ENVTL. COOPERATION, *CEC Ministerial Statement*, at 1 (17 July 2014), available at <http://www.cec.org/files/documents/council_statements/ministerial-statement-2014-en.pdf> [hereinafter 2014 Ministerial Statement].

¹³⁵ USMCA, art. 24.28(7).

¹³⁶ *See generally* ECA, art. 10.

¹³⁷ USMCA, art. 24.28(8).

The ECA provides that the Council shall “consider cooperation relevant to the topics addressed in factual records resulting from submissions on enforcement matters.”¹³⁸

2.3 Evolution of the SEM Process

Initial Guidelines and SEM Registry

The CEC first approved the SEM Guidelines in October 1995 in Council Resolution 95-10.¹³⁹ The Council in June 1999 issued Council Resolution 99-06, adopting revised Guidelines.¹⁴⁰ These Guidelines informed the public and governed the process for the first decade and a half of SEM implementation. In addition to establishing procedures, the Guidelines established a “registry” to provide information to the public to enable any person or organization to “follow the status of any given submission during the submission process.”¹⁴¹ Under the original Guidelines, the Secretariat was tasked to facilitate public inspection and provide for photocopies of documents available in its files. The online registry initially included the relevant SEM documents (submission, Party response, Secretariat notifications, Council decisions), and was later expanded to include the annexes to the submissions and responses.¹⁴²

Lessons Learned Report

In June 2000, the Council issued Council Resolution 00-09, instructing JPAC to conduct a public review of the SEM process.¹⁴³ In response, JPAC in June 2001 presented its report entitled *Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*.¹⁴⁴

JPAC reported that it received public comments related to “timeliness, transparency, and effectiveness” of the SEM process.¹⁴⁵

As for timeliness, JPAC summarized public comments advocating that both the Secretariat and Council be required to conduct their SEM procedures under clear time limits.¹⁴⁶ Commentators observed that there were no limits for “how long the Secretariat may take to review a submission for compliance with Articles 14(1) or 14(2),” and recommended setting a deadline for the Secretariat to determine whether to recommend to the Council that a Factual Record be

¹³⁸ ECA, art. 4(1)(m).

¹³⁹ See Council Resolution 95-10.

¹⁴⁰ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 99-06* (28 June 1999), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-99-06-en.pdf>.

¹⁴¹ Guidelines, para. 15.1, 2012 Guidelines, para. 15.1.

¹⁴² COMM’N FOR ENVTL. COOPERATION, *Registry of Submissions*, available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>> [hereinafter Registry].

¹⁴³ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 00-09* (13 June 2000), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-00-09-en.pdf> [hereinafter Council Resolution 00-09].

¹⁴⁴ See *Lessons Learned*.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.*

developed.¹⁴⁷ JPAC also stated that the “lack of human and financial resources assigned to the process” diminishes the efficiency of the Secretariat in administering SEM.¹⁴⁸

JPAC summarized comments urging that the SEM process be made more transparent. Some commentators argued that Factual Records should “clearly state conclusions and recommendations.”¹⁴⁹ Others criticized certain of the Party confidentiality provisions of the NAAEC.¹⁵⁰ Some commentators also criticized the Council’s apparent absolute discretion to decide whether to instruct the Secretariat to prepare a Factual Record.¹⁵¹

The Report noted that the SEM process does not provide any enforcement mechanisms, and that documented enforcement failures may not be redressed.¹⁵² The JPAC stated that “commentators agreed there was a need for a more adequate remedy plan” that should contain “both preventive and corrective programs.”¹⁵³ Commentators also believed that factual records should include conclusions as to the Party’s enforcement of its environmental law and should include recommendations to a Party for further action.¹⁵⁴

JPAC concluded, based on these comments, that development of a Factual Record offers opportunities for drawing public attention to a Party’s environmental enforcement practices. It advocated that the Secretariat remain independent and be provided with adequate resources to administer SEM, and recommended that time periods for review of a submission be shortened.¹⁵⁵

JPAC stated that the SEM process could accommodate greater public and CEC oversight.¹⁵⁶ JPAC proposed that affected Parties could report to the CEC within 12 months after the release of a Factual Record to address the matters raised by the submission. The Party’s report would be made public after the JPAC reviewed it and provided comments.¹⁵⁷ This would enable the Parties to “manifest an ongoing and real commitment of the CEC to make the Articles 14 and 15 process meaningful, transparent, and effective.”¹⁵⁸ JPAC also suggested “increased disclosure of Party responses to submitters” and repeal (or substantial reduction) of the then-prescribed 30-day “blackout” period for disclosure of Secretariat recommendations to the Council.¹⁵⁹ JPAC stated that a Party’s right to invoke a defense of confidential information against disclosure

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 10.

¹⁴⁹ *Id.* at 10-11.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 12.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 13.

¹⁵⁵ *Id.* at 13-4.

¹⁵⁶ *Id.* at 16.

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

should be construed narrowly so as not to “dilute the effectiveness of a procedure that relies on public disclosure and scrutiny for its credibility and acceptance.”¹⁶⁰

In June 2001, the Council published Council Resolution 01-06 in response to *Lessons Learned*.¹⁶¹ Addressing several of JPAC’s recommendations on transparency, the Resolution amended section 10.2 of the then-existing Guidelines to provide that five working days after the Secretariat determines that a submission warrants developing a Factual Record, both the notification and the Secretariat’s reasoning would be placed in the public registry.¹⁶² The Council further committed to provide a “public statement of its reasons whenever it votes not to instruct the Secretariat to develop a factual record.”¹⁶³ Finally, the Council committed to making its best efforts and encouraging the Secretariat to make best efforts to ensure timely processing of a submission, such that the process will be completed no more than two years after the Secretariat receives the submission.¹⁶⁴

Ten-Year Review

In March 2003, the Council released Council Resolution 03-02 establishing an independent Ten-Year Review and Assessment Committee (TRAC) to review implementation of the NAAEC on the tenth anniversary of NAFTA and NAAEC.¹⁶⁵ The TRAC issued its report in June 2004, entitled: *Ten Years of North American Environmental Cooperation*.¹⁶⁶

Section 6.3 of the report reviewed the SEM process. It described the Parties’ view of SEM as ambiguous, stating that “while they publicly embrace the values of transparency, accountability and stronger environmental enforcement—they have in practice sought to circumscribe it, for reasons not well appreciated by outside observers.”¹⁶⁷ The report said that government officials have found it difficult to accept that the CEC, a government-funded organization, is permitted to comment publicly on their regulatory decisions.¹⁶⁸ The report identified a series of actions by the Council that in the TRAC’s view had narrowed the SEM process by:

- disallowing investigations of broad patterns of “ineffective enforcement in several factual records;”
- “limiting the scope of factual records;” and

¹⁶⁰ *Id.* at 17-18.

¹⁶¹ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 01-06* (29 June 2001), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-01-06-en.pdf>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 03-02* (28 Mar. 2003), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-03-02-en.pdf>.

¹⁶⁶ See TRAC Report.

¹⁶⁷ *Id.* at 43.

¹⁶⁸ *Id.*

Submissions on Enforcement Matters: What Have We Learned?

- “questioning the sufficiency of information required for the Secretariat to recommend the preparation of a factual record.”¹⁶⁹

The report acknowledged reported benefits to the environment from the SEM process. However, it characterized the evidence for such benefits as “anecdotal” because there is no mandatory follow up procedure.¹⁷⁰ It concluded that the environmental impact of the process has been modest but positive.¹⁷¹

The TRAC made recommendations that could improve effective implementation of the SEM process. These included seeking greater clarity on the relationship between the Parties and the Secretariat to protect the integrity of the process and be sensitive to conflicts of interest; development of a mediation step in the SEM process to facilitate the resolution of enforcement matters; and the consideration of voluntary reporting by the Parties on follow-up activities to factual records.¹⁷²

In 2008, JPAC approved a plan to undertake a procedure to follow-up on Factual Records and advised the Council of its intent to do so.¹⁷³ However, the Council responded that this would be beyond the scope of the NAAEC, as it regarded the publication of the Factual Record as the final step authorized by the NAAEC and any follow-up as a matter committed to the individual Parties.¹⁷⁴

Guidelines Revision

In 2011, the Parties launched a process to adopt revisions to the Guidelines. This began with a Council-Directed Task Force on SEM Modernization. After many public meetings, engagement with JPAC, and external reviews, the effort culminated in the adoption of the 2012 Guidelines, approved by Council Resolution 12-06.¹⁷⁵

The 2012 Guidelines made critical improvements to the SEM process.¹⁷⁶ The most significant development was its comprehensive timeline regime for major steps in the process.

In December 2013 the JPAC issued its Public Review entitled: *20 Years of NAFTA and the NAAEC* (20 Year Review) in anticipation of the anniversary of the Agreements.¹⁷⁷ Although outreach and public comments included some consideration of SEM, the JPAC's Advice to Council No. 13-04

¹⁶⁹ *Id.* at 45.

¹⁷⁰ *Id.* at 46.

¹⁷¹ *Id.*

¹⁷² *Id.* at 54.

¹⁷³ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 08-01* (27 Feb. 2008), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-08-01-en.pdf>.

¹⁷⁴ COMM'N FOR ENVTL. COOPERATION, *Response from Council to Advice 08-01* (14 Aug. 2008), available at <http://www.cec.org/files/documents/jpac_advice_council/7634_Response_to_08-01_en.pdf>.

¹⁷⁵ See Council Resolution 12-06.

¹⁷⁶ See discussion Part 2.2.

¹⁷⁷ COMM'N FOR ENVTL. COOPERATION, *20 Years of NAFTA and the NAAEC* (2013), available at <<http://www.cec.org/publications/20-years-of-nafta-and-the-naaec>>.

focuses more broadly on substantive environmental issues.¹⁷⁸ With respect to the SEM Process, JPAC recommended that the CEC focus on measuring results and outcomes as a key consideration for governments, the public, and stakeholders.¹⁷⁹ On the twentieth anniversary of the NAAEC in July 2014, the CEC published a Ministerial Statement describing the Council's new priorities including: climate change mitigation and adaptation, green growth, and sustainable communities and ecosystems.¹⁸⁰ The Council also announced that it had implemented a new reporting approach for SEM as part of its commitment to transparency and modernization of the process.¹⁸¹ Following JPAC's proposal, each Party provided updates on actions taken in relation to submissions that concluded in the past year.¹⁸² Since then, Parties' updates have generally occurred during in-camera sessions and the information has not been publicly available.¹⁸³

USMCA/CUSMA and ECA Changes

In 2018, NAAEC and NAFTA were renegotiated and replaced by the USMCA/CUSMA and ECA, effective July 2020.¹⁸⁴ The SEM process was incorporated in Articles 24.27 and 24.28 of the USMCA/CUSMA. As discussed above, the USMCA/CUSMA made several changes to the timeline of the SEM process. A notable difference is that timelines prescribed in the agreement are measured in calendar days rather than "working days."¹⁸⁵

The USMCA/CUSMA created additional follow-up procedures related to Factual Records. The Environment Committee has the role to recommend to the Council whether the topics addressed in a Factual Record could benefit from cooperative activities.¹⁸⁶ And Parties must provide the Council and Environment Committee with updates on final Factual Records as appropriate.¹⁸⁷

The ECA continues to define and govern the roles of the Commission: the Council, the Secretariat, and JPAC. It affirms the Council's authority to consider cooperation relevant to the matters addressed in Factual Records.¹⁸⁸ The ECA also directs Parties to cooperate with the Secretariat to provide relevant information for the preparation of any Factual Record.¹⁸⁹ The

¹⁷⁸ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 13-04* (6 Dec. 2013), available at <http://www.cec.org/files/documents/jpac_advice_council/18241_JPAC_Advice_13-04-Final_en.pdf>.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ 2014 Ministerial Statement, at 1.

¹⁸¹ *Id.* at 2.

¹⁸² *Id.*

¹⁸³ SEM-17-001 (*Alberta Tailings Ponds II*), Submission pursuant to NAAEC: *Final Factual Record*, at para. 187 (4 Sept. 2020), available at <<http://www3.cec.org/islandora/fr/item/11861-alberta-tailings-ponds-ii-factual-record-north-american-environmental-law-and-en.pdf>> [hereinafter *Alberta Tailings Ponds II: Final Factual Record*].

¹⁸⁴ See discussion Part 2.1.2.

¹⁸⁵ USMCA, art. 1.5.

¹⁸⁶ *Id.* at art. 24.28(7).

¹⁸⁷ *Id.* at art. 24.28(8).

¹⁸⁸ ECA, art. 4(1)(m).

¹⁸⁹ *Id.* at art. 14.

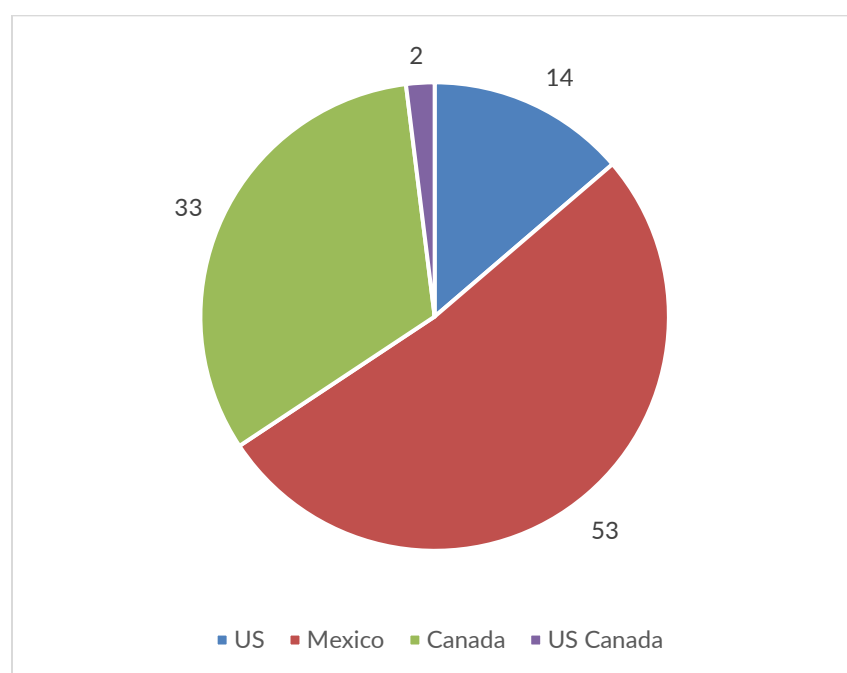
CEC is instructed to continue to operate under the existing “modalities” as required “to reflect and implement the provisions” of the ECA.¹⁹⁰

3 Presentation of Data

3.1 Submissions and Submitters

There have been 102 submissions from the inception of the SEM process in 1994 through December 2021. These submissions are divided among the three Parties unevenly (see Figure 1). Mexico was the subject of a little over half of all submissions, while Canada accounts for over a quarter, and the US accounts for 14. Two submissions concerned the United States and Canada concurrently.

Figure 1. Number of submissions per country



During the design of the SEM process, some expected Mexico would be the subject of more submissions, reflecting concerns of US and Canadian competitors under the new trade regime.¹⁹¹ Indeed, Mexico has been the subject of the greatest number of submissions; however, most of the submitters have been residents and organizations from Mexico rather than from the other countries. Commentators have observed that differential environmental enforcement in any of the three countries has not resulted in measurable trade effects.¹⁹²

¹⁹⁰ *Id.* at art. 2(3).

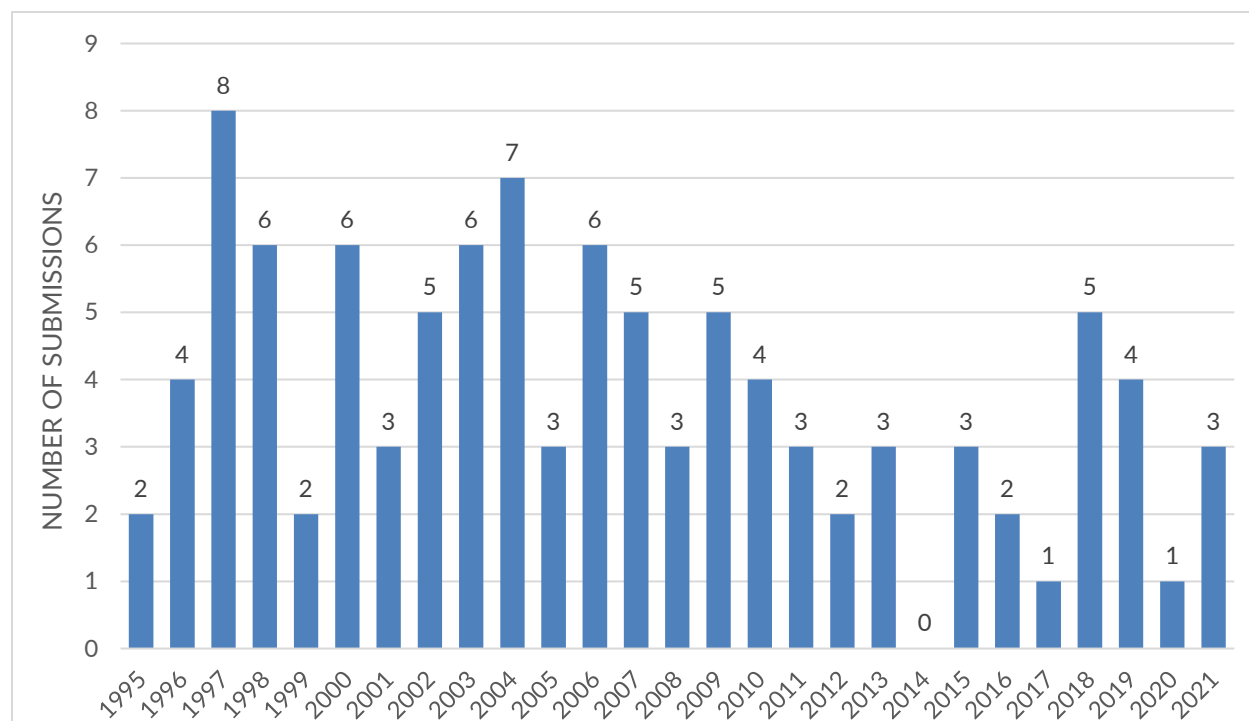
¹⁹¹ Markell and Knox 2012, 507.

¹⁹² *Id.*

Submissions on Enforcement Matters: What Have We Learned?

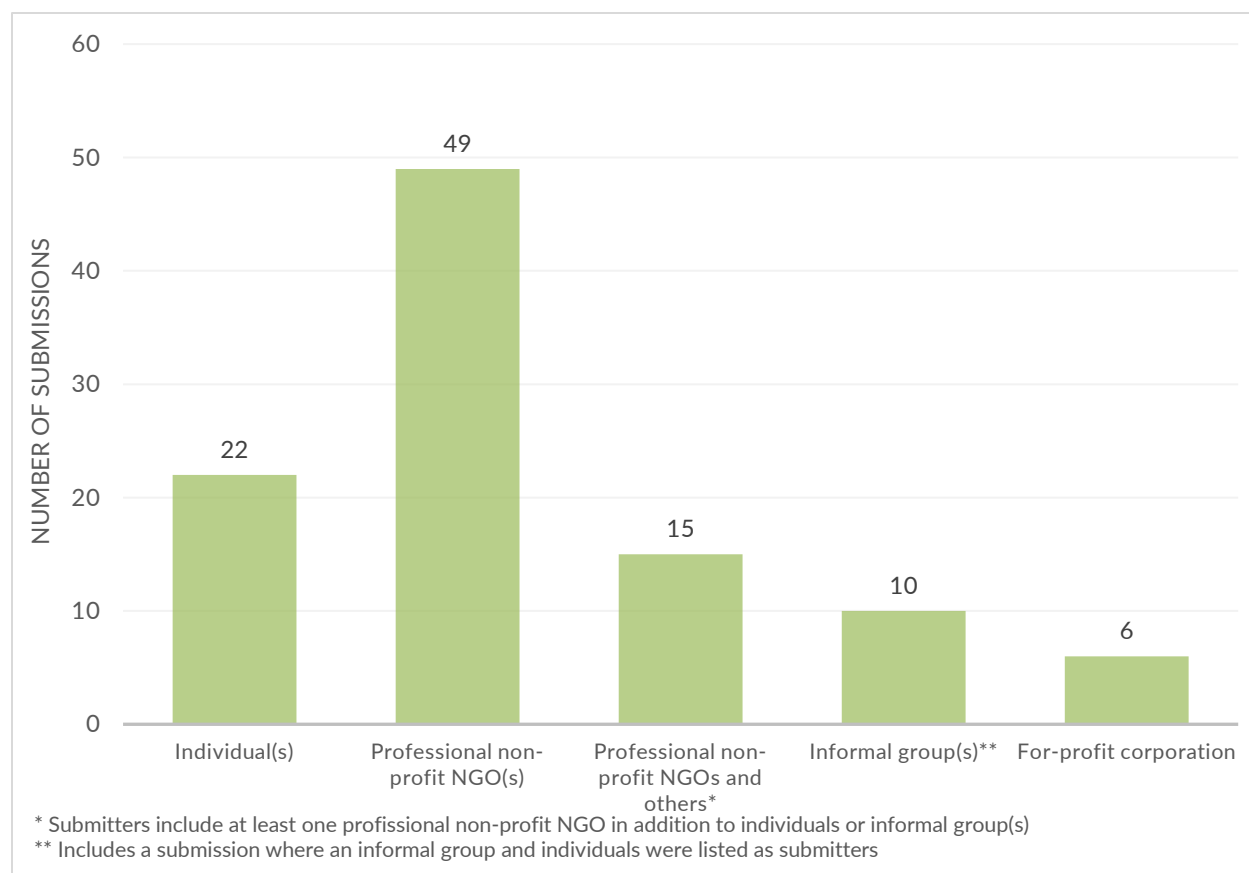
There was also an initial overestimation of the number of submissions the SEM process would see each year. The SEM process was conceptualized as an accessible process anticipated to generate numerous submissions each year.¹⁹³ The 102 total in 27 years reflects lower utilization of the process. In the starkest departure from initial expectations, 2014 saw zero submissions (see Figure 2).

Figure 2. Submissions by year



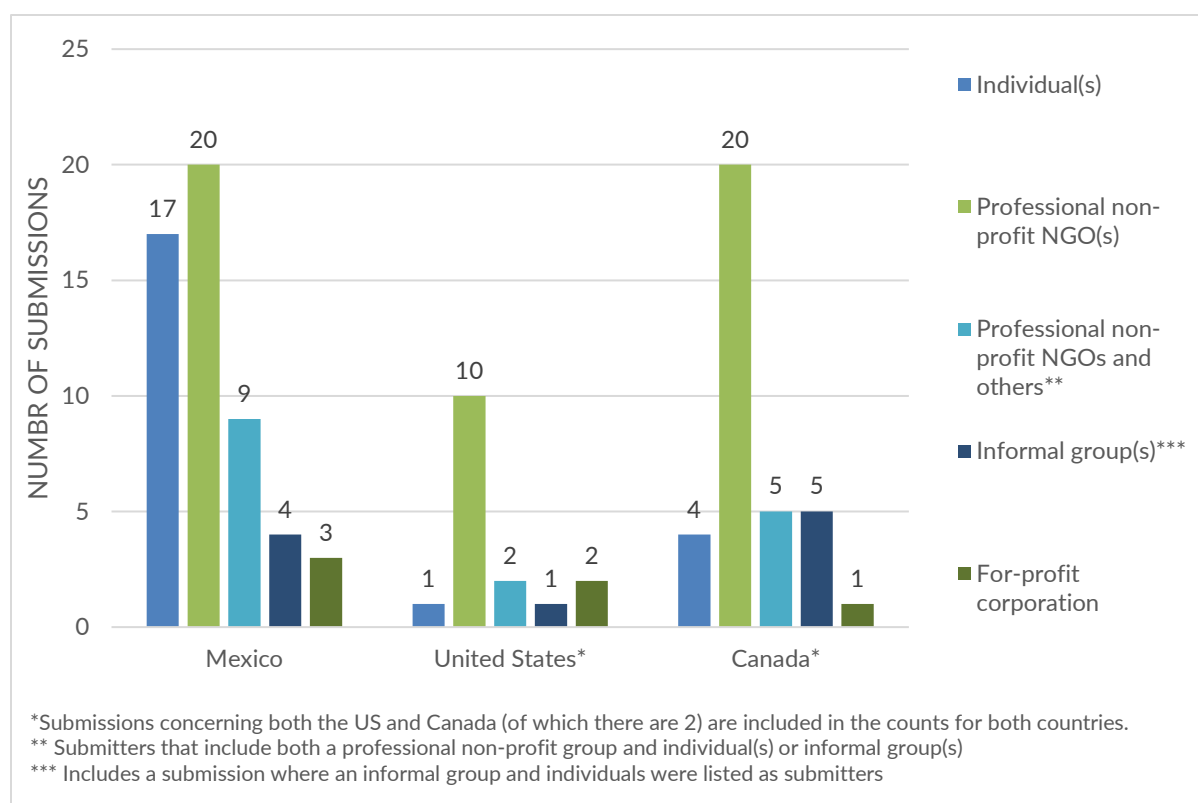
¹⁹³ *Id.*

Figure 3. Type of submitter



Non-profit NGOs with paid professional staff members (professional non-profit NGOs), rather than individuals or informal groups, have made the greatest use of the SEM process (see Figure 3). Taking into account submissions with multiple submitters, these professional non-profits NGOs have been involved in nearly two thirds of all submissions. While professional non-profit NGOs have made the greatest use of the submission process in all three countries, they have accounted for a higher proportion of submitters in Canada and the United States than in Mexico (see Figure 4). Almost all the submissions filed by individuals have concerned Mexico. Proportionally, Mexico accounts for 52 percent of all submissions, but 77 percent of submissions from individuals.

