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North American Environmental Law and Policy

19

Commission for
Environmental Cooperation
of North America

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PROFILE

In North America, we share a rich environmental heritage and a complex network of ecosystems that sustains our livelihoods and well-being. Protecting these ecosystems is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation of North America (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the top environmental officials from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES

Produced by the CEC, the North American Environmental Law and Policy (NAELP) series presents recent trends and developments in environmental law and policy in Canada, Mexico and the United States, including official documents related to the citizen submission procedure empowering individuals and organizations from the NAFTA countries to allege that a Party to the agreement is failing to effectively enforce its environmental law.

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PREFACE

When Canada, Mexico and the United States (the Parties) entered into the NAFTA in 1994, they also concluded the NAAEC. The NAAEC supports the environmental goals and objectives of NAFTA and recognizes the importance of public participation in the conservation, protection and enhancement of the environment. The citizen submission process under NAAEC Articles 14 and 15 is an innovative mechanism allowing the public to take part in the pursuit of NAAEC's goals. This volume of the NAELP series provides an update on the CEC Secretariat's activity on submissions on enforcement matters under Articles 14 and 15 since June 2002.

The NAAEC citizen submissions process allows members of the public to request that the CEC investigate concerns regarding environmental enforcement in Canada, Mexico or the United States. The Secretariat administers the process in accordance with NAAEC Articles 14 and 15 and the Guidelines for Submissions on Enforcement Matters, adopted by the Council in October 1995 and revised in June 1999. The Secretariat may consider a submission from any person or nongovernmental organization asserting that a Party to NAAEC is failing to effectively enforce its environmental law. Subject to certain conditions, the Secretariat may request a response from the concerned Party. The Secretariat may then inform the Council that it considers that the submission, in light of the response provided by the Party, if any, warrants developing a "factual record." Factual records provide information on alleged failures to effectively enforce the environmental law in North America that may support the submitters, the Parties to the NAAEC, and other interested members of the public in taking any action they consider appropriate regarding the matters addressed. Preparation of factual records requires a two-thirds affirmative vote by the Council, as does publication of final factual records.

Through August 2004, the Secretariat has received 44 citizen submissions since 1995. Fourteen concern Canada, twenty-two concern Mexico and eight concern the United States. Some submissions—

including most of those concerning Mexico—focus on a specific project or incident, while others allege a widespread failure to effectively enforce environmental provisions against an entire industry. The various submission raise enforcement concerns regarding many different types of environmental laws, though habitat protection, pollution prevention and environmental assessment provisions are most frequently invoked. Thirty-four submissions are now closed, following either publication of a factual record or termination at an earlier stage.

Since 1994, nine submissions have resulted in the publication of a factual record. Those submissions are the following: SEM-96-001 (Cozumel); SEM-97-001 (BC Hydro); SEM-98-007 (Metales y Derivados); SEM-99-002 (Migratory Birds); SEM-98-006 (Aquanova); SEM-97-006 (Oldman River II); SEM-98-004 (BC Mining); SEM-00-004 (BC Logging); and SEM-97-002 (Rio Magdalena).

As of 31 August 2004, ten submissions are active. The Secretariat is currently developing four factual records, as instructed by the Council, in connection with the following submissions: SEM-00-006 (Tarahumara); SEM-02-003 (Pulp and Paper); SEM-02-001 (Ontario Logging); and SEM-03-005 (Montreal Technoparc). The Council's vote on publication of the final factual record is currently pending for SEM-00-005 (Molymex II). The Secretariat has recommended a factual record for SEM-03-004 (ALCA-Iztapalapa II), and the Council's vote is pending. The Secretariat is reviewing two submissions in light of the Party's responses to determine whether they warrant the development of factual records: SEM-03-006 (Cytrar III) and SEM-00-003 (Lake Chapala II). The Secretariat is awaiting a response from the Party for SEM-04-001 (Hazardous Waste in Arteaga). The Secretariat dismissed SEM-04-002 (Environmental Pollution in Hermosillo), giving the Submitters 30 days to provide a revised submission.

This year marked the tenth anniversary of NAFTA and the CEC. At its annual session in Puebla Mexico in June 2004, the Council adopted the Puebla Declaration, which recognized the CEC's tenth anniversary as an opportunity for the Council to review the CEC's progress, reaffirm the Council's commitment to the CEC, and set directions for the future. Regarding the submissions on enforcement matters process under Articles 14 and 15, the Council stated: "We continue to be supportive of the process for submissions on enforcement matters, and commit to exploring ways for each Party to communicate how matters raised in factual records may be addressed over time."

All submissions, Party responses, Secretariat determinations, factual records, and related documents are available on the CEC website at <www.cec.org> under Citizen Submissions on Enforcement Matters and can also be requested from <info@ccemtl.org>. The Secretariat's determinations and other documents released through 31 August 1997 were compiled in the Winter 1998 issue of this series. Determinations and other documents released from September 1997 through 31 August 2000 were compiled in Volume 5, and those from 1 September 2000 through 30 June 2002 were compiled in Volume 9. Factual records published since the Cozumel factual record appear in Volumes 6, 8, 11, 12, 13, 14, 15 and 17. For information about previous issues, please contact Les Éditions Yvon Blais Inc. at commandes@editionsyvonblais.com or <http://www.editionsyvon blais.qc.ca> or at (800) 363-3047 (Canada) or (450) 266-1086.

The following table captures the status of submissions and actions taken by the Secretariat at different stages of the process.

1 September 2004

A History of the 44 CEC Submissions on Enforcement Matters, 1 January 1997 – 31 August 2004*

History	2004 (to 31 August)	2003	2002	2001	2000	1999	1998	1997
Submissions received	SEM-04-001/ Hazardous waste in Arteaga (Mx) (27 January, resubmitted on16 March and 25 May) SEM-04-002/ Environmental Pollution in Hermosillo (Mx) (14 July)	SEM-03-001/ Ontario Power Generation (Can) (1 May, resubmitted on 14 August) SEM-03-002/ Home Port Xcaret (Mx) (14 May) SEM-03-003/ Lake Chapala II (Mx) (23 May) SEM-03-004/ ALCA-Iztapalapa II (Mx) (17 June) SEM-03-005/ Montreal Technoparc (Can) (14 August) SEM-03-006/ Cytrar III (Mx) (15 August)	SEM-02-001/ Ontario Logging (Can) (6 February) SEM-02-002/ Mexico City Airport (Mx) (7 February) SEM-02-003/ Pulp and Paper (Can) (8 May) SEM-02-004/ El Boludo Project (Mx) (23 August – resubmitted on 10 and 24 October) SEM-02-005/ ALCA-Iztapalapa (Mx) (25 November)	SEM-01-001/ Cytrar II (Mx) (14 February) SEM-01-002/ AAA Packaging (Can) (12 April) SEM-01-003/ Dermet (Mx) (14 June)	SEM-00-001/ Molymex I (Mx) (27 January) SEM-00-002/ Neste Canada (US) (21 January) SEM-00-003/ Jamaica Bay (US) (2 March) SEM-00-004/ B.C Logging (Can) (15 March) SEM-00-005/ Molymex II (Mx) (6 April – Resubmitted 31 July) SEM-00-006/ Tarahumara (Mx) (9 June)	SEM-99-001/ Methanex (US) (18 October) SEM-99-002/ Migratory Birds (US) (19 November)	SEM-98-001/ Guadalajara (Mx) (9 January – Resubmitted 15 October 1999) SEM-98-002/ Ortíz Martínez (Mx) (Revised – 4 August) SEM-98-003/ Great Lakes (US) (27 May – Resubmitted 5 January 1999) SEM-98-004/ B.C. Mining (Can) (29 June) SEM-98-005/ Cytrar I (Mx) (23 July) SEM-98-006/ Aquanova (Mx) (20 October)	SEM-97-001/ BC Hydro (Can) (2 April) SEM-97-002/ Río Magdalena (Mx) (15 March) SEM-97-003/ Quebec Hog Farms (Can) (9 April) SEM-97-004/ Canadian Env. Defence Fund (Can) (26 May) SEM-97-005/ Biodiversity (Can) (21 July) SEM-97-006/ Oldman River II (Can) (4 October)

* Note: See *North American Environmental Law and Policy*, Volume 5 (Fall 2000) for a listing of determinations made in 1995 and 1996.

