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John H. Knox
Wake Forest University

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FIXING THE CEC SUBMISSIONS PROCEDURE: ARE THE 2012 REVISIONS UP TO THE TASK?

*JOHN H. KNOX**

I. INTRODUCTION

The citizen submissions procedure of the North American Commission for Environmental Cooperation (CEC) celebrates its twentieth birthday this year. After a promising childhood, the procedure has had a stormy adolescence, vexed by accusations of ineffectiveness, bias, and delay. In 2012, the CEC adopted revisions to the procedure that promise to improve its timeliness, but do little or nothing to address its other problems. As the procedure enters its twenties, settled maturity is still a distant prospect.

Created in 1993 by the North American Agreement on Environmental Cooperation (NAAEC),¹ a tri-national agreement between Canada, Mexico, and the United States, the submissions procedure allows any individual or group in one of the three Parties to file a complaint with the CEC alleging that a Party is failing to enforce its domestic environmental laws. If the submission meets certain admissibility requirements, it can lead to a detailed investigative report, called a “factual record.”²

As Section II of this Article describes, the first two decades of the

* Henry C. Lauerman Professor of International Law, Wake Forest University. I participated in the negotiation of the North American Agreement on Environmental Cooperation (NAAEC) as an attorney-adviser at the Department of State in the early 1990s. After I joined academia, I served as the chair of the U.S. National Advisory Committee on the NAAEC between 1999 and 2005. This Article reflects my personal views, not those of the U.S. government or the National Advisory Committee. I am grateful to Paul Kibel for his comments on a draft of the Article.

¹ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 8-14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

² *Id.* arts. 14, 15.

CEC submissions procedure have seen real achievements, but they have also given rise to growing controversies. Scholars and environmental advocates have increasingly criticized the procedure on three grounds: (a) it is far too slow, (b) the Parties interfere with it too often, and (c) the CEC does not follow-up factual records to determine whether they have led to real improvements.

The fundamental problem underlying all of these criticisms is that the procedure is overseen by the same Parties against which the submissions are directed. The Parties control key decision points, including whether to authorize an investigation and whether to make public any resulting report,³ and they have found it difficult to resist the temptation to use their power over the submissions process to delay or limit reports that might criticize their environmental policies. Their efforts to protect themselves from embarrassment have often led to counter-efforts by CEC advisory bodies and environmental groups to defend the independence and effectiveness of the procedure.⁴

As Part III explains, the most recent round in this recurring struggle began in 2011, when the NAAEC Parties announced that they planned to adopt revisions to the procedure's Guidelines. Outside observers saw the revision process as an opportunity to address long-standing problems, but they also feared that the Parties could use the revisions to weaken the procedure further. In early 2012, a governmental task force proposed revisions that seemed to confirm these concerns.⁵ As a result, CEC advisory bodies and others strongly objected to many of the suggested amendments to the Guidelines.⁶ The objections appear to have had some

³ *Id.* art. 15(2), (7).

⁴ See John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEX. INT'L L.J. 505, 525-26 (2012).

⁵ Council-Directed Task Force on SEM Modernization, Proposed Changes to the Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation: Draft Negotiating Text (Mar. 27, 2012) (draft), available at www.cec.org/Storage/136/16141_Proposed_SEM_Guideline_Changes_and_Memo-Draft_for_Comments_16April12_en.pdf [hereinafter Task Force Proposed Changes].

⁶ Comm'n for Env'tl. Cooperation, *SEM Task Force Proposals for Changes to the Guidelines for Submission on Enforcement Matters (SEM)*, Advice to Council No 12-01, CEC Doc. J/12-01/ADV/Final (May 23, 2012), available at www.cec.org/Storage/137/16238_JPAC_Advice_12-01-Final-en.pdf [hereinafter Advice to Council 12-01]; Joint Letter from U.S. Nat'l Advisory Comm. & U.S. Governmental Advisory Comm. to U.S. Env'tl. Prot. Agency (May 16, 2012), available at www.epa.gov/ocempage/gac/pdf/2012/2012_0516_joint_nac_gac_advice_letter.pdf [hereinafter Joint Advisory Letter]. The National Advisory Committee and the Governmental Advisory Committee are advisory committees created by the Environmental Protection Agency pursuant to the NAAEC, which provides that each Party may convene such committees, comprising members of the public and representatives of sub-federal governments, respectively, to advise it on the implementation and further elaboration of the NAAEC. NAAEC, *supra* note 1, arts. 17, 18. Canada and Mexico do not currently have such committees.

effect: the final version of the Guidelines adopted by the NAAEC Parties in July 2012 drops or softens the more controversial proposals.⁷ Moreover, the revisions set new deadlines that, if followed, would greatly shorten the time the procedure takes to process submissions. However, the revised Guidelines still impose new restrictions on the submissions procedure, and they continue to ignore the need for effective follow-up to factual records.

Part IV concludes by underlining that while the CEC submissions procedure still offers a unique mechanism to draw attention to important environmental issues that might otherwise be overlooked, its shortcomings have sapped its attractiveness to potential submitters. The adoption of stricter deadlines is a step in the right direction, but to restore trust in the procedure, the CEC must do more. Specifically, it must regularly meet the deadlines in practice, it should start following-up factual records, and, most importantly, the Parties must resist the urge to micromanage the process. Otherwise, criticisms and controversy will continue to follow the procedure as it enters its third decade.

II. THE CEC SUBMISSIONS PROCEDURE AND ITS DISCONTENTS

A. THE CEC SUBMISSIONS PROCEDURE ON PAPER

The history and structure of the CEC and its submissions procedure have been described many times.⁸ The following summary highlights only the main points.

Although the three North American governments negotiated the NAAEC to address environmental concerns with the North American Free Trade Agreement (NAFTA), the focus of the NAAEC is much broader than trade-related environmental issues. It provides a platform for environmental cooperation throughout North America. To that end, it offers innovative avenues for public involvement, including the submissions procedure that is the subject of this Article.

⁷ 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 (July 11, 2012), *available at* www.cec.org/Storage.asp?StorageID=10838 [hereinafter SEM GUIDELINES].

⁸ *See, e.g.*, JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS (1997); KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND (2004); JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS (2008); GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA].

The NAAEC created a new international organization, the Commission for Environmental Cooperation, with three components: a *Council* composed of the Parties' environmental ministers or their designees; a *Secretariat* of international civil servants headed by an Executive Director; and a *Joint Public Advisory Council* (JPAC) made up of fifteen citizens serving in their individual capacity, with five citizens appointed by each Party.⁹ The agreement gives each of the CEC components specific mandates. The Council has broad authority to serve as a forum for discussion of environmental matters, make recommendations, approve the CEC program, and promote cooperation between the Parties on environmental matters.¹⁰ The JPAC provides advice to the Council on any matter within the scope of the NAAEC.¹¹ The Secretariat primarily supports the Council in carrying out the CEC work program,¹² but it also has independent functions.

Most importantly, the Secretariat administers the CEC citizen submissions procedure, also known as the Submissions on Enforcement Matters (SEM) process.¹³ This procedure allows individuals and groups to file complaints with the CEC that may result in an independent investigation and publication of a "factual record." However, the scope of the complaints is limited: they may address only the alleged failure by a Party to "effectively enforce its environmental law."¹⁴

The focus on the failure of a Party to enforce *domestic* environmental law may seem an odd approach for an *international* agreement, but it resulted from the chief environmental criticism of NAFTA at the time the NAAEC was negotiated.¹⁵ By lowering barriers to trade and investment among the three North American countries, NAFTA allows—and even encourages—corporations to shift operations to take advantage of the lowest costs of production they can find. Environmentalists feared that countries would feel pressure to attract corporations by lowering the costs of compliance with environmental standards. The result would be a "race to the bottom," in which the Parties would compete to weaken their environmental laws. The particular concern was with enforcement. NAFTA critics generally accepted that, as written, Mexican environmental standards were

⁹ NAAEC, *supra* note 1, arts. 8(2), 9, 11, 16.