Figure 4. Type of submitter by country



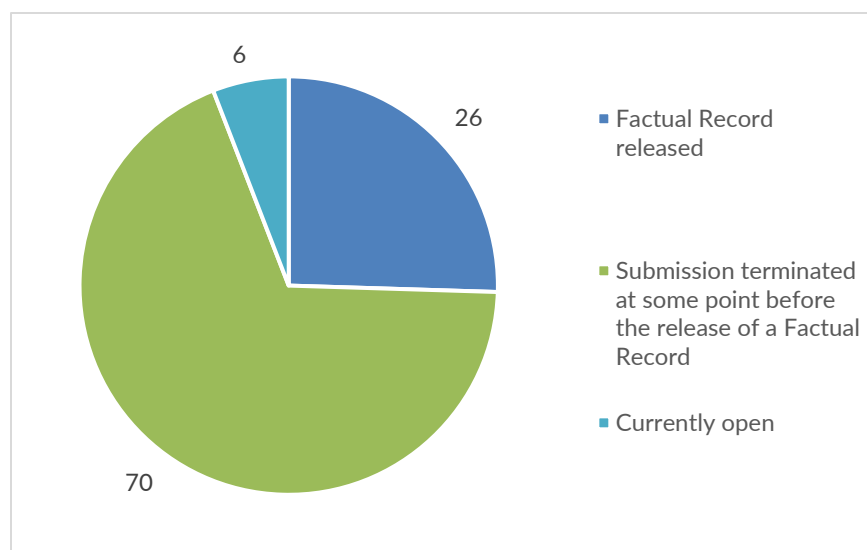
Throughout this report we have divided temporal analyses of the SEM experience into four 6-year periods plus the current ongoing 3-year period (1995-2000, 2001-2006, 2007-2012, 2013-2018, 2019-present), using the date each submission was filed. Temporal segmentation lends itself to a finer grained look at differences in submitter characteristics, timing of procedural steps, and outcomes of submissions. The use of these periods also allows us to capture the potential effect of the 2012 Guidelines, which were adopted to make the process more accessible, timely, and effective. The 6-year increments allow for a breaking point between 2012 and 2013, reflecting the effects of the revisions.

3.2 Factual Records

Although some submitters note that the SEM process can have value before the preparation of a Factual Record, the procedural goal for most is its preparation and publication.

Since the process began, the CEC has produced 24 Factual Records, regarding 26 submissions (See Figure 5). There have been two instances where two submissions were consolidated and concluded in a single Factual Record. Six submissions filed before the December 2021 termination date of this study are still open; the Secretariat is preparing draft Factual Records for two of these as instructed by the Council and two more are pending a Council vote.

Figure 5. Number of submissions resulting in publication of Factual Record



While the likelihood of a submission resulting in a Factual Record is close to one in four historically, the likelihood has fluctuated over time (See Figure 6). In fact, submissions in the first 12 years of the process were much more likely to result in a Factual Record than since then. For example, of the submissions filed between 1995 and 2000, 11 of 28 resulted in a Factual Record (39 percent). In contrast, for those filed in the period from 2013 to 2018, only 2 of 14 resulted in a Factual Record (14 percent). Two submissions initiated between 2013 and 2018 are still open. The Secretariat is currently preparing a Factual Record for one of these, and the Secretariat has advised the Council that preparation of a Factual Record for the other one is warranted.¹⁹⁴ If both of those submissions progress to Factual Records the percentage for that period would be 28 percent.

Among the eight submissions filed between 2019 and December 2021, four were terminated at an earlier stage, one has been authorized by the Council for a Factual Record,¹⁹⁵ one is pending a Council vote,¹⁹⁶ and two are at earlier stages in the process.¹⁹⁷ Thus, in the current period, the percentage of submissions resulting in a Factual Record will be at least 12.5 percent. With three submissions still open, that percentage could increase.

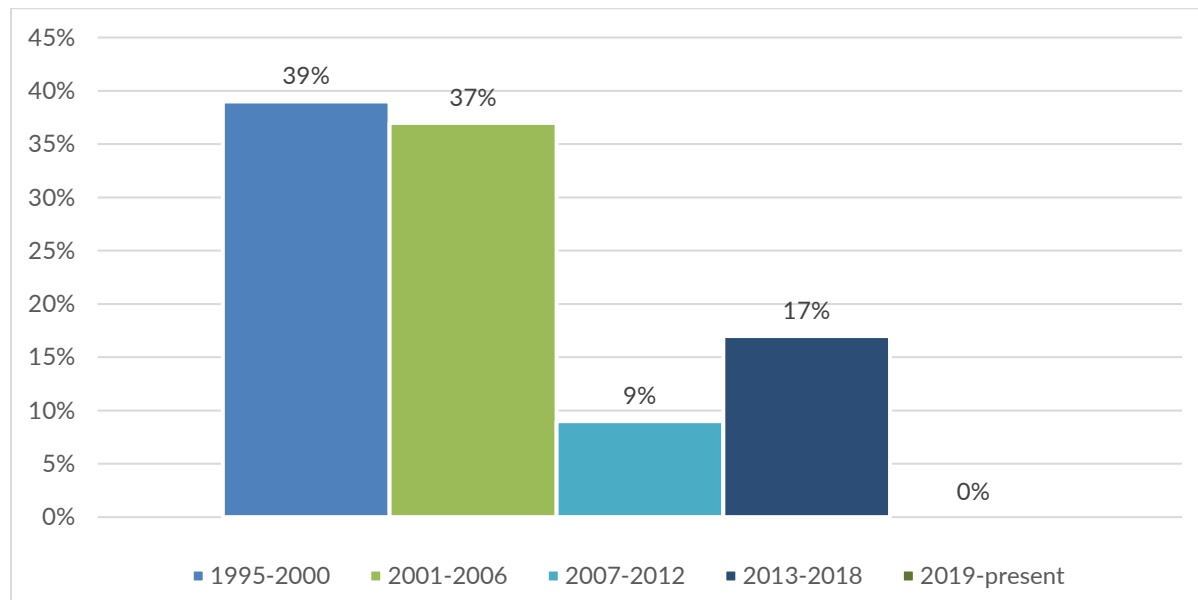
¹⁹⁴ See SEM-18-002 (*Metrobus Reforma*), Submission pursuant to NAAEC (2 Feb. 2018), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/metrobus-reforma/>>; See also SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*), Submission pursuant to NAAEC (3 Oct. 2018), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/hydraulic-fracturing-in-nuevo-leon/>>.

¹⁹⁵ SEM-19-002 (*City Park Project*), Submission pursuant to NAAEC (16 Apr. 2019), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/city-park-project/>>.

¹⁹⁶ See *Loggerhead Turtle*.

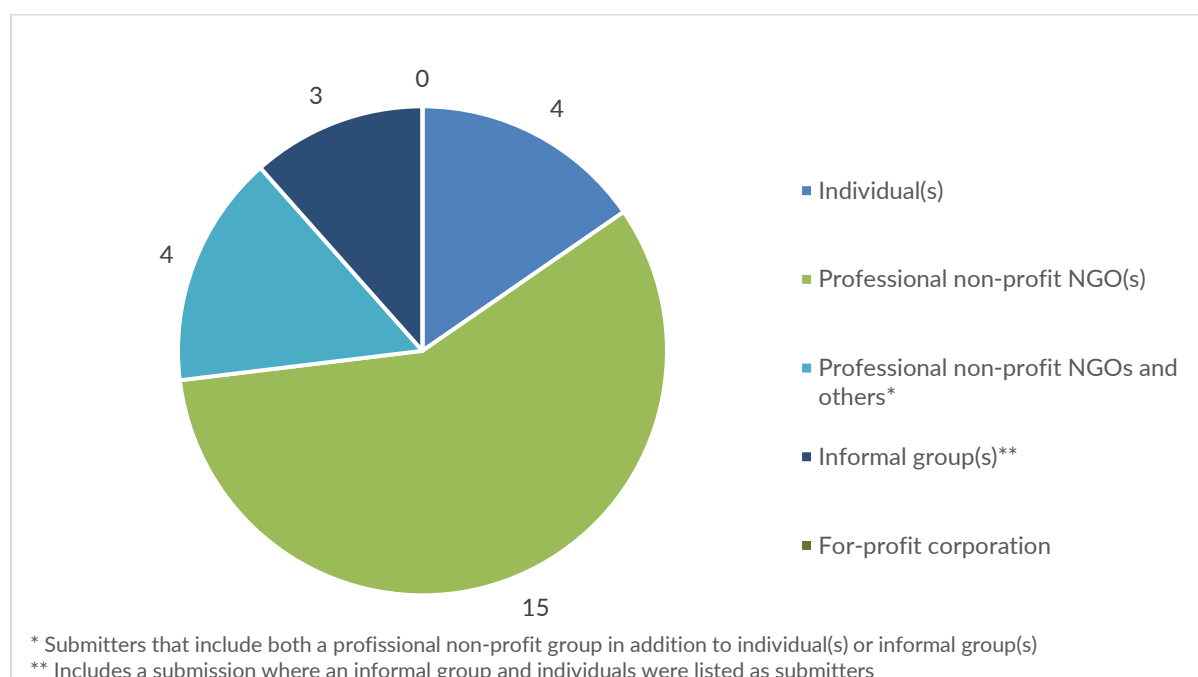
¹⁹⁷ SEM-21-002 (*Vaquita Porpoise*), Submission pursuant to USMCA (11 Aug. 2021), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/vaquita-porpoise/>>; See also SEM-21-003 (*North Atlantic Right Whale*), Submission pursuant to USMCA (4 Oct. 2021), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/north-atlantic-right-whale/>>.

Figure 6. Percentage of closed submissions that resulted in the publication of a Factual Record (by year submitted)



Over the entire history of SEM, professional non-profit NGOs have had the most success in their submissions concluding with Factual Records (see Figure 7). They filed 73 percent of all submissions that progressed to Factual Records. In contrast, they are only responsible for 62 percent of all submissions. Individuals, on the other hand, account for filing 21 percent of all submissions but only 15 percent of Factual Records have resulted from their submissions.

Figure 7. Total Factual Records by type of submitter

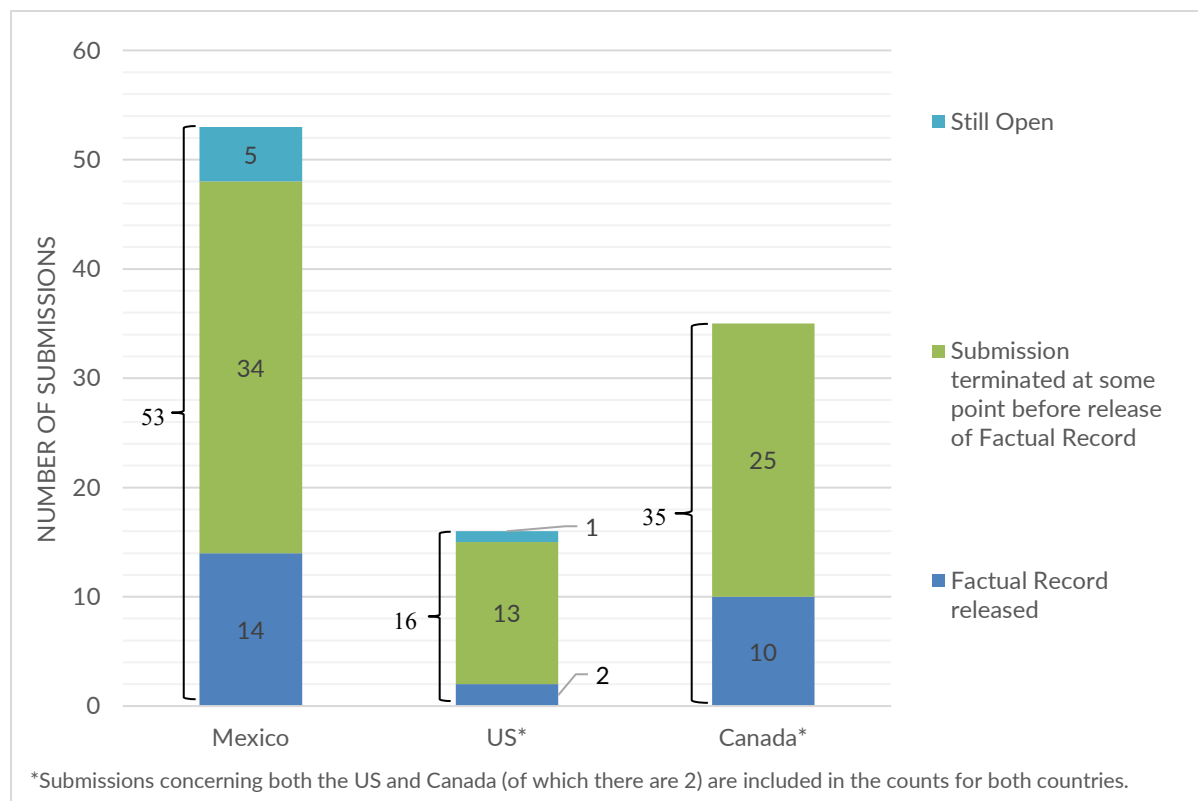


The differences between countries in the development of Factual Records are less drastic. There have been 14 Factual Records with Mexico as the subject, 2 with the United States as the

Submissions on Enforcement Matters: What Have We Learned?

subject, and 10 with Canada as the subject (see Figure 8). Both of those currently being prepared have Mexico as their subject. However, the numbers alone do not tell the whole story. In general, the United States has been the subject of far fewer submissions than Mexico or Canada. When comparing based on percentage, the margin of difference is much slimmer. Twenty-nine percent of all Mexican submissions and 29 percent of those involving Canada have been developed into Factual Records. For the United States, the percentage is a little lower at 20 percent, but not dramatically so.

Figure 8. Submissions by country resulting in a Factual Record



3.3 Other Dispositions

Submissions can be terminated at various points in the process before reaching the Factual Record stage (see Figure 9).

The first potential termination point is the eligibility determination under NAAEC Article 14(1) or (2) or USMCA/CUSMA Article 24.27 (2) and (3). The Secretariat conducts these eligibility reviews to ensure that the submission has conformed to both legal and technical requirements of the SEM process. For example, a submission not showing that the matter has been communicated to the relevant authorities of the affected Party would be terminated under NAAEC 14(1)/USMCA/CUSMA 24.27(2), and a submission not alleging harm would be terminated under NAAEC 14(2)/ USMCA/CUSMA 24.27(3). The Secretariat makes these determinations and announces them concurrently.

Typically, approximately 25 percent of submissions are terminated at this stage, although there was a strong, noticeable increase in this rate for submissions filed between 2007 and 2012. At that time, 45 percent of submissions were terminated at this first stage (see Figure 10).

Figure 9. Termination points for submissions based on date submitted

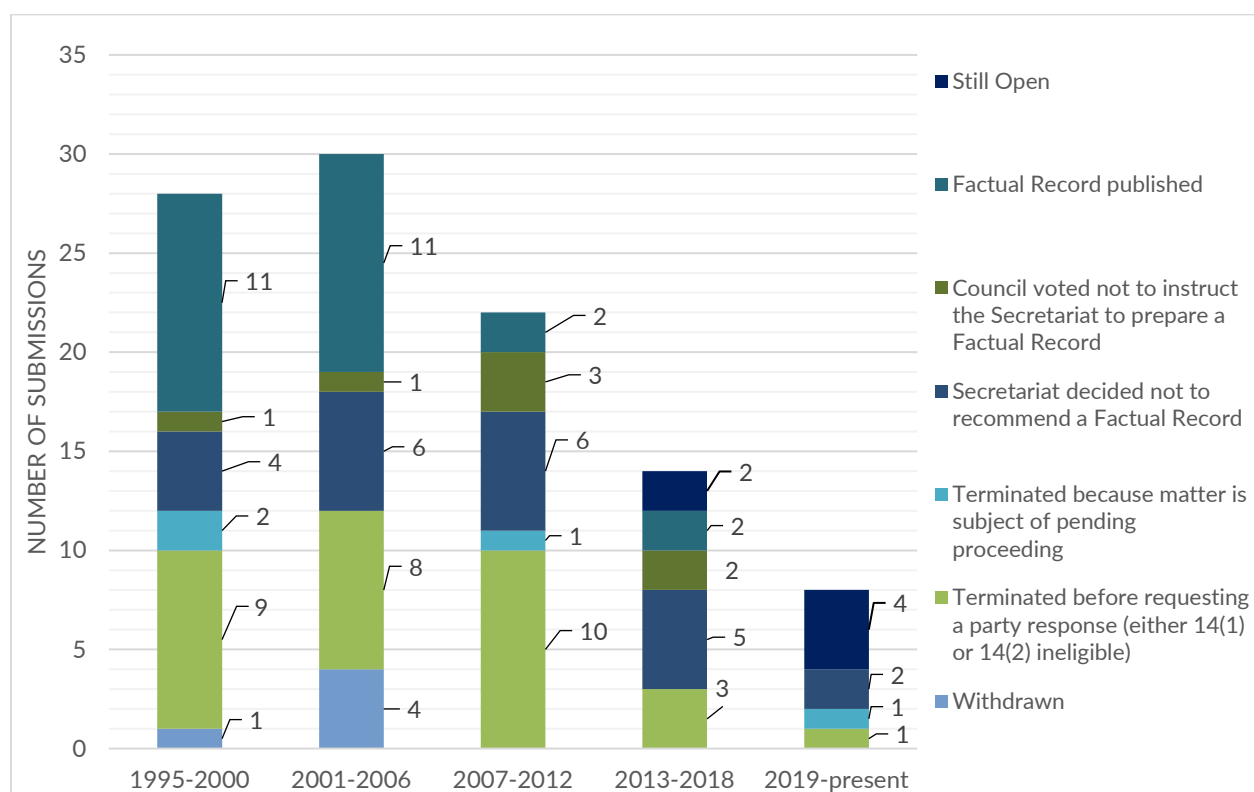
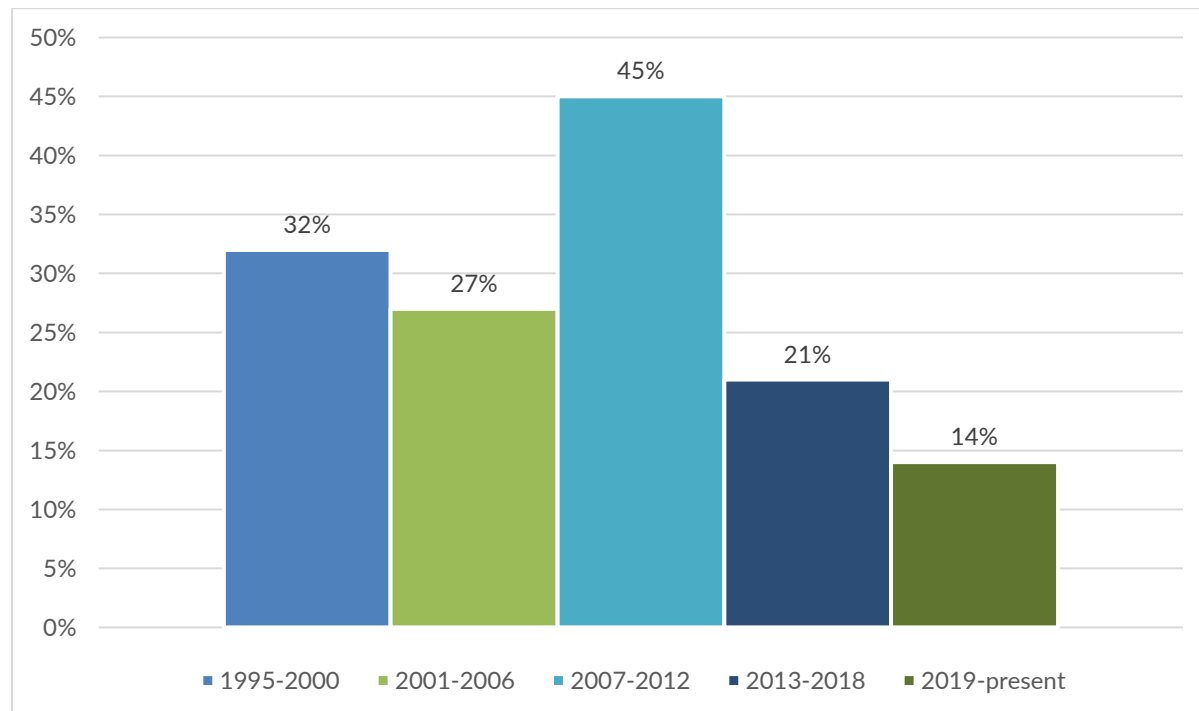
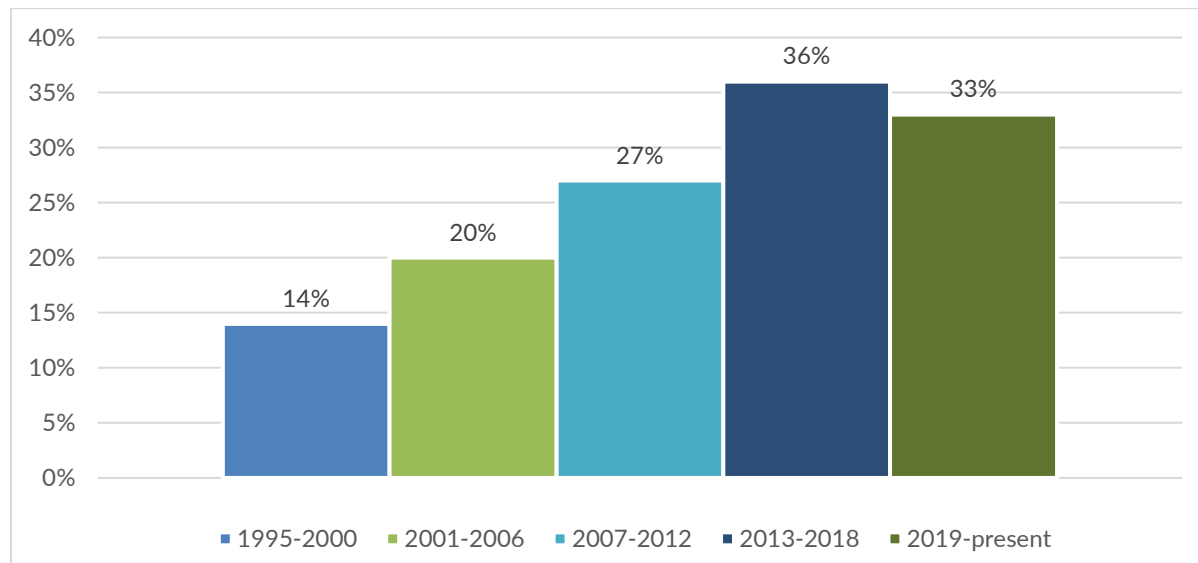


Figure 10. Percentage of closed submissions (and open submissions reaching at least this point) that were terminated before requesting party response



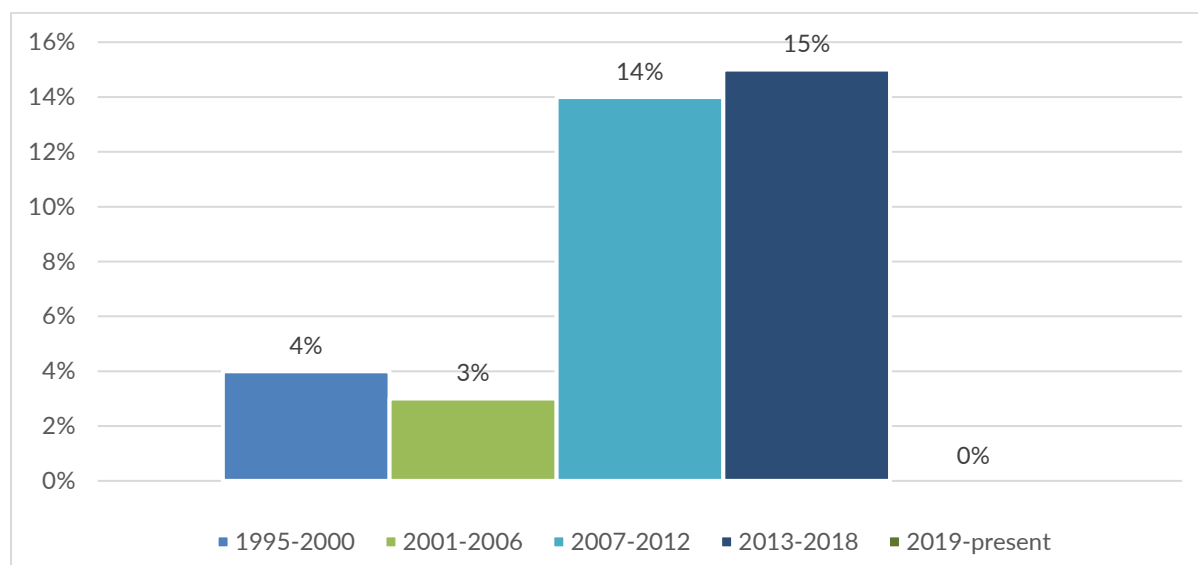
Once the Party has responded and provided the Secretariat with the relevant information, the Secretariat determines whether to recommend the matter for a Factual Record. Over time, fewer submissions have progressed past this point in the process (see Figure 11). For submissions filed in the first 6 years of the process, only 14 percent were terminated at this stage. In the last full, 6-year period (2013-2018) that percentage has more than doubled to 36 percent. In the 2019-present period, two submissions have not yet reached this point in the process and therefore could affect the final percentage in Figure 11.

Figure 11. Percentage of closed submissions (and open submissions reaching at least this point) that were terminated because Secretariat decided to not recommend a Factual Record



The Council has instructed the Secretariat not to prepare a factual record for a small percentage of submissions, thus terminating those submissions (see Figure 12). Less than 5 percent of submissions ended this way in the first twelve years of the SEM process. However, in the next twelve years, about 15 percent of submissions ended in this way.