History	2004 (to 31 August)	2003	2002	2001	2000	1999	1998	1997
Submissions received (*following*)							SEM-98-007/ Metales y Derivados (Mx) (23 October)	SEM-97-007/ Lake Chapala (Mx) (10 October)
14(1), 14(2) and 14(3) Determinations continuing the process**	SEM-04-001 (30 June)	SEM-03-006 (29 August) SEM-03-004 (9 September) SEM-03-005 (15 September) SEM-03-001 (19 September) SEM-03-003 (19 December)	SEM-02-002 (22 February) SEM-02-001 (25 February) SEM-02-003 (7 June) SEM-02-004 (26 November)	SEM-01-001 (24 April) SEM-01-001 (13 June) SEM-00-006 (6 November)	SEM-99-001 (30 March) SEM-00-002 (17 April, consolidated with SEM-99-001) SEM-00-004 (8 May) SEM-00-005 (19 October)	SEM-98-007 (5 March) SEM-98-006 (17 March) SEM-98-005 (9 April) SEM-98-004 (25 June) SEM-98-003 (8 September) SEM-99-002 (23 December)	SEM-97-002 (8 May) SEM-97-006 (23 January and 8 May) SEM-97-007 (2 October) SEM-98-004 (30 November)	SEM-96-004 (22 January) SEM-97-001 (1st and 15 May) SEM-97-002 (6 October) SEM-97-003 (8 May and 9 July)
14(1), 14(2) Dismissals	SEM-04-001 (20 February – resubmitted on 16 March) SEM-04-001 (20 April – resubmitted on 25 May)	SEM-03-001 (15 July – resubmitted on 14 August) SEM-03-002 (31 July)	SEM-02-004 (19 September – resubmitted on 10 and 24 October) SEM-02-005 (17 December)	SEM-01-002 (24 April) SEM-01-003 (19 September)	SEM-98-001 (11 January) SEM-00-003 (12 April)	SEM-98-002 (18 March) SEM-98-001 (13 September)	SEM-97-005 (26 May) SEM-98-002 (23 June)	SEM-97-004 (25 August)

** The Secretariat issued a single determination covering both Article 14(1) and 14(2) for several of these submissions.

History	2004 (to 31 August)	2003	2002	2001	2000	1999	1998	1997
14(1), 14(2) Dismissals (*following*)	SEM-04-002 (30 August)				SEM-00-001 (25 April) SEM-00-005 (13 July—Resubmitted 31 July 2000)		SEM-98-003 (14 December)	
Article 21(1)(b) Requests for additional information from the Party					SEM-98-003 (24 March)	SEM-97-002 (13 September)	SEM-97-003 (16 February)	
Dismissals following response	SEM-03-001 (28 May)		SEM-02-002 (25 September)	SEM-98-003 (5 October)	SEM-00-002 and SEM-99-001 (30 June) SEM-97-007 (14 July)			SEM-96-003 (2 April)
Notifications that a factual record is warranted	SEM-03-005 (19 April) SEM-02-004 (17 May) SEM-03-004 (23 August)	SEM-00-006 (29 August) SEM-02-003 (8 October) SEM-02-001 (17 December)	SEM-97-002 (5 February) SEM-01-001 (29 July) SEM-00-006 (29 August) SEM-02-001 (12 November)	SEM-98-004 (11 May) SEM-00-004 (27 July) SEM-00-005 (20 December)	SEM-98-007 (6 March) SEM-98-006 (4 August)	SEM-97-006 (19 July) SEM-97-003 (29 October)	SEM-97-001 (27 April)	

History	2004 (to 31 August)	2003	2002	2001	2000	1999	1998	1997
Final factual records completed		SEM-99-002 (24 April) SEM-98-006 (23 June) SEM-97-006 (11 August) SEM-00-004 (11 August) SEM-98-004 (12 August) SEM-97-002 (11 December)	SEM-98-007 (11 February)		SEM-97-001 (11 June)			SEM-96-001 (24 October)

Secretariat Determinations under Articles 14 and 15 of the North American Agreement on Environmental Cooperation: July 2002 through August 2004

SEM-00-006

(Tarahumara)

SUBMITTERS:	COMISIÓN DE SOLIDARIDAD Y DEFENSA DE LOS DERECHOS HUMANOS, ASOCIACIÓN CIVIL
PARTY:	MEXICO
DATE:	9 June 2000
SUMMARY:	The Submitters allege a failure by Mexico to effectively enforce its environmental law by denying access to environmental justice to Indigenous communities in the Sierra Tarahumara in the State of Chihuahua. They particularly assert failures to effectively enforce environmental law relative to the citizen complaint process, to alleged environmental crimes and other to alleged violations with respect to forest resources and the environment in the Sierra Tarahumara.

SECRETARIAT DETERMINATIONS:

ART. 15(1) **(29 August 2002)**	Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-00-006** (Tarahumara)
Submitter:	Comisión de Solidaridad y Defensa de los Derechos Humanos A.C. (Cosyddhac)
Concerned Party:	United Mexican States
Date of Receipt:	9 June 2000
Date of this Notification:	29 August 2002

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC"), the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it then determines whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat informs the Council and provides its reasons (Article 15). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's Article 15(1) analysis with respect to the submission filed 9 June 2000 by "Comisión de

Solidaridad y Defensa de los Derechos Humanos, A.C." (the "Submitter") in accordance with NAAEC Articles 14 and 15.

The submission asserts that Mexico is failing to effectively enforce its environmental law by denying environmental justice to the indigenous peoples of the Sierra Tarahumara in the State of Chihuahua, Mexico. In particular, it asserts failures to effectively enforce the environmental law relative to the *denuncia popular* citizen complaint process, to the prosecution of probable environmental crimes, and to other alleged environmental violations with respect to forest resources and the environment in the Sierra Tarahumara.

On 6 November 2001, the Secretariat determined that some of the assertions in the submission do not meet the requirements of Article 14(1), while others do. In addition, considering the criteria set forth in NAAEC Article 14(2), the Secretariat determined that a response from the Party was warranted in relation to those assertions meeting the Article 14(1) criteria.

On 15 February 2002, the Party filed its response with the Secretariat in accordance with NAAEC Article 14(3). Mexico asserts that it properly processed the citizen complaints and appeals for review (*recursos de revisión*) in regard to which the Secretariat requested a response. The Party further states that it resolved 139 additional citizen complaints filed by Tarahumara communities between February 1998 and March 2000, and that it took other actions to improve the participation of these communities in the environmental protection of the region. In regard to the alleged failure to prosecute probable environmental crimes, Mexico's response asserts that the authorities determined that the facts of which they had knowledge do not constitute specific environmental crimes, except in those cases allegedly pending resolution.

Having reviewed the submission in light of the response of the Party pursuant to NAAEC Article 15(1), the Secretariat hereby notifies Council that the submission warrants the development of a factual record with respect to some of the assertions for which the Secretariat considered the submission to warrant a response from the Party. Mexico's response provides detailed information on how the citizen complaints were addressed, but it cannot be concluded from the information provided that the relevant authorities took the proper enforcement actions as prescribed by the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) in the majority of the specific cases discussed in the submission. The matters raised by the submission concerning the effective enforcement of the citizen complaint procedure as a

mechanism allowing the indigenous peoples and other communities of the Sierra Tarahumara to participate in environmental protection, as well as the actions mentioned in Mexico's response that the authorities have taken to improve the participation of those communities, warrant documentation in a factual record. In addition, the matters raised in the submission concerning the prosecution of probable environmental crimes remain open despite the response of the Party, and warrant documentation in a factual record. The effective enforcement of the environmental law that establishes these procedures is fundamental to the promotion of citizen participation in environmental protection and natural resource conservation. While alleged failures to enforce environmental law of the kind in question might not individually warrant preparation of a factual record, taken together, and considering the importance of the effective participation by indigenous peoples and other communities of the Sierra Tarahumara in the environmental protection of that region, the allegations of this submission pose a central question about effective enforcement of environmental law that warrants preparation of a factual record.

II. SUMMARY OF THE SUBMISSION

The original submission consisted of five chapters and 45 pages. The Guidelines for Submissions on Enforcement Matters (the "Guidelines") suggest a limit of 15 pages, excluding appendices and supporting information (see section 3.3 of the Guidelines). On 19 June 2000, 20 February 2001, and 6 April 2001, the Secretariat requested the Submitter to amend the submission so as to correct this minor error of form. In its last letter, the Secretariat proposed to the Submitter a way of abridging the submission. This recommendation and the Secretariat's Article 14(1) and (2) analysis are based on the abridged submission.[1]

In the submission, Cosyddhac asserts that Mexico is failing to effectively enforce its environmental law in relation to the effective processing of citizen complaints (*denuncias populares*), the prosecution of environmental crimes, the consultation of indigenous peoples prior to issuing logging permits, and access to environmental information.[2]

1. These documents are available in the Registry of Citizen Submissions on Enforcement Matters on the CEC website at <www.cec.org>, or may be requested from the Secretariat.
2. The Submission recounts at least 112 specific situations (considering the examples from all the headings) in which it asserts that the Party failed to effectively enforce its environmental law. The original structure of this Submission contained a chapter (Chapter III, now Appendix I) providing a complete procedural history of each citizen complaint and action of the authorities employed in documenting each of the 21 assertions (contained in Chapter IV, which was kept in the body of the Submission).

According to the Submitter, the Party is failing to effectively enforce its environmental law as follows:

A. Failure by the Party to effectively enforce Article 189 in relation to Article 191 of the LGEEPA, by failing to guarantee the indigenous peoples, as social groups, access to environmental justice through the filing of citizen complaints, or from another standpoint, the Party's failure to enforce through its denial to these peoples of legal interest in the broad sense, as well as *legitimatio ad processum* and *legitimatio ad causam*.

B. The Party's failure to effectively enforce Articles 189 in relation to Articles 190 and 191 of the LGEEPA, with respect to its refusal to allow to proceed a citizen complaint that meets all the legal requirements.

C. The Party's failure to effectively enforce LGEEPA Article 176, through its failure to guarantee the affected parties, following a final decision pronounced by an administrative tribunal, access to environmental justice through the filing of an appeal for review against it, or from another standpoint, the Party's failure to enforce through its denial to the Indigenous Peoples of legal interest in the broad sense, as well as *legitimatio ad processum* and *legitimatio ad causam*.

D. The Party's failure to effectively enforce LGEEPA Article 176, in that every appeal for review must result in a decision that concludes the appeal.

E. The Party's failure to effectively enforce Article 15.2 of Convention 169 of the ILO [International Labour Organization] in connection with authorizations issued for the exploitation of timber resources.

F. The Party's failure to effectively enforce Article 199 in relation to Article 189 of the LGEEPA, in connection with its failure to resolve or conclude citizen complaint files.