¹⁰ *Id.* art. 10(1).

¹¹ *Id.* art. 16(4).

¹² *Id.* art. 11(5).

¹³ *Id.* arts. 14, 15.

¹⁴ *Id.* art. 14(1).

¹⁵ See David L. Markell & John H. Knox, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA*, *supra* note 8, at 4-5, 8.

comparable to those of its northern neighbors, but they correctly pointed out that Mexico put far less resources into enforcement. They convinced the U.S. government—and, through it, the other Parties—that a new agreement was necessary to ensure the effective enforcement of domestic environmental laws.¹⁶

The NAAEC, negotiated as a side agreement to NAFTA, has several provisions intended to encourage enforcement, including a formal legal obligation imposed on each Party “to effectively enforce its environmental laws and regulations,” and an intergovernmental dispute-resolution mechanism that allows Parties to bring complaints against one another based on an alleged “persistent pattern of failure . . . to effectively enforce.”¹⁷ The most important of these provisions establish a new submissions procedure through which individuals and nongovernmental organizations may seek an investigation of alleged failures by any of the Parties to effectively enforce its laws.

Studies conducted since NAFTA entered into force have undermined the belief that pollution havens cause a race to the bottom. The costs of compliance with environmental standards are, in general, not high enough to motivate corporations to shift their operations.¹⁸ Nevertheless, the concern with effective enforcement of domestic environmental standards remains. To ensure sustainable development, it is not enough that laws purport to require environmental protection: they must result in real changes in behavior. Developing countries, in particular, may find it relatively easy to enact environmental laws, but much more difficult to obtain compliance with the laws once enacted. In this sense, then, the emphasis in the NAAEC on effective enforcement of domestic laws has remained highly relevant, as has the success or failure of the CEC submissions procedure in promoting such enforcement.¹⁹

To be admissible, submissions on enforcement matters must meet several requirements. For example, a submission must clearly identify the person or organization making the complaint, and it must be filed by a person or organization residing or established in the territory of a party to the NAAEC.²⁰ If a submission clears these hurdles, the Secretariat decides whether it merits a response from the Party concerned, in light of four other factors: (a) whether the submission alleges harm to the person or organization making the submission; (b) whether the submission

¹⁶ *Id.* at 8-9.

¹⁷ NAAEC, *supra* note 1, arts. 5(1), 22(1).

¹⁸ GALLAGHER, *supra* note 8, at 31-33.

¹⁹ John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391, 398 (2010).

²⁰ NAAEC, *supra* note 1, art. 14(1).

raises matters whose further study in the SEM process would advance the goals of the NAAEC; (c) whether private remedies available under the Party's law have been pursued; and (d) whether the submission is drawn exclusively from mass media reports.²¹

In light of the Party's response, the Secretariat decides whether a full investigation is appropriate.²² If the Secretariat decides an investigation is warranted, it must request the Council's permission to proceed.²³

Only if the Council agrees, by a two-thirds vote, may the Secretariat conduct an investigation and prepare a "factual record."²⁴ As its name suggests, a factual record is not legally binding. In the view of the Parties, the Secretariat is not even permitted to reach legal conclusions about whether a Party has violated its obligation under the NAAEC to effectively enforce its environmental laws, although nothing in the NAAEC explicitly prohibits such statements. Finally, the Council controls one last decision point: after the factual record is submitted by the Secretariat, the Council decides, again by a two-thirds vote, whether to make it publicly available.²⁵

B. THE SUBMISSIONS PROCEDURE IN PRACTICE

The submissions procedure has been active throughout its history, receiving an average of over four submissions a year since the first submissions were filed in 1995, and a total of eighty submissions as of March 2013.²⁶ Of that number, fifty survived the initial admissibility decision and resulted in a request for a response by the government concerned, and twenty-six of those resulted in a request by the Secretariat for a factual record. Those twenty-six requests led to twenty-one Council authorizations of factual records.²⁷ As of March 2013, the

²¹ *Id.* art. 14(2).

²² *Id.* art. 15(1).

²³ *Id.*

²⁴ *Id.* art. 15(2).

²⁵ *Id.* art. 15(7).

²⁶ All figures concerning CEC submissions are derived from information available at the CEC Registry of Submissions. See *Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=751&ContentID=&SiteNodeID=250&BL_ExpandID=156 (last visited Nov. 20, 2013).

²⁷ The Council has declined to authorize only two Secretariat requests. See Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada Is Failing To Effectively Enforce Certain Environmental Protection Standards Regarding Agricultural Pollution Emanating from Livestock Operations (SEM-97-003)*, Council Res. 00-01, CEC Doc. C/C.01/004/RES/01/Rev.03 (May 16, 2000); Comm'n

Secretariat has produced seventeen factual records, with three more in preparation.²⁸

The great majority of the submissions have concerned Canada or Mexico. Forty, or exactly half of all submissions, have been filed against Mexico, and thirty-one have been filed against Canada, including one submission filed jointly against Canada and the United States. Only ten submissions have been directed against the United States (including the joint submission), and only two of those have been filed since 2000. The last submission directed solely against the United States was made nearly ten years ago, in 2004.²⁹

The distribution of factual records is similarly lopsided. Of the seventeen completed factual records, only one concerns the United States; the other sixteen are evenly divided between Canada and Mexico. Of the three factual records currently in preparation, two involve Mexico and one concerns the United States.³⁰

for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Mexico Is Failing To Effectively Enforce Its Environmental Law in Relation to the Establishment and Operation of the Cytrar Hazardous Waste Landfill, in the City of Hermosillo, Sonora, Mexico (SEM-01-001)*, Council Res. 02-13, CEC Doc. C/C.01/02-06/02-13/RES/Final (Dec. 10, 2002). Two other submissions were withdrawn after the Secretariat recommended a factual record. See *El Boludo Project, Registry of Submissions, COMMISSION FOR ENVTL. COOPERATION*, www.cec.org/Page.asp?PageID=2001&ContentID=2378&SiteNodeID=250&BL_ExpandID= (last updated July 16, 2004); *Coronado Islands, Registry of Submissions, COMMISSION FOR ENVTL. COOPERATION*, www.cec.org/Page.asp?PageID=2001&ContentID=2394&SiteNodeID=250&BL_ExpandID= (last updated Mar. 26, 2007). And two submissions were consolidated into one. See Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada Is Failing To Effectively Enforce Section 6(a) of the Migratory Bird Regulations (MBR) Adopted Under the Migratory Birds Convention Act, 1994 (MBCA) (SEM-04-006)*, Council Res. 05-04, CEC Doc. C/C.01/05/RES/04/Final (Apr. 1, 2005).

²⁸ One submission was withdrawn after the Council approved a factual record. See Letter from Devon Page, Exec. Dir., Ecojustice, to Evan Lloyd, Exec. Dir., Comm'n for Env'tl. Cooperation (Jan. 17, 2011), *available at* www.cec.org/Storage/85/9489_06-5-NOT_en.pdf [hereinafter *Withdrawal Letter*].

