



Enforcing Environmental Law in Central America,  
the United States and the Dominican Republic:

## A Citizen's Guide to the CAFTA-DR Environmental Submission Process



University of Florida | University of Costa Rica



Enforcing Environmental Law in Central America,  
the United States and the Dominican Republic:  
**A Citizen's Guide to the CAFTA-DR  
Environmental Submission Process<sup>1</sup>**

---

University of Florida | University of Costa Rica

---

1. This Citizen's Guide was prepared by the Conservation Clinic at the University of Florida | University of Costa Rica Joint Program in Environmental Law in San José, Costa Rica. the principal authors were Licda. Laura Carbonell, UCR Derecho and Micah McCrary, J.D. & MAIB Candidate, UF Law, under the supervision of Clinic Director and Legal Skills Professor Thomas T. Ankensen.

In January of 2009, Costa Rica became the last country to complete the domestic legislation required to bring the CAFTA-DR free trade agreement into full effect among all of the signatories. As a result, all of the member countries have now bound themselves to comply with the obligations that the Agreement creates, including the obligation to enforce their own environmental law. To help ensure that the Parties fulfill this obligation the CAFTA-DR follows the trend that began with the North American Free Trade Agreement (NAFTA) and creates a mechanism that enables non-governmental actors to participate in the effort to ensure that the parties comply with their own domestic environmental law.

This Guide to the CAFTA-DR Environmental Submission Process is intended for use by advocates and their representatives who are considering using this process to help to ensure that the environmental laws of the Parties are being enforced. The Submission Process is not a substitute for domestic enforcement and advocates should make every effort to pursue those avenues before considering using the CAFTA-DR mechanism. However, when it becomes clear that domestic remedies are not being effectively applied, the CAFTA-DR mechanism can be an appropriate and important means to advance the environmental law of the Parties. In order to encourage its use, the Secretariat for Environmental Matters has made every effort to make the Submission Process simple and straightforward, while complying with the terms of the Agreement.

Part I of this Guide briefly reviews Chapter 17, CAFTA-DR's environmental chapter and the institutions it creates, the Environmental Affairs Council and the Secretariat for Environmental Matters, and provides an overview of the Submission Process, including a flow chart that identifies key steps in the process. Part II provides a step by step "quick-step" guide to the Submission Process, from the initial drafting to the publication of the Factual Record. This Guide is based upon the author's review and analysis of Chapter 17 of the Agreement and the internal operating procedures of the Secretariat for Environmental Matters as well as consultations with the Secretariat. Persons interested in pursuing a Submission can contact the Secretariat at any point in the Submission Process to clarify the procedural and substantive requirements for Submissions.

### Overview

The main objective of Chapter 17 is the promotion of environmental protection through the effective implementation of each Party's (hereinafter collectively referred to as "the Parties or individually as a Party") domestic laws. While the Parties recognize that each Party can establish its own levels of domestic environmental protection and environmental and development policies and priorities, each Party must nonetheless diligently provide for environmental protection through law. Furthermore, under the terms of the agreement, the Parties must continue to improve those laws and policies.

There are two important matters that relate to enforcement in this Chapter. First, a Party cannot fail to enforce its environmental laws, either through action or inaction, in a manner that affects trade between the Parties. Second, a Party cannot weaken or reduce the environmental protection laws to encourage trade or investment.

This Chapter also establishes an Article on procedural matters, which ensures that there must be judicial or administrative proceedings available to sanction or remedy violations of a Party's environmental laws. Those proceedings must be fair, equitable, transparent, in accordance with due process of law and open to the public (except when otherwise required by judicial administration). It is the efficacy of these proceedings which will determine whether the CAFTA-DR Citizen Submission Process described in this Guide should be invoked.

Chapter 17 also calls on the Parties to promote voluntary mechanisms to enhance environmental performance, in particular, (i) mechanisms that facilitate voluntary action and (ii) incentives, including market-based incentives. In addition, Chapter 17 also provides a process (Collaborative Environmental Consultations) whereby a Party may request consultations with another Party regarding any matter that could arise under this Chapter. The Parties must establish a roster of panelists with experience on environmental law or international trade to aid in the resolution of disputes.