G. The Party's failure to effectively enforce CFPP [sic] Article 418, in relation to its failure to notify the agency responsible for criminal investigations and prosecutions (*Ministerio Público Federal*—MPF) of the probable occurrence of environmental crimes consisting of forest cutting, destruction of natural vegetation, and change of land use without authorization, despite becoming aware of these facts in the course of carrying out its duties.

H. The Party's failure to effectively enforce CPF [*Código Penal Federal*-Federal Criminal Code] Article 418 in connection with forest cutting and land use changes without authorization under the Forestry Act (*Ley Forestal*).

I. The Party's failure to effectively enforce CPF Article 418 in relation to its failure to notify the MPF of the probable occurrence of environmental crimes consisting of cutting, uprooting, felling or knocking down trees without authorization, despite becoming aware of these facts in the course of carrying out its duties.

J. The Party's failure to effectively enforce CPF Article 418 in connection with the crime of cutting, uprooting, felling or knocking down trees, or exploiting forest resources, without authorization under the Forestry Act.

K. The Party's failure to effectively enforce CPF Article 418 in relation to its failure to notify the MPF of the probable occurrence of environmental crimes consisting of intentionally causing fires in woodlands and forest vegetation, thus damaging natural resources, flora, fauna and ecosystems.

L. The Party's failure to effectively enforce CPF Article 418 in connection with the crime of intentionally causing fires in woodlands and forest vegetation, thus damaging natural resources, flora, fauna and ecosystems.

M. The Party's failure to effectively enforce CPF Article 419 in relation to its failure to notify the MPF of the probable occurrence of environmental crimes consisting of the transportation, storage and processing of forest resources without authorization under the Forestry Act, despite becoming aware of these facts in the course of carrying out its duties.

N. The Party's failure to effectively enforce CPF Article 416 in relation to its failure to notify the MPF of the probable occurrence of environmental crimes consisting of discharging and dumping wastewater into national bodies of water, causing harm to public health, natural resources, flora, fauna, and water quality.

O. The Party's failure to effectively enforce Article 169 *in fine* of the LGEEPA, a comprehensive reading of which establishes that once the decision referred to in Article 168 of the LGEEPA is issued and acts or omissions constituting one or more crimes are verified, the environmental authorities shall notify the MPF thereof.

P. The Party's failure to effectively enforce LGEEPA Article 202, in that the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) in the State of Chihuahua, despite conducting inspection visits, arising in most cases from citizen complaints, on which visits it directly observed acts

and omissions constituting environmental crimes, did not file corresponding denunciations of probable crimes.

Q. The Party's failure to effectively enforce LGEEPA Article 191 by failing to consolidate a citizen complaint with a pre-existing file opened in response to a previous citizen complaint of a similar nature.

R. The Party's failure to effectively enforce LGEEPA Articles 191 and 192, by failing to issue a decision on the admissibility of a citizen complaint, and consequently, failing to take the necessary steps to determine the existence of the acts or omissions alleged therein.

S. The Party's failure to effectively enforce Article 191 in relation to 190 of the LGEEPA, in failing to process a citizen complaint appropriately by referring the matter to the competent body.

T. The Party's failure to effectively enforce LGEEPA Article 193, by resolving a citizen complaint without informing the complainant of the considerations adopted in regard to the evidence and information provided.

U. The Party's failure to effectively enforce Article 159 Bis 3 in relation to Article 159 Bis 4 of the LGEEPA, by refusing to provide environmental information in response to a request.

The Submitter asserts that these alleged failures to effectively enforce the LGEEPA, the CPF, the Forestry Law and the Indigenous and Tribal Peoples Convention (Convention 169) of the ILO amount to denying environmental justice to indigenous peoples in the Sierra Tarahumara, State of Chihuahua, in violation of NAAEC Articles 6 and 7. The final part of the submission states that the 21 assertions and supporting examples "constitute a persistent pattern.[3]"

After analyzing the submission in light of Articles 14(1) and 14(2), the Secretariat requested a response from the Party only with respect to the assertions contained in headings A, C, D, F, G, H, I, K, M, N, O, P, R, S and T of the submission.[4]

III. SUMMARY OF THE RESPONSE OF THE PARTY

The Secretariat received Mexico's response to the submission on 15 February 2002. It contains a concise response to headings A, C, D, F, G, H,

3. Submission at 18.
4. Section IV.A of this notification summarizes the Article 14(1)/14(2) review.

I, K, M, N, O, P, R, S and T of the submission, supported by a large number of attached documents showing in detail the processing of the citizen complaints and appeals for review mentioned in the submission. The response alleges the environmental authorities' adequate performance of their duties in responding to the citizen complaints mentioned in headings A, F, R, S and T of the submission.

The response states:

> Mexico, based on NAAEC Articles 5(1)(j), 5(2), 6 and 7 [...] responded, in a timely manner and using a fair, open and equitable procedure, to a total of 173 citizen complaints filed between February 1998 and March 2000 relating to various violations of the LGEEPA committed in the Sierra Tarahumara; all the complaints were admitted by the Profepa and recorded in the National Citizen Complaint Response System (*Sistema Nacional de Atención a la Denuncia Popular*). It should be mentioned that, in accordance with LGEEPA Article 191 [...], Profepa's Environmental Petitions, Complaints, and Social Participation Unit in the State of Chihuahua sent the complainants an acknowledgement of receipt of each of the aforementioned complaints, issuing a decision on the admissibility of each complaint, and notifying the complainants of those decisions within the ten days following the receipt of the corresponding complaint.[5]

Concerning the assertions about the effective enforcement of the appeal for review procedure in the cases mentioned in the submission (headings C and D), the Response states that the Party, "based on NAAEC Articles 7(3) and (4) and LGEEPA Article 176 [...] resolved two appeals for review filed against decisions of the Profepa State Office in Chihuahua, to which the Secretariat refers in its determination, in accordance with Article 91, paragraph II of the Federal Administrative Procedure Law (*Ley Federal de Procedimiento Administrativo*—LFPA) [...] by upholding the administrative decision under review.[6]"

Regarding the assertions in the submission on the investigation and prosecution of environmental crimes, the Party asserts that it cannot respond to the assertion in heading G because the article cited by the Submitter (Article 418 of the Federal Code of Criminal Procedure [*Código Federal de Procedimientos Penales*—CFPP]) does not correspond to the matter alleged (which in fact relates to *Código Penal Federal*—CPF–Article 418). Regarding heading H, the Party asserts "it refers to a denunciation of probable crimes filed with the MPF by the Community of Ejido San Diego de Alcalá on 21 September 1999. In that regard, this Party,

5. Response at 2–3.
6. Response at 8–9.

based on NAAEC Article 14(3)(a), requests the Secretariat give no further consideration to the matter because it asserts that the complaint is the subject of a pending administrative procedure before the MPF, which shall determine whether or not to turn the file over to the competent judge".[7]

Concerning headings I, K, M and O, which refer to the failure to notify the MPF of the probable occurrence of environmental crimes in various cases, the response states that the citizen complaints in question were resolved, inspection visits were conducted, administrative procedures were followed, and in some cases, administrative sanctions were imposed on the responsible parties. According to the response, the environmental authorities did not notify the MPF because the acts and omissions observed by the authorities did not qualify as environmental crimes.[8] Finally, the response indicates that Mexico did institute criminal proceedings and issue an administrative decision in regard to the citizen complaint mentioned in heading N.

Mexico's response states further that "starting in the year 2000, a series of meetings was held between the relevant authorities of this Party [and the affected indigenous communities and nongovernmental organizations], for the purpose of keeping them informed of the status of their complaints and clarifying any legal situation that might arise in that connection, using those meetings as forums for discussion of environmental situations arising in that geographical area...". Finally, Mexico's response indicates that the Party intends to set up "participatory monitoring committees for natural resource conservation" in the region.[9]

IV. ANALYSIS

A. Introduction

The process in regard to this submission is currently at the NAAEC Article 15(1) stage. To reach this stage, the Secretariat must first determine that the submission meets the requirements of Article 14(1) and that it merits a response from the Party, considering the criteria of Article 14(2).

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7. Pages 10-12 of the Response. The complaint in regard to which the Party invokes Article 14(3)(a) is also mentioned in heading M.
8. Response at 11–12.
9. Response at 16–17.

On 6 November 2001, the Secretariat determined that the submission met all the requirements of NAAEC Article 14(1).[10] The submission meets the requirements of Article 14(1)(a), (b), (d) and (f) because it was filed in writing and in Spanish, one of the official languages of the Parties;[11] the Submitter clearly identifies itself in the submission as a nongovernmental organization (Cosyddhac) domiciled in the city of Chihuahua, State of Chihuahua, Mexico.[12] The submission appears to be aimed at promoting environmental law enforcement activities and not at harassing industry, since it focuses primarily on the manner in which the environmental authorities have addressed the complaints filed by the indigenous peoples and other groups interested in the protection of natural resources in the Sierra Tarahumara. The requirement set out in Article 14(1)(c) was also met since the submission and its appendices contain sufficient information to review it. The submission includes information on the means by which the indigenous peoples and other groups in the Sierra Tarahumara have attempted to participate in effective law enforcement for the protection of the natural resources of that area, on the manner in which the authority addressed its complaints, and on the reasons why the Submitter considers the authority's actions to represent a failure of effective enforcement.