²⁹ Comm'n for Env'tl. Cooperation, *Submission to the Commission for Environmental Cooperation*, CEC Doc. A14/SEM/04-005/01/SUB (Sept. 16, 2004). In July 2013, after this Article was written but before it went to press, the CEC received two submissions alleging that the United States has failed to enforce the Clean Air Act against refineries in Louisiana. See *Registry of Submissions, COMMISSION FOR ENVTL. COOPERATION*, *supra* note 26. The only other submission received through September 2013 was one alleging that Mexico failed to follow its environmental laws regarding the development of tourist resorts in the Gulf of California. See *id.*

³⁰ See *Coal-Fired Power Plants, Registry of Submissions, COMMISSION FOR ENVTL. COOPERATION*, www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=250&BL_ExpandID=&BL_ExpandID= (last updated Sept. 15, 2008); *Ex Hacienda El Hospital II, Registry of Submissions, COMMISSION FOR ENVTL. COOPERATION*, www.cec.org/Page.asp?PageID=2001&ContentID=2399&SiteNodeID=250&BL_ExpandID= (last

How successful has the CEC submissions procedure been? Last year, Professor David Markell and I analyzed the procedure according to four factors: (a) its attractiveness to potential submitters; (b) its “procedural justness,” which includes considerations of accessibility, neutrality, trustworthiness, and timeliness; (c) the impact the procedure has had on the effective enforcement of environmental laws; and (d) whether it “has contributed to deeper or more extensive and helpful civil engagement.”³¹

We found that in some respects the procedure has a strong record.³² For example, the procedure has consistently attracted submissions, albeit mainly against Canada and Mexico. In comparison to other dispute-resolution procedures established by NAFTA and its side agreements, most of which have seen very little activity, the CEC submissions procedure appears quite robust.³³

With respect to the other factors, too, the SEM process has concrete achievements. Outside observers have consistently found the Secretariat’s decisions on the admissibility of submissions, as well as the factual records, to be objective and reasonable; studies have indicated that many of the factual records have resulted in policy changes designed to improve environmental protection; and, although hard to measure, “it seems likely that the procedure has contributed to greater public participation in international and domestic institutions.”³⁴

However, we also identified real weaknesses in the procedure.³⁵ Three in particular stand out. First, the procedure has become very slow. In 2001, at the recommendation of the JPAC,³⁶ the Council said that the entire procedure, from filing a submission to publishing a factual record, should ordinarily take no more than two years.³⁷ The earliest factual

updated Aug. 29, 2012); *Environmental Pollution in Hermosillo II, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=250&BL_ExpandID= (last updated Aug. 30, 2013). In August 2013, the Secretariat submitted to the Council a draft factual record in *Hermosillo II. Id.*

³¹ Knox & Markell, *supra* note 4, at 514-17.

³² *Id.* at 527-29.

³³ See John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT’L L. 429 (2006).

³⁴ Knox & Markell, *supra* note 4, at 524, 527, 529.

³⁵ *Id.* at 520-25.

³⁶ JOINT PUB. ADVISORY COMM., LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (2001), available at www.cec.org/Storage/40/3253_rep11-e-final_EN.PDF [hereinafter LESSONS LEARNED].

³⁷ Comm’n for Env’tl. Cooperation, *Response to Joint Public Advisory Committee (JPAC) Report on Lessons Learned Regarding the Articles 14 and 15 Process*, Council Res. 01-06, CEC

records, published before 2003, came reasonably close to that standard, averaging less than three years each.³⁸ From 2003 to 2008, however, the factual records were published an average of five years after the submissions were filed.³⁹ And the procedure has become much slower in recent years. When we conducted our study in early 2012, the three factual records in preparation were based on submissions filed more than *seven years* earlier, and one of the three had been filed *nine years* previously.⁴⁰

The Council is responsible for much of the recent delay. Through 2004, the Council took an average of about five months to decide whether to approve a Secretariat recommendation for a factual record. In stark contrast, its decisions since 2008 have taken, on average, close to three years, and as of 2012 two pending Secretariat recommendations had been awaiting Council decision for four and five years, respectively.⁴¹ The blame cannot be placed on an increase in the number of recommendations. From 1996 to 2004, the Council decided on sixteen recommendations, and from 2005 to early 2012, it reviewed only five.⁴²

The Secretariat shares responsibility for the increased delay. The 2001 JPAC recommendation, endorsed by the Council, was that the Secretariat take no longer than thirteen months (after Council authorization) to prepare a draft factual record.⁴³ The first nine factual records, all issued before 2004, came close to that mark, averaging less than sixteen months. The next six, issued from 2004 to 2008, averaged more than two years each.⁴⁴

Doc. C/01-00/RES/06/Rev.4 (June 29, 2001).

³⁸ Knox & Markell, *supra* note 4, at 522.

³⁹ *Id.*

⁴⁰ See *Quebec Automobiles, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2392&SiteNodeID=250&BL_ExpandID= (last updated Dec. 6, 2012); *Coal-Fired Power Plants, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=250&BL_ExpandID=&BL_ExpandID= (last updated Sept. 15, 2008); *Lake Chapala II, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2382&SiteNodeID=250&BL_ExpandID= (last updated Jan. 23, 2013).

⁴¹ Knox & Markell, *supra* note 4, at 522-23; see Comm'n for Env'tl. Cooperation, *Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM-06-003 (May 12, 2008); Comm'n for Env'tl. Cooperation, *Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM/05-003/39/ADV (Apr. 4, 2007).

⁴² See *Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, *supra* note 26.

⁴³ LESSONS LEARNED, *supra* note 36, at 15.

⁴⁴ Knox & Markell, *supra* note 4, at 523.

By 2012, the process had slowed even further. The Secretariat had three factual records in preparation in early 2012, all of which had been approved more than three years earlier, and one of which had been approved more than *five years* previously.⁴⁵ In addition, the Secretariat was taking longer to review submissions. For most of its history, it had taken, on average, less than five months to decide whether a submission justified requesting a response from a party, but the submissions filed in 2010 and 2011 had taken an average of almost one year to reach that point in the process.⁴⁶

In addition to finding major problems with timeliness, we observed that the Council has often interfered with the Secretariat's independent assessment of submissions. The submissions procedure is inherently biased toward the governments because the NAAEC gives them the right to decide whether to authorize factual records and whether to publish those records,⁴⁷ and the governments have acted in ways that increase those biases. As noted, they have often put off making decisions on Secretariat requests for factual records, so that the reports are not finished until years after the submissions were filed. When the Council has approved preparation of a factual record, it has often narrowed the scope of the Secretariat recommendation, so much so that the JPAC and other observers have complained that the utility of the report has been undermined.⁴⁸ In December 2010, for example, the Council authorized a

⁴⁵ See Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Mexico is Failing to Effectively Enforce Articles 1, 2, 5, 18, 78, 80, 83, 88, 89, 133, 157, 161, 162, 163, 164, 165, 167, 168, 169, and 170 of the General Law on Ecological Balance and Environmental Protection and 3 of its Environmental Impact Regulations; 1, 2, 3, 4, 7, and 9 of the National Water Law and 2 of its Regulations; as well as Article 44 of the Internal Regulations of the Secretariat of Environment and Natural Resources (SEM 03-003)*, Council Res. 08-01, CEC Doc. C/C.01/08/RES/01/Final (May 30, 2008); Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Submission on Enforcement Matters SEM -04-005 Asserting that the United States of America is Failing to Effectively Enforce Provisions of the Clean Air Act and Clean Water Act with Regard to Mercury from Coal-Fired Power Plants*, Council Res. 08-03, CEC Doc. C/C.01/08/RES/03/Final (June 23, 2008); Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Canada, and More Specifically the Province of Québec, is Failing to Effectively Enforce Sections 96.1 and 96.2 of Québec's Regulation Respecting the Quality of the Atmosphere (RQA) and Sections 10.1, 20 and 51 of the Québec Environment Quality Act (SEM-04-007)*, Council Res. 06-07, CEC Doc. C/C.01/06/RES/07 (June 14, 2006).