Figure 12. Percentage of closed submissions (and pending submissions reaching at least this point) that were terminated because the Council instructed the Secretariat not to prepare a Factual Record



In its history, the Council has voted against the preparation of a Factual Record 7 times (see Table 2). The Council voted against preparation of a Factual Record in only one of the twelve submissions between 1995 and 2000 for which the Secretariat recommended a Factual Record, and against only one of fifteen recommended in the 2001-2006 period. But Secretariat

Submissions on Enforcement Matters: What Have We Learned?

recommendations fared worse in subsequent periods. The Council instructed the Secretariat not to prepare a Factual Record for three of the five recommendations made by the Secretariat for submissions filed between 2007 and 2012, and not to prepare a Factual Record for two of the five Secretariat recommendations for submissions filed between 2013 and 2018, with a sixth one still pending.

In the 2019-2021 period, the Council has voted to instruct the Secretariat to prepare a Factual Record with respect to one of the two recommendations presented to it, with the other still pending a Council vote.

Table 2. Council votes on Secretariat recommendations

Time Period	Number of Secretariat Recommendations for Factual Records	Council Voted to prepare of a Factual Record	Council Voted not to prepare a Factual Record	Council Vote is Pending
1995-2000	12	11	1	0
2001-2006	15	14	1	0
2007-2012	5	2	3	0
2013-2018	6	3	2	1
2019-present	2	1	0	1

Note: Under the NAAEC, the Council would vote on whether to instruct the Secretariat to prepare a Factual Record. Subsequently, under the USMCA/CUSMA, the Council members instruct the Secretariat on whether to prepare a Factual Record.

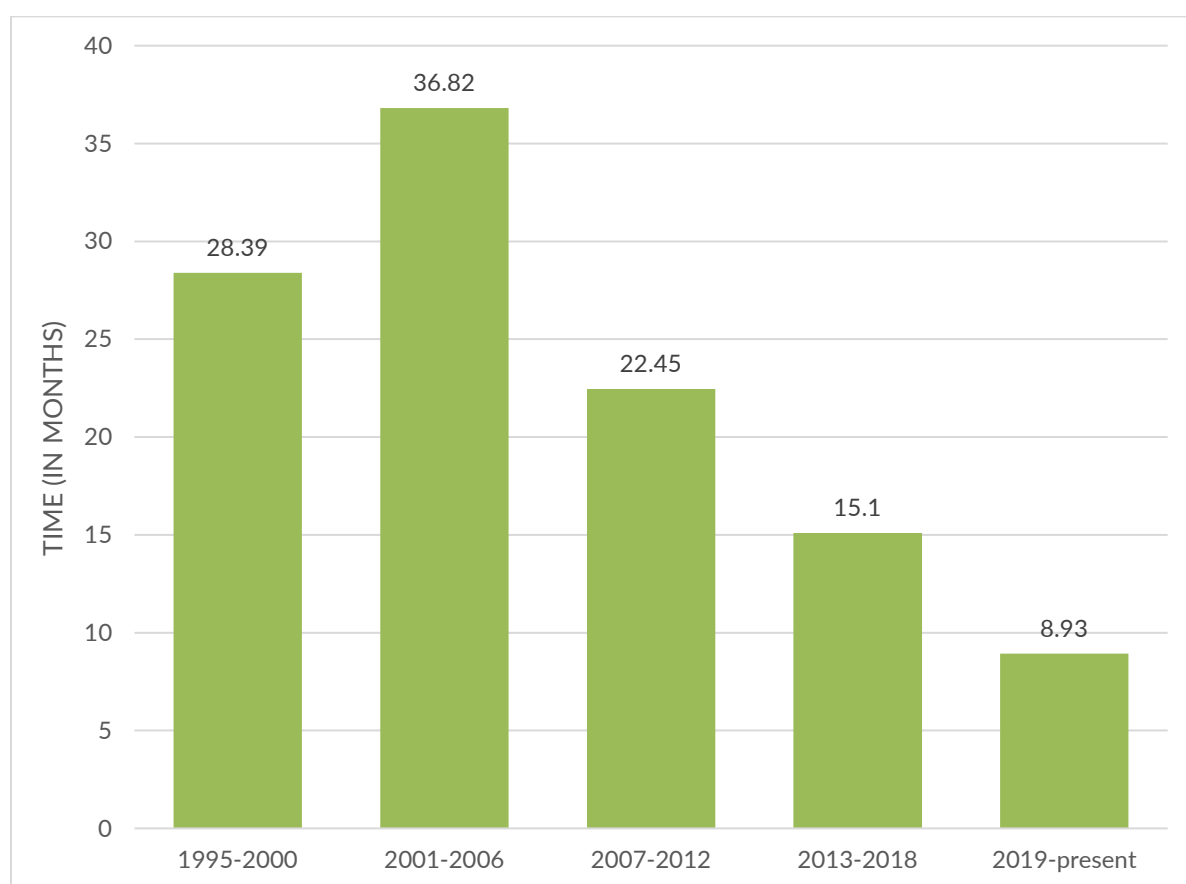
The only other way for a submission to terminate is withdrawal, which has occurred 5 times in the CEC's history, all with submissions filed before 2007. One submission, SEM 06-005 (*Species at Risk*), was withdrawn by the submitter in 2011 after the Council voted to instruct the Secretariat to prepare a Factual Record with a far narrower scope than the Secretariat had proposed in its recommendation.¹⁹⁸

¹⁹⁸ SEM-06-005 (*Species at Risk*), Submission pursuant to NAAEC: *Withdrawal Letter from Devon Page to Evan Lloyd* (17 Jan. 2011), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/06-5-not_en.pdf> [hereinafter *Species at Risk: Withdrawal Letter*].

3.4 Timelines and Compliance

Another point of interest is how long the SEM process takes. The 2012 Guidelines addressed this concern specifically as it had become a recurring issue. Figure 13 shows the average time it took the CEC for all concluded submissions. For submissions filed between 2007 and 2012, the entire process was, on average, 14 months shorter than for submissions filed between 2001 and 2006, reflecting both the preparation of fewer Factual Records (just two for this period), and the likely effect of the Guidelines on the later submissions. More recent periods show shorter average processing times. However, the period between 2013 and 2018, as well as 2019 to the present, still have several open submissions that will increase the average times for these periods.

Figure 13. Average time from submission to termination for all closed submissions



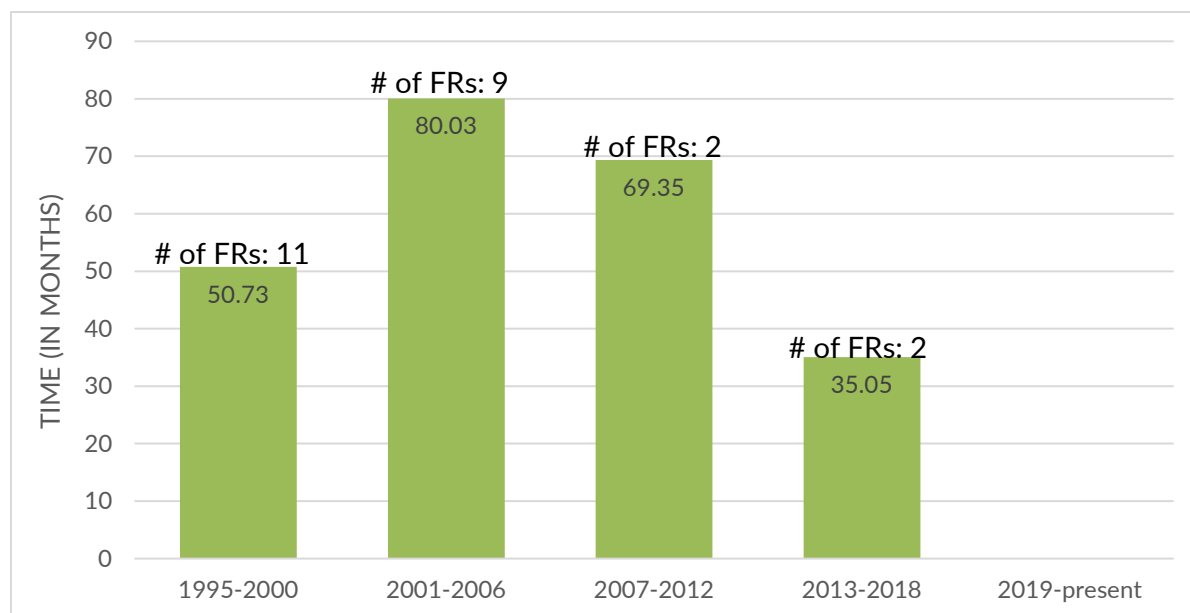
Of most interest to submitters is the length of time it takes for the SEM process from the moment a submission is filed to the publication of a Factual Record. The first 12 years saw the development of 20 of the 24 Factual Records to date (see Figure 14). For the 2000-2006 period, submissions took, on average, over 6 years from the time of filing to the publication of a Factual Record.

Submissions on Enforcement Matters: What Have We Learned?

In the 2007-2012 period 2 submissions led to final Factual Records, with an average of just under 6 years. In the 2013-2018 period, 2 submissions have led to final Factual Records, averaging just under 3 years to complete. However, the Secretariat is preparing one more draft Factual Record, for SEM-18-002 (*Metrobus Reforma*). If the CEC meets all of its applicable timelines, this submission will have taken a total of about 4 years (49 months) from start to conclusion, which will increase the average time to Factual Record for the 2013-2018 period to approximately 3 years and 4 months (40 months). One more submission from this period, SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*) is still awaiting a Council vote on the Secretariat's recommendation; it has been pending for just over 3 years (38 months) as of December 2021. In contrast, the 2012 Guidelines state that reaching the stage of a Factual Record publication is expected to occur normally within "two and a half years of the submission being filed."¹⁹⁹

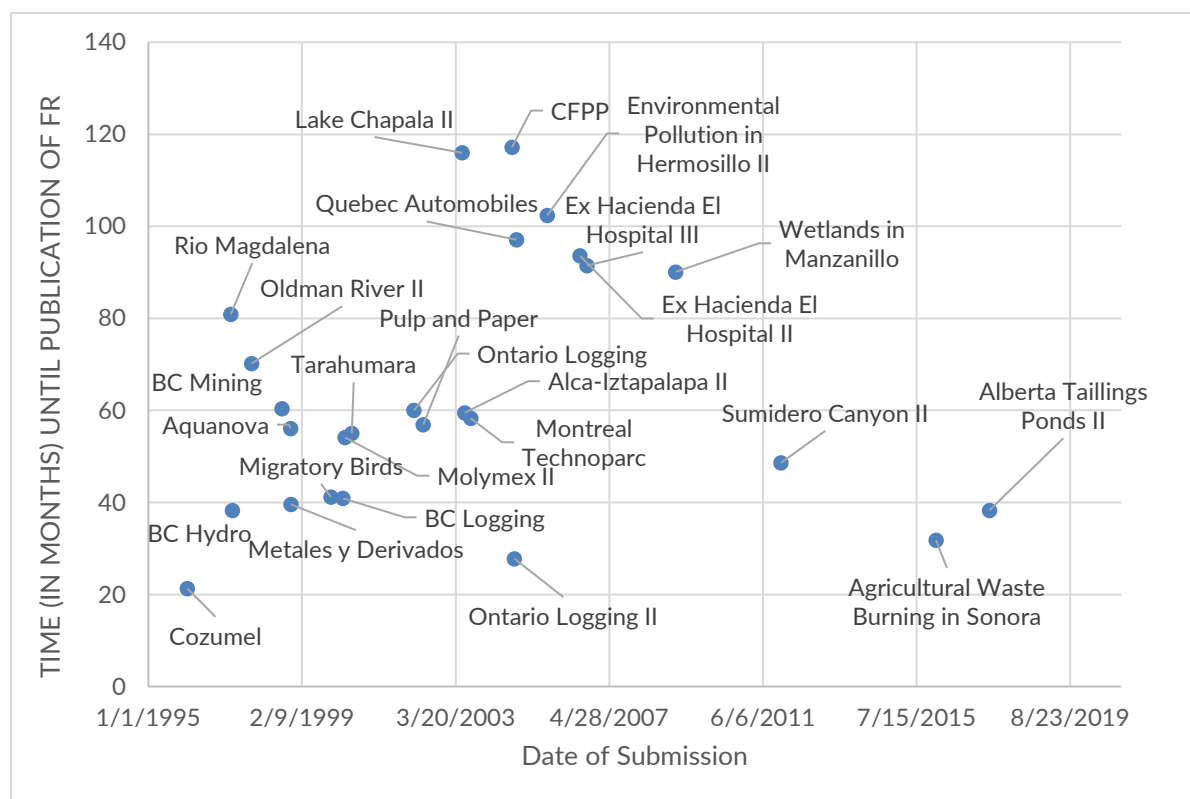
Figure 15 shows the actual amount of time from submission to Factual Record for all concluded submissions. The shortest timeline from submission to Factual Record was actually the first Factual Record, SEM-96-001 (*Cozumel*). The SEM process that took the longest amount of time to complete was SEM-04-005 (*Coal-fired Power Plants*) (CFPP on Figure 15) which was submitted in 2004 but whose Factual Record was published in 2014.

Figure 14. Average time to final Factual Record publication from initial submission



¹⁹⁹ 2012 Guidelines, Introduction.

Figure 15. Time (in months) for final Factual Record publication from initial submission



A more fine-grained analysis of the individual steps of the process offers insight into how the time for performance of various functions have changed over the years. Two sequential steps in the process are of interest in this regard: the Party response after the Secretariat's initial determination of eligibility, and the Secretariat's action either notifying the Council that a Factual Record is warranted or terminating the submission. For submissions filed between 2007 and 2012, responses from the subject Party took, on average, two and a half months after the Secretariat's request for a response (see Figure 16). For the same time period, Secretariat determinations that a Factual Record is or is not warranted after receipt of the responses took nearly 15 months, on average (see Figure 17).

In the 2013-2018 period, and the most recent period (2019-present) Party responses are taking longer, currently an average of 5.6 months (170 calendar days).²⁰⁰ Secretariat determinations that a Factual Record is or is not warranted following a Party response improved to an average of three months, and have met the 60-calendar day deadline with respect to all submissions filed after July 2020.

²⁰⁰ The 2012 Guidelines allotted 30-60 working days for this step; the USMCA/CUSMA allots 60 calendar days. 2012 Guidelines, para. 19.2, USMCA/CUSMA, art. 24.27(4).

Figure 16. Mean time from request of Party response to complete Party response

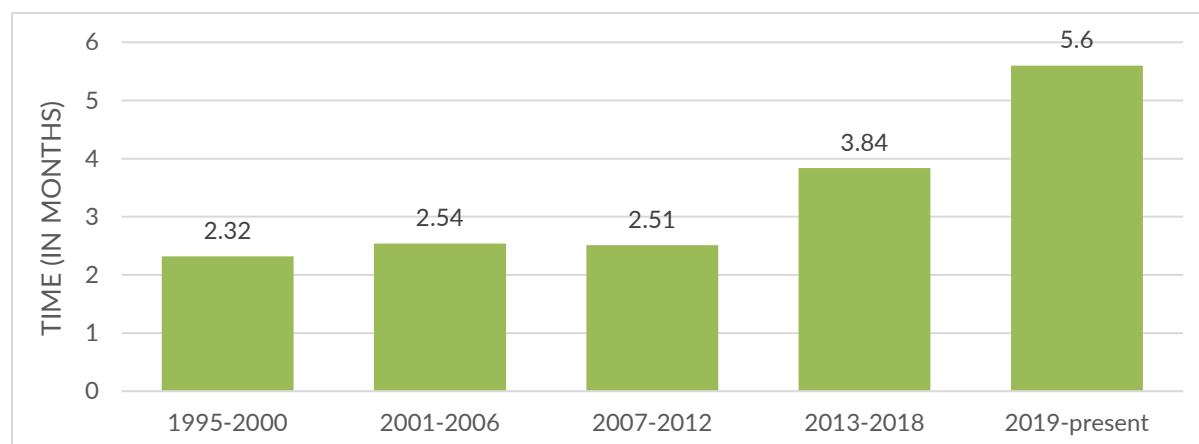
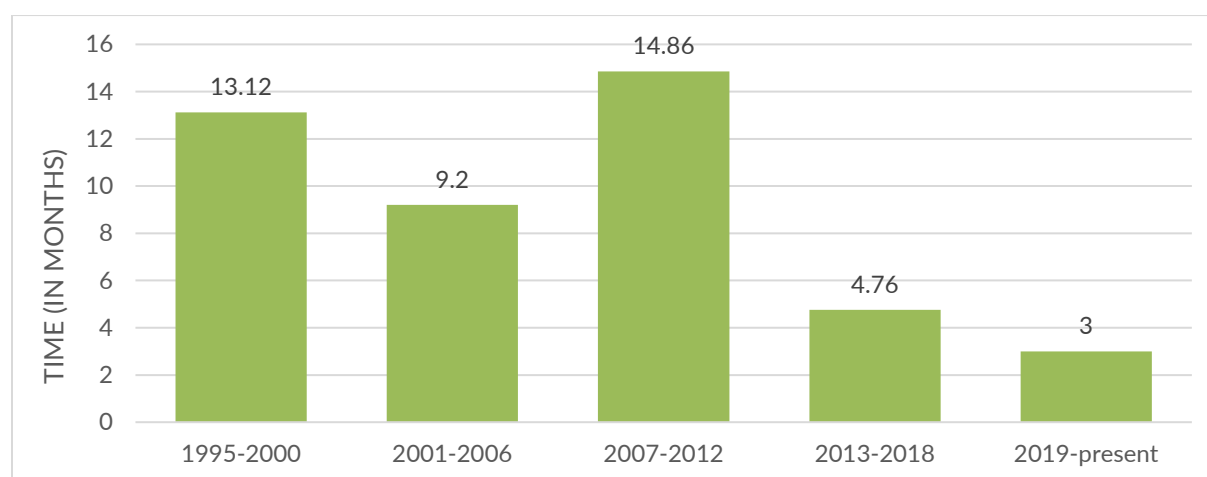


Figure 17. Mean time from Party response to Secretariat determination that Factual Record is or is not warranted



The timing of Council votes to instruct the Secretariat whether or not to prepare a Factual Record has varied substantially (see Figure 18). The 2012 Guidelines under the NAAEC called for such a vote to occur “normally within 60 working days of receiving the Secretariat’s recommendation” or just under three months.²⁰¹ For submissions filed between 2000 and 2006 (and before the 2012 Guidelines), the Council took an average of over two years to vote on whether to instruct the Secretariat to prepare a Factual Record. While that timeline improved dramatically (to approximately 7.5 months) for Council action on submissions initiated between 2007 and 2012 (a period when Council instructed the Secretariat not to prepare factual records for 3 out of 5 Secretariat recommendations), timelines lengthened again between 2013 and 2018. There is one decision still pending on a Secretariat determination from this time period, SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*), which has been awaiting action for 14 months

²⁰¹ 2012 Guidelines, para. 19.4.

Submissions on Enforcement Matters: What Have We Learned?

as of the end of 2021. In the period from 2019-present, one vote has occurred, SEM-19-002 (*City Park Project*), taking 15 months from the Secretariat's recommendation. Another recommendation awaiting Council action, SEM-20-001 (*Loggerhead Turtle*), has been pending for just under 5 months, as of the end of 2021.

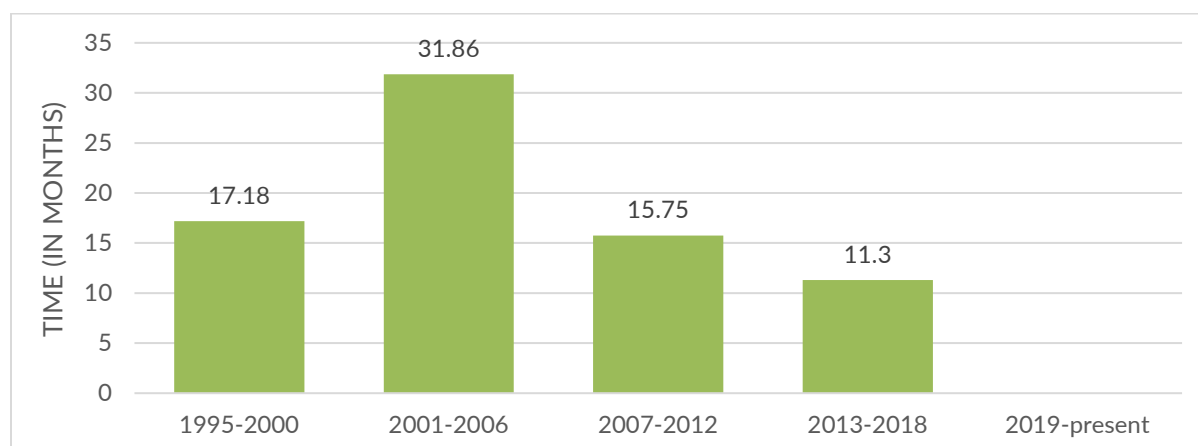
Figure 18. Mean time from Secretariat recommendation to Council vote



Note: Under the NAAEC, the Council would vote on whether to instruct the Secretariat to prepare a Factual Record. Subsequently, under the USMCA/CUSMA, the Council members instruct the Secretariat on whether to prepare a Factual Record.

Once the Council voted, the time taken to create the draft Factual Record had steadily decreased from the 2001 to 2006 average of almost 32 months. In the most recent time period, the Secretariat took an average of 11.3 months to prepare a draft Factual Record (see Figure 19).

Figure 19. Mean time from Council vote to Draft Factual Record



Note: Under the NAAEC, the Council would vote whether to instruct the Secretariat to prepare a Factual Record. Subsequently, under the USMCA/CUSMA, the Council members instruct the Secretariat on whether to prepare a Factual Record.

It should be noted that fewer Factual Records have been prepared for submissions filed after 2006. Therefore, while the Secretariat has improved its ability to adhere to the prescribed times, an increase in submissions or in Council decisions to authorize preparation of Factual Records could test this increased efficiency. The Secretariat is currently drafting two Factual Records (one from the 2013-2018 period, and one from the 2019-present period), and is awaiting Council decisions on two more recommendations one filed under NAAEC and one under USMCA/CUSMA.

3.5 Subject of Submissions

The NAAEC and USMCA/CUSMA both define “environmental law” as falling into four general categories: pollution, hazardous substances and related information, species and habitat protection, and protected natural areas. A submission must identify laws, regulations, or legal provisions fitting into one or more of these categories. In practice, submitters have often also asserted failure to effectively enforce a procedural right as the main claim. However, even submissions focused on these procedural rights (referenced here as Environmental Impact Assessment (EIA)/process rights) must connect to the agreement definitions. For example, a submission may simultaneously concern EIA/process rights and also be about pollution. Of the 19 submissions we categorize chiefly as asserting EIA/process rights, four pertain to pollution, ten to species/habitat, and five to protected areas.

We classified all submissions in accordance with these categories to discern how the SEM process has been used, and to identify what interests submitters have attempted to protect. Submissions most often have addressed pollution and species/habitat enforcement (see Figure 20). These submissions also have the highest success rate in producing Factual Records (see Figure 21).