Regarding Article 14(1)(e), the Secretariat determined that the majority of the assertions in the submission refer to matters that have been communicated to the relevant authorities of the Party.[13] In addition, the majority of the assertions in the submission satisfy the requirement in the opening language of Article 14(1), which states that a submission must assert "a Party is failing to effectively enforce its environmental law". The Secretariat determined that some of the assertions do not meet that requirement, because they do not refer to provisions that are "environmental law" for the purposes of the NAAEC,[14] or

10. SEM-00-006 (Tarahumara), Determination in accordance with Articles 14(1) and (2) (6 November 2001).
11. See also section 3.2 of the Guidelines.
12. Submission at 1 and Appendix 0.
13. Submission Appendices 5, 10, 20, 49 and 51.
14. NAAEC Article 45(2) establishes the following definition of environmental law:
For purposes of Article 14(l) and Part Five:
(a) "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 life or health, through
(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not

because they refer to past situations in regard to which the environmental authorities could not have carried out any environmental law enforcement action at the time that the submission was filed, so that there cannot be an assertion that Mexico "is failing" to enforce in those cases.

The Secretariat proceeded to review the submission considering the criteria of NAAEC Article 14(2) taken together, and concluded in its determination of 6 November 2001 that the submission warranted a response from the Party in relation to the assertions contained in headings A, C, D, F, G, H, I, K, M, N, O, P, R, S and T.

The submission contends that the alleged lack of access to the citizen complaint procedure represents harm to the indigenous peoples and other groups of the Sierra Tarahumara in that it restricts the exercise of the right to participate in the protection of the environment by reporting possible violations of environmental law [Article 14(2)(a)]. The Secretariat considers that the effective enforcement of the citizen complaint procedure as a means of access to environmental justice, to which the submission refers, and the effective enforcement of the criminal law for the protection of the forest resources of the Sierra Tarahumara are matters whose further consideration in this process would advance the goals of the NAAEC [Article 14(2)(b)]. The submission addresses the available remedies pursued under the Party's law, and the Secretariat considers that a reasonable effort was made to pursue those remedies [Article 14(2)(c)]. The matter raised by the submission is precisely that the efforts of these groups to use the available remedies under the Party's law to denounce harm to the environment of the Sierra Tarahumara were not successful due to the Party's alleged failure to effectively enforce its environmental law. Finally, the submission does not appear to be based on media reports [Article 14(2)(d)].

Further to the Secretariat's determination of 6 November 2001, the Party provided its response on 15 February 2002, in accordance with NAAEC Article 14(3).

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include any statute or regulation, or provision thereof, directly related to worker safety or health.
(b) For greater certainty, the term "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.
(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) 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.

B. Why Development of a Factual Record is Warranted

In accordance with NAAEC Article 15(1), and in light of Mexico's response, the Secretariat considers that the submission warrants the development of a factual record.

As detailed in this section, the information provided by the Party in its response shows how the citizen complaints discussed in the submission, by which the indigenous peoples and communities of the Sierra Tarahumara reported acts of illegal destruction or exploitation of the woodlands in the Sierra, were processed. Based on this information, the matters raised in the submission concerning the effective enforcement of the environmental law with respect to two of the 33 complaints in question are deemed resolved.[15] In the case of the remaining complaints, either questions persist as to whether the authorities failed to carry out one or more of the specific actions comprising the procedure, or it appears that these actions were carried out but not within the period prescribed by law. In regard to the investigation and prosecution of probable environmental crimes, except in one case, the authorities decided that the facts of which they had knowledge do not constitute crimes, without providing any grounds and reasons for that decision (the minimum requirements set forth by the Political Constitution of the United Mexican States) and without notifying the complainants of the decision. On the other hand, concerning the allegations in the submission relating to the appeals for review filed further to citizen complaints, the Submitter's assertions are not confirmed and do not warrant documenting in a factual record, because Mexico's response shows that they were in fact resolved.

As mentioned above, the response of the Party consists of a concise response to the assertions in headings A, C, D, F, G, H, I, K, M, N, O, P, R, S and T, and numerous appendices documenting the processing by the relevant environmental authorities of the citizen complaints and appeals for review as to which the Secretariat requested a response from Mexico.[16]

To simplify the review of the submission in light of the Party's response, the allegations were grouped under three titles:[17]

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15. See Submission Appendix 15 and Response Appendix I. Complaints filed by Ricardo Chaparro Julián (Tepehuán de las Fresas Indigenous People) on 12 October 1998 and Ejido Rocoroyvo, on 18 February 2000.
16. The Secretariat was unable to identify the case to which the document contained in Response Appendix II referred.
17. A complaint may appear under more than one heading, (i.e., that of 12 October 1998, filed by the Tepehuán de las Fresas People, which was stated as an instance of

1. Alleged failures to effectively enforce the provisions relating to the citizen complaint procedure (LGEEPA Articles 189, 190-193 and 199) mentioned in headings A, F, R, S and T of the submission;

2. Alleged failures to effectively enforce the provisions relating to the investigation and prosecution of probable environmental crimes (CPF Articles 416, 418 and 419 and LGEEPA Articles 169 and 202) mentioned in headings G, H, I, K, M, N, O and P of the submission;

3. Alleged failures to effectively enforce the provisions relating to appeals for review (LGEEPA Article 176) mentioned in headings C and D of the submission.

1. Alleged failures to effectively enforce the provisions relating to the citizen complaint procedure (LGEEPA Articles 189, 190-193 and 199)

Under headings A, F, R, S and T of the submission, the Submitter asserts that Mexico is failing to effectively enforce its environmental law by inadequately processing 30 citizen complaints about illegal logging and forest destruction in the Sierra Tarahumara. These citizen complaints were filed between February 1998 and March 2000 by various groups: the Community of San Ignacio de Arareco; the communities of Ejido de Ciénega de Guacayvo, Ejido de San Diego de Alcalá and Ejido de El Consuelo; the Rarámuri and Tepehuán Indigenous Peoples, and the Coalición Rural/Rural Coalition. The majority of the citizen complaints refer to activities or facts which the complainants consider to pose a threat to the ecosystem of the Sierra Tarahumara, as well as the subsistence, heritage and resources of the Sierra-based cultures.

Pursuant to LGEEPA Articles 191-199, the citizen complaint procedure may be summarized as follows:

- Upon receipt of a citizen complaint, the authority shall issue a decision on the initial status of the complaint (*acuerdo de calificación*), i.e. to allow or disallow it or to consolidate it with one or more other complaints, and shall notify the complainant

failure to enforce by the Submitter in points A.2, F.3, I.3 and O.1). The same applies to the inspections. Appendix A of this recommendation contains a list of the citizen complaints or denunciations of probable crimes, remedies and inspections, indicating the headings in which each is mentioned.

of this decision within the ten days following the filing of the complaint.

- Where the authority receiving the complaint is not competent to process it given the facts alleged in the complaint, it shall refer the complaint to the competent authority. This referral process entails the following: acknowledging receipt (without allowing the complaint); referring the complaint to the competent authority for the latter's decision and resolution; and notifying the complainant that the complaint was referred to that authority, by means of a reasoned and justified decision.

- Where the complaint is allowed, the authority shall notify the respondent so that the respondent may submit appropriate documents and evidence within a maximum period of 15 working days.

- The authority shall verify the acts or omissions raised in the complaint, taking any necessary measures and initiating any relevant inspection and enforcement procedures, as well as any administrative procedures arising therefrom.

- The complainant may assist the authority, and the authority shall, in resolving the complaint, state the considerations adopted with respect to the information provided by the complainant.

- The authority shall notify the complainant where it is not proven that the acts or omissions denounced cause or could cause ecological imbalance, harm the environment or natural resources, or violate the law, and the complainant shall then be given an opportunity to make any observations it sees fit.

According to the submission, the complaints filed by the indigenous peoples and other groups of the Sierra Tarahumara were not processed as prescribed by the LGEEPA: some were disallowed; others were allowed but not resolved or processed as prescribed by law; and for some, the follow-up actions prescribed by law have not been taken. The submission contends that the alleged lack of effective access to the citizen complaint procedure represents harm to the indigenous peoples and other groups of the Sierra Tarahumara, by restricting the exercise of the right to participate in the protection of the environment by reporting possible violations of environmental law.

In its response, the Party asserts that it appropriately processed the complaints filed by the indigenous peoples and communities of the Sierra Tarahumara to which the submission refers, and it provides copies of numerous related decisions and communications. A detailed review of these indicates the following:

In heading A of the submission, the Submitter asserts that the environmental authorities failed to guarantee the indigenous peoples, as social groups, access to environmental justice through the filing of citizen complaints, by disallowing citizen complaints filed by these groups. In heading R of the submission, the Submitter asserts that the environmental authorities did not issue a decision on the admissibility of a citizen complaint, and therefore ceased to conduct the procedures necessary to determine the existence of the acts or omissions alleged in the complaint. From Mexico's response, it is evident that the authorities only issued proper decisions on the admissibility of two of the 19 complaints about which the Submitter asserts in these headings that Mexico is failing to effectively enforce the LGEEPA.[18] For four of the complaints, no such decision was issued,[19] while in the remaining 13 cases, a decision was issued but within a period exceeding, by a few days to over a month, the 10 days prescribed by the LGEEPA.[20]

In heading F of the submission, the Submitter alleges that the authorities did not properly conclude the procedures for 10 citizen complaints by issuing a final decision further to the administrative procedure arising from forestry inspections.[21] Pursuant to Article 17 of the LFPA, the administrative authority shall issue a decision within a period of four months.[22] The documents provided by the Party show that the authority issued decisions on the ten complaints, but in each case outside the period prescribed by law. For three of the complaints, the