⁴⁶ Knox & Markell, *supra* note 4, at 523.

⁴⁷ NAAEC, *supra* note 1, art. 15.

⁴⁸ See Comm'n for Env'tl. Cooperation, *Limiting the Scope of Factual Records and Review of the Operation of CEC Council Resolution 00-09 Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Advice to Council 03-05, CEC Doc. J/03-05/ADV/Final (Dec. 17, 2003) [hereinafter Advice to Council 03-05]; David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, in GREENING NAFTA, *supra* note 8, at 274; Chris Wold et

factual record on a submission alleging failures to enforce Canadian law on the protection of endangered species, but the Council restricted the scope of the investigation so drastically that the submitter chose to withdraw the submission, alleging that the Council's limits would "frustrate objective evaluation of Canada's failure to enforce" its law.⁴⁹

The third problem is the lack of follow-up of factual records. A systematic method of examining the effects of factual records would help everyone involved, from submitters to Parties, to understand the practical effects of the submissions procedure. It would also provide information that could be used to strengthen the procedure, as well as to improve the situations that led to the submissions. Despite repeated suggestions that the CEC institute regular follow-up, however, the Council has never adopted it. And when the JPAC announced in 2008 that it would follow-up factual records itself, the Council discouraged the JPAC from doing so.⁵⁰

In our 2012 article, Professor Markell and I made a series of recommendations aimed at improving the timeliness of the procedure, reducing Council interference, and enhancing follow-up. With respect to timeliness, we urged the Council to immediately authorize factual records in two pending cases, *Ex Hacienda II* and *Hermosillo II*, both of which had been awaiting the Council's decision for more than four years, and we proposed specific deadlines that the Secretariat and Council should meet for each point in the submissions procedure.⁵¹ If our proposals were adopted, the process would normally take no more than thirty months from the filing of a submission to the publication of the factual record. We suggested that the Council remove its temptation to narrow Secretariat recommendations by authorizing all such recommendations in advance.⁵² And, finally, we argued that the JPAC should institute a procedure to follow-up factual records.⁵³

We warned that if the problems are not addressed, they will continue to erode the strengths of the submissions procedure. Indeed,

al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004).

⁴⁹ Withdrawal Letter, *supra* note 28.

⁵⁰ See Comm'n for Env'tl. Cooperation, *Re: Submissions on Enforcement Matters: From Lessons Learned to Following Up Factual Records*, Advice to Council 08-01, CEC Doc. J/08-01/ADV/Final (Feb. 27, 2008) [hereinafter Advice to Council 08-01]; Letter from David McGovern, Alternate Rep. for Can., Council of the Comm'n for Env'tl. Cooperation, to Jane Gardner, Chair for 2008, Joint Pub. Advisory Comm. (Aug. 14, 2008), available at www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01_en.pdf.

⁵¹ Knox & Markell, *supra* note 4, at 530-35.

⁵² *Id.* at 532.

⁵³ *Id.* at 537.

they may threaten its very existence. As the procedure increasingly comes to be seen as unfair, untimely, and ineffective, it will become less attractive to submitters. It is probably not a coincidence that no submissions against the United States alone have been filed since the *Coal-Fired Power Plants* submission in 2004, whose factual record is still pending more than eight years later. Environmental groups waiting to see if that report would be meaningful enough to justify further submissions have been waiting a very long time. There are also signs that potential submitters interested in Canada and Mexico may be losing interest in the SEM procedure. In 2010-2011, the CEC received a total of seven submissions, the fewest in any two consecutive years since 1995-1996, the first two years of the procedure. In 2011-2012, the total dropped even further, to five, the lowest in the history of the CEC.⁵⁴

The problems with the submissions procedure have attracted attention from many sources, including scholars, submitters, former Secretariat officials, and advisory bodies.⁵⁵ Perhaps most notably, the CEC's own JPAC has urged the Council to ensure that the procedure meets set deadlines,⁵⁶ to refrain from limiting the scope of Secretariat recommendations,⁵⁷ and to follow-up factual records.⁵⁸

In November 2011, the JPAC held a public meeting in El Paso, Texas, at which those who had filed submissions with the CEC expressed their concerns with lengthy delays, Council interference, and lack of follow-up.⁵⁹ In connection with the meeting, the JPAC also conducted a survey of all those who had ever filed a submission with the CEC, which further documented their views of the procedure. The results were strikingly negative. In the words of the JPAC:

Citizens who have taken part in SEM submissions overwhelmingly voiced concern that the SEM process is not being administered consistent with the spirit and intent of the NAAEC. The prevailing

⁵⁴ See *Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, *supra* note 26.

⁵⁵ See, e.g., Randy L. Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165 (2004); Geoff Garver, *Tooth Decay*, 24 ENVTL. F. 34 (2008); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425 (2010); Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submissions Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443 (2005).

⁵⁶ LESSONS LEARNED, *supra* note 36.

⁵⁷ Advice to Council 03-05, *supra* note 48.

⁵⁸ Advice to Council 08-01, *supra* note 50.

⁵⁹ Joint Pub. Advisory Comm., *Joint Public Advisory Committee (JPAC) Regular Session 11-03: Perspectives on the Citizen Submissions on Enforcement Matters Process and Addressing the Cross Border Movements of Chemicals in North America*, COMMISSION FOR ENVTL. COOPERATION, www.ccc.org/Page.asp?PageID=924&SiteNodeID=1029 (last visited Nov. 20, 2013).

public perception is that the credibility of this valued opportunity to contribute positively to the North American environment has been seriously eroded, primarily because of untimely action and resistance to full transparency and independent review by the Council and the Parties. . . . Feedback from the El Paso forum strongly suggests that citizens and environmental groups who have tried to put the process to good use are finding it increasingly difficult to justify using the process because the considerable effort required to prepare submissions does not reliably lead to timely and useful information.⁶⁰

The JPAC agreed, stating that it “supports the public’s perspective that the SEM process is, for the most part, unduly time-consuming and that the Parties are insufficiently responsive to the information it produces.”⁶¹

III. REVISING THE GUIDELINES

During the same period that public discontent with the submissions procedure was being expressed to the JPAC, the Council created a working group composed of government officials, called the SEM Modernization Task Force, to develop revisions to the Guidelines for Submissions on Enforcement Matters (Guidelines).⁶² The Guidelines were adopted in 1999 in order to provide to potential submitters a simple, easily understandable description of the submissions procedure. For the most part, the Guidelines were successful at meeting that aim: in the JPAC poll of submitters, nearly all of the respondents used the Guidelines, and all of those who used them described them as helpful.⁶³ Major modifications of the Guidelines were therefore not necessary to improve public understanding of the procedure.

Amendments could serve other purposes, however. By revising the Guidelines, the Parties could make changes to the submissions procedure without amending the NAAEC itself, which might require domestic legislative approval.⁶⁴ Revisions could address the concerns raised by the

⁶⁰ Comm’n for Env’tl. Cooperation, *Re: Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America*, Advice to Council 11-04, CEC Doc. J/11-04/ADV/Final (Dec. 7, 2011), available at www.cec.org/Page.asp?PageID=122&ContentID=25148&SiteNodeID=656 [hereinafter Advice to Council 11-04].

⁶¹ *Id.*

⁶² *Id.*

⁶³ COMM’N FOR ENVTL. COOPERATION, SUMMARY OF RESPONSES TO THE JPAC QUESTIONNAIRE ON SUBMITTERS’ EXPERIENCES WITH THE CITIZEN SUBMISSION PROCESS UNDER NAAEC ARTICLES 14 AND 15, available at www.cec.org/Storage.asp?StorageID=10150.

⁶⁴ See NAAEC, *supra* note 1, art. 48.