Figure 20. Content of submission

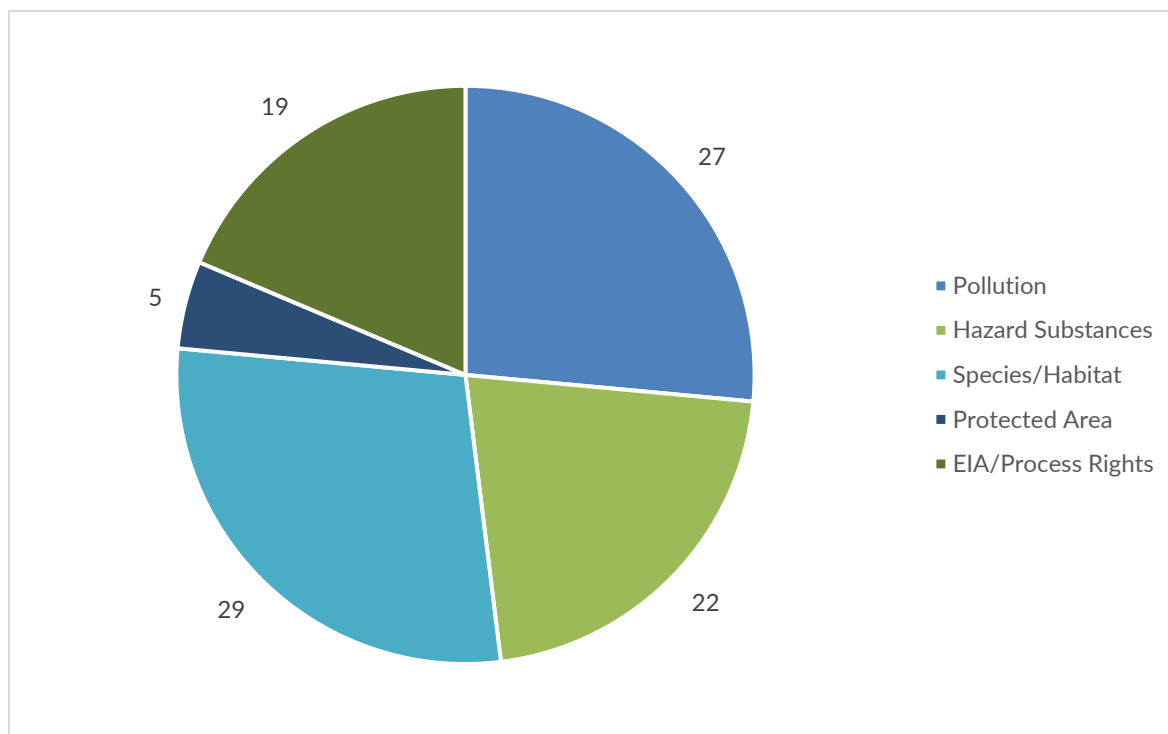
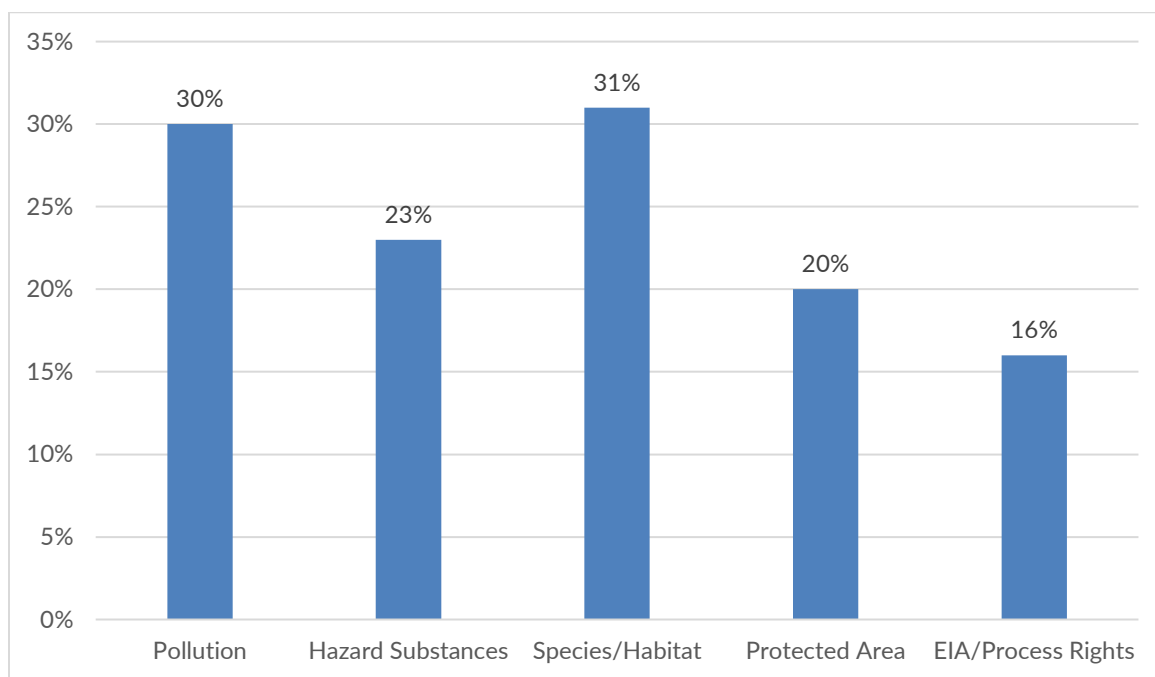


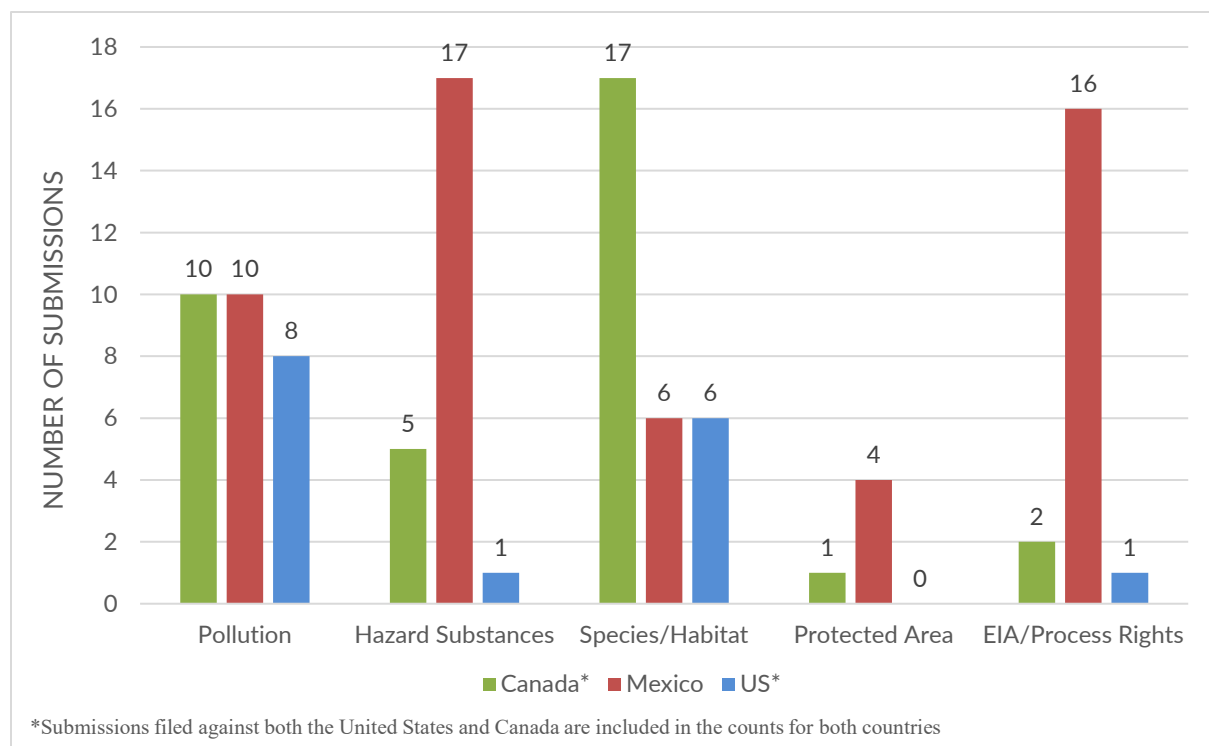
Figure 21. Percentage of submissions from each category that result in Factual Records



Submissions on Enforcement Matters: What Have We Learned?

While Mexico is the most frequent subject of submissions relating to hazardous substances and EIA/process rights, Canada has been the most frequent subject of submissions related to species and habitat protection. All three Parties are fairly even when it comes to the percentage of submissions targeting pollution (see Figure 22).

Figure 22. Submissions by category and country



Additional differences among the three Parties arise when considering the scope of the submission. The data show that in both Canada and the United States, most submissions related to claims that the Party has failed to effectively enforce particular types of laws, which we characterize as overall enforcement claims. In contrast, most Mexican submissions relate to a specific project or facility (see Figures 23-25). The United States and Canada figures include the two submissions made in relation to both Parties. These differences in scope and content offer insight into the way NGOs and residents of the three countries view and use the SEM process differently.

Submissions on Enforcement Matters: What Have We Learned?

Figures 23 and 24. Scope of submissions (Canada and Mexico, respectively)

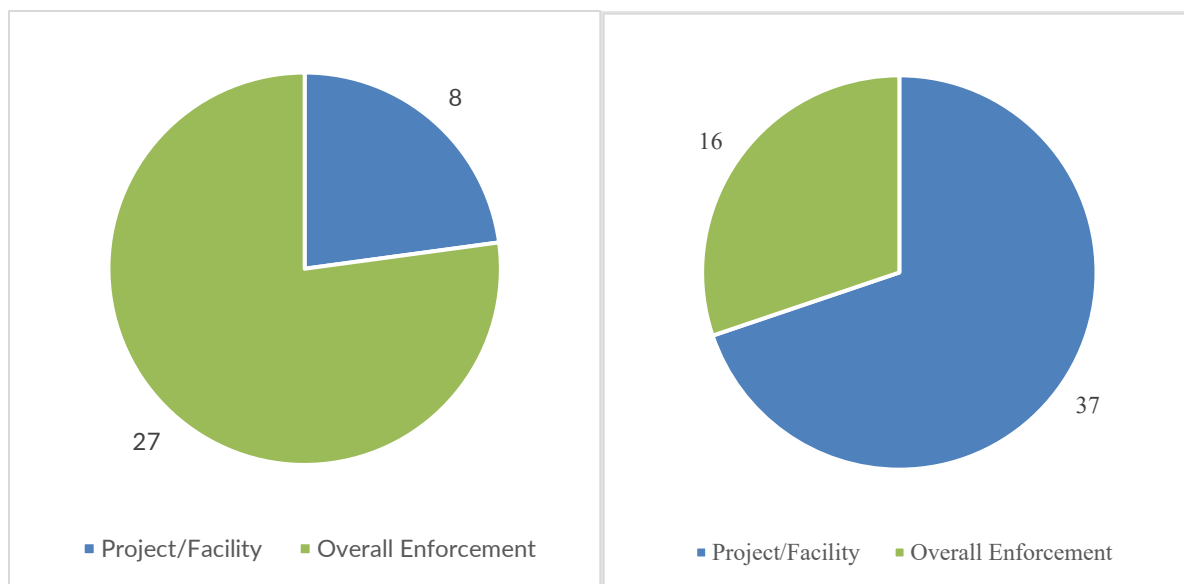
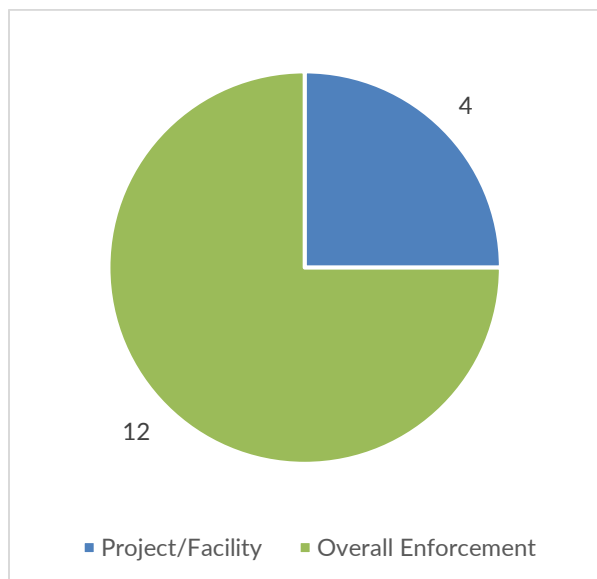


Figure 25. Scope of US submissions



4 Survey Analysis

4.1 Overview

The CEC provided the Environmental Law Institute with contacts for all past, non-confidential submitters for whom the Commission had up-to-date information. The Environmental Law Institute also attempted to find additional contacts for past submitters whose information had changed. Confidential submitters were contacted directly by the CEC. In total, at least one point of contact was identified for 86 of the 102 total submissions and these contacts were sent a link to complete an online survey in their preferred language (see Annex for full survey). Each potential respondent was contacted three times to encourage participation.

The survey itself yielded 13 responses, but many of the respondents had filed multiple submissions. Of those 86 submissions for which points of contact were identified, 24 were represented in the survey results. This represents a survey yield of 28 percent and a representation of 24 percent of all submissions. Among the survey responses, 8 had submitted a submission in or after 2012 (36 percent of total submissions in that time period) and 16 before 2012 (or 21 percent of total submissions from that time period).²⁰²

Most of the survey responses came from submitters who had filed submissions relating to Canada (52 percent), which is in contrast to the overall number of submissions (for which Canada only accounts for 33 percent). Only three submissions pertaining to the United States were represented, or about 12 percent, which is fairly close to the United States' overall percentage of submissions (13 percent). Mexico was the subject of 38 percent of survey responses despite being the subject of 50 percent of the submissions. Therefore, when analyzing survey results, the Canadian perspective is overrepresented and the Mexican perspective is underrepresented.

The survey also over-represents submissions that have resulted in a Factual Record. Of all the submissions referenced in survey responses, 54 percent of them resulted in a Factual Record. Forty-two percent were terminated at some point before the development of a Factual Record and two are still in progress. For the SEM process itself, only 26 percent of all submissions have resulted in a Factual Record. This difference in response rates is expected. Those who have seen success in the process are more likely to provide feedback.

Finally, almost all survey responses came from someone affiliated with a non-profit NGO. Seventy-seven percent of all survey respondents identified themselves as such. While these organizations make up the majority of all submitters, their percentage of all submitters is closer to 60 percent. In fact, 100 percent of the survey respondents who had filed submissions before 2012 were affiliated with an NGO. This pattern is likely because NGOs house more institutional

²⁰² The data can also be considered this way:

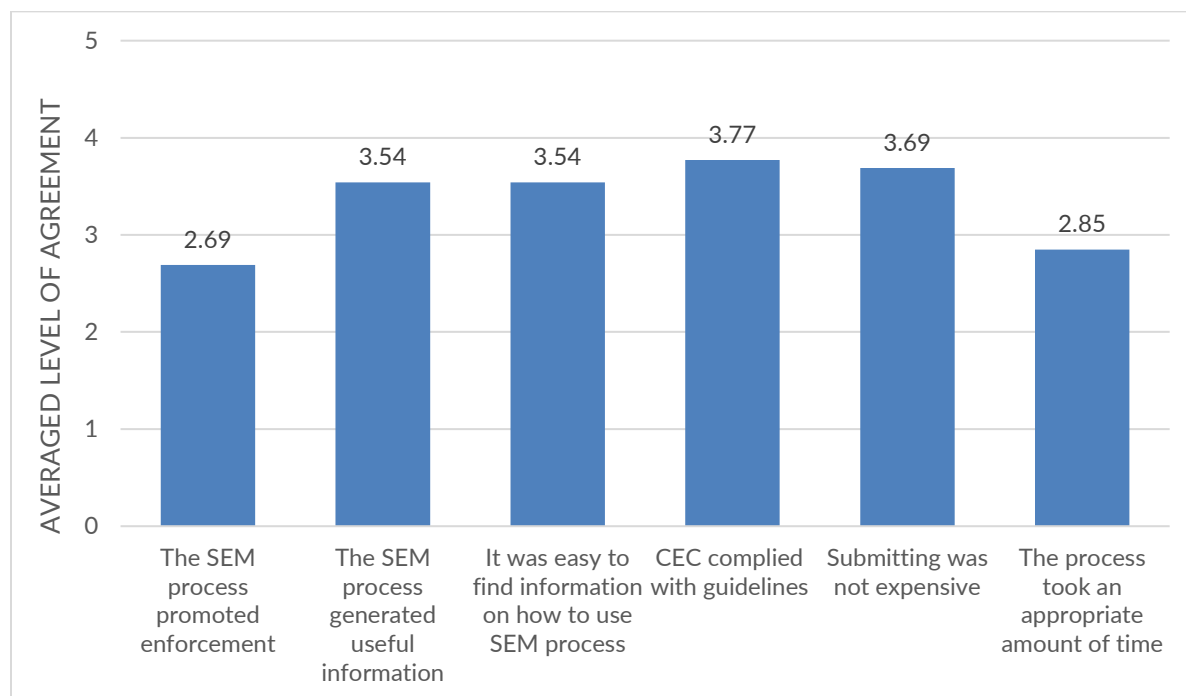
- Population size: 102
- Sample size: 24
- Confidence level 80%
- Margin of error: 12%

knowledge and have more continually accessible contact information, in contrast with individuals or informal groups.

4.2 Analysis

In conducting this survey, six questions used a five-point Likert scale and can therefore be categorized numerically (strongly disagree = 1, disagree = 2, neutral = 3, agree = 4, strongly agree = 5). The closer a number is to five, the more respondents agreed with a statement (see Figure 26).

Figure 26. Averaged responses to Likert scale questions



The averaged responses indicate that in general, respondents showed some disagreement or slight agreement with the statements presented. With a value of 3.77, respondents agreed most strongly with the proposition that the CEC complied with its guidelines. Survey respondents also, on average expressed modest agreement with the statement, “Preparing a submission was not expensive.” Elsewhere in the survey, another question asked about the amount of time submitters spent preparing their submissions. Three respondents said it took them 6 months, one respondent estimated that it took 3-4 months, and the rest said it took two or fewer months. Two respondents said it took them less than a month.

On the other hand, respondents most often disagreed with the idea that the SEM process promoted environmental enforcement. In fact, of the 13 survey respondents, only one agreed and one strongly agreed with this statement. In contrast, six respondents either disagreed or strongly disagreed (the most of any of the Likert scale questions).

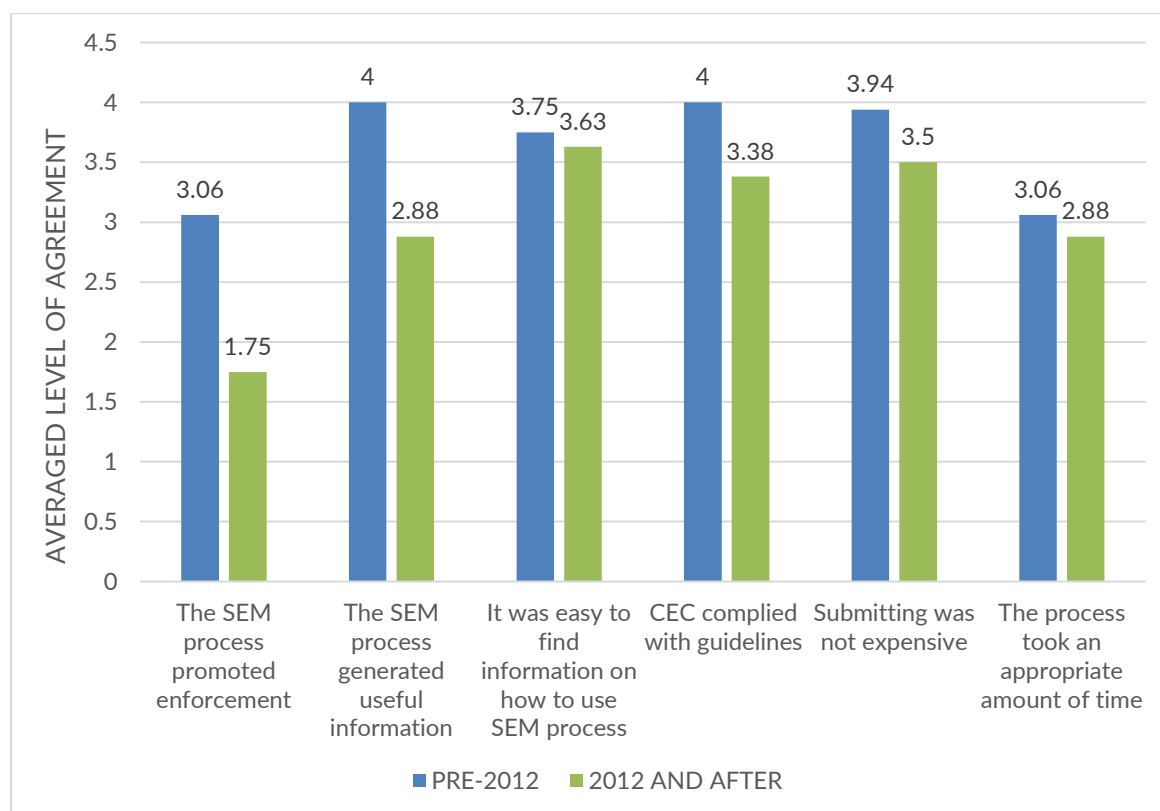
Submissions on Enforcement Matters: What Have We Learned?

Respondents also modestly disagreed with the proposition that the process took an appropriate amount of time. On this question, respondents were clustered more centrally, with the majority expressing either a neutral or negative view. When asked directly, and in yes or no format, whether they thought the time taken for the SEM process was appropriate, seven of the thirteen respondents replied in the affirmative. Of the six that said it took too long, two pointed to the Council vote as the primary factor, one pointed out the Party response, two cited the Secretariat determination (although one acknowledged that in later submissions it had not been a problem), and one respondent who had filed two submissions wrote “most deadlines were missed throughout both submission processes.”

Respondents on average somewhat agreed, at 3.54, that the SEM process generated useful information. In fact, three respondents strongly agreed with this statement and four agreed. Only one respondent strongly disagreed. Respondents also generally somewhat agreed that finding information on how to use the SEM process was easy.

Across the board, respondents who filed submissions in or after 2012 disagreed with the Likert scale statements more strongly than did those with submissions before 2012 (see Figure 27), and particularly the statement that the SEM process promotes environmental enforcement. Before 2012, responses produced a largely neutral average on this issue, but responses by submitters in or after 2012 are nearing strong disagreement with this statement.

Figure 27. Agreement with Likert scale questions based on whether survey taker submitted before or after 2012

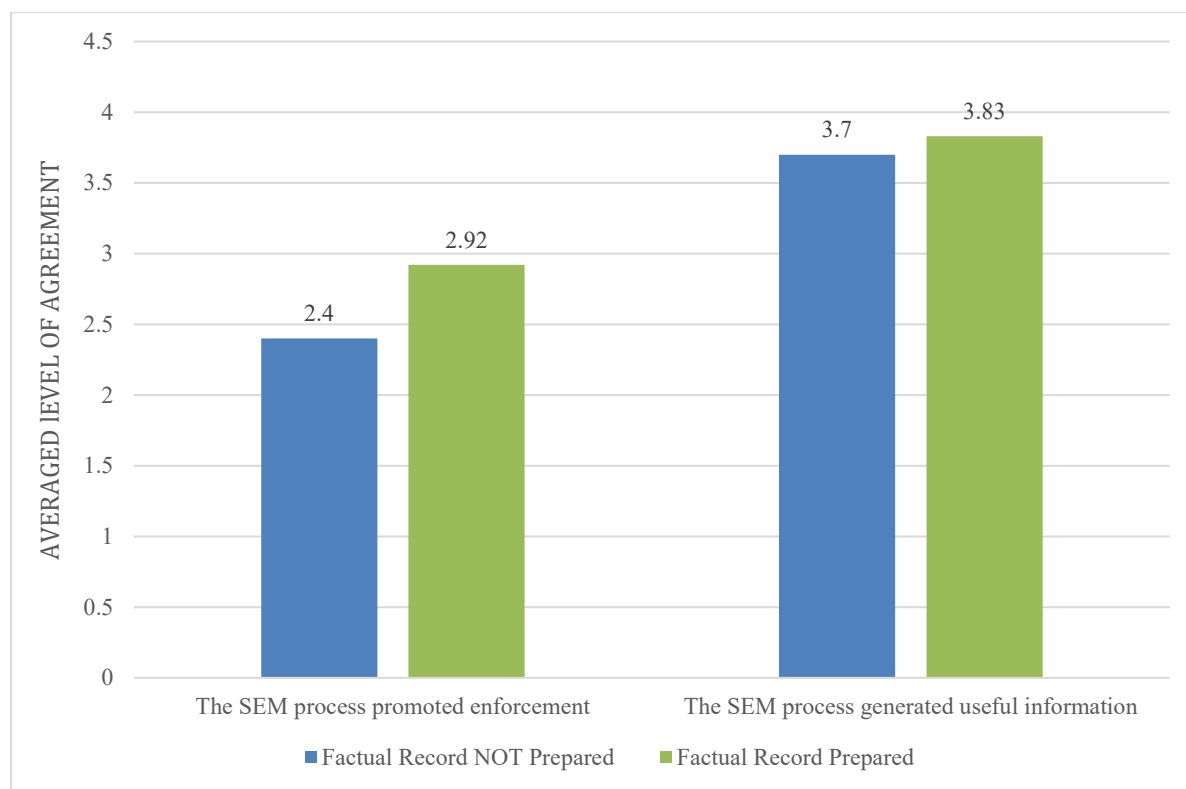


Submissions on Enforcement Matters: What Have We Learned?

There is a similar increase in disagreement on whether the SEM process generates useful information, although post-2012 submitters still produce a largely neutral average response on that issue. Although timelines have been quicker since 2012, respondents disagree more with the proposition that the process took an appropriate amount of time. While they do not disagree drastically more, the formal improvements in the timelines have not been met with equivalent increase in approval. That said, one respondent who submitted in or after 2012 strongly agreed with the statement that the process took an appropriate amount of time, while no one strongly agreed before 2012.

Another characteristic that influences opinions on these questions is whether one's submission resulted in a Factual Record (see Figure 28). While still not garnering a high level of agreement, those whose submissions resulted in a Factual Record agreed more with the statement that the process promotes environmental enforcement.

Figure 28. Agreement with Likert scale questions based on whether or not a Factual Record was prepared



Also, while those who reached a Factual Record agreed a little more with the statement that the process generated useful information, the difference between the two groups was small. Perhaps this gives credence to the idea raised in interviews that a Party response can be useful even without the publication of a Factual Record. However, another question in the survey asked respondents if they found the response from the Party helpful. Of the ten that received a Party response, 5 said the response was helpful and 5 said it was not.

Submissions on Enforcement Matters: What Have We Learned?

Despite the overall disagreement with the statement that the SEM process promoted enforcement, promoting enforcement was one of the most common reasons referenced for why respondents decided to use the SEM process in the first place. When asked why they chose to use the SEM process, 5 of the 13 respondents mentioned that they decided to use it because laws were not being enforced or because they wanted to promote enforcement. One Mexican respondent wrote, “we thought that with a factual record, we could promote compliance with environmental legislation from a general perspective in Mexico” (originally in Spanish). Six respondents mentioned other remedies not being available to them or not working while four mentioned that the SEM process would help raise the profile of their issues. Finally, one respondent said they approached the SEM process as one of many potential remedies and one said that they were inspired to submit based on past conversations with the CEC.

Only five of the thirteen respondents said that the SEM process changed their situation. Four of those five respondents mentioned changes like raising awareness and making the problems visible. The fifth said the SEM process changed their situation by allowing them to realize that neither the CEC nor their respective Party was living up to the NAAEC.

The survey also asked respondents what they felt the best part of the SEM process was. Three respondents wrote “unsure”, “none”, or that the best part was discovering the process was unhelpful and they should not use it again. Six respondents that said the best part was raising the profile of the issue and two that said the best part were the changes in environmental enforcement the process inspired. Two respondents lauded the information the SEM process generated (one through the creation of a Factual Record), another praised the straightforward nature of the application, and a final one said the CEC staff was “responsive, helpful, and very pleasant.” Some of these respondents listed multiple “best” things.