### The Environmental Affairs Council and the Secretariat for Environmental Matters

Chapter 17 creates the Environmental Affairs Council (EAC or Council) and the Secretariat for Environmental Matters (SEM). The Environmental Affairs Council is a body composed of cabinet-level members or their designees. According to Article 17.5, each of the Parties must maintain an office for the Council representative in the corresponding Ministry that would operate as a contact point for the EAC. The Secretariat for Environmental Matters operates under the sole direction and supervision of the Environmental Affairs Council. In 2006, the CAFTA-DR Parties requested the Secretariat for Central American Economic

Integration (SIECA) to establish a new unit within SIECA to serve as the Secretariat and SIECA agreed to that request. The Secretariat consists of a General Coordinator and a Technical Assistant, both appointed by the Council for a two-year term.<sup>2</sup> The Secretariat is based in Guatemala City.

Among other duties, the Secretariat for Environmental Matters receives and considers Public Submissions claiming that a Party is failing to effectively enforce its environmental laws. When the EAC instructs it, by a vote of any party, the Secretariat is responsible of preparing Factual Records regarding Submissions. Thus, the Submission Process is intended to encourage the public to contribute to policing the effectiveness of domestic environmental laws, the overarching goal of Chapter 17.

### The Submission Process

One of the most important aspects of Chapter 17 is the creation of a **Submission Process** to enable an individual or Non-Governmental Organization to seek the enforcement of environmental laws when the person believes a Party is failing to do so.

Any "**person of a Party**" may invoke the Submission Process by filing a Submission request before the Secretariat. A person is defined to be any individual who is a national within the meaning of domestic law of each Party, or a permanent resident of the Party. The Secretariat will then determine if certain minimal procedural and substantive requirements of the Process have been met. These are described in greater detail in Part II below. If these have not been met, the Secretariat will dismiss the Submission without prejudice to resubmit. If these have been met, the Secretariat will request a Response from the Party against whom the claim of failure to enforce has been made. After considering the Submission and Party's Response, the Secretariat will forward the case to the Council for a determination on whether to direct the Secretariat to prepare a Factual Record. If the Council finds that a Factual Record is necessary, it will direct the Secretariat to conduct its own investigation and draft the Factual Record and submit it to the EAC. The EAC may then provide recommendations to the Environmental Cooperation Commission, and will decide whether to make the Factual Record publicly available or not.



2. CAFTA-DR Environmental Cooperation Program Website ([http://www.caftadr-environment.org/left\\_menu/secretariat.html](http://www.caftadr-environment.org/left_menu/secretariat.html)), revised on July 4, 2010.

## WHAT IS A FACTUAL RECORD?

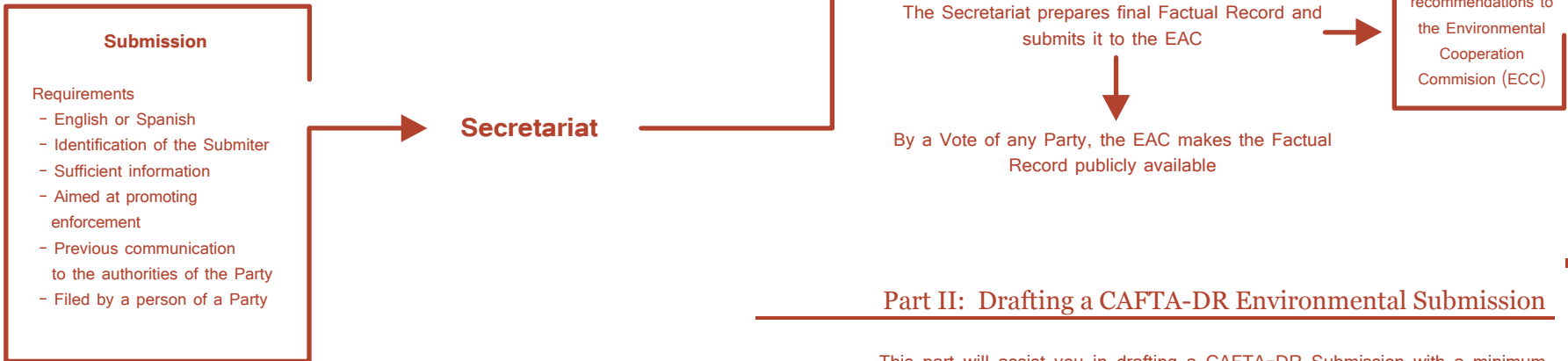
Chapter 17 does not define the term. However it is the same term that is employed by the NAFTA Submission Process. In the context of NAFTA, Professor David Markell has described the Factual Records as providing:

***“information about the nature of the party’s enforcement practices at issue and about the effectiveness of those enforcement practices.”***

David L. Markel, *Understanding Citizen Perspectives On Government Decision Making Processes As a Way to Improve The Administrative State*, 36 *Env'tl Law* 651

Publication of the Factual Record is the end point in the Submission Process. The Factual Record may not explicitly determine that a Party has complied or failed to comply with its environmental law. Moreover a Party has no legally binding obligation to comply with any explicit or implicit conclusions that arise from the Factual Record. There is no appeal from the Factual Record. The Factual Record can be said to “shine a light” on the enforcement practices of the Party and, depending on what it reveals about the Parties enforcement practices, can be used as an advocacy tool in subsequent formal and informal fora.

## Flowchart of the Submission Process







## Drafting a Proper Submission

This portion of the guide provides assistance with the most critical step of the Submission Process, and also the step you have the most control over, drafting a successful Submission. Not every Submission will result in a Factual Record. Even though the Submission Process has been designed to encourage its use, certain minimum procedures must be followed. If they are not, the Submission will be dismissed without prejudice. In addition, Submissions can be successfully resolved through resolution of the case prior to publication of the Factual Record.

Every Submission must meet **six basic criteria**. The Submission must be:

1) be filed by a member of a Party, 2) be in English or Spanish, 3) identify the person or entity making the Submission, 4) provide sufficient evidence on which the Submission may be based, 5) show that the matter has been communicated to the Party and any responses from the Party, and 6) promote enforcement of the law rather than harassing industry.

## The Substantive Requirements

The most important aspect of the Submission Process is the substantive requirement that **a Submission may be filed only to assert that a Party is failing to implement or substantially enforce** its own environmental law. This means that a Submission filed to urge reform in the existing law must be dismissed for failure to satisfy the enforcement requirement. Several Submitters have expended great time and effort to file with SEM on these erroneous grounds. In addition, the Submission must assert that a Party is failing to implement or substantially enforce **environmental law - as it is defined in Chapter 17**. This is important because specific areas of law that might otherwise be considered environmental law are excluded from the CAFTA-DR definition, quoted in full in the text box below.

### CAFTA-DR DEFINITION OF ENVIRONMENTAL LAW (ART. 17.13.1)

**Environmental law** means 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, animal, or plant life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas,

in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

For greater certainty, **environmental law** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

For purposes of the definition of “environmental law,” the primary purpose of a particular statutory or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

The SEM has developed its own internal “Working Procedures” to assist with their decision to accept a Submission and request a Response from a Party. The SEM will consider whether the Submission is frivolous or intended solely for harassment, whether it alleges some sort of general or specific harm, and whether it furthers the goals of CAFTA-DR and the ECA. In addition, you must show that you have attempted to exhaust all available private remedies prior to submitting and that your Submission is not based entirely on media reports.