JPAC, but they could also impair the procedure further by, for example, placing additional restrictions on the independence of the Secretariat. While the governmental task force was still at work, the JPAC urged it to focus “on the timeliness and accessibility of the process, on giving more deference to the Secretariat’s independent recommendations and interpretations in the process, and on follow-up to factual records.”⁶⁵

The task force published its proposed changes to the Guidelines in the spring of 2012.⁶⁶ After requesting public comments on the Guidelines, the JPAC provided advice to the Council in May of that year,⁶⁷ as did two advisory bodies to the U.S. government.⁶⁸ After making further changes, the Council adopted the new Guidelines in July 2012.⁶⁹

The following sections examine the changes proposed by the task force, the comments by the JPAC and others, and the final Guidelines adopted by the Council, in light of each of the major areas of criticism: (a) timeliness, (b) Council interference with the procedure, and (c) follow-up of factual records.

A. TIMELINESS

The draft revisions to the Guidelines proposed deadlines for the stages in the submissions procedure.⁷⁰ These additions were generally welcomed enthusiastically by the JPAC and other commenters,⁷¹ and the Council adopted them with only minor changes.⁷² If the deadlines are met in the future, they will largely solve one of the major problems with the procedure.

The following chart compares the new deadlines with three referents: (a) the timeline recommended by the JPAC in 2001, (b) the average times actually taken by the CEC, and (c) the recommendations that Professor Markell and I made in our 2012 article.⁷³ As revised, the new Guidelines are generally in accord with the JPAC’s 2001 recommendations and our recent suggestions. They impose a timeline of about thirty months between the filing of a submission and the

⁶⁵ Advice to Council 11-04, *supra* note 60.

⁶⁶ Task Force Proposed Changes, *supra* note 5.

⁶⁷ Advice to Council 12-01, *supra* note 6.

⁶⁸ Joint Advisory Letter, *supra* note 6.

⁶⁹ SEM GUIDELINES, *supra* note 7.

⁷⁰ Task Force Proposed Changes, *supra* note 5, § 19.

⁷¹ Advice to Council 12-01, *supra* note 6, at 2.

⁷² SEM GUIDELINES, *supra* note 7, § 19.

⁷³ Knox & Markell, *supra* note 4.

publication of a factual record. That is only slightly longer than the JPAC's 2001 recommendation of twenty-four months, and about the same as our proposed schedule.⁷⁴

The chart identifies the time allotted for the following six points in the SEM process: (1) *Admissibility*—the determination by the Secretariat as to whether a submission meets the admissibility requirements in Article 14(1) and merits requesting a response from the Party under Article 14(2); (2) *Party Response*—the response by the Party concerned to the submission; (3) *Request for Factual Record ("FR")*—the determination by the Secretariat that a factual record is warranted under Article 15(1); (4) *Council Decision*—the decision by the Council as to whether to approve the Secretariat request; (5) *Draft FR*—the preparation of the draft factual record by the Secretariat; and (6) *Publication*—the decision by the Council as to whether to make the final factual record publicly available, which follows the submission of any comments by the Parties on the draft factual record and the Secretariat's preparation of a final factual record.⁷⁵

The times are provided in months for convenience of comparison, but the Guidelines actually refer to "working days." The chart includes in parentheses the number of working days set by the Guidelines for each deadline, and converts the number of working days to months on the assumption that, on average, there are twenty-one working days per month.

CEC Submissions Procedure Timelines				
[in months]				
	JPAC	Historical Average	Knox/Markell	Guidelines
Admissibility	2	5	2	3 (60)
Party Response	2	2-3	2	1.5-3 (30-60)
Request for FR	1-2	11	8	6 (120)
Council Decision	3	5 (1996-2004) Over 24 (2004-present)	3	3 (60)
Draft FR	13	16 (1996-2004) Over 36 (2004-	12	9 (180)

⁷⁴ *Id.* at 530-35. Our proposal would allow extensions for some of the deadlines if necessary, up to a maximum of forty-one months.

⁷⁵ NAAEC, *supra* note 1, art. 15(5)-(7).

		present)		
Publication	2	2 (1996-2004) 5 (2004-present)	2	7 (150)
Total	23-24	54	29	28.5-30 (600-630)

As the chart illustrates, if the new CEC deadlines are followed, the procedure will take about half the time of the historical average, and will reduce even further the time the process has taken in more recent years. Some of the new deadlines are especially valuable. For example, under the revised Guidelines, the Council should make its decision on whether to approve a Secretariat recommendation within sixty working days, or about three months.⁷⁶ This would shorten the process by nearly *two years* over the length of time the Council has taken since 2004 to make such decisions.

For these reasons, the reaction of the JPAC, the U.S. advisory committees, and other commenters on this aspect of the revisions was generally very favorable.⁷⁷ However, there are a few points of potential criticism. First, the revised Guidelines seem to have tacitly amended three deadlines set by the NAAEC itself. The agreement provides that the Parties must make any response to a submission within thirty days (or, exceptionally, within sixty days) of receiving the request, that the Parties may make comments on a draft factual record within forty-five days of its submission by the Secretariat to the Council, and that after the Secretariat incorporates such comments, as appropriate, the Council may, by a two-thirds vote, publish the final factual record “normally within sixty days following its submission.”⁷⁸ By not using the term “working days,” the drafters of the NAAEC evidently intended to refer to the normal meaning of the term “days,” that is, calendar days. The revised Guidelines keep the references to thirty, forty-five, and sixty days, respectively, but by treating them as *working* days, the effect is to

⁷⁶ SEM GUIDELINES, *supra* note 7, § 19.4.

⁷⁷ *E.g.*, Advice to Council 12-01, *supra* note 6, at 2 (“JPAC commends the proposals in Section 19 of the Guidelines, which establish clear timeframes for each step of the process.”); Joint Advice Letter, *supra* note 6, at 4 (“The NAC and GAC generally endorse the Task Force’s proposals to speed up the SEM process and believe that, if implemented, these proposals will improve the responsiveness of the process to citizen concerns and thereby strengthen the process.”); Letter from Ecojustice to Joint Pub. Advisory Comm. (May 17, 2012), available at www.cec.org/Storage.asp?StorageID=10656 [hereinafter Ecojustice Letter] (“The suggested timeframes for action by Secretariat, Parties and Council are a step in the right direction.”).

⁷⁸ NAAEC, *supra* note 1, arts. 14(3), 15(5), (7).

lengthen the set periods without going through the formal method of amending the NAAEC.

Apart from the legal infirmity of this approach, the result is to provide far more time than should be necessary for the draft factual record to be finalized and published.⁷⁹ The revised Guidelines allow about seven months (150 working days) for this stage of the process, most of which is provided for the Parties to submit comments and for the Council to decide whether to publish the factual record. In practice, the Council has never decided, and never should decide, not to publish a factual record. The Council would have done better simply to announce that the final factual record will be published whenever the Secretariat is finished with it.

In contrast, another of the deadlines seems too short: nine months is probably not enough time to prepare a draft factual record. The only draft factual record produced so quickly was the first one, prepared in 1996-1997, when the Secretariat still had a very small number of submissions to review.⁸⁰ The average preparation time from 1996 to 2003, when the Secretariat was perhaps at its most efficient, was sixteen months.⁸¹ A former Secretariat official who worked on factual records in this period commented to the JPAC in 2012 that it would be more reasonable to allow fifteen months, including twelve for preparation and three for translation.⁸² This amount of time would still be far shorter than that taken in recent years, in which the Secretariat has taken three years or more to complete a draft.⁸³

Finally, and most importantly, the revised Guidelines will improve

⁷⁹ *But see* Advice to Council 12-01, *supra* note 6, at 6 (“JPAC does not have a significant concern about using working days for several of the timeframes set forth in Articles 14 and 15.”).