The survey also inquired about the worst part of the process. Here, too, some respondents wrote more than one worst thing. One respondent wrote “unsure” in response to this question, and another wrote “to realize that the SEM process was not serious at all and that it was more like a chokehold!” Three respondents complained about a lack of teeth in the process; four respondents said the worst part was the lack of timeliness; two said there should have been more accountability to and input from submitters; and two criticized the lack of transparency.

Two respondents also wrote that the worst part was when their submission was terminated, and both felt that it had been terminated unfairly based on the actions of the Parties. (One was a Council vote, and one a Secretariat determination based on what the submitter regarded as an erroneous Party response). One respondent wrote that the worst part about the process is that the 2012 Guidelines have not been revised under the USMCA/CUSMA, calling the new process confusing. Finally, one respondent called the process overly political, writing, “It was terribly frustrating to know that the political pressure exerted from the government of [the Party] ...gave way to the decision not to recommend a factual record. It was a totally flawed process.”

Ultimately, 11 of the 13 respondents said the process needed to be changed. When asked how they would like to see it change, five respondents said they would like to see either more involvement of the submitter in the process or less involvement from the Parties. Four

mentioned having stricter or quicker deadlines to improve the timeliness of the process with one writing, “Streamline the response times of the Parties, once the factual record is approved, there does not need to be consultation before publication and follow-up to accompany the environmental improvement process.” Four respondents also mentioned improving accountability and three that wanted the process to have a remedy or follow-up mechanism. Finally, one respondent urged the creation of new guidelines under the USMCA/CUSMA.

4.3 Comparison to JPAC Survey

Ours is not the first survey of its kind. In 2011, JPAC whose main role is to advise the Council on environmental matters through public engagement, launched a similar survey. They received 15 responses, representing 24 submissions.

Some of the questions asked in the two surveys were similar. For example, JPAC asked “Did the CEC’s response time seem appropriate?” 77 percent of respondents answered that it did not. However, 10 years later when we asked whether the SEM process took an appropriate amount of time, only 46 percent of respondents said that it did not.

JPAC asked respondents how difficult gathering information on the SEM process was and 95 percent said it was easy (given the options of easy or difficult). Since the comparable question this time around was asked on a Likert scale, the responses are not exactly equivalent, but only 62 percent of respondents said they agreed or strongly agreed.

Responses to the two surveys mirrored each other in some areas. For example, in the JPAC survey, 33 percent of respondents said they saw a change in the situation they identified in their submission. In our survey, the percentage (38 percent) was virtually the same. Additionally, in both surveys most respondents expanded on this answer by stating that the process raised awareness or increased information, rather than actually changed policy.

In both surveys, respondents indicated that the SEM process needed to be amended – 92 percent of the 2011 JPAC responses, and 83 percent of the current survey responses. A current respondent called for “better follow-up” by the CEC of Factual Records. Four respondents cited particular timing issues, although one of these appreciated the CEC’s “current compliance with timelines.” Nearly all called for additional “accountability” including some recommendations for submitter engagement at stages after the initial submission. These results are consistent with comments in the JPAC survey.

5 Findings

This section examines the performance of the SEM process with respect to four characteristics:

- Has the process facilitated meaningful public engagement?
- Has the process maintained institutional credibility?
- Has the process produced information not otherwise accessible?
- Has the process promoted effective enforcement of environmental laws?

The findings in this section are based upon the comprehensive review of CEC documents related to SEM, data analysis of the 102 SEM filings from 1994 through December 2021, the survey responses, and the structured interviews. Material from the interviews is, in accordance with the ground rules of the interviews, not attributed to a specific individual, but may be attributed to the individual's role in the SEM process (government or former government official, former CEC official, academic, or submitter). We also incorporated, where helpful, relevant academic literature and prior evaluations of the SEM process identified in the bibliography.

5.1 Facilitates Meaningful Public Engagement?

Finding: The SEM process has facilitated meaningful public engagement. It has also presented some obstacles to such engagement.

The SEM process was intended to promote and facilitate meaningful public engagement with the protection of the North American environment by providing a mechanism to surface concerns with possible areas of enforcement failure. All sectors embrace the public engagement function of SEM, including those, often the government Parties, who see it as an informational tool, and others, such as many submitters, who see it as an accountability tool.

5.1.1 Accessibility of Process

Finding: The process is generally regarded as accessible to individuals and informal groups as well as to NGOs.²⁰³

The SEM submissions data show that while NGOs account for the most submissions, all types of submitters are represented. Individuals and informal groups account for the majority of submissions concerning Mexico. Factual Records have been obtained by all types of submitters except for-profit companies, although as one might expect, those submitted or aided by NGOs have been most frequently successful.

²⁰³ Accessibility is a key characteristic identified by Markell, D.L., *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425 (2010).

Submissions on Enforcement Matters: What Have We Learned?

Survey respondents did not find the preparation of a submission difficult or costly, a result consistent with the 2011 JPAC Survey. Interviewees concurred that the process is mostly accessible to submitters with legal expertise or the ability to access or partner with others that have such expertise (such as large NGOs).

Government and former government officials agreed that submitters need time and expertise to engage in this legal process; however, they differed on whether this was a negative or positive attribute. Several said that the process could be overwhelming for an average person, while one emphasized that it is important that submitters understand the relevant laws and clearly provide evidence and justifications that meet the requirements. This interviewee said that without quality controls, the submission may be misguided, and the Secretariat cannot correct a fatal flaw.

The most substantial accessibility issue has been the ability of submitters to satisfy the past NAAEC or the new USMCA/CUSMA criteria for a valid submission that passes the threshold for warranting a Party response. Submitters must identify an alleged failure to effectively enforce an environmental law, show that they have communicated the matter to the Party, provide sufficient information to allow for review, and the submission must appear to be aimed at promoting enforcement rather than harassing industry. Submissions that meet these thresholds are further considered by the Secretariat with respect to whether the submission alleges harm to the submitter, whether the submission raises matters about which further study would advance the goals of the agreement, whether private remedies have been pursued, and whether the submission has not been drawn exclusively from mass media reports.²⁰⁴ The academic literature has described this as “complaint-based” monitoring of environmental enforcement. If made accessible, this can encourage public participation and engagement.²⁰⁵

Over the entire history of the SEM process, just over 30% of all submissions have been terminated by the Secretariat at this review step, while 70% have proceeded. Individuals and informal groups have submitted almost all of the submissions that the Secretariat has terminated at this step of the process.

The Secretariat has exercised a fairly broad view of how the threshold criteria may be satisfied. With respect to private remedies, for example, the Secretariat has determined that all available private remedies need not be exhausted as a prerequisite to filing.²⁰⁶ Moreover, the submitter itself need not have pursued available remedies if some other entity has done so. Harm to the person or organization has been broadly interpreted as well – reflecting the goals of the SEM

²⁰⁴ NAAEC, art. 14(1), (2); USMCA, art. 24.27(1)-(3).

²⁰⁵ Raustiala, K, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389 (2004).

²⁰⁶ E.g., SEM-98-004 (BC Mining), Submission pursuant to NAAEC (29 June 1998), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/bc-mining/>>; SEM-03-003 (Lake Chapala II), Submission pursuant to NAAEC (23 May 2003), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/lake-chapala-ii/>> [hereinafter *Lake Chapala II*]; SEM-04-005 (Coal-fired Power Plants), Submission pursuant to NAAEC (20 Sept. 2004), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/coal-fired-power-plants/>>.

process to entertain submissions that may address issues of enforcement of environmental laws without too narrow a “standing” requirement.²⁰⁷

One of the more significant issues is whether the submission sufficiently identifies an environmental law or laws as defined in the NAAEC or USMCA/CUSMA. These must be specifically identified. Submitters have, at times, had difficulty with the environmental law requirement. The inclusion of environmental laws is fairly broad in the NAAEC and has not been regarded by most submitters as a severe constraint, but may be narrower in the USMCA/CUSMA. The newer agreement explicitly limits submissions to laws enforceable by the central government of a Party.²⁰⁸ The Secretariat has interpreted the definitional requirement somewhat broadly over most of the period. For example, whether a legal provision has a “primary purpose” of protecting the environment and/or preventing danger to life or health has been interpreted broadly by the Secretariat, even over the objections of the subject Parties.²⁰⁹ However, these views of the Secretariat have been frequently contested in Party responses (see below). And the Council has, on occasion, rejected the Secretariat’s determination that a submission met the threshold criteria by voting not to authorize preparation of a Factual Record based on the view that the matter at issue did not involve enforcement of an environmental law.²¹⁰ One government official interviewee suggested that the Secretariat has been too expansive in allowing submissions under laws that are not environmental laws. Another interviewee suggests that the Secretariat has curtailed its interpretation of environmental laws so that it addresses only those laws it wishes to address. In general, however, most interviewees supported the Secretariat’s general exercise of interpretive discretion.

Academic literature explains that the Council constrains the Secretariat’s scope of authority with respect to these interpretive matters.²¹¹ However, the Secretariat has tried to interpret environmental law expansively, while deferring to the Parties’ legal interpretations of their own domestic laws. In practice, even provisions that are not “environmental laws” have been used by the Secretariat to inform the interpretation of those laws that are properly within the SEM process.²¹²

²⁰⁷ Markell 2010, 425.

²⁰⁸ Waldron, L. *Environmental Governance Under the New NAFTA*, 30 J. TRANSNAT’L L. & POL’Y 151 (2021) (observing that the USMCA definition may preclude the SEM process from considering state environmental enforcement failures).

²⁰⁹ E.g., SEM-09-001 (*Transgenic Maize in Chihuahua*), Submission pursuant to NAAEC (28 Jan. 2009), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/transgenic-maize-in-chihuahua/>>. Although the Secretariat found that the submission met the criteria of Article 14(1), the Secretariat terminated the process under NAAEC 15(1).

²¹⁰ SEM-11-003 (*Protection of Polar Bears*), Submission pursuant to NAAEC: *Council Resolution 14-04* (5 June 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/11-3-cr-14-04_en.pdf> (stating that the Council rejected the Secretariat’s recommendation of a Factual Record) [hereinafter *Polar Bears*: Council Resolution 14-04].

²¹¹ Solano, P. *Choosing the Right Whistle: The Development of the Concept of Environmental Law under the Citizen Submissions Process*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 75 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

²¹² *Id.*

Another important factor that has implications for accessibility is the need for submitters to show an ongoing failure to enforce – that a Party “is failing to effectively enforce” its environmental law.²¹³ Providing detailed, time-sensitive information can be a major hurdle to a submitter of any type. Interviewees note the complexity of gathering timely information (often requiring use of domestic freedom of information laws which take time), of then ascertaining what remedies have been pursued and what proceedings may be pending, notifying relevant Party authorities (and getting a response, if possible), and then compiling the information and submitting it with exhibits. This can be a significant undertaking even for an NGO. Yet this information may become stale by the time of a Party response. In sum, while not strictly an accessibility hurdle, the initial submission can be a very substantial undertaking even if not formally difficult. While insistence on time-relevant information may promote due diligence by the public, it may transfer much of the anticipated information generation from the CEC to the prospective submitter.²¹⁴

5.1.2 Legalistic Process

Finding: The SEM process has become unnecessarily oppositional , especially at the early stages.

Nearly every interview we conducted suggested that the SEM process is, or within a few years became, “too legalistic” and “adversarial.” While the Secretariat is generally given high marks for its responsiveness and providing information to potential submitters, the submissions process has frequently become an exercise in legal pleading. The subject Parties usually invoke multiple Agreement provisions in their responses under NAAEC 14(3) to urge the Secretariat to terminate submissions on technical, substantive, and procedural grounds, even if they have passed the first eligibility thresholds.

Our review of Party responses available on the SEM Registry indicates that for large portions of the SEM period – and especially between 2000 and 2015 – Party responses under NAAEC 14(3) treated the process as oppositional. This adversarial character of the process has been highlighted in prior studies, in the academic literature, and in the interviews.²¹⁵

Under the former NAAEC and USMCA/CUSMA, Party responses may contain, in addition to information on pending proceedings, “any other information a Party wishes to submit.” Parties have invoked, among other grounds for termination of a submission, insufficient showings of harm to the submitter, that the subject matter does not involve an “environmental law”, that the submission lacks specificity, that private remedies have not been pursued or exhausted, that the action or inaction complained of is wholly in the past, that there is no enforcement obligation,

²¹³ NAAEC, art. 14(1); USMCA, art. 24.27(1).

²¹⁴ Markell, D.L. *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. 10360 (2007) (noting that the increasing specificity requirements have increased burdens on submitters); *See also* Welts, L. *Form over Substance: Procedural Hurdles to the NAAEC Citizen Submission Process*, in NAFTA and Sustainable Development: History, Experience and Prospects for Reform 123, 136-8 (Hoi L. Kong & L. Kinvin Wroth eds., 2015) (arguing that Secretariat has been too restrictive by requiring a showing of ongoing failure to enforce environmental law, requiring submitters in effect to allege a broad and persistent failure while supporting it with narrow and succinct evidence).

²¹⁵ E. g., Markell and Knox 2012.

and others. The Secretariat itself has taken notice of the frequency of this practice, in which Party responses seek to litigate threshold issues already passed on by the Secretariat. For example:

The Secretariat takes note of the Party's practice of including in its response procedural arguments on admissibility of a submission that would give rise to an additional period of consideration not contemplated by the agreement, and reiterates that the Secretariat is not a court charged with the administration of justice, but rather that its function is to facilitate and administer the citizen submission process in an impartial and efficient manner.²¹⁶

The most potent of the Party responses is the invocation of a "pending judicial or administrative proceeding":

The Party shall advise the Secretariat...whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.²¹⁷

Interviewees and others have explained that the purposes of the "pending administrative or judicial proceeding" provision in NAAEC and USMCA/CUSMA were to promote efficiency, avoid duplication of effort, and ensure that Parties remain in control of their own enforcement processes.

However, as a pleading tool, its use raises the possibility of foreclosing fact-finding. In practice, there have been differing views of how to deal with a Party's claim of "pending proceeding." There is the question of the consequence of the Party response – specifically whether the Party's notice itself terminates the submission, or only a Secretariat determination that there is a qualifying pending proceeding.²¹⁸ Who decides?

Only 4 submissions of the 75 that reached this stage have been terminated by the Secretariat on the ground of "pending proceeding." Many more submissions have received a Party response asserting the existence of a "pending proceeding" that would arguably prevent the submission from continuing. This has been a perennial issue. In 2015 JPAC observed that some Parties had sought termination of submissions although the Secretariat had determined that no pending proceeding would address the actual substance of the submission. JPAC stated its belief that the phrase should not be "unilaterally interpreted by any one Party to encompass matters that do not

²¹⁶ SEM-09-001 (*Transgenic Maize in Chihuahua*), Submission pursuant to NAAEC: *Secretariat Determination under Article 15(1)*, at para. 40 (20 Dec. 2010), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/09-1-det_15_1_public_en.pdf> [hereinafter *Transgenic Maize: Secretariat Determination under Article 15(1)*].

²¹⁷ NAAEC, art. 14(3)(a); USMCA, art. 24.27(4)(a) (substituting the term "CEC Secretariat").

²¹⁸ Rovalo, M. *Pending Proceedings in the New Guidelines for Submissions on Enforcement Matters: An Improved Regression?*, in NAFTA and Sustainable Development: History, Experience and Prospects for Reform 97 (Hoi L. Kong & L. Kinvin Wroth eds., 2015) (arguing that the Secretariat has this role, as a Party "veto" would destroy the SEM process).

fit the definition.” It said that the term is meant to focus on “relatively formal, transparent proceedings capable of leading to a binding enforcement outcome or to voluntary compliance.”²¹⁹

The Secretariat, over the years, has looked behind the assertion of a pending proceeding, and applied a multi-factor test:

[T]he Secretariat must consider whether the proceeding was initiated by the Party; whether it is timely in accordance with the Party’s law; whether it is related to matters of effective enforcement raised in the submission, and whether the proceeding has the potential to resolve the matter raised in the submission.²²⁰

Based on these factors, the Secretariat has at times declined to terminate a submission under NAAEC 14(3), but terminated it under NAAEC 15(1) based on the existence of enforcement and other related activities that obviated the need for a Factual Record.²²¹ This is in keeping with its view of the purpose of the SEM process.

In some instances, the Council has disagreed with the Secretariat’s decision to evaluate a Party’s claim of a pending proceeding. As recently as 2015, the Council by unanimous vote declined to authorize a Factual Record requested by the Secretariat, based on the Party response claim of a pending proceeding:

Canada fulfilled its responsibility under NAAEC Article 14(3)(a) to advise the Secretariat in a timely manner that the matter at issue in the submission was the subject of a pending judicial proceeding. Accordingly, the Secretariat should have proceeded no further in its analysis and terminated the submission pursuant to the Agreement and the SEM Guidelines.²²²

The United States, while “not satisfied” that this was a pending proceeding, concurred in the vote, believing that “the Secretariat should have exercised caution and refrained from continuing to process the submission.”²²³ The previous year, Canada and Mexico voted against authorizing a Factual Record, citing the Party’s claim of a pending proceeding; while the United States voted

²¹⁹ COMM’N FOR ENVTL. COOPERATION, *Advice to Council No. 15-02*, at para. 3 (8 May 2015), available at <http://www.cec.org/files/documents/jpac_advice_council/advice_15-02.pdf> [hereinafter *Advice to Council No. 15-02*].

²²⁰ See *Transgenic Maize: Secretariat Determination under Article 15(1)*, at para. 65 (citing earlier Secretariat determinations). In its Determination, the Secretariat reviewed some claims included in the submission that do not necessarily involve the same subject matter as the asserted “pending proceeding,” but nonetheless terminated the *Transgenic Maize* proceeding under Article 15(1) of the NAAEC.

²²¹ *Id.*

²²² SEM-10-002 (*Alberta Tailings Ponds I*), Submission pursuant to NAAEC: *Council Resolution 15-01 – Reasons for Council Instructions*, at 1 (27 Jan. 2015), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/10-2-reasons-canada_and_mexico-united_states_en.pdf> [hereinafter *Alberta Tailings Ponds I: Council Resolution 15-01*].

²²³ *Id.*

for a Factual Record, stating that the identified proceedings did not involve the same subject and “[are not being] pursued by the Party.”²²⁴

Despite these actions, the Secretariat still maintains its ability to review such assertions by a Party, doing so as recently as 2020, in a determination upholding the United States’ assertion of a pending proceeding:

The Secretariat has consistently found that ongoing enforcement and defensive litigation involving the same matter that is the subject of the submission meets the definition of pending judicial or administrative proceeding. The Secretariat also considers such factors as whether the matter is being pursued by the Party in a timely fashion and in accordance with its law and if the proceeding invoked by the Party in its response has the potential to resolve the matter raised in the submission.²²⁵

An interviewee opined that the interpretation of “pending proceeding” had expanded over time at the behest of the Council, and that the Secretariat has accepted that expansion while continuing to maintain its right of review.

Interest in meaningful engagement means that the public should see some role for the Secretariat in reviewing Party responses that may terminate a submission. An adversarial pleading environment needs at least some elements of independent administration to retain public interest and confidence.

5.1.3 Transparency of Process to Submitter

Finding: The SEM process has become increasingly transparent with the posting of documents online on the Registry, and the Secretariat’s Compliance Tracker indicating decision point status and timelines. Nevertheless, some aspects of the process are somewhat opaque to the submitter.

Submitters note that their formal involvement in the process essentially concludes with their filing of the submission, or a revised submission when the Secretariat has advised that certain components are insufficient to support a valid submission. Further interactions are thereafter limited to the Parties and the Secretariat.

Party responses provide the Secretariat with information, make assertions and representations, and offer legal interpretations that are evaluated by the Secretariat SEM unit without the opportunity for submitters to reply. In addition, Party responses have on a substantial number of

²²⁴ SEM-12-001 (*BC Salmon Farms*), Submission pursuant to NAAEC: Council Resolution 14-09 – Statement of the United States of America Explaining its Position and the Reasons for its Vote (9 Dec. 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/12-1-us_statement_on_its_vote_en.pdf> [hereinafter *BC Salmon Farms*: Council Resolution 14-09].

²²⁵ SEM-19-004 (*Barred Owl*), Submission pursuant to NAAEC: Secretariat Determination under Article 14(3)(a), at para. 11 (20 Mar. 2020), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/19-4-det143_en.pdf>.

occasions relied on confidential information. In these instances, even the posting of Party responses on the Registry has provided minimal insight to submitters as to facts at issue.

If the process leads to a Secretariat finding that a Factual Record is warranted, Professor Hester notes that the practice of allowing the subject Party to draft the Council resolution authorizing preparation of a Factual Record allows it an opportunity to add or omit issues from a potential Factual Record, without any opportunity for feedback from the submitter.²²⁶ The Secretariat also has no involvement at this stage. This means that the fundamental shaping of a Factual Record takes place out of view of the submitter, the Secretariat, and the general public, even though the Council does append a brief statement of reasons to its ultimate vote.

Submitter interviewees and former CEC officials both note that the inability of the submitter to respond at any stage has weakened the perception of transparency and meaningful public engagement. This is particularly problematic when the entire process may run as long as six years. One former CEC official said that submitters should be heard at some point in the process and not just limited to the initial submission. Another interviewee with several connections to the SEM process urged some balance to the process.

Professors Markell & Knox have maintained that submitters should be able to respond to factual assertions or legal representations made in Party responses.²²⁷ Some submitters have done so even though there is no provision for consideration of such information by the Secretariat, nor placement of such information on the Registry. Markell reported that the Council has argued that a submitter reply would “result in a more adversarial public submissions process,” but observed that not allowing such a reply has sowed distrust while increasing the burden on the initial submission to anticipate possible responses.²²⁸

Our interviews suggest that whether submitters should have any further informational or engagement role depends in part on how stakeholders view the SEM mechanism. One view sees SEM as merely a submitter-triggered signaling process, with all subsequent action owned entirely by the CEC and the Parties.²²⁹ Others see SEM as a way to prompt fact-finding and engagement, which might include providing some external accountability during the process. Even as early as 2004, Recommendation 10 of the TRAC Report addressed possible means of improving this interaction and reducing the black-box nature of the process, including possible exploration of a mediation step to allow for more engagement with submitters and the subject matter of concern to the Parties.²³⁰

²²⁶ Hester, T. *Designed for Distrust: Revitalizing NAFTA's Environmental Submission's Process*, 28 GEO. ENVTL. L. REV. 29, 49 (2015).

²²⁷ Markell and Knox 2012.

²²⁸ Markell, D.L. *Understanding Citizen Perspectives on Government Decision-Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 662 (2006); *See also* Markell 2007, 10377.

²²⁹ *See* Markell 2007; *See also* Markell 2010 (noting the SEM function as a “spotlighting” mechanism).

²³⁰ TRAC Report, at 54.

5.1.4 Declining Use of SEM

Finding: There have been modest declines in the use of SEM by eligible submitters.

The data show a declining use of SEM over time and fewer submissions proceeding to Factual Record, suggesting a potential reduction in perceived value to potential submitters. Interviewees and survey respondents alike expressed concern with the process. Survey respondents with experience since 2012 expressed less confidence in the process either promoting enforcement or producing useful information on enforcement. Welts suggests that the barriers are too high and the results are too seldom achieved.²³¹ Others identify lack of confidence in the independence of the process from the control of the Parties.²³²

While there is interest in the process and the initial entry point for a submission is not high, interviewees suggest that a lack of knowledge about the SEM process, as well as its lack of results, contributes to its disuse. It is known to only specialized groups, said these interviewees, and submissions have led only to diffident outcomes, making it less attractive as an option for airing an environmental enforcement issue. For more than a decade, even submissions advanced by the Secretariat to the Council had very little chance of producing a Factual Record. In the period from 2007-2018, the Council rejected 5 of the 10 Secretariat recommendations presented to it (with one still pending). The Council has on numerous occasions also narrowed the issues that may be considered in a Factual Record from those recommended by the Secretariat.

Who is choosing not to engage? One prominent instance is Ecojustice which, after the scoping of the Secretariat's recommendation by the Council in December 2010, withdrew its submission and affirmed that it sees no value in use of the process.²³³ Nevertheless, other NGOs have continued to pursue multiple submissions (e.g., CEMDA, Center for Biological Diversity, NRDC, and Environmental Defence Canada). Some individual submitters have expressed disappointment with the process, and particularly objected to its adversarial nature.

While both individual submitters and groups have used SEM, some express a preference for tribunals that can produce an enforceable outcome and that allow for further public engagement (e.g., international human rights tribunals). In the United States, the availability of citizen suits for most environmental matters can offer both an adversarial process within which the person or NGO can engage in fact-finding on a continuing basis, and the advantage of a definitive outcome.²³⁴ However, submitters continue to see value for SEM even in some US contexts, such as SEM-21-003 (*North Atlantic Right Whale*) seeking to prompt the preparation of a Factual Record on alleged failure to protect this highly endangered species.

²³¹ Welts 2015, 123.

²³² Hester 2015.

²³³ See *Species at Risk*: Withdrawal Letter.

²³⁴ Markell, D.L., Tyler, T.R. *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008).

Has the process led to civic engagement? In general it has, but with marked limitations. In their 2012 review, Professors Markell and Knox suggested that the process has contributed to public engagement in three ways: opportunities for submitters from different countries to work together (as shown by submissions with multiple NGOs), improving domestic networks of environmental activists (particularly in Mexico), and increasing focus on transparency and participation in public institutions in Mexico.²³⁵ Our interviewees suggest that all of these are the case, while some note that the transparency gains in Mexico may be the product more of domestic legal developments than an influence of the SEM process.