18. See Submission Appendix 15 and Response Appendix I. Complaint filed by Ricardo Chaparro Julián (Tepehuán de las Fresas Indigenous People) on 12 October 1998, and complaint filed by Ejido Rocoroyvo on 18 February 2000.
19. See Submission Appendices 1, 2, 3, 4, 16, 17 and 19, and Response Appendices I and III. Complaints filed by José María Fuentes Rodríguez *et al.* (Choguita Community) on 26 October 1998; by Ricardo Chaparro Julián (Tepehuán de las Fresas Indigenous People) on 4 December 1998 and by members of the ejido council of Ejido Ciénega Guacayvo on 26 July and 4 October 1999.
20. See Submission Appendices 57 and 66–80 and Response Appendix I. Complaints filed by various Rarámuris Indigenous Peoples through the intermediary of Agustín Bravo Gaxiola, 7 December 1998, 7 and 18 February 2000, and 15 March 2000.
21. Heading F, Submission at 8.
22. LGEEPA article 160, paragraph 2 establishes the LFPA as suppletive law for administrative procedures and appeals, among others.

authority did not inform the complainant, even when the authority carried out administrative procedures and imposed corrective measures and fines.[23] In regard to the last complaint, Profepa allowed it only with respect to matters under its jurisdiction, referring to the National Water Commission (*Comisión Nacional del Agua*—CNA) those matters for which the latter has jurisdiction. The response does not indicate that the CNA processed this complaint.[24]

In heading S of the submission, the Submitter asserts that the environmental authorities, having received a citizen complaint outside their jurisdiction, failed to refer it to the competent authority, which in turn should have allowed the complaint. Mexico's response states that "it does not possess information enabling the determination of the status of those complaints.[25]"

Finally, in heading T of the submission, the Submitter states that in resolving one complaint regarding allegedly illegal logging, the authorities failed to state their considerations to the complainant with respect to the information that the complainant provided, as required by LGEEPA Article 193. The resolution of the complaint attached to Mexico's response indicates that the logging complained of does not merit sanctions because it was authorized. However, the resolution does not "state the considerations" of the authorities in regard to the information provided by the complainant, as required by law.[26]

In summary, notwithstanding the detailed nature of Mexico's response, the documents provided with it do not allow the conclusion that the relevant authorities took the enforcement actions provided by the LGEEPA in the majority of the specific cases raised by the submission. It follows from the decisions and communications attached to the response that the authorities strictly enforced the environmental law with respect to only two of the 33 complaints covered by this

23. See Submission Appendices 15, 26 and 27 and Response Appendix II. Complaints filed by Ricardo Chaparro Julián *et al.* (Tepehuán de las Fresas Indigenous People) on 12 October 1998 and by Oscar Romero Viezcas (Community of Ejido San Diego de Alcalá) on 16 June and 1 September 1999.
24. See Submission Appendices 26-27 and Response Appendix II. Complaint filed by Oscar Romero Viezcas (Community of Ejido San Diego de Alcalá) on 1 September 1999.
25. See Submission Appendices 22-25 and Response at 6-7. Complaints filed by Félix Baiza Duarte (Tepehuán de las Fresas Indigenous People) on 13 October 1999 and by the Tepehuán de Malanoche Indigenous People on 9 July 1999.
26. See Submission Appendices 58-60 and Response Appendix IV. Complaint filed by Prudencio Ramos Ramos (Rarámuri Indigenous People of Ejido Pino Gordo) on 7 August 1998.

notification.[27] For the remaining complaints, the authorities either omitted one or more specific actions comprising the procedure, or performed them outside the period prescribed by law (by a few days in approximately half the cases, and by approximately a month in the others). The failure to process these citizen complaints within the required time period is especially relevant in light of the other alleged failures to effectively enforce the citizen complaint procedure in the cases mentioned in this submission.

The Mexican legal system only allows persons with a recognized legal interest to initiate a legal proceeding against persons who, in violation of the applicable law, cause harm to the environment or natural resources. The citizen complaint procedure is the only means available to any interested party to set in motion the government's environmental protection apparatus. For that reason, the effective enforcement of the citizen complaint procedure by the environmental authority is fundamental to the promotion of citizen participation in environmental protection. Furthermore, the Mexican legal system emphasizes the importance of ensuring the right of indigenous peoples to protect their environment and natural resources.[28] The matters raised by the submission with respect to the effective enforcement of the citizen complaint procedure as a mechanism allowing the indigenous peoples and other communities of the Sierra Tarahumara to participate in environmental protection in that region warrant development and documentation in a factual record. The Secretariat considers the development of a factual record to be warranted in relation to the effective enforcement of LGEEPA Articles 189, 190-193 and 199 with respect to the citizen complaints in question.

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27. See Submission Appendix 15 and Response Appendix I. Complaints filed by Ricardo Chaparro Julián (Tepehuán de las Fresas Indigenous People) on 12 October 1998 and by Ejido Rocoroyvo on 18 February 2000.

28. Political Constitution of the United Mexican States, Article 2, A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to self-determination, and in consequence, autonomy to:
[...] V. Conserve and improve their habitat, and preserve their lands in the terms established in this Constitution.
[...] VIII. Full access to State jurisdiction. To guarantee this right, in all trials and proceedings in which they participate, individually or collectively, their customs and cultural characteristics will be taken into account, respecting the precepts of this Constitution [...]
LGEEPA, Article 15: In formulating and conducting environmental policies and in issuing official Mexican norms and other instruments stipulated in this Law, in the area of preservation and restoration of ecological equilibrium and environmental protection, the Federal Executive Branch will observe the following principles:
XIII. Guarantee the right of communities, including indigenous peoples, to the protection, preservation, use and sustainable exploitation of natural resources and the safeguarding and use of biodiversity, in accordance with this Law and other applicable ordinances [...]

2. *Alleged failures to effectively enforce the provisions relating to the investigation and prosecution of probable environmental crimes (CPF Articles 416, 418 and 419, and LGEEPA Articles 169 and 202)*

Headings G, H, I, K, M, N, O and P of the submission contain assertions about the alleged failure to effectively enforce environmental law with respect to the investigation and prosecution of probable environmental crimes.

The submission indicates that by means of citizen complaints, the environmental authorities were made aware of facts that possibly constituted environmental crimes. It further states that the authorities conducted at least 15 inspection visits on which they allegedly have identified probable environmental crimes. The submission asserts that Mexico is failing to effectively enforce the environmental law in two respects: by failing to exercise the powers invested in the environmental authorities to initiate investigations or notify the agency responsible for criminal investigations and prosecutions—the MPF—of facts that might constitute such crimes, pursuant to LGEEPA Articles 169 and 202, and by failing to apply to the alleged crimes CPF Articles 416, 418 and 419, which define and sanction criminal conduct that harms the environment.[29]

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29. CPF, Article 416.- Anyone who performs any of the following acts without the required authorization, or in violation of the laws, regulations and Mexican official standards, is liable to a penalty of three months to six years imprisonment and a fine of 1,000 to 20,000 times the daily minimum wage:

    I.- Discharging, dumping, or infiltrating, or authorizing or ordering the discharge, dumping or infiltration of wastewater, chemical or biochemical liquids, refuse or pollutants into soils, marine waters, rivers, watersheds, reservoirs and other water bodies or watercourses under federal jurisdiction, causing or possibly causing harm to public health, natural resources, flora, fauna, water quality in watersheds, or ecosystems.

    Where the water in question is water for bulk delivery to population centers, the penalty may be increased by up to three additional years...

    CPF, Article 418.- Anyone who, without the required authorization under the Forestry Law, cuts or destroys natural vegetation, cuts, uproots, knocks down or fells trees, exploits forest resources or causes land use changes is liable to a penalty of three months to six years imprisonment and a fine equivalent to 100 to 20,000 times the daily minimum wage... The same penalty shall apply to anyone who intentionally causes fires in woodlands, forests, or natural vegetation which damage natural resources, flora, fauna, or ecosystems.

    CPF, Article 419.- Anyone who transports, deals in, stores, or processes timber resources in quantities greater than four cubic meters roundwood equivalent or the equivalent without authorization under the Forestry Law is liable to a penalty of three months to six years imprisonment and a fine equivalent to 100 to 20,000 times the daily minimum wage, except in cases of exploitation of forest resources for domestic use, as prescribed by the Forestry Law.

LGEEPA Article 169 provides that the authorities shall notify the MPF of the occurrence of acts or omissions that they have observed in the course of their duties that "may constitute one or more crimes.[30]" In particular, the authorities shall: determine whether the facts of which they have knowledge may or may not constitute crimes; notify the MPF if there are facts that may constitute a crime; communicate to the MPF all the relevant information in their possession; and place the indicted persons at the disposal of the MPF, if they have been detained. In the case of a citizen complaint, the authority may make its determination of whether the facts referred by the complainant may or may not constitute a crime either in the decision to allow the complaint or separately (regardless of whether the complaint is allowed or not) but—as with any act of authority—that determination must be reasoned, justified and in writing, and it must be communicated to the complainant. It is not necessary for the environmental authorities to ascertain that the activities constitute crimes (since it is the responsibility of the court to determine that), but merely to know of the existence of acts or omissions that may be considered crimes. Likewise, LGEEPA Article 202 provides that the Profepa may initiate the relevant proceedings before the competent authorities where it becomes aware of acts or omissions that violate administrative or criminal law.