⁸⁰ *Cozumel, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2346&SiteNodeID=250&BL_ExpandID=156 (last updated Oct. 25, 1997).

⁸¹ Knox & Markell, *supra* note 4, at 523.

⁸² Comments from Katia Opalka on the North American Agreement on Environmental Cooperation Modernizing Submissions Enforcement Matters Process (Article 14 & 15) (Apr. 23, 2012), *available at* www.cec.org/Storage.asp?StorageID=10625. One of the revisions to the Guidelines now requires the Secretariat to provide factual records to the Council in all three official languages. SEM GUIDELINES, *supra* note 7, § 11.4.

⁸³ *See Lake Chapala II, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2382&SiteNodeID=250&BL_ExpandID= (last updated Jan. 23, 2013) (Council approved May 30, 2008; Secretariat submitted draft May 28, 2012); *Montreal Technoparc, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2384&SiteNodeID=250&BL_ExpandID= (last updated June 24, 2008) (Council approved Aug. 20, 2004; Secretariat submitted draft Dec. 3, 2007); *Quebec Automobiles, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2392&SiteNodeID=250&BL_ExpandID= (last updated Dec. 6, 2012) (Council approved June 14, 2006; Secretariat submitted draft Mar. 22, 2011).

the timeliness of the procedure only if actually implemented. The problems of untimeliness in recent years have been due not to the absence of deadlines in the Guidelines, but rather to inaction by the Council and the Secretariat. As the U.S. advisory committees stated, “[a]mbitious timeframes may motivate improved timeliness, but significant gaps between the timetables and actual performance are likely to undermine confidence in the process rather than enhance it.”⁸⁴ For that reason, they urged that the Council decide on two Secretariat requests for factual records that had been pending before the Council for more than four years,⁸⁵ and that the Secretariat complete three factual records based on submissions filed more than seven years earlier.⁸⁶

B. COUNCIL INTERFERENCE WITH SECRETARIAT INDEPENDENCE

Unfortunately, most of the changes to the Guidelines proposed by the task force were not as helpful as those concerning timeliness. The JPAC and the U.S. advisory committees criticized several proposals as reducing the ability of the Secretariat to use its judgment in making the decisions allocated to it under the NAAEC, further tilting the balance toward the governments acting on the Council.⁸⁷ In the words of the U.S. advisory committees, “[t]he guidelines should not create the perception that the Council is giving more power to the Council and/or the Parties than is clearly provided in the text of the NAAEC; or that the Council is limiting the discretion of the Secretariat beyond the limits contained in the NAAEC; or that the Council is limiting the value of the process to submitters compared to the text of the Agreement.”⁸⁸

Although the final version of the Guidelines adopted by the Council does not incorporate some of the most problematic proposals of the task force, the revised Guidelines still include provisions that appear to give the Parties greater control of the procedure. The following paragraphs describe the revisions in relation to four issues: (1) restricting admissibility of submissions, (2) allowing Parties to terminate the process prematurely, (3) limiting the scope of factual records, and (4) transparency.

⁸⁴ Joint Advice Letter, *supra* note 6, at 4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Advice to Council 12-01, *supra* note 6, at 3-5; Joint Advice Letter, *supra* note 6, at 5-7; Ecojustice Letter, *supra* note 77, at 2-3.

⁸⁸ Joint Advice Letter, *supra* note 6, at 4.

1. *Restricting Admissibility of Submissions*

As noted above, one of the criteria the NAAEC instructs the Secretariat to consider in deciding whether to request a response from a government to a submission is whether “private remedies available under the Party’s law have been pursued.”⁸⁹ The task force proposed several changes to the Guidelines that would recast this requirement as whether private remedies have been pursued *by the submitter*.⁹⁰ International complaint mechanisms do sometimes require that the submitter exhaust domestic remedies before seeking international remedies.⁹¹ The NAAEC relaxes this criterion, however, by changing the requirement of *exhaustion* to one of *pursuit* of domestic remedies, and by not requiring that the pursuit be by the submitter. The result is to allow the Secretariat to take into account whether remedies have been pursued by *anyone*. The task force’s proposal would have tightened the requirement beyond the text of the agreement, with the possible effect of reducing the number of eligible submitters. For these reasons, the JPAC and other commenters urged the Council simply to delete the added references to the submitter.⁹²

In the final version of the Guidelines, the Council dropped one reference to remedies being pursued “by the Submitter,”⁹³ but it retained two other references with only slight modifications.⁹⁴ The result is confusing. The Guidelines now state that in deciding whether private remedies have been pursued “by the Submitter *and others*”—language that appears consistent with the NAAEC—the Secretariat “will be guided by whether . . . reasonable actions have been taken *by the Submitter* to pursue private remedies.”⁹⁵ It is unclear how the Secretariat will interpret this language, although it would be on solid ground in adhering to the language of the NAAEC itself, particularly in light of the statement in the Guidelines that they “do not modify the Agreement and, therefore, at

⁸⁹ NAAEC, *supra* note 1, art. 14(2)(c).

⁹⁰ Task Force Proposed Changes, *supra* note 5, §§ 5.6, 7.3, 7.5.

⁹¹ *E.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, art. 2, Dec. 19, 1966, 999 U.N.T.S. 302.

⁹² Joint Advice Letter, *supra* note 6, at 5-6; *see also* Advice to Council 12-01, *supra* note 6, at 3; Ecojustice Letter, *supra* note 77, at 2-3; Comments of Mariana Westendarp Palacios to the Proposed Changes to CEC’s Guidelines for Submissions on Enforcement Matters (May 17, 2012), *available* at www.cec.org/Storage.asp?StorageID=10658 [hereinafter Palacios Comments]; Letter from Gustavo Alanis Ortega, Centro Mexicano de Derecho Ambiental, to Joint Pub. Advisory Comm. (May 11, 2012), at 4.

⁹³ SEM GUIDELINES, *supra* note 7, § 7.3.

⁹⁴ *Id.* §§ 5.6, 7.5.

⁹⁵ *Id.* § 7.5 (emphasis added).

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all times, should be interpreted in a manner consistent with the Agreement.”⁹⁶

2. *Allowing Parties to Terminate the Process Prematurely*

The governmental task force proposed two changes to the Guidelines that would allow a Party to end consideration of a submission before the Secretariat decides whether to propose a factual record. Both proposals would expand the scope of existing defenses, or bars, to Secretariat review of submissions, by giving the Parties more power to invoke the defenses without having their arguments second-guessed by the Secretariat. The JPAC, the U.S. advisory committees, and others strongly opposed the proposals.⁹⁷ The Council adopted them both, but only after amending their language.

The first of the two bars to Secretariat consideration of a submission is that the NAAEC provides that if the matter raised by a submission is the subject of a pending legal proceeding, “the Secretariat shall proceed no further.”⁹⁸ The NAAEC limits this defense, however, by requiring the Party concerned to notify the Secretariat of the existence of such a legal proceeding in its response to the submission.⁹⁹ The task force proposed changes to the Guidelines that would purport to allow the Party to raise this affirmative defense not only in its response, but “at any point in the submission process,” which might even be interpreted to include the period after the Council has authorized a factual record.¹⁰⁰ In response to criticisms of this proposal, the Council adopted a weaker version of it, which states that if a Party informs the Secretariat of a pending proceeding at any time other than in its response to the submission (as long as the notification comes before the Council authorizes preparation of a factual record), the Secretariat should “consider” terminating the process.¹⁰¹

The second defense is broader. Article 45(1) of the NAAEC states that a Party has not failed to effectively enforce its environmental law

⁹⁶ *Id.* § 18.1.