5.2 Maintains Credibility of the Process?

Finding: The credibility of the SEM process with the Parties and the North American public is a critical aspect of its continued utility. This credibility depends, in turn, upon whether the CEC adheres to well-understood procedures, and whether the procedures are understood to provide fairness to potential users. The administration of SEM has reflected both difficulties and incremental process changes intended to address these concerns.

5.2.1 Independence of SEM Process

Finding: The SEM process is not generally perceived as independent of the interests of the Parties that oversee it.

A key element in credibility is to ensure that the SEM process is perceived as independent of the Parties themselves. This has posed a continuing dilemma for the CEC. Decisions to prepare Factual Records are made by 2/3 vote of the Parties in Council. Also, the Parties control the timing and content of the decisions; define the scope of Factual Records; review draft Factual Records, and submit comments before they vote on whether to publish them. Therefore, it is especially important to create procedural safeguards and to provide transparency to increase confidence in the process.

The CEC is governed by the Council under, first under NAAEC and now under the ECA.²³⁶ The Council is controlled by the Parties who exercise both indirect and direct control over the outcome of the SEM process.²³⁷ This structural bias in design has been often criticized in the academic literature,²³⁸ as well as by nongovernment interviewees. In contrast, some government or former government interviewees stated that because the SEM process is not carried out under an international organization or tribunal with independent powers, but rather by an intergovernmental organization (the CEC), its outcomes should reflect the views of the Parties.

²³⁵ Markell and Knox 2012, 528.

²³⁶ NAAEC, art. 10(1); ECA, art. 4(1).

²³⁷ Markell 2006, 662; Wold, C., Ritchie, L., Scott, D., Clark, M. *The Inadequacy of the Citizen Submission Process of Articles 14 & (and) 15 of the North American Agreement on Environmental Cooperation* 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004).

²³⁸ E.g., Markell and Knox 2012, 528.

One institutional element that provides some additional transparency is JPAC, provided for as a CEC body in both the NAAEC and the ECA. Although JPAC has no direct decision-making authority, it has provided a partial safeguard and advisory sounding board to call out actions of the Council that might weaken the credibility of the SEM process. The Council recognized this fairly early when it was already receiving criticism relating to the SEM process. It adopted a resolution providing that the Council could refer issues concerning implementation of SEM to the JPAC at any time; and that others could raise an issue directly to the Council for possible referral to JPAC for advice.²³⁹ This resolution served both as the basis for the *Lessons Learned* study and as the basis for other recommendations from JPAC.

A continuing theme of JPAC and others relating to the function and credibility of the SEM process has been the importance of Secretariat independence of the Parties. This has included both structural and process elements:

The professional independence and competence of the Secretariat is indispensable to a credible and properly functioning [SEM] process...The Secretariat must ...have (and be perceived to have) the independence to exercise its best professional judgment with respect to Submissions, the adequacy of Party responses, recommendations to Council, and development of factual records.²⁴⁰

Particularly important in this regard has been the Secretariat's ability to look beyond the surface of a Party response to make its own assessment of issues including those described above (environmental law, alleged exercise of enforcement discretion, pending proceedings). It is important to the SEM process that the Secretariat is not directly answerable to the Parties, but can exercise discretion (under NAAEC 15(1), and USMCA/CUSMA 24.28(1)) to inform the Council that preparation of a Factual Record is warranted. This includes the central fact-finding consideration identified in the 2012 Guidelines:

In determining whether it should recommend the preparation of a factual record, the Secretariat is to consider whether central questions of fact related to the assertion(s) in the submission remain open that could be addressed in a factual record.²⁴¹

Interviewees, as one would expect, represented a wide range of views. NGO interviewees highly valued Secretariat independence in administering the SEM process, perhaps because it has been more welcoming to submissions than have Council decisions on Factual Record determinations. Former CEC officials generally concurred. In contrast, government or former government interviewees emphasized the role of the Council as the overseer of the Secretariat. According to one interviewee, the Secretariat actually has no discretion, although it acts as if it does. But another government or former government interviewee said it is important that the Secretariat actually be independent, neutral, transparent and international, as this provides most of the

²³⁹ See Council Resolution 00-09.

²⁴⁰ *Lessons Learned*, at 14.

²⁴¹ 2012 Guidelines, para. 9.7.

credibility for the process. A government official said, “the Secretariat has a lot of discretion, but that is not necessarily a bad thing...it is fulfilling the role it was created to do.” Another suggested that the Secretariat should treat each case as unique, and not look to prior Secretariat decisions for precedents, and that focusing entirely on facts would reduce the question of its independence or dependence. In general, the question of whether the Secretariat exercises any discretion in making determinations and informing the Council that a Factual Record is warranted is still contested. However, the credibility of the SEM process relies on the perception that it is independent, honest, and transparent in carrying out the functions it has under the agreements.

A separate, but slightly related, issue is the status of the CEC itself among the Parties. The former NAAEC provided that the “Executive Director and staff of the Secretariat shall enjoy in the territory of each Party such privileges and immunities as are necessary for the exercise of their functions.”²⁴² But this provision was not reproduced in the ECA or USMCA/CUSMA.

The ECA, as noted earlier, does provide that the CEC “will continue to operate under the modalities in place as of entry into force of this Agreement.”²⁴³ Canada expressly recognized the privileges and immunities for the CEC Secretariat and official staff under the NAAEC, and the CEC as an international organization, in accordance with their domestic laws; Canada has reaffirmed such status following the ECA.²⁴⁴ In the United States, the CEC retains its international organization status per Executive Order 12,904 (16 March 1994)²⁴⁵ However, Mexico has not reaffirmed the international status of the CEC following the ECA. As a result, the change in agreements may expose the CEC, its Secretariat, staff, and experts—including JPAC members—to domestic legal or other processes in their conduct of SEM activities within the territory of Mexico. Indeed, the CEC was named in litigation in Mexico by a private party as a third party in interest in connection with an active submission, which could complicate the Secretariat’s preparation of a Factual Record.

²⁴² NAAEC, art. 44.

²⁴³ ECA, art. 2(3).

²⁴⁴ See Headquarters Agreement between the Commission for Environmental Cooperation and the Government of Canada, (16 Dec. 2020) (confirming the status of the CEC; also providing that experts performing missions for the Commission shall have “such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions” while in Canada).

²⁴⁵ See also 22 U.S.C. 288 note (CEC listed as a public international organization).

5.2.2 Timelines for SEM Determinations

Finding: SEM timelines have improved, especially since the 2012 Guidelines, but the Council has not consistently adhered to time commitments for its own actions.

The time required to carry out the SEM process is a critical area for institutional credibility. This is particularly important given the subject matter of submissions—an alleged ongoing breakdown in enforcement of specific environmental laws with continuing adverse consequences.

Timing issues include both the total time expected to arrive at the publication of a Factual Record, and the actual time it has taken for the CEC to carry out this process. If the prescribed timelines are too lengthy, then the process will have little credibility as a vehicle to identify alleged enforcement failures. And if prescribed timelines are usually exceeded, such that achievement of a Factual Record requires a wait of six years, then credibility will be low. (See Figures 14, 15). This is borne out by prior reviews of the SEM process and reiterated by the JPAC 2011 survey and our current survey results.

The NAAEC itself prescribed only a few time requirements (Party response, Party comments on the draft Factual Record, publication of the Factual Record), but it did not impose timelines on the Secretariat nor on the Council. The initial SEM Guidelines, as amended, developed some additional time standards (revised submissions, new or supplemental information following determination that no Party response is necessary, publication of Secretariat recommendation to Council), but none for determinations by the Secretariat or for actions by the Council.²⁴⁶ According to the data, and as confirmed by reviews at the time, SEM was a lengthy process that grew even longer in its first 16 years.

In response to advice from JPAC and public comments on the SEM Modernization process, the CEC published revised Guidelines in 2012 that established timelines for nearly every stage of the SEM process (see Section 2.3, *supra*). The result was substantially improved timelines for processing and decision making for submissions filed after 2012.

The USMCA/CUSMA preserved many of the 2012 Guideline timelines but shortened many of them by substituting “calendar days” for “working days.”²⁴⁷

The USMCA/CUSMA, notably, also shortened the period for preparation of a draft Factual Record by the Secretariat from the previous 180 working days to 120 calendar days.²⁴⁸ This is a reduction from approximately 9 months to 4 months. While shorter timelines are generally important to credibility (as borne out by the interviews and survey), the newly shortened timeline for the preparation of a draft Factual Record preparation may not provide enough time to collect and analyze information for a credible, useful result. The purpose of the SEM mechanism is

²⁴⁶ COMM’N FOR ENVTL. COOPERATION, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (13 Oct. 1995) [hereinafter 1995 Guidelines].

²⁴⁷ USMCA, art. 1.5 (stating “days means calendar days, including weekends and holidays.”).

²⁴⁸ USMCA, art. 24.28(5).

fundamentally to allow for the gathering and documentation of useful information relating to the subject of the submission. The preparation of the draft Factual Record is the only stage where this independent fact-finding actually occurs. And such fact-finding needs to include information from the subject Party, additional information gathered by the Secretariat, and information that may be submitted by interested entities.

The shortened timeline for this step is perhaps an overreaction to the unhappy history of this step. In its 2001 *Lessons Learned* report, JPAC recommended that the Secretariat take no more than 13 months after Council instruction to prepare the draft Factual Record. And after that report, this step got even slower, with the time to prepare draft Factual Records from 2004-2008 averaging more than 27 months.²⁴⁹ Preparation of the draft Factual Record for SEM-04-005 (*Coal-fired Power Plants*) took more than 5 years after the Council Instruction, from June 2008 to October 2013. SEM-04-007 (*Quebec Automobiles*) took nearly 5 years, from June 2006 to March 2011. SEM-03-003 (*Lake Chapala II*) took four years, May 2008 to May 2012.²⁵⁰ The 180 working day time frame adopted by the Council in the 2012 Guidelines was a necessary reaction, but it has been difficult to meet even for the few submissions subject to the 2012 Guidelines. The CEC's Compliance Tracker shows that this time frame was met in just 4 of the 7 draft Factual Records completed after the 2012 Guidelines became effective.²⁵¹ This step is also significantly influenced by how prompt the subject Party is in providing information requested by the Secretariat to support its preparation of the draft Factual Record.

The Council has also not been consistent in holding votes and making decisions. The 2012 Guidelines established a goal for a Council vote to take place "normally within 60 working days of receiving the Secretariat's recommendation."²⁵² The Council vote in SEM-05-003 (*Environmental Pollution in Hermosillo II*), taken just before the adoption of the 2012 Guidelines, came 5 years after the Secretariat's recommendation. And thereafter, the Council's performance improved. However, the Council has not consistently met its time commitment from the 2012 Guidelines for voting on whether to instruct the Secretariat to prepare a Factual Record within the 60 working day goal.

In the most recent submissions reaching this stage, the Council took two years to vote on the Secretariat's recommendation for SEM-18-002 (*Metrobus Reforma*), and 15 months for SEM-19-002 (*City Park*). As of the end of 2021, the Council still had not voted on SEM-20-001 (*Loggerhead Turtle*) (pending for 5 months), nor on SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*) (pending for 15 months). The Council has an important role to play in maintaining the credibility of the SEM process by establishing and holding itself to time commitments. However, its negotiation of votes has resulted in very long gaps between the Secretariat's notification that a Factual Record is warranted and a Council instruction to the Secretariat to proceed.

²⁴⁹ Markell & Knox 2012.

²⁵⁰ See Registry.

²⁵¹ See Compliance Tracker.

²⁵² 2012 Guidelines, para. 19.4.

It is noteworthy that the CEC created the Compliance Tracker to hold itself accountable to the public, even if the timelines themselves are not enforceable.

At the Council's direction, it established a Compliance Tracker online following the 2011-2012 reworking of the Guidelines. The Tracker accounts for all steps of the SEM process. It shows each time frame in days or working days, as applicable, and for each submission the number of days elapsed for each step. It includes the precise number of days in which each step was completed, and highlights in red each step in which a timeline is being or was exceeded.²⁵³ In addition, per Council direction, when a step has not been completed within the timeline and remains incomplete, a notice is placed in the Registry indicating the anticipated date for completion. The Compliance Tracker, while complete, is slightly difficult to follow for those not very familiar with the process and could be improved with some additional interpretive or explanatory information.

5.2.3 Disclosure of Documents

Finding: Prompt posting and disclosure of documents, decisions, and reasoning on the Registry has improved understanding of the SEM process.

The early establishment of the SEM Registry was a key element assisting with integrity of the process. The Registry includes submission documents, reasoning for determinations, Party responses, recommendations by the Secretariat, and Council decisions. The 2012 Guidelines provide a comprehensive list of documents published on the registry and available online.²⁵⁴ The transparency of actions posted to the Registry has increased over time. For example, in the first six years of SEM, notice of a Secretariat recommendation to Council that a Factual Record was warranted was only disclosed 30 days after transmittal to Council. The reasoning for the recommendation was only disclosed after the Council vote.²⁵⁵ Following JPAC's *Lessons Learned* report, the Council authorized the Secretariat to place both its recommendation and the reasoning in the Registry within 5 working days after its transmittal to Council.²⁵⁶ Likewise, the Council undertook to publish on the Registry its decision and reasoning for instructing the Secretariat whether or not to prepare a Factual Record.²⁵⁷ These measures are important to the credibility and accountability of the process, even though limited.

²⁵³ See Compliance Tracker.

²⁵⁴ 2012 Guidelines, para. 15.1.

²⁵⁵ See COMM'N FOR ENVTL. COOPERATION, *Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at para. 10.2 (28 June 1999) [hereinafter 1999 Guidelines].

²⁵⁶ COMM'N FOR ENVTL. COOPERATION, *Council Resolution 01-06* (29 June 2001), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-01-06-en.pdf> [hereinafter Council Resolution 01-06]; See 2012 Guidelines, para. 10.2

²⁵⁷ See 2012 Guidelines, para. 10.4; See also Council Resolution 01-06 (stating that Council would give reasons whenever it votes to deny the Secretariat's recommendation to prepare a factual record).

5.2.4 Responsibility for Factual Record

Finding: The Council has exercised very tight control over the authorization and contents of Factual Records in ways that lessen public confidence in the SEM process.

For much of the history of the SEM process, there have been concerns with the role of the Secretariat as a screener and evaluator of submissions versus the desire of the Parties to oversee and direct the process. This has most often played out in the context of Secretariat recommendations that a Factual Record is warranted.

Because the Council's instruction to prepare a Factual Record requires at least two of the Party representatives to affirmatively instruct, and at least one of the Parties is always the subject of the submission, this has led to conflict. Submitters, academics, Secretariat officials, and former government officials have raised the question of whether and to what extent the Council should defer to the Secretariat's recommendation. Council actions during periods of conflict seem to have included delays in voting, rejecting the Secretariat's recommendation, and narrowing the scope of an authorized Factual Record. Interviewees (not just submitter interviewees) suggest that this may reflect implicit deal-making among the Party representatives. In effect, the conflict of interest presented by the Council vote has not been ameliorated in the public view by the procedures adopted to date. Among the more important procedures is the statement of reasons by the Council members for their votes for or against preparation of a Factual Record.²⁵⁸

Numerous interviewees said that the Council members should be more transparent before the meetings (or virtual meetings) on how they intend to vote. One government official recommended that Council members notify submitters of votes and why they intend to vote as they will. A submitter suggested that discussion among the Parties of their intended votes on submissions be in public, as opposed to behind the scenes with subsequent statement of reasoning.

This issue is most often expressed as the question of whether the Council should in general defer to Secretariat recommendations. In 1994, the President of the United States issued an Executive Order that in effect ratified that approach for the United States. This has perhaps simplified the choice for the representatives of that Party. Executive Order 12,915 (13 May 1994) requires that the United States, "to the greatest extent practicable, shall support the preparation of a factual record whenever the Secretariat informs the Council that a factual record is warranted."²⁵⁹ It may have been easier for the United States to maintain this posture given that it has been the subject of only 16 of the 102 submissions filed since 1994 (and the sole subject of just 14).

²⁵⁸ 2012 Guidelines, para. 10.4 (specifying written reasons for Council instructions to prepare a Factual Record); see also 2012 Guidelines, para. 15.1(h)(vi). In practice, the Council members also provide written reasons for denying a Secretariat recommendation as well as minority views.

²⁵⁹ Exec. Order No. 12915 – Federal Implementation of the North American Agreement on Environmental Cooperation § 2(d)(1) (1994).

Submissions on Enforcement Matters: What Have We Learned?

While previous reviews and the academic literature recommend that deferring to Secretariat recommendations for preparation of Factual Records will enhance the credibility and usefulness of the SEM process, the Council has not taken this approach.²⁶⁰ Instead, the Council has maintained rather strict control over authorization of Factual Records—whether they may be prepared at all, and what they may or may not consider.

Council has voted to deny preparation of a Factual Record on 7 of the 36 Secretariat recommendations to prepare a Factual Record on which it has taken a vote. The Council rejected 5 out of the 10 recommendations presented by the Secretariat for submissions originating during the 12-year period from 2007-2018.²⁶¹ This suggested a profound level of disagreement with the institutional body responsible for administering the SEM process.

The Council has used other actions to closely manage the fact-finding process. Beginning in 2001, Council resolutions narrowly framed the issues and time periods that the Secretariat would be authorized to examine. Such narrowing of the “scope” of the inquiry has permitted members of the Council to vote in favor of a Factual Record, while in practice removing much of the potential informational value of the process.

In 2001, Council narrowly “scoped” four of the five Secretariat recommendations for Factual Record then pending before it.²⁶² Scoping was used to eliminate the possibility of inquiry into allegations of systemic or widespread breakdown of effective enforcement, and to limit the prospective Factual Records to specific instances originally submitted as examples of more substantial failures.²⁶³ Rather than Factual Records examining alleged areas of systemic non-enforcement, the Council instructed the Secretariat to investigate only two examples of an alleged failure to protect migratory birds referenced in a single paragraph of one submission, actions at a single logging road in another, activities at two of many mines, and water quality issues affecting two streams.²⁶⁴

The Council’s effective control of the content of the fact-finding process was widely criticized at the time. JPAC objected to the action in advance of the Council decisions. In its Advice to Council 01-07, JPAC cited Council Resolution 00-09 and its findings in *Lessons Learned* in urging

²⁶⁰ Markell 2010; E.g., Markell and Knox 2012.

²⁶¹ *Polar Bears*: Council Resolution 14-04; *BC Salmon Farms*: Council Resolution 14-09; *Alberta Tailings Ponds I*: Council Resolution 15-01; SEM-13-001 (*Tourism Development in the Gulf of California*), Submission pursuant to NAAEC: Council Resolution 15-02 (19 May 2015), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/13-1-cr_15-02_en.pdf>; SEM-15-001 (*La Primavera Forest*), Submission pursuant to NAAEC: Council Resolution 17-01 (4 Apr. 2017), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/15-1-cr-17-01_en.pdf>.

²⁶² SEM 99-002 (*Migratory Birds*), Submission pursuant to NAAEC: Council Resolution 01-10 (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/99-2-res-e.pdf>>; SEM 97-006 (*Oldman River II*), Submission pursuant to NAAEC: Council Resolution 01-08 (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/97-6-res-e.pdf>>; SEM-98-004 (*BC Mining*), Submission pursuant to NAAEC: Council Resolution 01-11 (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-res-e.pdf>>; SEM 00-004 (*BC Logging*), Submission pursuant to NAAEC: Council Resolution 01-12 (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/00-4-res-e.pdf>>.

²⁶³ Markell 2006, 662.

²⁶⁴ *Id.*

the Council not to use this approach.²⁶⁵ JPAC also criticized Council's simultaneous requirements that the Secretariat submit a proposed work plan for each Factual Record for Council comment and approval.²⁶⁶

JPAC followed up immediately in its Advice to Council 01-09 asking for public review of these issues.²⁶⁷ In its response, the Council agreed to allow JPAC to review the scoping issue but only after the final Factual Records had been completed.²⁶⁸ The final, narrowed Factual Records were published in April and August 2003.²⁶⁹ A report commissioned by JPAC found that the Council actions had prevented Factual Records from addressing "evidence of widespread enforcement failures, cumulative effects that stem from such widespread patterns, or the broader concerns of submitters about implementation of enforcement policies."²⁷⁰ JPAC, in its Advice to Council 03-05, continued its criticism:

By intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process...[F]actual records no longer address the matters raised by the submitters, rendering the process less relevant.²⁷¹

The 2004 TRAC Report levelled a similar criticism.²⁷² Among our interviewees, only the governmental ones expressed positive support for scoping. One said it was a useful tool to prevent overreach by the Secretariat exceeding its authority. Another described scoping as bringing the SEM process back to its original intent of focusing on specific lapses rather than broad areas. But former CEC officials, submitters, and academic experts opined that scoping has severely damaged the SEM mechanism. Even now, 20 years later, some of our interviewees characterize this as a dark period for the SEM process, stating that such action undermined the perceived independence of the fact-finding inquiry.

The process of preparing for Council votes is also of interest. The customary procedure before a Council vote on a Secretariat recommendation to prepare a Factual Record is that the subject Party prepares the resolution for the instruction – be it negative, positive, scoped, or limited. The

²⁶⁵ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 01-07* (23 Oct. 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-01-07-en.pdf>.

²⁶⁶ *Id.*

²⁶⁷ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 01-09* (30 Nov. 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-01-09-en.pdf>.

²⁶⁸ Letter from Norine Smith, Alternative Representative for Canada, to Jonathan Plaut, JPAC Chair for 2002 (n.d.), available at <http://www.cec.org/files/documents/jpac_advice_council/1599_Response-Advice-01-09.pdf>.

²⁶⁹ SEM 99-002 (*Migratory Birds*), Submission pursuant to NAAEC: *Final Factual Record* (24 Apr. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/99-2-ffr_en.pdf>; SEM 00-004 (*BC Logging*), Submission pursuant to NAAEC: *Final Factual Record* (11 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/00-4-ffr_en.pdf>; SEM 97-006 (*Oldman River II*), Submission pursuant to NAAEC: *Final Factual Record* (11 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/97-6-ffr_en.pdf>; SEM-98-004 (*BC Mining*), Submission pursuant to NAAEC: *Final Factual Record* (12 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-ffr_en.pdf>.

²⁷⁰ ENVTL. L. INST., *Final Report: Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at V (2003), available at <<https://www.eli.org/sites/default/files/eli-pubs/d13-16.pdf>>.

²⁷¹ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 03-05* (17 Dec. 2003), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-03-05-en.pdf>.

²⁷² See TRAC Report.

terms and scope are worked out ahead of Council meetings between the Parties and not in public view.

The Council continued to scope its Factual Record instructions even after the much-criticized 2001 instances. For example, in 2010, the Council approved preparation of a Factual Record for SEM-06-005 (*Species at Risk*). The Council Resolution limited the scope of the inquiry to a few particular provisions of law, and to only six of the scores of species at issue, while excluding certain enforcement issues altogether.²⁷³ The submitter in response withdrew its submission, stating that such a limitation would not allow an independent statement of the facts, and arguing that the Council's action created a "material risk" that an attenuated Factual Record would "jeopardize meaningful review and informed debate," an outcome it characterized as "not in the public interest."²⁷⁴ Over half of all approved Factual Record recommendations through 2011 were scoped by the Council to reduce their coverage.²⁷⁵ And in recent years, only one Factual Record has not been scoped.²⁷⁶

This has been a continuing issue. JPAC brought up scoping again in 2015 in its Advice to Council 15-02: "Submissions under SEM should be allowed to unfold with the independence and integrity that a process of this nature requires."²⁷⁷ Professor Kong that same year argued that narrowing the scope of a Factual Record undermines public accountability, when the Party's own representatives are making the decision on how to shape the investigation.²⁷⁸

Apart from the procedural concern for independence of inquiry and fact-finding, the way in which scoping has been applied highlights a substantive concern related to the purpose of SEM. The result is that both the inquiry and the identification of possible enforcement improvements are severely constrained. Single site-specific failures or weaknesses can more easily be characterized as exercises of governmental discretion or prioritization. Also, given the time lag between the original submission and the preparation of a Factual Record, limitations to time frames can obscure possible ongoing failures or overall breakdowns in governmental performance.²⁷⁹

²⁷³ COMM'N FOR ENVTL. COOPERATION, *Council Resolution 10-05* (20 Dec. 2010), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-10-05-en.pdf>.

²⁷⁴ See *Species at Risk*: Withdrawal Letter, at 4.

²⁷⁵ Hester 2015.

²⁷⁶ SEM-16-001 (*Agricultural Waste Burning in Sonora*), Submission pursuant to NAAEC: *Council Resolution 17-03* (9 June 2017), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/16-1-cr-17-03_en.pdf>.

²⁷⁷ Advice to Council No. 15-02, para. 11.

²⁷⁸ Kong, H.L. *The Citizen Submissions Process in the NAAEC: Theory and Practice in Deliberative Democratic Institutional Design for Transnational Institutions*, in NAFTA and Sustainable Development: History, Experience and Prospects for Reform 351 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

²⁷⁹ See, e.g., Hester 2015 (discussing the procedural disadvantage to submitters); Markell 2006, 703-707 (summarizing impacts of scoping).

Submissions on Enforcement Matters: What Have We Learned?