Other considerations when drafting a Submission are the length and level of detail of the document and whether to request confidentiality. A good Submission does not need to be a lengthy Submission. The SEM is required to initially accept any Submission which meets the minimum requirements and provides enough information for SEM review. The actual investigative part of the process is performed by the SEM during the creation of a Factual Record, if a Factual Record is ordered. Confidentiality must also be addressed in drafting the Submission. Further instructions and limitations regarding confidentiality can be found in the drafting guide below.

Once you have delivered your Submission to the SEM you should receive notification of receipt by the SEM within seven days. Thereafter, you will be periodically notified of the status of your Submission as it progresses through the various stages of the process. Remember, all dates and time frames provided in this guide are approximations only; actual response times will vary depending on the current SEM workload. Furthermore, a day as defined by Chapter 17 is a calendar day, unless the last day happens to fall on a non-business day, in which case the next business day will be the final day.

## Drafting your Submission: A Step by Step Guide

### STEP 1: Drafting the Submission



**Overview:** Every Submission begins with drafting the initial document. This document forms the basis by which the Secretariat for Environmental Matters (SEM) will initially review your claim. It is important that you understand which components of the Submission are compulsory and which are supplementary and adjust your Submission accordingly. The initial Submission will be reviewed by the SEM to ensure compliance with the Article 17.7.2 before determining if a Response is required from the Party. The SEM will notify the Submitter and the Council within seven days of receipt.<sup>3</sup> Failure to comply with the minimal **REQUIREMENTS** listed below will result in dismissal for review, without prejudice to the Submitter or issue.

### 1.1 What is REQUIRED for a Submission?

Article 17.7.2 of the Agreement includes six requirements: The Submission must: 1) be filed by a person of a Party State, 2) be in writing in either English or Spanish, 3) identify the person or entity making the Submission, 4) provide sufficient evidence on which the Submission may be based, 5) show that the matter has been communicated to the Party and include any responses from the Party, and, 6) promote enforcement of the law rather than harassing industry.

### 1.2 Does the Submission Process have a standing requirement?

Other than the limitation to members of a Party, the Agreement contains no standing requirements. Any member of any Party may file a Submission against any Party for failure to implement or substantially enforce that Party's environmental law.<sup>4</sup> A member of a Party is defined as a national or permanent resident of the Party according to the Party's domestic law.

### 1.3 What is meant by sufficient evidence?

The initial evidentiary standard required for Submission review is minimal. A Submission need indicate only enough information to allow the SEM to review the Submission. This includes referencing the statute or regulation that is not being enforced, and providing a concise review of the pertinent facts on which the claim is based and submitting any correspondence with the Party made in attempt to reconcile the issue. Bear in mind that the purpose of the Factual Record is to gather sufficient evidence for the creation of any information and any evidence you provide the SEM could benefit your Submission.

### 1.4 What does communicating with the Party entail?

The SEM requires that some attempt be made to reconcile the issue with the offending Party prior to making a Submission. This could be as simple as letters

or emails sent to the Party communicating your complaint. Be sure to include your initial correspondence as well as any response you received from the Party in your initial Submission.

### 1.5 What does promoting enforcement mean?

The principal misconception among Submitters is that the Submission Process can be used to urge changes in the current law of a Party. This is incorrect. The Submission Process is designed strictly for issues of non-compliance or failure to implement the environmental law of a Party. Any attempt to use the Submission Process in an effort to urge legal change or to harm an industry or competitor will result in dismissal of the Submission.

### 1.6 How long should the Submission be?

A longer Submission is not necessarily a better Submission. The Submission should be no longer than is necessary to comply with the requirements listed above. The SEM reviews Submissions based on the merits of the claim, not the depth of the Submission. Additionally, the SEM may only deny Submissions which without doubt fail to meet the criteria of Article 17.7.2.

### 1.7 What about confidential information?

The Submitter may declare certain information confidential and request that it is not released to the public. To do so, mark the top of each page containing such information as CONFIDENTIAL in red ink, if possible; briefly describe your rationale for keeping such information confidential and supply the SEM with a separate version of your Submission with the confidential information already redacted. The SEM will not release any information marked as confidential so long as it is not otherwise publicly available and release of which would reveal the providers identity and leave the provider subject to serious reprisal or if release would make public confidential or proprietary information. For additional information on publication and confidentiality, see Appendix II, *infra*.