⁹⁷ Advice to Council 12-01, *supra* note 6, at 3-4; Joint Advice Letter, *supra* note 6, at 6; Ecojustice Letter, *supra* note 77, at 3; Letter from Irene Henriques, Professor of Sustainability & Econ., York Univ., to Whom It May Concern, available at www.cec.org/Storage.asp?StorageID=10631 [hereinafter Henriques Letter]; Palacios Comments, *supra* note 92, at 6.

⁹⁸ NAAEC, *supra* note 1, art. 14(3)(a).

⁹⁹ *Id.*

¹⁰⁰ Task Force Proposed Changes, *supra* note 5, § 9.5.

¹⁰¹ SEM GUIDELINES, *supra* note 7, § 9.6. If the notification is made after the Council authorizes a factual record, “the Secretariat is to proceed . . . unless Council directs otherwise.” *Id.*

when the action or inaction in question reflects a reasonable exercise of discretion or results from *bona fide* decisions to allocate resources to higher environmental enforcement priorities.¹⁰² Nothing in the NAAEC suggests, however, that the Secretariat must accept the Party's assertion as necessarily correct. In practice, the Secretariat is free to consider whether a particular failure to effectively enforce falls within the scope of these exceptions.

The task force proposed adding a section to the Guidelines that would cloud the Secretariat's discretion in this respect, by stating that "[w]hen the Party . . . informs the Secretariat in its response that its actions do not constitute a failure to effectively enforce its environmental laws, as provided for under Article 45(1), the Secretariat is to limit its consideration to whether the Party has provided sufficient information."¹⁰³ The result of this language would appear to be that a Party could terminate Secretariat review of submissions merely by informing the Secretariat that the Party's failure to effectively enforce is excused by its decision to allocate its resources elsewhere. One environmental group described this proposal as "the most egregious abuse of the spirit and intent of the Citizen Submission Process in service of the illegitimate motivations of the parties."¹⁰⁴

In response to such criticisms, the Council did not reject the proposal, but the Council did change it to preserve the Secretariat's discretion. As adopted, the language now states: "When the Party . . . informs the Secretariat that its actions or inactions do not constitute a failure to 'effectively enforce its environmental law,' the Secretariat is to *consider whether* the Party has included sufficient information."¹⁰⁵ By itself, this language would be much less troubling than the original proposal. But the Council left unchanged the last sentence of the provision, which states that "[i]f the Secretariat considers that the Party response does not provide sufficient information, the Secretariat may determine that the submission warrants the development of a factual record."¹⁰⁶ If the "if" in that sentence is read as "if and only if," then it would have the same effect as the original task force proposal. To give effect to the Council's amendment to the proposal, however, the last sentence should not be read so restrictively.

¹⁰² NAAEC, *supra* note 1, art. 45(1).

¹⁰³ Task Force Proposed Changes, *supra* note 5, § 9.7.

¹⁰⁴ Ecojustice Letter, *supra* note 77, at 3.

¹⁰⁵ SEM GUIDELINES, *supra* note 7, § 9.5 (emphasis added).

¹⁰⁶ Task Force Proposed Changes, *supra* note 5, § 9.7; SEM GUIDELINES, *supra* note 7, § 9.5.

3. *Limiting the Scope of Factual Records*

Other proposals by the task force were directed toward cabining the scope of factual records. One of its suggested revisions would instruct the Secretariat “to limit its consideration [of whether to recommend a factual record] to whether pertinent and necessary questions of fact remain open that could be addressed in a factual record.”¹⁰⁷ More explicitly, another section would state that factual records “are not to include conclusions regarding whether a Party is failing to effectively enforce its environmental law or recommendations relating to future Party or submitter action.”¹⁰⁸

There is no basis in the NAAEC for preventing the Secretariat from making such recommendations, and doing so is contrary to one of the chief purposes of the agreement: to encourage the effective enforcement of domestic environmental laws. The possibility that a Party may be embarrassed by a showing that it has failed to effectively enforce its domestic law is not some undesirable by-product of the procedure; it is how the procedure puts pressure on Parties to enforce their laws. The submissions procedure sheds light on potential failures to effectively enforce in order to induce better enforcement. Preventing the Secretariat from assessing whether such failures have occurred is impossible to reconcile with that purpose.

The task force also proposed codifying the often-criticized Council practice of choosing for itself the scope of a factual record, rather than voting up or down on the Secretariat’s proposal.¹⁰⁹ As noted above, this practice also has no basis in the NAAEC, and it has long been the target of criticisms from the JPAC and scholars.¹¹⁰

The JPAC, the U.S. advisory committees, and other commenters again urged the Council to delete these added provisions,¹¹¹ and here they were more successful. Rather than state that in considering whether to recommend a factual record, “the Secretariat is to limit its consideration to whether pertinent and necessary questions of fact remain open,” as the task force proposed, the Guidelines as adopted by the Council merely state that the Secretariat “is to consider whether central questions of fact related to the assertion(s) in the submission remain

¹⁰⁷ Task Force Proposed Changes, *supra* note 5, § 9.6.

¹⁰⁸ *Id.* § 12.2.

¹⁰⁹ Task Force Proposed Changes, *supra* note 5, § 10.4.

¹¹⁰ See Advice to Council 03-05, *supra* note 48.

¹¹¹ Advice to Council 12-01, *supra* note 6, at 4; Joint Advice Letter, *supra* note 6, at 6; Ecojustice Letter, *supra* note 77, at 3.

open.”¹¹² Moreover, the Council dropped entirely the prohibition on including conclusions regarding whether a Party is failing to effectively enforce its environmental law, as well as the codification of the Council’s disputed authority to restrict the scope of factual records in approving them.¹¹³

4. *Transparency*

Section 15.1 of the Guidelines sets out the information that the Secretariat is required to include in the public registry, that is, the information posted online at the CEC website.¹¹⁴ The task force proposed deleting the information that “the final factual record has been provided to the Council.”¹¹⁵ There was no good reason for this change; without this information, the public would not be able to determine whether the Secretariat has met the new deadline for submitting factual records, or to judge whether delays in final publication of factual records are the fault of the Secretariat or the Council. The JPAC and the U.S. advisory committees opposed this proposal and urged that the registry include notification of the provision by the Secretariat of the *draft* factual record as well as the final factual record.¹¹⁶ Here, too, they were successful: the final Guidelines include both requirements.¹¹⁷

C. FOLLOWING-UP FACTUAL RECORDS

Together with the proposed revisions to the Guidelines, the task force proposal includes a set of “Memos on Proposed Changes to the Guidelines.”¹¹⁸ Most of the memos, which seem to have been proposed by individual governments, suggest particular changes to the Guidelines that have already been discussed. Memorandum 18, however, entitled “Follow-Up on Concluded Submissions,” does not make any specific proposals. Instead, it addresses the criticisms that the CEC should do more to follow-up factual records. Specifically, it states that each Council member “as necessary, would provide one update” on

¹¹² SEM GUIDELINES, *supra* note 7, § 9.7.

¹¹³ *Id.* § 10.4, 12.2.

¹¹⁴ *Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, *supra* note 26.

¹¹⁵ Task Force Proposed Changes, *supra* note 5, § 15.1.

¹¹⁶ Advice to Council 12-01, *supra* note 6, at 5; Joint Advice Letter, *supra* note 6, at 7; *see also* Henriques Letter, *supra* note 97, at 1.

¹¹⁷ SEM GUIDELINES, *supra* note 7, § 15.1(h).