While the Council continues to use scoping to limit the reach of Factual Records, the data suggest that after the adverse feedback in the years following 2001, the Council began simply to vote “no” on more recommendations for Factual Records. The Council has voted to deny the Secretariat approval for 5 of 10 recommendations presented to it for submissions originating between 2007 and 2018.²⁸⁰

In recent years, the Council further continued to scope Factual Records by issuing limiting instructions. For example, in SEM-17-001 (*Alberta Tailings Ponds II*), the Council authorized a Factual Record with instructions limiting the scope of the Factual Record to non-enforcement issues, specifically: the state of publicly available peer-reviewed literature; Alberta’s relations to Canada limited to specific sites referenced in the submission; and how Canada’s general “Oil & Gas Monitoring Program” is carried out. The Council’s reasoning for these limitations stated that Canada had provided sufficient evidence concerning its “reasonable exercise of discretion” and thus could not have had a failure to enforce; and that Canada need not use every enforcement tool available to it.²⁸¹

The scope of Council resolutions is determined by the Parties collectively according to their positions, which may differ. The fact that Council resolutions are generally drafted by the subject country can mean that they revisit aspects of a determination made by the Secretariat in the lead-up to a recommendation. For example, in 2014, the Council by 2/3-vote denied a request for preparation of a Factual Record, declaring that the Party’s response had already provided more than enough information. The Council resolution stated that any more fact-finding would be “duplicative, redundant,” and an “inefficient use of public resources,” and could involve potential information “beyond the purview of the Secretariat.”²⁸² Ultimately, the practice of scoping and which Party drafts the Council Resolution is not set forth in writing and may change in the future.

The credibility of the SEM process is still at stake. Both the propensity of the Parties to engage in substantial scoping of potential Factual Records, and the outright rejection of nearly half of Secretariat recommendations over the preceding decade have undermined confidence in the process.

²⁸⁰ See discussion Part 3.

²⁸¹ COMM’N FOR ENVTL. COOPERATION, *Council Resolution 18-01* (20 Aug. 2018), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-18-01-en.pdf>.

²⁸² SEM-11-003 (*Protection of Polar Bears*), Submission pursuant to NAAEC: *Council Resolution 14-04 – Reasons for Council Instructions*, at 1 (5 June 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/11-3-council_vote_explanation_en.pdf>.

5.3 Produces Information Not Otherwise Accessible?

Another key characteristic for SEM is whether it can produce useful, timely information not otherwise available. The SEM Guidelines identify the generation of independent, reliable public information as an important goal for the SEM process. Interviewees concur in the importance of this information.

Finding: The SEM process produces useful information. However, Parties' responsiveness to Secretariat requests for information can be improved.

5.3.1 Secretariat Resources

Finding: In order to generate useful information, it is essential that the CEC (and ultimately the Parties) provide sufficient resources to enable the SEM unit to produce high quality work over short periods of time.

The SEM unit generally gets high marks for its professionalism and competence over the decades of SEM activities, as noted in both the academic literature and our interviews. Yet, it must also be able to draw on other resources, including the availability of expert consultants to assist in the preparation of Factual Records. The Secretariat must have time and resources to identify and engage qualified experts and deploy them in an intensive process. Interviewees advise that, at times, the selection of experts has engendered controversy.²⁸³ However, some interviewees suggest that narrowed scoping has been one means used by the Council to rein in potential bias resulting from the selection of consultants. Also, the controversy over Council review and approval²⁸⁴ of Secretariat work plans for Factual Records has abated. Interviewees report that the work plan process is now regarded as fairly straightforward.

A number of former CEC officials identified the former panel of "Special Legal Advisors" as a valuable resource to the staff. While this panel was discontinued more than a decade ago after a period of conflict between the Secretariat and Council, it seems to have provided some assistance in what is otherwise a closed, thinly staffed process that must be capable of addressing a vast range of environmental issues. These unpaid, confidential legal advisors provided a useful sounding board for the small SEM unit staff and could help identify concerns or issues that might arise with respect to environmental law, enforcement, and international agreements.

The shorter time frames for preparation of a draft Factual Record (first in the 2012 Guidelines, and now in the USMCA/CUSMA) may further compress the Secretariat's ability to be thorough, thoughtful, and complete. If the SEM process is to produce informational results as well as serve as an outlet for persons and enterprises to make submissions, it will need to have sufficient

²⁸³ See SEM-03-003 (*Lake Chapala II*). Contention over alleged bias of experts may have contributed to the process taking nearly ten years until publication of the Factual Record.

²⁸⁴ COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 01-07* (23 Oct. 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-01-07-en.pdf>.

resources to carry out effective review of submissions and produce timely, thorough Factual Records. The current staffing, funding, and level of effort, it appears, would be hard pressed to manage a higher number of submissions each year given current timelines. The Secretariat has two draft Factual Records in preparation, and two more are pending before the Council. Sufficient support will be needed to carry out this work.

5.3.2 Effect of Submission on Party

Finding: Information provided by the Parties is critically important to the value of the SEM process. Improvements can be made both in the content of Party responses and in the timely provision of information for the preparation of Factual Records.

Party Response

Among the key functions of the SEM process is its trigger of a Party response to submissions that pass the initial thresholds for a valid submission. A Party response offers a potential space for an organized and well-presented explanation of governmental actions, decisions, and legal interpretations. These are potentially available to citizens and the public in no other way.

However, as noted above, for most of the history of SEM, Party responses have been legalistic and closely argued with the apparent primary objective of having the submission terminated. Accordingly, only half of our survey respondents found that the Party response provided any useful information, while half said that it did not. This is actually an improvement over the 2011 JPAC survey, in which 70 percent of respondents said that the Party response provided no useful information.²⁸⁵

Nevertheless, it appears that within the governments, the task of compiling information, and preparing a response has produced attention to an issue and fact-finding. This intragovernmental fact-finding in turn has enabled government agencies to direct their attention to important issues raised by the submission. The central government's fact-finding in preparation for a Party response (and subsequent Factual Record, if any) has generated information that might not otherwise have become available to the public. This may be most prominently the case in Mexico, where many of the submissions involve actions in particular states and specific projects or developments.

Parties have sometimes made expansive claims of confidentiality in their Party responses. This has made it difficult for submitters and the public to discern what some of the issues, claims, and government policies have been. This has, in turn, made the Secretariat's task more complex where it must rely on such information in making a determination and explaining its reasoning, without any unauthorized disclosure. The Secretariat has in general done a good job of providing such explanations.

²⁸⁵ COMM'N FOR ENVTL. COOPERATION, *JPAC Survey Results*, at Q. 10 (2011) [hereinafter 2011 JPAC Survey Results].

Information for Factual Record

Where a Factual Record has been authorized, the Secretariat immediately seeks responsive, relevant information from the subject Party on the issues being investigated.

However, for much of its modern history, the CEC has found it difficult to obtain timely information from a Party after preparation of a Factual Record has been authorized. Interviewees confirmed that Parties have been slow in providing information, which in turn has made preparation of a Factual Record more difficult. JPAC in its Advice to Council No. 15-02 says that such information should be easier to obtain and parties should not delay their responses to Secretariat requests for information or increase costs for such information by delay.²⁸⁶

Despite a NAAEC provision that obligated the Parties to provide information on request of the Council or Secretariat,²⁸⁷ the Secretariat has found that it must generally rely on countries' domestic freedom of information laws rather than on the Parties' commitments under the NAAEC. And for years it has relied on its contractors for Factual Record work to file such requests. Recently, with the shorter timelines, it has even had contractors file such information requests under domestic laws *prior* to the final Council vote to authorize a Factual Record, because there is not sufficient time to request, receive, and analyze the data otherwise.

The subsequent cooperation or lack of cooperation with information requests has been up to the Parties. There are no sanctions for lack of response or incomplete responses, and there is no timeline for providing such information under the 2012 Guidelines nor the USMCA/CUSMA. The ECA directs the Parties to cooperate with the Secretariat to provide information for the preparation of a Factual Record.²⁸⁸ The same provision says that the Secretariat's requests "shall be in accordance with guidelines established by the Council."²⁸⁹ It is not clear whether additional policies or procedures will be adopted to render this directive more meaningful or accountable in practice; however, guidelines should prompt rapid and complete responses given the shorter time frame for a draft Factual Record.

5.3.3 Information Generally

***Finding:* SEM information has value to the submitters and the public.**

Both in the 2011 JPAC Survey and our current survey, respondents identified the generation of useful information as a benefit of the SEM process. However, post-2012 submitters who did not succeed in achieving a Factual Record did not agree that the process produced useful information in general.

²⁸⁶ Advice to Council No. 15-02, para. 8.

²⁸⁷ NAAEC, art. 21(2).

²⁸⁸ ECA, art. 14.

²⁸⁹ *Id.*

First, there are procedural limitations on what information is gathered and considered relevant in the SEM process. Party responses and Council resolutions have generally limited Secretariat consideration of relevant information only to the time period leading up to the date of the submission. This is because the submission must allege an ongoing failure to enforce. Thus, where a process takes a period of years, the enforcement information generated by the SEM process can be stale. Second, the Parties have at times offered only limited cooperation with information requests, or asserted claims of confidentiality preventing disclosure. Finally, the Secretariat and its contractors have only a limited amount of time to gather and assess information.

Even where Factual Records are limited by these factors, users have observed that the information function of the SEM process provides a benefit. For example, in *Alberta Tailings II*, which was scoped to exclude enforcement issues, the factual findings nevertheless showed the state of knowledge of the chemistry of materials in the tailings ponds and highlighted what information the government's own agencies had available.²⁹⁰ The submitter has used the compilation in follow-up activities and advocacy. *Agricultural Waste Burning in Sonora* produced health and pollution information not otherwise available, although practical changes have not necessarily ensued.²⁹¹

Academics and interviewees have suggested that information on the extent of enforcement, and potential conclusions regarding enforcement could be useful if authorized. Fact-finding is not simply limited to environmental facts, they suggest, but to administrative acts under applicable laws and regulations. These include permits, site visits, inspection reports, sanctions, training of inspectors, resource allocation, follow-up on findings, development of studies and compliance reports, auditing, certifying, etc. Identification of relevant conclusions could benefit the process.²⁹²

5.4 Promotes Effective Enforcement of Environmental Laws?

Finding: The SEM process has provided a means for focusing attention on governmental actions or inactions with some positive outcomes. Additional follow-up activities are needed if better environmental outcomes are to be recognized.

The former NAAEC and the present USMCA/CUSMA-ECA seek environmental improvement and sustainability in the context of a free trade regime. However, there are differing expectations concerning the role of the SEM process in promoting environmental enforcement. Interviews as well as prior assessments of SEM indicate that the expectations of submitters and government Parties differ as to the desired outcome of a submission. While government Parties emphasize the information generation and disclosure functions of the SEM process, submitters

²⁹⁰ See SEM-17-001(*Alberta Tailings Ponds II*): Final Factual Record.

²⁹¹ See SEM-16-001 (*Agricultural Waste Burning in Sonora*), Submission pursuant to NAAEC: *Final Factual Record* (17 Sept. 2018), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/16-1-ffr_en.pdf>.

²⁹² Knox, J.H. *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391 (2010).

are often seeking an outcome that will actually result in enforcement activities by the subject government and in solution of the environmental harm alleged.

This difference also relates to the conflict over whether submissions may focus on overall enforcement vs. narrow project-specific failures. Over the history of Party responses and scoping of Factual Records, the Parties seem to prefer that the SEM process focus on evaluation of individual, limited failures, rather than on broader claims of systemic failure. But a narrower focus also makes it easier for a government Party to cite enforcement discretion, prioritization of resources, or pending proceedings to address the submission.

The SEM provisions, which authorize the Secretariat to consider submissions asserting a Party's "failure to effectively enforce its environmental law",²⁹³ were at least implicitly understood to support each Party's undertaking in NAAEC Article 5(1) to "effectively enforce its environmental laws and regulations." While the USMCA/CUSMA reproduced the SEM process from the NAAEC with minimal changes, its connection to the Parties' enforcement commitments is less clear. USMCA/CUSMA Article 24.4 says "no Party shall fail to effectively enforce its environmental laws through a sustained course of action or inaction in a manner affecting trade or investment between the Parties," which is a more narrowly constrained undertaking. The same provision includes footnotes linking the subject failures to effects on trade, albeit with presumptions, and provides that failure means "consistent or ongoing" or "recurring" action or inaction and not isolated cases; but the related footnotes also reference "dispute settlement" which is a separate mechanism from SEM.²⁹⁴ While the SEM process in Article 24.27 is not clearly linked to these commitments, the changes may create some ambiguity.

The ECA, for its part, explicitly states and maintains the NAAEC commitment to cooperation among the Parties related to "compliance with, and enforcement of, environmental laws and regulations."²⁹⁵

5.4.1 Environmental Enforcement Outcomes

Finding: There is not sufficient evidence to indicate that the SEM process has consistently produced improved environmental enforcement outcomes.

Survey data show more disagreement than agreement with the proposition that SEM promoted environmental enforcement. Interviewees suggest that SEM is better at producing information than at promoting enforcement.

Nevertheless, there are instances where persons have identified a positive enforcement or environmental outcome from the SEM process – particularly in instances when a Factual Record

²⁹³ NAAEC, art. 14(1).

²⁹⁴ USMCA/CUSMA, art. 24.29 (Environment Consultations), art. 24.32 (Dispute Resolution). See also USMCA/CUSMA, art. 24.6 (Procedural Matters), which includes undertakings regarding Parties' administration of investigation and enforcement of their domestic environmental laws.

²⁹⁵ ECA, art. 1(e). Compare NAAEC, art. 1(g).

has been prepared.²⁹⁶ However, as there have been fewer Factual Records in recent years, it is not clear this is likely to be a source of continuing accomplishment for the SEM process.

Among Factual Records cited as leading to improved outcome were SEM-96-001 (*Cozumel*), the first one prepared, and SEM-11-002 (*Sumidero Canyon II*). The TRAC Report cited “anecdotal evidence” that SEM-97-001 (*BC Hydro*) led to new ideas and resolution of issues that had been stalled related to federal and provincial water management; SEM-00-004 (*BC Logging*) to improvements in some Canadian fisheries procedures; and SEM-98-006 (*Aquanova*) to negotiations and voluntary management changes at a Mexican shrimp farm.²⁹⁷ After SEM-98-007 (*Metales y Derivados*), Mexico and the United States undertook joint actions for cleanup of the contaminated lead smelter site and completed activities in 2008.²⁹⁸ Professor Pacheco-Vega notes the value of the SEM process in enabling non-state actors to influence the implementation of environmental law, and to focus attention on company actions and development activities that might otherwise have less pressure for results.²⁹⁹ Nevertheless, there is no confirmed process to link the SEM process and its Factual Records with improvements either in enforcement or in results on the North American landscape.

Some interviewees and survey respondents identified improved environmental or government responsiveness as results of the SEM process even without a Factual Record. In SEM-05-002 (*Coronado Islands*) the process resulted in increased governmental attention and a decision by the project proponent to terminate the project before preparation of a Factual Record. Another interviewee highlighted the value of the SEM process as useful in calling public attention to an area of environmental concern, with possible improvements in governmental performance. One government interviewee identified an unsuccessful submission that nonetheless led to meetings between citizen petitioners and high-level government officials, which in turn led to greater governmental attention to the specific pollutant issue raised in the submission in the region identified.

Another interviewee noted the value of information obtained and compiled in a Factual Record as a way of compelling government attention to the issue, specifically driven by the need for government responses to news media interest in the subject created by the Factual Record. While modest, this was regarded as a positive outcome.³⁰⁰

²⁹⁶ Markell and Knox 2012, 505.

²⁹⁷ TRAC Report, at 46.

²⁹⁸ SEM-98-007 (*Metales y Derivados*), Submission pursuant to NAAEC (23 Oct. 1998), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/metales-y-derivados/>>.

²⁹⁹ Pacheco-Vega, R. *Transnational Environmental Activism in North America: Wielding Soft Power Through Knowledge Sharing?*, 32 REV. OF POL'Y RES. 146 (2015).

³⁰⁰ See also Kong 2015.

Jodoin suggests that environmental improvements in Mexico may owe more to the effects of free trade and market effects than to the NAAEC.³⁰¹ But others attribute modest environmental policy improvements to these processes, including the SEM process.³⁰² An interviewee suggested that improvement in Mexico environmental law performance was due in greater part to domestic political changes and civil society activities.

5.4.2 Follow-up Activities

Finding: The Parties can implement consistent approaches to activities following up on the publication of Factual Records.

A continuing issue has been how or whether to follow-up on closed submissions and particularly Factual Records. The academic literature and JPAC recommendations in support of such follow-up are substantial.³⁰³ Markell and Knox argue that an intentional follow-up by the CEC or the Parties after publication of a Factual Record could benefit both the perception and reality of the process by documenting changes in conditions.³⁰⁴ One of the benefits would be the ability to discern more systematically when environmental improvements or changes in enforcement policy had resulted from the SEM process, rather than relying on “anecdotes” about results.³⁰⁵

One type of follow-up activity is an event where the recently published Factual Record is explained. For example, the Secretariat has conducted an informational event in the area relevant to a Factual Record after its publication. Such events have included, for example, experts, submitters, CEC officials and others, explaining what the Factual Record did and did not do. This has been helpful, in the view of some interviewees, in calling attention to the enforcement issue and the contents and limitations of the report.

CEC cooperative activities on related issues can also follow a Factual Record. This possibility is expressly recognized in USMCA/CUSMA Article 24.28(7) and is assigned to the new Environment Committee for consideration:

The Environment Committee shall consider the final factual record in light of the objectives of this Chapter and the ECA and may provide recommendations to the Council on whether the matter could benefit from cooperative activities.

³⁰¹ Jodoin, S. *Pathways of Influence in the NAFTA Regime and Their Implications for Domestic Environmental Policy Making in North America*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 329 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

³⁰² See Kong 2015; See also Markell and Knox 2012.

³⁰³ E.g., Markell and Knox 2012; Knox, J.H. *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 *GOLDEN GATE U. ENVTL. L.J.* 81, 105 (2014); Garver, G. *Forgotten Promises: Neglected Environmental Provisions of the NAFTA and the NAAEC*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 15 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

³⁰⁴ Markell and Knox 2012, 536.

³⁰⁵ Cf., See TRAC Report, at 46 (stating the lack of follow-up renders outcomes “anecdotal”).

The ECA reinforces this possibility. It expressly provides that the Council “shall”:

Consider cooperation relevant to the topics addressed in factual records resulting from submissions on enforcement matters.³⁰⁶

The most substantial follow-up would be commitments by the Parties to provide public updates on activities following the publication of a Factual Record. This is not a new idea. Ninety-five percent of JPAC 2011 survey responses supported continued CEC involvement following conclusion of the SEM process, even while expressing substantial dissatisfaction with the process itself.³⁰⁷ Waldron suggests that the USMCA/CUSMA creates a new opportunity to revisit this issue with possibility for improvement.³⁰⁸ However, a government or former government interviewee regards such follow-up as voluntary, and not within the scope of what the SEM process was designed to do.

For more than a decade there has been public interest in the Parties themselves providing updates to indicate what is happening with respect to the matters documented in Factual Records. JPAC Advice to Council 12-01 said:

JPAC believes updates could be provided one year following the conclusion of a submission process, to ensure that the matters at issue are all still relevant. In addition, JPAC believes it is important to include a mechanism for making these updates available to the public.³⁰⁹

Since the 2014 Ministerial Statement, the Parties have undertaken to provide updates to the Council, but such updates have been confidential and hence not available to the public nor particularly useful outside the Council itself.³¹⁰ The USMCA/CUSMA endorsed and codified the practice of providing updates and expanded it to include the Environment Committee: “The Parties shall provide updates to the Council and the Environment Committee on final factual records, as appropriate.”³¹¹

If Guidelines are revised under the USMCA/CUSMA, the Council could determine and make transparent how such updates could best occur. The Council could provide updated information for publication on the Registry,³¹² in order to share information that is currently lacking on outcomes of the SEM process – specifically how it affects Party activities and environmental results.

³⁰⁶ ECA, art. 4(1)(m).

³⁰⁷ 2011 JPAC Survey Results, at Q. 13A, 13B.

³⁰⁸ Waldron 2021.

³⁰⁹ COMM’N FOR ENVTL. COOPERATION, *Advice to Council No. 12-01*, at para. 12 (23 May 2012), available at <http://www.cec.org/files/documents/jpac_advice_council/16238_JPAC_Advice_12-01-Final-en.pdf>.

³¹⁰ See 2014 Ministerial Statement.

³¹¹ USMCA, art. 24.28(8).

³¹² Cf. 2012 Guidelines, para. 15.1 (listing documents and notifications placed on the SEM registry, including, for example, “Party comments on the draft factual record, if a Party so desires”).

6 Recommendations

There are six ways that the CEC can continue to improve its implementation of the SEM process. These recommendations draw upon the data analysis, survey responses, interviews, and literature review supporting the findings in the previous section. They supplement and reinforce the discrete opportunities that this report has highlighted throughout.

The CEC should promptly update the Guidelines governing the SEM process.

The 2012 Guidelines, while widely regarded as helpful and well-written, should be updated to reflect the requirements of the USMCA/CUSMA and ECA.³¹³ The Guidelines are the primary means by which the SEM process is explained to the North American public. They provide critical information on each step of the process, including explanations and timelines not found in the agreements themselves. In addition to reflecting the new USMCA/CUSMA and ECA, an update is needed to remove ambiguity and provide clear guidance to the public and the Parties, improving accessibility and understanding of the process. Recommended measures include:

- Update the descriptions of the procedural steps and citations to conform to the USMCA/CUSMA and ECA. The current Guidelines are based on the prior agreements and are not fully consistent with the current governing agreements. Revisions could provide clear definitions (for instance of “Person of a Party”), explain the roles of the Council and Environment Committee, update the explanation of what “environmental law” means for purposes of the SEM process, and make all references consistent with the existing agreements.
- Completely revise the timeline provisions to provide accuracy and clarity. The timelines for the SEM steps need to be updated to comply with the USMCA/CUSMA, to use calendar days rather than working days when required, and to prescribe or reaffirm timing for steps not covered in the agreement (See Table 1 in this Report for timeline differences). Updated guidelines can also address how to proceed when a deadline is missed, and provide for cases where a timeline extension is acceptable. Revise 2012 Guidelines paragraphs 19, 13.1, 6.2, and others.
- Adopt procedures to improve the effectiveness of the SEM process. Establish processes for communications with submitters during the SEM process; include provisions on how to proceed when a Party response is unreasonably late; address limitations affecting the time available for preparation of the draft Factual Record; provide a process for Council accountability for timely decisions; authorize limited recommendations in Factual Records; and adopt provisions to implement and further develop follow-up actions implementing USMCA/CUSMA Articles 24.28(7) and (8).

³¹³ ECA, art. 2(3).

The CEC should improve communications with the submitters during the SEM process.

The lack of opportunity for submitters to engage with the Secretariat and the subject Party after filing a submission is perceived as a weakness in the process by submitters, academics, and the JPAC. The CEC can improve engagement practices without substantial change to the character of the SEM process and may reduce its adversarial character.

The CEC should consider, in revised Guidelines, whether to create an opportunity for a submitter to respond succinctly to address new factual matters or issues raised in a Party response.³¹⁴ Such a limited practice could enhance the Secretariat's ability to develop an accurate record, make a credible determination, and assist the Council in reaching consensus if development of a Factual Record is recommended. This, in turn, may reduce some of the conflict over whether or not to authorize the Secretariat to develop a Factual Record and address issues of scoping encountered at the Council vote stage.

The CEC could also consider adding a dialogue function, facilitating discussion between the submitter and the Party at an appropriate stage.³¹⁵ For example, such a process might be offered (if supported by mutual agreement) after the Secretariat recommendation and while a Council vote is pending. Or, when the Council instructs the Secretariat to prepare a Factual Record, there could be an opportunity for engagement in facilitated dispute resolution or mediation if agreed to by both the Party and submitter (with an appropriate tolling of the timeline). An interviewee noted that "There is enough flexibility for the Secretariat to offer its Good Offices, but it could be [made] clearer in the Guidelines."

The Compliance Tracker has been a useful tool supporting public understanding of the steps of decision-making and timeliness of pending or completed actions. It should be updated (along with the Guidelines) to include additional explanatory material concerning the steps to which each time target applies. This would make the information more understandable on its own terms and assist in communication with submitters and the broader public.

³¹⁴ Compare the World Bank's Inspection Panel, which after receiving the Bank Management's response to a complaint, has the opportunity to communicate with the requester in order to make an informed decision to recommend or not recommend an investigation. THE INSPECTION PANEL AT THE WORLD BANK, *Operating Procedures (Draft)* (Apr. 2021), available at <[https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/Inspection%20Panel%20Draft%20Updated%202021%20Operating%20Procedures%20\(clean\).pdf](https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/Inspection%20Panel%20Draft%20Updated%202021%20Operating%20Procedures%20(clean).pdf)> [hereinafter Inspection Panel Draft Operating Procedures].

³¹⁵ E.g., Inspection Panel Draft Operating Procedures, at 15; OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN, *IFC/MIGA Independent Accountability Mechanism (CAO) Policy* (28 June 2021), available at <<https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>>. Several informational/investigation processes involving individuals/NGOs and governments offer such dispute resolution opportunities with the mutual consent of each interested entity; if the process is not successful, the formal processes continue.

The CEC should find ways to provide flexibility—consistent with the USMCA/CUSMA—for meeting certain time frames in the SEM process in light of exceptional circumstances to enhance both feasibility and timeliness of action.

First, the Secretariat should be offered some limited flexibility on the 120 calendar days provided in the USMCA/CUSMA to develop the draft factual record in order to be thorough and complete. While the 2012 Guidelines allotted this step 180 working days, only the first draft Factual Record, SEM-96-001(*Cozumel*), long before the 2012 Guidelines, was completed that quickly. Subsequent to the 2012 Guidelines, the Secretariat often could not meet the 180-working day goal, or used all of this nearly 9-month period. Given the need to retain experts, obtain information from the Party, gather additional facts, prepare a rigorous analysis, and have the draft Factual Record translated into the three official languages, the 120 calendar days provided by the USMCA/CUSMA (about 4 months) leaves little time for this step – the most important fact-gathering step of the SEM process.