The process the MPF shall follow in prosecuting and sanctioning crimes is, in general terms, as follows. The MPF is required to investigate the crimes of which it has knowledge (CFPP Article 113). It shall order any measures and provisions necessary to afford security, safety, and assistance to victims; prevent from being lost, destroyed or altered all traces or evidence of the crime, as well as the instruments or things affected by it, or its effects; ascertain the identity of witnesses; prevent the crime from continuing to be committed; and, in general, prevent the investigation from being impeded, detaining those who took part in committing the crime where they are caught in the act (CFPP Article 123). Where the MPF deduces from the preliminary investigation that

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The relevant paragraph of LGEEPA Article 169 provides that: "Where applicable, the federal authorities shall notify the Office of the Attorney General of the performance of acts or omissions observed in the course of carrying out their duties which may constitute one or more crimes."
LGEEPA, Article 202.- The Office of the Federal Attorney for Environmental Protection, within the scope of its competence, is empowered to initiate any relevant proceedings before the competent judicial authorities where it becomes aware of acts or omissions that constitute violations of administrative or criminal law.

30. The same provision is made, for all public servants, by CFPP Article 117. Likewise, LGEEPA Article 202 provides that Profepa is empowered to initiate any relevant proceedings before the competent judicial authorities where it becomes aware of acts or omissions that constitute violations under administrative or criminal law.

both the *corpus delicti* and the suspect's probable responsibility are proven, it shall bring legal action (CFPP Article 134).

The submission asserts that the environmental authorities are failing to effectively enforce the law by failing to notify the MPF of the probable occurrence of environmental crimes.[31] It follows from Mexico's response that both in the cases involving only the filing of citizen complaints or denunciation of probable crimes, and in those involving inspection visits arising from the complaints, the authorities had knowledge of acts or omissions that probably constituted environmental crimes. However, with respect to the 45 points (complaint and visits) in headings G, I, K, M, N, O and P of the submission for which this failure to enforce is asserted, the environmental authorities do not appear to have determined, in a timely manner and by means of a reasoned and justified decision, whether the facts in question could constitute crimes. In its response, Mexico simply asserts that the competent authority considered that the facts did not constitute crimes. The information provided to the Secretariat does not show that in each case the competent authority provided its reasons and justification in a written decision.

Regarding headings I, K and O of the submission, Mexico's response indicates that on 35 occasions, corrective measures and sanctions were imposed on the persons responsible for the corresponding facts; in these cases, Mexico contends that the facts were not reported to the MPF because they were not found to constitute crimes.[32] However, it is not clear that this determination by the environmental authorities was made properly given that each of these cases involved facts that potentially constituted crimes, and it is not necessary for the authorities to determine that the facts constitute a crime in order to notify the MPF.[33] For example, in eight of the citizen complaints filed by indigenous peoples and various communities through Agustín Bravo Gaxiola on 15 March 2000, which report the illegal logging and storage of timber resources, among other probable crimes, the acts complained of potentially fall under the crimes contemplated in CPF Article 418. There is no indication that the authorities notified the MPF of these acts, or that they applied the correct standard for determining whether to notify the MPF.

Heading P of the submission also asserts that the environmental authorities failed to denounce probable environmental crimes despite having observed facts that were probable environmental crimes on 15

31. Headings G (p. 9), I (p. 10), K (p. 12), M (p. 13), N (p. 13) and O, Submission at 13.
32. See Submission Appendices 1, 2, 7-12, 15-17, 19, 22-27, 42, 43, 49, 50, 58-63, 66-70 and 74-80, and Response at 11, 12, 14 and 15.
33. See Response Appendices VIII, IX and XII.

inspection visits.[34] In two of these cases, the residents of the *ejido* had filed denunciations of probable crimes in connection with the same facts, so that it was not necessary for the authorities to notify the MPF thereof.[35] In the other cases, however, it is evident from Mexico's response that the environmental authorities found indications of criminal activity that they did not report to the MPF.[36] Mexico's response indicates that the complaints were resolved by imposing administrative corrective measures and sanctions on the persons responsible for the facts observed during the inspection visits. Again, Mexico's response contends that the facts were not reported to the MPF because they did not constitute environmental crimes, but the response does not include any reasoned and justified determination by the environmental authorities to support the decision not to notify the MPF.

Regarding the six points referred to by heading G of the submission,[37] the Submitter made an error in citing the provision that Mexico allegedly is failing to effectively enforce. The Party asserts that this error prevented it from responding to the assertions in that heading.[38] However, in view of the description in the submission of the actions to which these assertions refer, it is clear that this is a typographical error and that the Submitter was referring to Article 418 of the *Código Penal Federal*—CPF—and not the *Código Federal de Procedimientos Penales*—CFPP. Furthermore, the Secretariat noted this error in its request for a response from the Party.[39] Because Mexico did not respond to these assertions, they remain open.

Regarding the complaint referred to in heading N of the submission, Mexico's response states that the authorities reported the facts to the MPF on 23 May 2000.[40] However, the report provided with the response refers to the alleged unauthorized removal of natural vegetation and land use change (CPF Article 418) while heading N refers to the alleged discharge and dumping of wastewater into bodies of water under federal jurisdiction, causing harm to public health, natural

34. Heading P, Submission at 13.
35. See Response Appendix XIII.
36. See Response Appendix III.
37. See Submission Appendices 13, 14, 14A, 26, 27, 57, 64 and 65. Complaints filed by the Community of San Ignacio de Arareco on 18 July 1999; by Oscar Romero Viezcas (Ejido San Diego de Alcalá) on 16 June and 1 September 1999, and by Prudencio Ramos Ramos (Rarámuri Indigenous People of Ejido Rocheachi) on 7 December 1999 and 10 March 2000, as well as the Technical Forestry Audit performed in the Community of Colorada de los Chávez in September of 1999.
38. Response at 10.
39. SEM-00-006 (Tarahumara), Article 14(1) and (2) Determination (6 November 2001), page 2.
40. Response at 13 and Appendix XI.

resources, flora, fauna, and water quality (CPF Article 16). This appendix does not include information on the manner in which the CNA (the competent authority in this matter) processed the complaint in question. Consequently, it is not clear whether the CNA took any action with respect to the facts indicated in heading N.

In the case of the complaint filed 4 October 1999 by the Community of Ejido Ciénega de Guacayvo, the subject of heading M of the submission,[41] the Party states in its response that the complaint is the subject of a pending proceeding before the MPF, and requests the Secretariat proceed no further concerning this complaint. However, the Party does not include information enabling the Secretariat to confirm that it is in fact a pending procedure in the terms of NAAEC Article 14(3)(a). Beyond the Party's statement that the matter is the subject of a pending proceeding, there is no information on the manner in which the denunciation of probable crimes in question was processed. The Secretariat cannot determine from Mexico's response and its appendices that the matter is the subject of a proceeding initiated by the Party in accordance with Article 14(3)(a), and therefore it is appropriate to proceed further with respect to this allegation.[42] Because Mexico did not respond to this assertion, the question of whether Mexico is effectively enforcing its environmental law with respect to this complaint remains open.

Finally, heading H of the submission asserts that Mexico is failing to effectively enforce the law in the processing and resolution of a denunciation of probable crimes filed 21 September 1999.[43] Mexico's response reiterates its request to the Secretariat to proceed no further with respect to this allegation, stating that the complaint in question is the subject of a pending administrative proceeding.[44] However, on this point as well, Mexico's response includes no information enabling the

41. See Submission Appendix 1, point G.7 (p. 28) (without appendix) and Response at 12–13.
42. The Secretariat has determined on other occasions that in order to apply Article 14(3)(a), it must show that there exists a pending proceeding in the sense of the NAAEC, and that this proceeding refers to the same matter as the Submission. In this case, the Secretariat was not provided with the information necessary to determine this. See NAAEC Articles 14(3)(a) and 45(3); SEM-99-001 (Methanex) Secretariat Determination under Article 14(3)(a) (30 June 2000); SEM-97-006 (Oldman River II) Secretariat Notification to Council under Article 15(1) (19 July 1999); SEM-97-001(BC Hydro) Secretariat Notification to Council under Article 15(1) (27 April 1998); SEM-98-004 (BC Mining) Secretariat Determination under Article 15(1) (11 May 2001); SEM-00-004 (BC Logging) Secretariat Determination under Article 15(1) (27 July 2001); and SEM-01-001 (Cytrar II) Secretariat Determination under Article 15(1) (29 July 2002).
43. Submission at 10.
44. Response at 10–11.

Secretariat to determine that this matter is the subject of a pending proceeding in the terms of NAAEC Article 14(3)(a), and therefore it is appropriate to continue reviewing this allegation. Here again, the question of whether Mexico is effectively enforcing its environmental law with respect to this complaint remains open, given that the Party did not respond to this allegation.[45]

In summary, it is not clear from Mexico's response that the environmental authorities and the MPF have effectively enforced the environmental law as it concerns the investigation and prosecution of probable environmental crimes. The factual record that warrants development with respect to this submission will allow documentation of the process whereby the environmental authorities determined whether the facts in question of which they had knowledge constitute probable environmental crimes, as well as the decisions on whether to notify the MPF of these facts, in accordance with LGEEPA Articles 169 and 202. In addition, a factual record is warranted to develop information on whether Mexico is effectively enforcing CPF Articles 416, 418 and 419 in regard to the facts that according to the submission constitute probable crimes.

3. Alleged failures to effectively enforce the appeal for review provisions (LGEEPA Article 176)

Headings C and D of the submission contain assertions relating to the processing of the appeals for review filed further to the citizen complaints in question.