### 1.8 How long does it take before being notified of receipt of a Submission?

Where practicable, the SEM will make every effort to notify both the Submitter and the Council within seven days of receipt of a new Submission.

### 1.9 What does dismissed without prejudice mean?

If the SEM elects to dismiss a Submission without prejudice, the Submitter may thereafter create a new Submission on the same issue, should they choose to do so.

## STEP 2: Determination to request a Response from the Party

**Overview:** After reviewing the Submission to ensure compliance with the minimum criteria of Article 17.7.2 the SEM then determines if a Response from the Party is warranted. This review is based on four factors listed in Article 17.7.4, and

3. All time periods included in this Guide are for reference only and are dependent upon the SEM workload.

4. This varies for persons from the United States when filing a Submission alleging a failure to enforce United States environmental law. In these circumstances, persons from the United States should file their Submissions with the CEC under NAFTA's Environmental Chapter. All other Party members must file Submissions, including Submissions directed to the United States, through the SEM. And, persons from the United States must use the CAFTA-DR Submission Process for Submissions alleging the failure to enforce environmental law by any Party other than the United States.



described below; however, it is important to note that these factors are **not required** and serve only “to guide” the SEM. If the SEM determines that no Response is warranted, the Submitter and Council will be notified within seven days of any deficiencies and the Submitter will be given sixty days to revise the Submission. If the Submission is not appropriately revised, it will be dismissed without prejudice to the Submitter or issue. Otherwise, a Response from the Party will be requested. Upon request, the Party has forty-five days, or sixty days with notification to the SEM, to provide a Response.

## 2.1 What factors does the SEM consider when determining if a Response is warranted?

Article 17.7.4 outlines four general guidelines to aid the SEM in its decision:

1) the Submission must not be frivolous and must allege harm to the Submitter, 2) private remedies must have been exhausted prior to Submission, 3) the Submission should not be based exclusively on media reports and, 4) the Submission should raise matters which further the goals of the CAFTA-DR.

## 2.2 Are these factors required for Submission?

No. These factors serve as guidelines only. The SEM will use this information to help determine whether a Response from a Party is needed. However, a well-drafted Submission would address all four factors to the greatest extent possible.

## 2.3 What is harm to the Submitter?

Harm in this context must substantially arise from failure to enforce or implement a Party's environmental law and relates to environmental protection of human, animal or plant health, exclusive of worker health and safety. Harm in the general sense may be acceptable. However, the more concrete the harm the greater the likelihood that a Submission will be favorably received.

## 2.4 How can a Submitter demonstrate that private remedies have been exhausted?

A remedy is considered exhausted if the Submitter has pursued all legal options reasonably available. The SEM will consider which remedies have been pursued and what their status is. Additionally, the SEM recognizes that there may be practical barriers to remedies otherwise available to the Submitter. If the “precise matter” of the Submission is already the subject of a pending judicial or administrative proceeding then the Submission will be dismissed until the proceeding is completed. Chapter 17 defines the term judicial or administrative proceeding.

### CAFTA-DR DEFINITION OF JUDICIAL OR ADMINISTRATIVE PROCEEDING (Article 17.13.2)

For purposes of Article 17.7.5, **judicial or administrative proceeding** means:

- (a) a domestic judicial, quasi-judicial, or administrative action pursued by the Party ***in a timely fashion*** and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
- (b) an international dispute resolution proceeding to which the Party is a party.

(text in bolded italics emphasized by authors)

An important term in this definition is “in a timely fashion.” If you believe that the proceedings are being delayed in a way that deprives you of due process of law, then you should make that clear in your Submission so the Secretariat can consider it when it receives a Party's Response.

