

SUBMISSIONS ON ENFORCEMENT MATTERS (SEM) MODERNIZATION REVIEW

SEM Task Force

JPAC Public Session

April 18, 2012

Purpose & Function of SEM Process

- ❑ Information-Sharing Process. SEM process designed to promote the effective enforcement of domestic environmental law by facilitating the sharing of information. Process is not intended nor capable of providing a specific means of redress (e.g., the closure of a facility or clean-up of a historically contaminated site)
- ❑ Bringing the Facts to Light. Through information sharing, the SEM process is intended to “shine the light” on/draw attention to issues of concern
- ❑ Central Questions of Fact. Ideally, Party Response to submission provides adequate explanation re how the concerned Party is effectively enforcing its environmental law, thus resulting in the termination of the process; however, if Party Response leaves open central questions of fact, then the process may result in a factual record

Purpose & Function of SEM Process (cont.)

- ▣ Not Intended as Avenue of First Resort. Under normal circumstances, the SEM process is not intended to be an avenue of first resort
- ▣ Exhaustion of Private Remedies Not Required. Although process not intended to be avenue of first resort, nor is it intended to require an exhaustion of private remedies (e.g., pursuit of domestic litigation)

SEM Modernization Review: Origin

- ▣ NAAEC Articles 14 & 15 SEM process is critical North American public participation mechanism warranting continued CEC care and attention

- ▣ SEM Modernization Review represents Council response to concerns expressed by JPAC, the public, Secretariat, and Parties re implementation of the SEM process. E.g.,
 - length of time required to conclude SEM process
 - disconnect between the actual purpose and function of the SEM process and perceived purpose and function
 - accessibility of the process

SEM Modernization Review: Origin (cont.)

- ▣ Council commitment to “modernize” the SEM process to keep pace with technological developments and natural evolution of the process
- ▣ Establishment of Trilateral SEM Task Force to support SEM Modernization Review
- ▣ Objective: Develop SEM proposals for Council action at July 2012 Council Session

SEM Task Force

- ▣ Established – May 2011
- ▣ Composition – reps from each of the Parties
- ▣ Consultant Support – ELI
- ▣ Charge:
 - Review and evaluate SEM process implementation
 - Identify specific issues warranting definitive attention
 - Develop SEM proposals for Council action at July 2012 Council Session
 - In particular, to propose revised SEM Guidelines that modernize and clarify SEM process implementation in order to increase transparency and accessibility of process

CEC

- ▣ Council – governing body of CEC
 - comprised of Environment Ministers or equivalent of three Parties;
 - responsible for interpreting the NAAEC and overseeing its implementation
 - Alternate Representatives – Council decision-making designees

- ▣ Secretariat – operational body of CEC which includes separate SEM Unit responsible for administering the SEM process

- ▣ JPAC – trilateral advisory body - conduit of public views; has provided extensive Advice on SEM process

SEM Task Force Proposals

- ▣ SEM Task Force proposal material
 - Memo compilation document
 - SEM Guidelines negotiation text
- ▣ Cleared at CEC Alternate Representative level
- ▣ Shared with Secretariat SEM Unit and with JPAC for public distribution and for review and comment

Selected SEM Proposal Highlights

- ▣ Council to make Factual Record votes, normally within 90 calendar days of receiving a Secretariat determination that a Factual Record is warranted

- ▣ Establishment of “target deadlines” to help ensure SEM process is timely, normally:
 - less than one year if factual record not called for (the result in approximately 70% of SEM cases)
 - 2.5 years if factual record prepared

- ▣ Concerned Parties to follow up with the JPAC at Council Sessions occurring two years after the conclusion of a specific SEM process

Information Considered in Developing SEM TF Proposals

- Comprehensive review of past JPAC Advice, public views, and Secretariat input
- Party questions, concerns, and differences on issues of interpretation and application
- 2011-2012 SEM Review Taskforce discussions with JPAC and Secretariat SEM Unit
- November JPAC public session
- ELI consultant research

SEM TF Proposals: Key Goals

1. Modernization – to update the process to reflect technological developments and the intended current-day implementation of the process
2. Clarification – to provide clarity regarding the interpretation and implementation of the process as called for in the NAAEC and SEM Guidelines
3. Timeliness – to increase the speed, efficiency, predictability, and relevance of the process
4. Transparency & Accessibility – to improve the understandability and accessibility of the process

1. Modernization

- ▣ Update Guidelines to allow for technological developments (e.g., allow for electronic submissions)

- ▣ Revise Guidelines to reflect 18 year evolution of the process
 - Update SEM process implementation to address:
 - ▣ “bottlenecks” in process
 - ▣ ambiguities re process implementation
 - ▣ increasing number, complexity, and sophistication of submissions

2. Clarification

- ▣ Revise Guidelines to clarify interpretation and appropriate implementation of NAAEC provisions and SEM Guidelines
- ▣ Provide additional guidance to address ambiguities so that submissions move forward through the process in a more timely manner

3. Timeliness

- ▣ Clarify appropriate timeframes for implementing the SEM process in order to increase efficiency, predictability, and movement of SEM submissions
- ▣ In particular, to do so by identifying “target deadlines” for key action points in the process (e.g., Council factual record votes to take place normally within 90 calendar days)
- ▣ SEM process duration expected to be cut by approximately 50%

Proposed Target Deadlines

SEM Step	Proposed Standards (days)	Historical Average (days)
1. Sec's 14.1 and 14.2 determinations	90	125
2. Party Response (30-60 days)	60	74
3. Sec's 15.1 determination	180	275
<i>Sub-total</i>	330	474
4. Council vote on FR	90	391
5. FR preparation	270	749
<i>Sub-total</i>	360	1140
6. Party review (45 days)	45	49
7. Secretariat revisions	45	54
8. Council vote on publication	60	99
<i>Sub-total</i>	150	202
TOTAL	Approx. 2.5 years	Approx. 5.0 years

4. Transparency & Accessibility

- ▣ Translation – revise translation approach to include translation of all key SEM process documents in the three official languages of the NAAEC Parties (e.g., original submission, Party response)
- ▣ In the event the Council votes not to instruct the Secretariat to prepare a Factual Record, all or in part, Council will provide its reasoning for the decision
- ▣ Explanation and revised completion day to be provided if action not to be completed by target deadline

Next Steps

- ▣ April/May - Public Comment/JPAC Advice
- ▣ May - SEM TF, with Alt Rep clearance, to finalize SEM proposals for Council review
- ▣ July – Council to decide on revised SEM Guidelines and take whatever other action deemed appropriate at Council Session

Q & A