LGEEPA Articles 176–181 provide that affected persons may challenge a final administrative decision issued as a result of various acts of enforcement of that law. Based on a comprehensive reading of Article 8 of the Constitution, LGEEPA Articles 176–181, and LFPA Articles 17 and 83–96, the appeal for review procedure may be described as follows. The authorities either allow or dismiss the appeal; as applicable, they grant or deny a stay of the act appealed and review the harm or injury alleged by the appellant. The authorities are required to issue a final decision within the following four months. The decision may be to dismiss or stay the appeal; to uphold the act appealed; to declare the nonexistence, nullity, or voidability of the appealed act or nullify it in whole or in part; or to order the amendment of the appealed act or dictate or order the issuance of a new one in its place, where the appeal is resolved wholly or partially in favor of the appellant. The authorities are required to notify the appellant of the final decision without delay.

45. *Ibid.*

Regarding the Party's alleged failure to enforce in connection with its allowance or dismissal of the appeals for review referred to in heading C of the submission, Mexico's response shows that the appeals in question were allowed, and it exhibits the corresponding decisions. Likewise, regarding the Party's alleged failure to enforce in connection with the issuance of a final decision in the appeals for review contemplated in heading D of the submission, Mexico's response shows that these appeals were resolved, and it includes the corresponding resolutions.[46] Therefore, the Secretariat considers that the development of a factual record is not warranted in relation to the allegations in the submission concerning the appeals for review filed further to citizen complaints.

4. Summary

The matters raised by the submission in regard to the effective processing of citizen complaints as a mechanism for notifying the authorities of the existence of alleged violations of environmental law warrant development of a factual record, even though the response of the Party does provide information on the processing of the citizen complaints filed by the indigenous peoples and communities of the Sierra Tarahumara that are referenced in the submission. For the majority of the specific cases discussed in the submission, the communications and decisions attached to Mexico's response do not resolve the matters raised in the submission as to whether the relevant authorities took proper enforcement actions as prescribed by the LGEEPA.[47] Mexico's response provides a considerable amount of relevant information on the manner in which the complaints in question were processed, but this information does not resolve the central issue of whether Mexico is failing to effectively enforce its environmental law in these cases. The submission warrants the development of a factual record in order to shed more light on that matter.

Similarly, it is appropriate to address in a factual record the matters raised in the submission in relation to the investigation and prosecution of probable environmental crimes. In particular, the factual record would document the status of the denunciations of probable crimes filed

46. See Response at 8–9 and appendices VI–VII.
47. Specifically, this refers to the cases discussed in Submission headings A (except the complaints filed by Ricardo Chaparro Julián [Tepehuán de las Fresas Indigenous People] on 12 October 1998 and by Ejido Rocoroyvo on 18 February 2000), F, G, H, I, K, M, N, O, P (except for the inspection visits on which facts already complained of by the ejido residents were observed, as discussed in Response Appendix XIII), R, S and T.

with the MPF that are mentioned in the submission; the process whereby the environmental authorities determined whether the facts in question of which they had knowledge constitute probable environmental crimes; and the decisions on whether to notify the MPF of these facts.

The Submitter asserts that the failures to process the citizen complaints filed by the indigenous peoples and communities of the Sierra Tarahumara constitute a persistent pattern of denial of access to environmental justice to those communities. The NAAEC stresses the importance of public participation in conserving, protecting and enhancing the environment, and contemplates, among the goals of the Parties, the achievement of high levels of environmental protection and compliance with the law.[48] The submission also states that the alleged failures to enforce fall within the context of NAAEC Articles 6 and 7, which establish the commitment of the Parties to initiate, in a timely manner, judicial proceedings to seek appropriate sanctions or remedies for violations of their environmental law. The effective enforcement by Mexican environmental authorities of the citizen complaint procedure is fundamental to the promotion of citizen participation in environmental protection. Equally important is cooperation between the environmental authorities and the MPF in the proper investigation and prosecution of probable environmental crimes. The development of a factual record with respect to this submission would promote the effective enforcement of the Party's environmental law provisions that enable the indigenous peoples and other rural communities of the Sierra Tarahumara to participate, by filing complaints and denunciations, in the protection of the region's forests and the conservation of its ecosystems.

In the case of the alleged failures to enforce in connection with the appeal for review process, Mexico's response resolves the matters raised in the submission, and the Secretariat considers that the development of a factual record is not warranted in this regard.

While the alleged failures to enforce environmental law of the kind raised in this submission might not individually warrant preparation of a factual record, taken together, and considering the importance of the effective participation by indigenous peoples and other communities of the Sierra Tarahumara in the environmental protection of that region, the allegations in this submission pose a central question about effective enforcement of environmental law that warrants preparation of a factual record.

48. NAAEC Preamble, sixth paragraph, and Articles 1(a) and (g) and 5(1).

V. RECOMMENDATION

For the reasons set forth in this Notification, the Secretariat hereby informs the Council that in light of the response of Mexico, it considers that those assertions in submission SEM-00-006 (Tarahumara) that previously warranted a response from the Party, concerning the alleged failures to effectively enforce LGEEPA Articles 169, 189, 190–193, 199 and 202, as well as CPF Articles 416, 418 and 419, warrant the development of a factual record. The submission asserts failures to effectively enforce environmental law with respect to the citizen complaint procedure and the prosecution of probable environmental crimes, in the cases presented by indigenous peoples and communities of the Sierra Tarahumara, which, in light of the response from the Party, warrant documenting in a factual record. The effective enforcement of the environmental law that establishes these procedures is fundamental to the promotion of citizen participation—particularly of indigenous peoples—in environmental protection and natural resource conservation.

Respectfully submitted for your consideration on this 29th of August 2002.

Victor Shantora
Acting Executive Director

Appendix A

Date of Complaint	Filed by:	Sections to which the complaint pertains
1.- 14/10/1998	Comunidad Choguita	A.1, I.1
2.- 12/10/1998	Tepehuán de las Fresas	A.2, F.3, I.3, O.1
3.- 04/12/1998	Tepehuán de las Fresas	A.3, F.4, I.4, O.2
4.- 07/12/1998	Comunidad Rochéachi	A.4, G.4
5.- 15/03/2000	Ejido Cuiteco (A. Bravo Gaxiola)	A.5, I.14
6.- 15/03/2000	Ejido Baragomachi (A. Bravo Gaxiola)	A.6, I.15
7.- 15/03/2000	Ejido Monterde (A. Bravo Gaxiola)	A.7, I.16
8.- 15/03/2000	Ejido Basonaivo (A. Bravo Gaxiola)	A.8, I.17
9.- 15/03/2000	Ejido Mesa de Arturo (A. Bravo Gaxiola)	A.9, I.18
10.- 07/02/2000	Ejido Churo (Domingo Carrillo)	A.10, I.19
11.- 15/03/2000	Ejido Churo (A. Bravo Gaxiola)	A.11, I.20
12.- 15/03/2000	Ejido del Refugio (A. Bravo Gaxiola)	A.12, I.21
13.- 15/03/2000	Ejido Ocoviachi (A. Bravo Gaxiola)	A.13, I.22
14.- 18/02/2000	Ejido Rocoroyvo	A.14, I.23
15.- 15/03/2000	Ejido Rocoroyvo	A.15, I.24
16.- 15/03/2000	Ejido Areponapuchi	A.16
17.- 15/03/2000	Ejido San Alonso	A.17
18.- 20/08/1998	Ejido el Consuelo	F.1, I.2
19.- 18/08/1999	Ejido San Ignacio Arareco (A. Bravo Gaxiola)	F.2, G.1
20.- 16/06/1999	Ejido San Diego Alcalá (O. Romero)	F.5, G.2
21.- 01/09/1999	Ejido San Diego Alcalá (O. Romero)	F.6, G.3, N.1
22.- 18/02/1998	Ejido Ciénega Guacayvo	F.7, I.7, O.3
23.- 19/07/1999	Ejido Ciénega Guacayvo	F.8, I.8, O.4
24.- 03/08/1999	Ejido Ciénega Guacayvo	F.9, I.9, O.5
25.- 08/11/1999	Coalición Rural/Coalition	F.10
26.- 10/03/2000	Ejido Rocheachi	G.5

27.- 13/10/1999	Tepehuán de las Fresas	I.5, S.1
28.- 09/07/1999	Tepehuán de Malanoche	I.6, S.2
29.- 04/10/1999	Ejido Ciénega Guacayvo	I.10, M.1, O.7, R.2
30.- 01/12/1999	Ejido Ciénega Guacayvo	I.11
31.- 07/08/1998	Ejido Pino Gordo (P. Ramos)	I.12, T.1
32.- 30/03/1999	Ejido Pino Gordo (J. García y H. Olvas)	I.13
33.- 26/07/1999	Ejido Ciénega Guacayvo	O.6, R.1

Note: (A.B.G.) = Claim submitted by Agustin Bravo Gaxiola

Date of Appeal	**Filed by:**	**Relevant Sections**
1.- 17/12/1998	Comunidad Choguita (J. Fuentes)	C.1, D.1
2.- 15/02/1999	Ejido Rochéachi (A.B.G.)	C.2, D.2

Date of Criminal Complaint	**Filed by:**	**Relevant Sections**
1.- 21/09/99	Ejido San Diego de Alcalá	H.1