## 2.5 What is the purpose of the limitation on sole reliance on media reports?

The limitation on Submissions based solely on media reports is designed to set a minimum burden of proof. The SEM will still review these Submissions but will look to see if other sources were available to the Submitter that should have been included. A well-drafted Submission would present other evidence to support the contention that the law is not being adequately enforced.

## STEP 3: Requesting a Response from the Party

**Overview:** Once the SEM determines a Response from a Party is necessary, the Party will be forwarded a copy of the Submission and supporting documentation for review. The Party will then have forty-five days, or – if the Party requests it – 60 days, from the date of receipt to provide a Response. The Response should include notice of any judicial or administrative proceedings on the same issue as well as any supplemental information that the Party wishes to submit. If the principal issue in the Submission is also at issue in a pending (and timely – See Step 2.4 above) action the SEM will dismiss the Submission, without prejudice to the Submitter or issue. In the event of a decision to dismiss the Submission, the SEM will provide notice to the Submitter and Council within seven days. However, if the Party does not respond or the Response is insufficient the SEM must then decide if the Submission warrants the creation of a Factual Record.

## 3.1 What must the Party do to extend the deadline to sixty days?

The Party must notify the SEM of any exceptional circumstances requiring the extension.

## STEP 4: Determining if a Factual Record is warranted

**Overview:** The SEM will base its decision to create a Factual Record on the totality of the evidence received from the Submitter and the Party, including the Party's Response and any supplemental information that it may have provided. If





the SEM believes a Factual Record is justified, it will notify the Council and Submitter with a written explanation within seven days of this Determination. The SEM will also supply the Council with copies of all materials relating to the Submission. Thereafter, the Council will convene and by the Vote of one Party may elect to create a Factual Record.

#### **4.1 How does the SEM decide if a Factual Record is warranted?**

The SEM reviews the Submission and Response from the Party as well as any supporting information from either entity. If the SEM believes a Factual Record is justified they will notify the Council within seven days of this Determination and await a Vote on the matter.

#### **4.2 What if the Council requests clarification?**

Any member of the Council may, within twenty-one days of receipt of the request, ask the SEM to clarify its rationale for Determining that a Factual Record is warranted. The Council member should notify other Council members of the request. Upon such request, the SEM has twenty-one days to submit clarification for its Determination.

#### **4.3 How many members of the Council must vote for the creation of a Factual Record?**

The Vote of only one member of the Council is sufficient to support creation of a Factual Record.

#### **4.4 How long does the Council have to reach a decision?**

The Council has one-hundred-twenty (120) days to reach a decision. If the Council takes no action or the Submission receives no votes for creating a Factual Record, the Submission will be dismissed without prejudice to the Submitter or issue and no Factual Record will be created.

### **STEP 5: Creating a Factual Record**

**Overview:** After the Council votes to create a Factual Record, the SEM is notified to begin the investigation and drafting. The SEM can use a variety of resources in their investigation and will ultimately produce a detailed document explaining the findings and of the investigation.

#### **5.1 What information can the SEM use when creating the Factual Record?**

The SEM is required to use all information presented to them by the Submitter or Party. Additionally, the SEM may use any pertinent information that is publicly available, presented by an interested person (including businesses and Non-Governmental Organizations), submitted by a Party advisor, developed by an independent expert or developed by the Parties under the Environmental Cooperation Agreement.

#### **5.2 How should interested persons submit any relevant information?**

Interested persons, including businesses and Non-Governmental Organizations, should submit only relevant information to the SEM. This should be done in as concise a format as practical.

#### **5.3 How long does it take the SEM to complete the Factual Record?**

Typically, the SEM has one-hundred-eighty (180) days to complete the Factual Record. This may be extended, with notice to the Council within thirty days of expiration, for an additional one-hundred-eighty days (180).

#### **5.4 What must the SEM include in the Factual Record?**

The Factual Record must include an executive summary, summaries of the Submission, Response from the Party, reasons for developing the Factual Record, information considered and the factual findings.