¹¹⁸ Compilation of Memos on Proposed Changes to the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, *in* Task Force Proposed Changes, *supra* note 5, at 11.

enforcement actions on any submission that concluded at or beyond the Party-response stage, at the first Council session two years after such conclusion (or earlier if the Council member so chooses), and to use the joint *in camera* session of the annual Council session to allow each Council member to provide an update to the JPAC.¹¹⁹

The flaws in this type of voluntary governmental self-reporting are obvious. For the same reasons that they are not eager to authorize factual records, governments will seek to avoid critical reviews of their responses to factual records. Indeed, the JPAC had suggested more than a decade earlier that governments report on their follow-up to individual factual records, but the Council had failed to implement the suggestion.¹²⁰ As Professor Markell and I have argued, the appropriate CEC organ to follow-up factual records is the JPAC itself, which could undertake an objective, transparent review of the factual record and make appropriate recommendations to the Council and Secretariat.¹²¹

As the organ of the CEC designed to facilitate public participation, the JPAC has long played an active role in supervising the procedure, including conducting workshops, undertaking reports on the procedure, and providing advice to the Council and Secretariat. And, as noted above, the JPAC had expressed interest in following-up factual records in the past, but the Council had discouraged it from doing so.¹²²

In response to Memorandum 18, some commenters again urged the JPAC to revisit its proposal and take on the important task of following-up factual records. In particular, the U.S. advisory committees stated:

The JPAC follow-up would be far more effective, and have much greater credibility with the public, than the very limited, unilateral party follow-up the Task Force proposed in Memorandum 18. . . . [B]ecause of its status as an objective observer and its track record and capacity to engage the public, regularized JPAC follow-up is likely to advance the goal of building public confidence and increasing transparency and accountability and should be included in the revised guidelines.¹²³

The Council did not acknowledge these suggestions, although the JPAC did state that “in response to the public’s comments, it will consider the role that [it] may play in promoting the development of

¹¹⁹ *Id.* at 33.

¹²⁰ LESSONS LEARNED, *supra* note 36, at 17.

¹²¹ Knox & Markell, *supra* note 4, at 536-37.

¹²² See Advice to Council 08-01, *supra* note 50.

¹²³ Joint Advice Letter, *supra* note 6, at 5.

information regarding follow-up to factual records.”¹²⁴

IV. CONCLUSIONS

The process of revising the Guidelines for the submissions procedure offered an opportunity for the CEC to address each of the three major sets of problems that have bedeviled the procedure in recent years: its long delays, its susceptibility to governmental interference, and its failure to follow-up factual records. In the end, the revised Guidelines are a step forward with respect to timeliness, a small step backward with respect to Secretariat independence, and little to no movement either way on follow-up.

The real effect of the revisions to the Guidelines will become clear only through their implementation. In particular, the revised deadlines will be effective only if the Council and Secretariat honor them. Here, the early results are mixed. In June 2012, the Council finally decided to approve the two long-standing Secretariat recommendations for factual records in *Ex Hacienda II* and *Hermosillo II*.¹²⁵ In the following months, the Secretariat finished, and the Council approved publication of, two of the three factual records it had been preparing for years: *Quebec Automobiles* and *Lake Chapala II*.¹²⁶ And the Secretariat submitted a draft factual record for *Hermosillo II* to the Council in August 2013, a little more than one year after the Council authorized it.¹²⁷

On the other hand, the factual record in the *Coal-Fired Power Plants* case is still in progress five years after the Council authorized it in June 2008.¹²⁸ And the Secretariat has already failed to meet other

¹²⁴ Advice to Council 12-01, *supra* note 6, at 6.

¹²⁵ Comm'n for Env'tl. Cooperation, Res. 12-03, CEC Doc. C/C.01/12/RES/03/Final (June 15, 2012); Comm'n for Env'tl. Cooperation, Council Res. 12-04, CEC Doc. C/C.01/12/RES/04/Final (June 15, 2012).

¹²⁶ COMM'N FOR ENVTL. COOPERATION, FACTUAL RECORD FOR SUBMISSION SEM-03-003 LAKE CHAPALA II (Jan. 23, 2013), *available at* www.cec.org/Storage/150/17567_Lake_Chapala_II_Factual_Record_en.pdf; COMM'N FOR ENVTL. COOPERATION, FACTUAL RECORD FOR SUBMISSION SEM-04-007 (QUEBEC AUTOMOBILES) (Dec. 6, 2012), *available at* www.cec.org/Storage/142/16781_FR_Quebec_Autos_en.pdf.

¹²⁷ See *Environmental Pollution in Hermosillo II, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=250&BL_ExpandID= (last updated Aug. 30, 2013). Although the preparation of the draft factual record took longer than the 180 working days allowed by the Guidelines, that deadline may be unreasonably short. See text accompanying notes 80-83.

¹²⁸ *Coal-Fired Power Plants, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=250&BL_ExpandID= (last updated Sept. 14, 2008).

deadlines. As of July 2012, when the Guidelines were adopted, six submissions were pending at various stages before recommendation of a factual record. Four of the submissions were awaiting an admissibility decision, which under the Guidelines should take no more than sixty working days, or about three months.¹²⁹ Even if the adoption of the Guidelines could be considered to have reset the clock, only one of the submissions received an admissibility decision within three months after July 2012.¹³⁰ Another missed the deadline by two months, a third by more than a year, and the fourth has yet to receive an admissibility decision more than three years after it was filed.¹³¹ The other two submissions pending in July 2012 had already been found admissible and had received responses from the Parties concerned, and were therefore waiting for the Secretariat decision whether to propose a factual record. The Guidelines now give the Secretariat about six months (120 working days) to make this determination.¹³² In one of these two cases, the Secretariat recommended a factual record in August 2013, more than a year after the adoption of the Guidelines (and nearly three years after the response from the Party).¹³³ The other case is still waiting for a Secretariat decision.¹³⁴ This is not a promising beginning.

As this Article explains, a great deal is at stake. Despite its faults, the CEC submissions procedure has offered a unique form of independent review of allegedly ineffective enforcement of

¹²⁹ SEM GUIDELINES, *supra* note 7, § 19.1.

¹³⁰ See *Sumidero Canyon II, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=25135&SiteNodeID=547&BL_ExpandID=502 (last updated Nov. 27, 2012).

¹³¹ See *Protection of Polar Bears, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=25143&SiteNodeID=546&BL_ExpandID=502 (last updated Jan. 24, 2013) (found admissible in December 2012); *BC Salmon Farms, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=25165&SiteNodeID=250&BL_ExpandID= (last updated Feb. 15, 2012) (found admissible in September 2013); *Alberta Tailings Ponds, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2864&SiteNodeID=546&BL_ExpandID=502 (last updated Oct. 1, 2010).

¹³² SEM GUIDELINES, *supra* note 7, § 19.3.

¹³³ *Wetlands in Manzanillo, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2412&SiteNodeID=250&BL_ExpandID= (last updated Aug. 19, 2013).

¹³⁴ See *Iona Wastewater Treatment, Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.cec.org/Page.asp?PageID=2001&ContentID=2876&SiteNodeID=250&BL_ExpandID= (last updated Feb. 14, 2012).

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environmental laws. By continuing to bring complaints to the procedure, individuals and groups have repeatedly demonstrated that they regard it as valuable. It is therefore deeply troubling that the procedure's recent dysfunctions seem to have discouraged potential submitters from using it.

To restore their faith in the submissions procedure, more is necessary than the adoption of Guidelines promising shorter deadlines. The Council and the Secretariat will have to meet the new deadlines in practice, the Council will have to refrain from micro-managing the Secretariat, and the Joint Public Advisory Committee will probably have to take on the difficult but crucial task of following-up factual records. Otherwise, the problems that have plagued the adolescence of the submissions procedure seem likely to persist into its third decade.