The Council should consider adopting a guideline providing that the translation period does not count against the 120 days for this step. Additionally, Article 14 of the ECA addresses the duty of the Parties to provide information relevant for the preparation of a Factual Record, noting that requests “shall be in accordance with guidelines established by the Council.” The Council should consider using this authority to provide a tolling period if a Party is slow to provide information, extending the timeline for a limited period directly related to delays in a Party’s provision of such information. In each instance, the timing exclusions could be subject to defined limits in order to ensure that the USMCA/CUSMA’s objectives for prompt production of draft Factual Records can still be met.

Second, the Council should ensure meaningful implementation of the timeline for its own decision on whether to instruct the Secretariat to prepare a Factual Record. The current timeline in use (60 working days) is a carryover from the 2012 Guidelines, but it is often exceeded by many months or even years. This accountability is important given the unusual structure of the USMCA/CUSMA (and the former NAAEC) giving the Parties a substantial role in determining whether a submission involving them may be investigated. Indeed, under other similar trade agreements only the vote of one Party is needed to proceed.³¹⁶ As the USMCA/CUSMA preserves the feature of Council decision-making by majority decision, it is important not only to establish firm timelines for Council decisions, but also to provide a means to hold the Council accountable for acting promptly in order to maintain the credibility and effectiveness of the process.³¹⁷ One option would be for the Council to specify a prescribed period for its review, with perhaps a limited one-time extension. If desired, the Council could provide that after that time, the process would move forward per the Secretariat recommendation, unless the Council

³¹⁶ E.g., Dominican Republic-Central America Free Trade Agreement, at art. 17.8(2), (7) (5 Aug. 2004); See also United States- Colombia Trade Promotion Agreement, at art. 18 (22 Nov. 2006); United States-Perú Free Trade Agreement, at art. 18 (1 Feb. 2009); United States-Panama Trade Promotion Agreement, at art. 17 (31 Oct. 2012).

³¹⁷ Interestingly, the USMCA/CUSMA, art. 24.28(2), provides that the Secretariat shall prepare a Factual Record “if at least two members of the Council instruct it to do so.” Unlike the NAAEC, it does not specifically refer to a vote in Council. See NAAEC, art. 15(2) (“if the Council, by a two-thirds vote...”).

votes otherwise.³¹⁸ The Council might also provide that it will notify the Environment Committee why its timeline is not being met and commit to take action. Adoption of an accountability mechanism would place the onus upon the Council to act, but not to delay indefinitely. This approach may also reduce the incentive for lengthy scoping by the Council – which, in any event, may be less needed than in prior decades because the Secretariat’s own reach is constrained by the need to complete its work within a shorter time.

The CEC should consider developing guidance regarding actions following the publication of a Factual Record.

Factual Records provide information that can be useful to the Parties in advancing the goals of the agreements and enhancing the North American environment. USMCA/CUSMA 24.28(7) and ECA 4(1)(m) contemplate use of the information by the Environment Committee, the CEC, and the Parties themselves. Upon completing the fact-intensive process to prepare a Factual Record, the Secretariat has a practical basis to offer useful information on activities that may be considered by the Council and Environment Committee as they carry out these functions.

The Introduction to the 2012 Guidelines includes a statement that a Factual Record “is not to contain conclusions or recommendations.”³¹⁹ But the USMCA/CUSMA and ECA do not prescribe such limitations. While Parties would be reasonably sensitive to statements resembling a legal conclusion, this concern should not preclude the identification of potential responses in keeping with the cooperative goals of the Agreements. Indeed, one expert interviewed for this study stated that “recommendations can exist without saying that a legal violation existed.” The provisions of the USMCA/CUSMA and ECA offer an opportunity for advancement in this area. Note that most international mechanisms include both statements of fact and related recommendations to assist the recipients. Review mechanisms adopted by multilateral environmental agreements regularly include recommendations with their findings.³²⁰ Review mechanisms in other international contexts also include recommendations with their findings, while leaving the actual development of responses to the responsible entities.³²¹

³¹⁸ This could be done using ECA, art. 2(3).

³¹⁹ 2012 Guidelines, para. 3; see also *Id.* at para. 12.1, 12.2. But see JPAC, *Lessons Learned*, at 10-11.

³²⁰ E.g., Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), at arts. 15(5), 18(2) (4 Mar. 2018); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447 (25 June 1998); Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243 (3 Mar. 1973); See also CITES CONFERENCE OF THE PARTIES, *Resolution Conf. 14.3- Annex Guide to CITES Compliance Procedures*, at 1 (2007), available at <<https://cites.org/sites/default/files/document/E-Res-14-03-R18.pdf>>. In the case of the CITES, the compliance process, including recommendations, was adopted by the Conference of the Parties.

³²¹ The World Bank Inspection Panel (for the IBRD) and Compliance Advisor Ombudsman (for the IFC) regularly include recommendations in their reports investigating assertions that a project has not complied with World Bank safeguards. These recommendations are considered by Bank Management and IFC/MIGA.

The CEC should establish a standardized approach to follow up on Factual Records.

USMCA/CUSMA 24.28(7) provides for consideration by the Environment Committee of the Factual Record and recommendations to the Council on whether the matter raised in the Factual Record could benefit from cooperative activities. And the Council's consideration of such matters is provided for in ECA art. 4(1). The CEC could provide, in revised Guidelines, or otherwise, for instructions on how to incorporate issues identified in Factual Records into the CEC cooperative agenda, for the consultation of experts and for possible engagement with submitters if a cooperative activity is pursued.

USMCA/CUSMA 24.28(8) provides for "updates" from the Parties on completed Factual Records "as appropriate." The CEC could establish a standard process and expectation that Parties provide updates one year afterwards and a longer period (say, three years) afterwards if warranted. If not adopted as a requirement, provision of updates could be standardized in practice, building on the practice announced in the Council's 2014 Ministerial Statement. It would be useful to make updates or summaries public for purpose of transparency and place them in the Registry. In any case, the procedure should not be limited only to Factual Records from the previous year.

If desired, JPAC, the submitters, and the Parties could be invited to share observations. Providing the submitters such an opportunity could create an incentive for Parties to foster further engagement with submitters.

JPAC should continue its active role on SEM

JPAC has provided a useful sounding board and accountability mechanism throughout the history of SEM. Article 6(4) of the ECA states that JPAC "may provide advice to the Council on matters within the scope of this agreement, and may perform such other functions as the Council may direct." The Council should follow up on the roles outlined in Council Resolution 00-09, which integrated JPAC into assisting with the interpretation and implementation of the SEM process by authorizing it to provide reasoned advice, public review, and ways to address implementation issues as they arise. JPAC should consider establishing a continuing monitoring function to follow up and advise on SEM implementation, and especially the public-facing issues identified in this review such as continuing engagement with submitters, and follow-up on Factual Records – including identification of potential cooperative activities, and provision and disclosure of updates. JPAC could also assist in periodic (5-year) reviews of SEM implementation, particularly if revised Guidelines are being adopted that may warrant review after implementation.

Annexes

CEC Submission Process Survey

The Commission for Environmental Cooperation (CEC) has asked the Environmental Law Institute to conduct a long-term assessment of the implementation of the Submissions on Enforcement Matters process (SEM process) over the last 25 years since the process is entering a new era under the US-Mexico-Canada trade agreement (USMCA/CUSMA).

An important part of our review is a survey of all previous Submitters – users of the SEM process. This short survey will help us identify differences in Submitter experiences, evaluate changes over time, understand the impact of the process over the years, and provide recommendations for its implementation in the future. The information you provide will be aggregated and analyzed so that it cannot be traced to you or your organization.

Page 1

Responses in this section will not be used to identify submitters in the report but will aid in analyzing the responses to all questions.

Q1. Which of the following best describes you as a user of the Submissions on Enforcement Matters process [SEM process]?

- ☐ Individual Person
- ☐ Community Organization
- ☐ Incorporated nongovernmental organization (NGO)
- ☐ Private Company

Q2. Do you identify as an indigenous person or group of indigenous persons?

- ☐ Yes
- ☐ No

Page 2

Responses in this section will not be used to identify submitters in the report but will aid in analyzing the responses to all questions.

Q3. In what year(s) did you file a Submission on Enforcement Matters? (short answer)

Q4. What government Party (country) was the subject of your submission? (1st submission)

- ☐ Canada
- ☐ United States
- ☐ Mexico
- ☐ Canada & United States

Q5. What government Party (country) was the subject of your submission? (2nd submission, if applicable)

- ☐ Canada
- ☐ United States
- ☐ Mexico
- ☐ Canada & United States

Q6. What government Party (country) was the subject of your submission? (3rd submission, if applicable)

- ☐ Canada
- ☐ United States
- ☐ Mexico
- ☐ Canada & United States

Q7. Was a Factual Record prepared? (1st submission)

- ☐ Yes
- ☐ No
- ☐ Still in process

Q8. Was a Factual Record prepared? (2nd submission, if applicable)

- ☐ Yes
- ☐ No
- ☐ Still in process

Q9. Was a Factual Record prepared? (3rd submission, if applicable)

- ☐ Yes
- ☐ No
- ☐ Still in process

Page 3

Q10. Please provide a response to the following statements

The SEM process promoted governmental enforcement of environmental laws.

Strongly Agree Agree Neutral Disagree Strongly disagree

The SEM process produced useful information about enforcement of environmental laws.

Strongly Agree Agree Neutral Disagree Strongly disagree

It was easy to find information on how to use the SEM process.

Strongly Agree Agree Neutral Disagree Strongly disagree

Q11. Please provide a response to the following statements

Submissions on Enforcement Matters: What Have We Learned?

The CEC complied with their published procedures (Guidelines) for the SEM process.

Strongly Agree Agree Neutral Disagree Strongly disagree

Preparing a submission was not expensive.

Strongly Agree Agree Neutral Disagree Strongly disagree

The entire SEM process took an appropriate amount of time.

Strongly Agree Agree Neutral Disagree Strongly disagree

Page 4

Q12. Why did you choose to use the SEM process to address the matters you raised in your submission? (short answer)

Q13. Approximately how much time did it take you to prepare your submission (in months)? (short answer)

Page 5

Q14. If the government Party filed a response to your submission, was the response helpful in understanding the Party's positions and decisions regarding the matters you raised?

- ☐ Yes
- ☐ No

Q15. Did the SEM process affect the situation you were raising in any way?

- ☐ Yes
- ☐ No

Q15b. If yes, how? (short answer)

Q16. Was the time taken to reach each step of the SEM process appropriate?

- ☐ Yes
- ☐ No

Q17. If not, which steps took too much, or too little time? (short answer)

Q18. What were the best aspects of the SEM process? Why? (short answer)

Q19. What were the most difficult or frustrating aspects of the SEM process? Why? (short answer)

Q20. Does the SEM process need to be changed?

- ☐ Yes
- ☐ No

Q20b. If yes, in what ways? (short answer)

Q21. Do you have any other comments on the SEM process? (short answer)

Interview Overview

We will cover the following topic areas:

- I. Background: Describe your involvement with the SEM Process – your responsibilities, activities, and time frame when you dealt with SEM.
- II. Core Questions
 - a. What expectations did you have for the SEM Process?
 - b. In what ways were these expectations met or not met?
 - c. Describe your views of SEM Process concerning:
 - i. Timeliness
 - ii. Efficiency or inefficiency
 - iii. Transparency
 - iv. Did it generate useful information?
 - d. Did the SEM process add any value or assist in achieving objectives?
 - i. What was accomplished?
 - ii. What aspects of the process provided the most value?
 - iii. Did the process promote the enforcement of environmental law?
 - e. What parts of the SEM Process would you change if you could? Explain.
- III. Other Issues
 - a. Are thresholds for an admissible submission appropriate? (too high/low?)
 - b. What are your views on the amount of discretion the Secretariat has?
 - c. How useful are Government Party responses to Submissions?
 - d. Do you have comments concerning the following Interpretive issues:
 - i. How should the SEM process evaluate “Pending Proceedings”?
 - ii. Is it clear what is an “Enforcement Matter”?
 - iii. Is “Environmental Law” properly interpreted?
 - iv. What do you think of the concept of “central open questions” on which a Factual Record could shed light?
 - e. Do you have observations on how the Council voting process is conducted?
 - f. Factual Records
 - i. Do you have any observations on the process the Secretariat uses to prepare Factual Records?
 - ii. The contents of final Factual Records?
 - iii. Observations on appropriate actions or follow-through after publication of Factual Records?
 - g. SEM Guidelines – usefulness, effect of 2012 revisions, ideas for new Guidelines
- IV. Additional Questions
 - a. Does the process work better for some types of submitters?
 - b. What changes have you seen in the SEM Process over time? What decisions or actions brought about these changes? Have these made the process better, worse, or had no effect?
 - c. Any other observations?

Bibliography

Agreement Between the United States of America, the United Mexican States, and Canada, (18 Dec. 2018).

Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada, (18 Dec. 2018).

CITES CONFERENCE OF THE PARTIES, *Resolution Conf. 14.3- Annex Guide to CITES Compliance Procedures* (2007), available at <<https://cites.org/sites/default/files/document/E-Res-14-03-R18.pdf>>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 95-10* (13 Oct. 1995), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-95-10-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (13 Oct. 1995).

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 99-06* (28 June 1999), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-99-06-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Revised Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (28 June 1999).

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 00-09* (13 June 2000), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-00-09-en.pdf>.

COMM'N FOR ENVTL. COOPERATION JOINT PUBLIC ADVISORY COMMITTEE, *Lessons Learned: Citizen Submissions Under Articles 14 And 15 of the North American Agreement on Environmental Cooperation, Final Report to The Council of The Commission for Environmental Cooperation* (6 June 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/3253_rep11-e-final_EN.PDF>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 01-06* (29 June 2001), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-01-06-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 01-07* (23 Oct. 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-01-07-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 01-09* (30 Nov. 2001), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-01-09-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 03-02* (28 Mar. 2003), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-03-02-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 03-05* (17 Dec. 2003), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-03-05-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 08-01* (27 Feb. 2008), available at <http://www.cec.org/files/documents/jpac_advice_council/jpac-advice-08-01-en.pdf>.

Submissions on Enforcement Matters: What Have We Learned?

COMM'N FOR ENVTL. COOPERATION, *Response from Council to Advice 08-01* (14 Aug. 2008), available at <http://www.cec.org/files/documents/jpac_advice_council/7634_Response_to_08-01_en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 10-05* (20 Dec. 2010), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-10-05-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *JPAC Survey Results* (2011).

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 12-01* (23 May 2012), available at <http://www.cec.org/files/documents/jpac_advice_council/16238_JPAC_Advice_12-01-Final-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 12-06* (11 July 2012), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-12-06-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *SEM Guidelines for Submissions on Enforcement Matters Under Articles 14 And 15 Of the North American Agreement on Environmental Cooperation* (11 July 2012), available at <<http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf>>.

COMM'N FOR ENVTL. COOPERATION, *20 Years of NAFTA and the NAAEC* (2013).

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 13-04* (6 Dec. 2013), available at <http://www.cec.org/files/documents/jpac_advice_council/18241_JPAC_Advice_13-04-Final_en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *CEC Ministerial Statement*, at 1 (17 July 2014), available at <http://www.cec.org/files/documents/council_statements/ministerial-statement-2014-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Advice to Council No. 15-02*, at para. 3 (8 May 2015), available at <http://www.cec.org/files/documents/jpac_advice_council/advice_15-02.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Council Resolution 18-01* (20 Aug. 2018), available at <http://www.cec.org/files/documents/council_resolutions/council-resolution-18-01-en.pdf>.

COMM'N FOR ENVTL. COOPERATION, *Considering filing a submission?*, available at <<http://www.cec.org/submissions-on-enforcement/filing-a-submission/#memberswrap>>.

COMM'N FOR ENVTL. COOPERATION, *Registry of Submissions*, available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>>.

COMM'N FOR ENVTL. COOPERATION, *SEM Compliance Tracker*, available at <<http://www.cec.org/submissions-on-enforcement/sem-compliance-tracker/>>.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 U.N.T.S. 447 (25 June 1998).

Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243 (3 Mar. 1973).

Dominican Republic-Central America Free Trade Agreement, (5 Aug. 2004).

Submissions on Enforcement Matters: What Have We Learned?

ENVTL. L. INST., *Final Report: Issues Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (2003), available at <<https://www.eli.org/sites/default/files/eli-pubs/d13-16.pdf>>.

Exec. Order No. 12915 – Federal Implementation of the North American Agreement on Environmental Cooperation § 2(d)(1) (1994).

Garver, G. *Forgotten Promises: Neglected Environmental Provisions of the NAFTA and the NAAEC*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 15 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

Headquarters Agreement between the Commission for Environmental Cooperation and the Government of Canada, (5 Oct. 2020).

Hester, T. *Designed for Distrust: Revitalizing NAFTA's Environmental Submission's Process*, 28 GEO. ENVTL. L. REV. 29 (2015).

Jodoin, S. *Pathways of Influence in the NAFTA Regime and Their Implications for Domestic Environmental Policy Making in North America*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 329 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

Knox, J.H. *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391 (2010).

Knox, J.H. *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 GOLDEN GATE U. ENVTL. L.J. 81 (2014).

Kong, H.L. *The Citizen Submissions Process in the NAAEC: Theory and Practice in Deliberative Democratic Institutional Design for Transnational Institutions*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 351 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

Letter from Norine Smith, Alternative Representative for Canada, to Jonathan Plaut, JPAC Chair for 2002 (n.d.), available at <http://www.cec.org/files/documents/jpac_advice_council/1599_Response-Advice-01-09.pdf>.

Markell, D.L. *Understanding Citizen Perspectives on Government Decision-Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651 (2006).

Markell, D.L. *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. 10360 (2007).

Markell, D.L., Tyler, T.R. *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008).

Markell, D.L., *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425 (2010).

Markell, D.L., Knox, J.H. *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L.J. 505 (2012).

Submissions on Enforcement Matters: What Have We Learned?

North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 8-14, 1993, 32 I.L.M. 1480 (1994).

North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993).

OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN, *IFC/MIGA Independent Accountability Mechanism (CAO) Policy* (28 June 2021), available at <<https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>>.

Pacheco-Vega, R. *Transnational Environmental Activism in North America: Wielding Soft Power through Knowledge Sharing?*, 32 REV. OF POL'Y RES. 146 (2015).

Raustiala, K, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389 (2004).

Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), (4 Mar. 2018).

Rovalo, M. *Pending Proceedings in the New Guidelines for Submissions on Enforcement Matters: An Improved Regression?*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 97 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

SEM-98-004 (*BC Mining*), Submission pursuant to NAAEC (29 June 1998), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/bc-mining/>>.

SEM-98-007 (*Metales y Derivados*), Submission pursuant to NAAEC (23 Oct. 1998), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/metales-y-derivados/>>.

SEM 00-004 (*BC Logging*), Submission pursuant to NAAEC: *Council Resolution 01-12* (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/00-4-res-e.pdf>>.

SEM-98-004 (*BC Mining*), Submission pursuant to NAAEC: *Council Resolution 01-11* (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-res-e.pdf>>.

SEM 99-002 (*Migratory Birds*), Submission pursuant to NAAEC: *Council Resolution 01-10* (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/99-2-res-e.pdf>>.

SEM 97-006 (*Oldman River II*), Submission pursuant to NAAEC: *Council Resolution 01-08* (16 Nov. 2001), available at <<http://www.cec.org/wp-content/uploads/wpallimport/files/97-6-res-e.pdf>>.

SEM 99-002 (*Migratory Birds*), Submission pursuant to NAAEC: *Final Factual Record* (24 Apr. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/99-2-ffr_en.pdf>.

SEM-03-003 (*Lake Chapala II*), Submission pursuant to NAAEC (23 May 2003), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/lake-chapala-ii/>>.

Submissions on Enforcement Matters: What Have We Learned?

SEM 00-004 (*BC Logging*), Submission pursuant to NAAEC: *Final Factual Record* (11 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/00-4-ffr_en.pdf>.

SEM 97-006 (*Oldman River II*), Submission pursuant to NAAEC: *Final Factual Record* (11 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/97-6-ffr_en.pdf>.

SEM-98-004 (*BC Mining*), Submission pursuant to NAAEC: *Final Factual Record* (12 Aug. 2003), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-ffr_en.pdf>.

SEM-04-005 (*Coal-fired Power Plants*), Submission pursuant to NAAEC (20 Sept. 2004), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/coal-fired-power-plants/>>.

SEM-09-001 (*Transgenic Maize in Chihuahua*), Submission pursuant to NAAEC (28 Jan. 2009), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/transgenic-maize-in-chihuahua/>>.

SEM-09-001 (*Transgenic Maize in Chihuahua*), Submission pursuant to NAAEC: *Secretariat Determination under Article 15(1)*, at para. 40 (20 Dec. 2010), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/09-1-det_15_1_public_en.pdf>.

SEM-06-005 (*Species at Risk*), Submission pursuant to NAAEC: *Withdrawal Letter from Devon Page to Evan Lloyd* (17 Jan. 2011), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/06-5-not_en.pdf>.

SEM-11-003 (*Protection of Polar Bears*), Submission pursuant to NAAEC: *Council Resolution 14-04* (5 June 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/11-3-cr-14-04_en.pdf>.

SEM-11-003 (*Protection of Polar Bears*), Submission pursuant to NAAEC: *Council Resolution 14-04 – Reasons for Council Instructions*, (5 June 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/11-3-council_vote_explanation_en.pdf>.

SEM-12-001 (*BC Salmon Farms*), Submission pursuant to NAAEC: *Council Resolution 14-09 – Statement of the United States of America Explaining its Position and the Reasons for its Vote* (9 Dec. 2014), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/12-1-us_statement_on_its_vote_en.pdf>.

SEM-10-002 (*Alberta Tailings Ponds I*), Submission pursuant to NAAEC: *Council Resolution 15-01 – Reasons for Council Instructions*, (27 Jan. 2015), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/10-2-reasons-canada_and_mexico-united_states_en.pdf>.

SEM-13-001 (*Tourism Development in the Gulf of California*), Submission pursuant to NAAEC: *Council Resolution 15-02* (19 May 2015), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/13-1-cr_15-02_en.pdf>.

SEM-15-001 (*La Primavera Forest*), Submission pursuant to NAAEC: *Council Resolution 17-01* (4 Apr. 2017), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/15-1-cr-17-01_en.pdf>.

Submissions on Enforcement Matters: What Have We Learned?

SEM-16-001 (*Agricultural Waste Burning in Sonora*), Submission pursuant to NAAEC: *Council Resolution 17-03* (9 June 2017), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/16-1-cr-17-03_en.pdf>.

SEM-18-002 (*Metrobus Reforma*), Submission pursuant to NAAEC (2 Feb. 2018), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/metrobus-reforma/>>.

SEM-16-001 (*Agricultural Waste Burning in Sonora*), Submission pursuant to NAAEC: *Final Factual Record* (17 Sept. 2018), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/16-1-ffr_en.pdf>.

SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*), Submission pursuant to NAAEC (3 Oct. 2018), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/hydraulic-fracturing-in-nuevo-leon/>>.

SEM-19-002 (*City Park Project*), Submission pursuant to NAAEC (16 Apr. 2019), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/city-park-project/>>.

SEM-19-004 (*Barred Owl*), Submission pursuant to NAAEC: *Secretariat Determination under Article 14(3)(a)* (20 Mar. 2020), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/19-4-det143_en.pdf>.

SEM-20-001 (*Loggerhead Turtle*), Submission pursuant to USMCA: *Secretariat Notification to Council under Article 24.28(1) of the CUSMA/USMCA* (27 July 2020), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-adv_en.pdf>.

SEM-17-001 (*Alberta Tailings Ponds II*), Submission pursuant to NAAEC: *Final Factual Record* (4 Sept. 2020), available at <<http://www3.cec.org/islandora/fr/item/11861-alberta-tailings-ponds-ii-factual-record-north-american-environmental-law-and-en.pdf>>.

SEM-20-001 (*Loggerhead Turtle*), Submission pursuant to USMCA (17 Dec. 2020), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/loggerhead-turtle/>>.

SEM-21-002 (*Vaquita Porpoise*), Submission pursuant to USMCA (11 Aug. 2021), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/vaquita-porpoise/>>.

SEM-21-003 (*North Atlantic Right Whale*), Submission pursuant to USMCA (4 Oct. 2021), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/north-atlantic-right-whale/>>.

Solano, P. Choosing the Right Whistle: *The Development of the Concept of Environmental Law under the Citizen Submissions Process*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 75 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

Submissions on Enforcement Matters: What Have We Learned?

TEN-YEAR REVIEW AND ASSESSMENT COMMITTEE, *Ten Years of North American Environmental Cooperation* (15 June 2004), available at <<http://www3.cec.org/islandora/en/item/11382-ten-years-north-american-environmental-cooperation-report-ten-year-review-and-assessment-en.pdf>>.

THE INSPECTION PANEL AT THE WORLD BANK, *Operating Procedures (Draft)* (April 2021), available at <[https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/Inspection%20Panel%20Draft%20Updated%202021%20Operating%20Procedures%20\(clean\).pdf](https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/Inspection%20Panel%20Draft%20Updated%202021%20Operating%20Procedures%20(clean).pdf)>.

United States- Colombia Trade Promotion Agreement, (22 Nov. 2006).

United States-Panama Trade Promotion Agreement, (31 Oct. 2012).

United States-Perú Free Trade Agreement, (1 Feb. 2009).

Waldron, L. *Environmental Governance Under the New NAFTA*, 30 J. TRANSNAT'L L. & POL'Y 151 (2021).

Welts, L. *Form over Substance: Procedural Hurdles to the NAAEC Citizen Submission Process*, in *NAFTA and Sustainable Development: History, Experience and Prospects for Reform* 123 (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

Wold, C., Ritchie, L., Scott, D., Clark, M. *The Inadequacy of the Citizen Submission Process of Articles 14 & (and) 15 of the North American Agreement on Environmental Cooperation* 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004).