#### **5.5 May a Party comment on the accuracy of the Factual Record?**

Yes. Prior to the creation of a final Factual Record, a draft version is submitted to the Council and the Party for review by the Party. Thereafter, the Party has forty-five days from the date the draft Factual Record was submitted to comment on the accuracy of the draft before the SEM creates the final Factual Record.

#### **5.6 May the Submitter comment on the draft Factual Record?**

No. Prior to publication, if the Factual Record is published, the draft and final Factual Records are only distributed to the Council and Party.

#### **5.7 How long does the SEM have to create the final Factual Record?**

From the date the draft Factual Record is submitted to the Council and Party, the Party has forty-five days to comment on its accuracy. See, 5.5. After the commenting period has expired, the SEM will, where practicable, submit the final Factual Record to the Council and Party within sixty days.

### **STEP 6: Publication of the Factual Record**

**Overview:** Once the final Factual Record has been produced, the Council will have sixty days to Vote on publishing the Factual Record. A Vote by any member of the Council is sufficient to publish the Factual Record. This Vote must occur no sooner than fifteen days after the final Factual Record has been submitted to the Council. If there are no Votes for publication by a Party within sixty days the SEM will notify the Council and Submitter.

#### **6.1 How does the Council review the Factual Record?**

The Council will consider the final Factual Record in light of the objectives of the Environmental Chapter and the Environmental Cooperation Agreement.

#### **6.2 If there are no Votes for publication what happens?**

If the SEM receives no Votes in support of publication the Factual Record will not be published.

## Withdrawing a Submission

---

There are three general periods in which a withdrawal may be requested by the Submitter: before a Party has responded, after a Party has responded and after the SEM has been instructed to create a Factual Record. Each request is handled differently.

### **W.1 Withdrawing before a Party has responded.**

If a request from the Submitter is made to the SEM in writing before a Party has responded to the Submission, the SEM must terminate the Submission. Note that a request to withdraw a Submission jointly filed by more than one person or entity must be approved by each Submitter. Lastly, the SEM must promptly notify the Party and Council of the withdrawal.

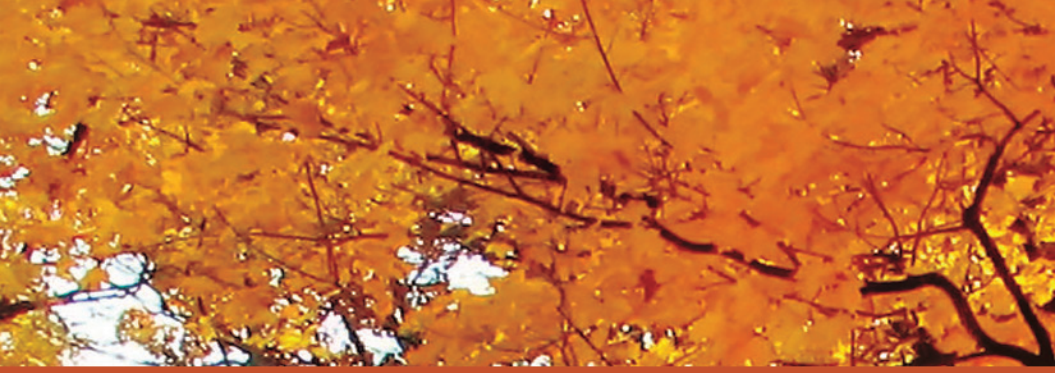
### **W.2 Withdrawing after a Party has responded.**

If a request is made to withdraw the Submission after the Party has responded, the SEM must notify the Party and Council. Thereafter, the Party has thirty days to decide whether the Submission should continue. If the Party agrees to the withdrawal, the Submission is dismissed. In either event, the SEM must notify the Submitter and Council of the Party's decision.

### **W.3 Withdrawing after the Council has ordered a Factual Record.**

If a withdraw request is made after the Council has ordered the SEM to create a Factual Record, the SEM must notify the Council and continue developing the Factual Record, unless otherwise directed by the Council.





**UF** | UNIVERSITY of  
**FLORIDA**  
Levin College of Law