Date of Forestry Audit/Inspection	Conducted at:	Relevant Sections	Arising from complaints mentioned in the submission?
1.- xx/09/1999	Ejido Pino Gordo (Colorada de los Chávez)	G.6, K.1, P.5	Yes (p. 35 submission)
2.- 02/06/1999	Ejido Ciénega Guacayvo	K.2, P.4	?
3.- 11/08/1999	Ejido Ciénega Guacayvo	K.3, P.4′	Yes, that of 03/08/99 and that of 03/08/99 (sections F.8, I.8, O.4, F.9, I.9, O.5; Appendices 43-50 of the submission)
4.- 25/10/99	Ejido Ciénega de Guacayvo	K.4, P.4′′	Yes, that of 01/10/1999 (Appendix 50 of the submission)
5.- 31/05/1999	Ejido el Consuelo	P.1	Yes, that of 20/08/98 (sections F.1, I.2; Appendix 12 of the submission)
6.- 25/11/1999	Ejido San Ignacio Arareco	P.2	Yes, that of 18/08/99 (sections F.2, G.2; Appendix 14 of the submission)
7.- 04/03/1999	Tepehuán de las Fresas (Ejido Llano Grande)	P.3	Yes, that of 04/12/98 (sections A.3, F.4, I.4, O.2; see footnote 88 of the submission)
8.- 16/07/1998	Ejido Ciénega de Guacayvo	P.4′′′	Yes, that of 18/02/98 (sections F.7, I.7, O.3; p. 25 of the submission)
9.- xx/xx/xx	Ejido Mesa de Arturo	P.9	?
10.- xx/xx/xx	Ejido Churo	P.10	?
11.- xx/xx/xx	Ejido Cerocachui	P.11	?
12.- xx/xx/xx	Ejido el Refugio	P.12	?
13.- xx/xx/xx	Ejido Baragomachi	P.6	?
14.- xx/xx/xx	Ejido Monterde	P.7	?
15.- xx/xx/xx	Ejido Basonayvo	P.8	?
16.- xx/xx/xx	Ejido Ocoviachi	P.13	?
17.- xx/xx/xx	Ejido Rocoroyvo	P.14	?
18.- xx/xx/xx	Ejido San Alonso	P.15	?

SEM-01-001

(Cytrar II)

SUBMITTERS: ACADEMIA SONORENSE DE DERECHOS HUMANOS, A.C., DOMINGO GUTIÉRREZ MENDÍVIL

PARTY: MEXICO

DATE: 14 February 2001

SUMMARY: The submission asserts that Mexico is failing to effectively enforce its environmental law in relation to the establishment and operation of the Cytrar hazardous waste landfill near the city of Hermosillo, Sonora, Mexico. The Submitters assert that the Cytrar hazardous waste landfill carried on activities in violation of multiple legal provisions, since: a) it operated without an environmental impact authorization; b) it failed to comply with the applicable legal provisions concerning the design and construction of its facilities; c) it deposited hazardous waste originating from the company Alco Pacífico, Inc. of the United States of America. The submitters allege that these violations concerning the disposal of hazardous wastes have caused damage to human health and to habitat.

SECRETARIAT DETERMINATIONS:

ART. 15(1) **(29 July 2002)**	Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-01-001** (Cytrar II)
Submitter(s):	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Concerned Party:	United Mexican States
Date of Receipt:	14 February 2001
Date of this Notification:	29 July 2002

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC"), the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). In light of any response from the Party, the Secretariat may notify the Council that it considers that the submission warrants developing an Article 15 factual record. By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's analysis with respect to whether Submission SEM-01-001 (Cytrar II), filed 14 February 2001 by

Academia Sonorense de Derechos Humanos, A.C. and Domingo Gutiérrez Mendívil (the "Submitters") warrants developing a factual record. The submission asserts that Mexico is failing to effectively enforce its environmental law with respect to alleged violations in the construction and operation of the hazardous waste landfill known as Cytrar, and with respect to the Submitters' access to information relating to those alleged violations.

On 24 April 2001, the Secretariat determined that the submission met the requirements of Article 14(1) of the NAAEC. In addition, considering the criteria set forth in NAAEC Article 14(2), the Secretariat determined that a response from the Party was warranted. On 4 June 2001 and 30 July 2001, Mexico provided information to the Secretariat about a pending international dispute resolution proceeding (hereinafter "the arbitration"), which according to the Party precludes further processing of this submission, in accordance with Article 14(3)(a) of the NAAEC. In these communications, the Party did not provide any response to the assertions contained in the submission.

As described in this notification, the Secretariat determines that termination of the process of this submission under NAAEC Article 14(3)(a) is not warranted, because the matter raised in the submission is not subject to a pending proceeding. In accordance with NAAEC Article 15(1), the Secretariat notifies the Council that the submission warrants development of a factual record. The Secretariat considers that developing information in a factual record on the matters raised in the submission would advance the goals of NAAEC of promoting transparency, public participation and the effective enforcement of environmental law.

II. SUMMARY OF THE SUBMISSION

On 14 February 2001, Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendívil filed a submission with the Secretariat in accordance with Articles 14 and 15 of the NAAEC. The Submitters assert that the Mexican government is failing to effectively enforce its environmental law with respect to alleged violations in the construction and operation of the hazardous waste landfill known as Cytrar, and with respect to access to information relating to those alleged violations. This is the second submission filed with respect to the Cytrar landfill. The first submission, SEM-98-005, was terminated on 26 October 2000.

Cytrar is located near the city of Hermosillo in the state of Sonora, Mexico. The landfill is no longer operating, because in 1998 the environmental authority denied Cytrar, S.A. de C.V. renewal of its operating authorization. The submission asserts that Mexico has failed to effectively enforce with respect to Cytrar, Article 9 of the Federal Law of Environmental Protection (*Ley Federal de Protección al Ambiente*—LFPA) of 1982;[1] Articles 28, 29, 32, 153 and 159 Bis 3 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); Article 7 of the LGEEPA Hazardous Waste Regulations (*Reglamento de la LGEEPA en Materia de Residuos Peligrosos*—RRP); Article 415 of the Federal Criminal Code (*Código Penal Federal*—CPF);[2] and Mexican Official Standard NOM-057-ECOL-1993, which establishes the requirements for the design, construction and operation of controlled hazardous waste landfill cells (NOM-057).[3]

According to the Submitters, Mexico failed to effectively enforce Articles 28, 29 and 32 of the LGEEPA by not requiring an environmental impact statement prior to the performance of works and activities at the landfill site now known as Cytrar, and by allowing the persons subsequently responsible to operate it without the appropriate authorization. Second, the submission asserts that the environmental authority failed to effectively enforce Article 153 of the LGEEPA and Article 7 of the RRP, which prohibit the import of hazardous waste for final disposal in Mexico and require the repatriation of hazardous waste generated under the temporary import regime. The submission claims that hazardous wastes abandoned by the company Alco Pacífico, S.A. de C.V. should have been repatriated to the United States but instead were disposed of in the Cytrar landfill. The third assertion of the submission is that Mexico did not take enforcement action regarding the alleged violation of the specifications under NOM-057 for the construction of confinement cells. The fourth assertion is that the Party has failed to effectively enforce CPF Article 415 by not bringing a criminal action following the denunciation of alleged environmental crimes concerning the matters described above, by one of the Submitters on 8 December 1997 and 3 December 1998. Lastly, the submission asserts that Mexico has violated the right to

1. The LFPA was in effect until 1988. The LGEEPA, which replaced it, essentially keeps the environmental impact provisions (Articles 28 through 30). Reference is made hereafter only to the current provisions.
2. The penalties set forth in this article were modified by Decree on 1 February 2002, published in the Federal Official Gazette (*Diario Oficial de la Federación*—DOF).
3. As well as the prior Ecological Technical Standard *NTE-CRP-010/88*, published in the DOF on 14 December 1988, and Mexican Official Standard *NOM-PA-CRP-006/93*, which would receive its current nomenclature, *NOM-057-ECOL-1993*, by reason of the Accord published on 22 October 1993.

environmental information contemplated in Article 159 Bis 3 of the LGEEPA, by denying environmental information to the Submitters, principally with regard to the nature and origin of waste deposited in the Cytrar landfill.

III. SUMMARY OF THE RESPONSE OF MEXICO

In its response, received 4 June 2001, the Party asserts that "the Government of the United Mexican States is legally prevented from responding to the matter in question, since it is the subject of an arbitration proceeding to settle an international dispute with the company Técnicas Medioambientales Tecmed, S.A. [shareholder of Cytrar S.A. de C.V.], presumably arising from default on the Agreement for the Reciprocal Promotion and Protection of Investments (*Acuerdo para la Promoción y Protección Recíproca de Inversiones*—APRI) with Spain.[4]" (translation from original) The Party therefore requested that the Secretariat proceed no further with submission SEM-01-001, pursuant to NAAEC Article 14(3)(a).

Following the Secretariat's determination of 13 June 2001 that it did not have sufficient information to evaluate this assertion of the Party, on 30 July 2001 Mexico provided additional information to the Secretariat on the international dispute in question. Mexico asserts that, based on "the connexity of causes [...] between the Cytrar II submission and the international dispute subject to an ICSID arbitration proceeding, it is clearly demonstrated that 'the matter (Cytrar II) is the subject of a pending judicial or administrative proceeding' as provided in Article 14.3(a) of the NAAEC, and given that this proceeding began procedurally before the Cytrar II submission [...] the United Mexican States considers that submission should be deemed fully and absolutely concluded." (translation from original)

The Party did not respond to the matters raised in the submission in either of the two communications sent to the Secretariat.

IV. ANALYSIS

A. Introduction

This Notification concerns the NAAEC Articles 14(3) and 15(1) stages of the process. The Secretariat previously determined that the

4. ICSID, Case No. ARB(AF)/00/2, listed as number 27 in the list of pending cases.

submission met the requirements of Article 14(1) and that it merited a response from the Party, in consideration of the criteria of Article 14(2).

On 24 April 2001, the Secretariat determined that the submission met all requirements under Article 14(1) (a)-(f) of the NAAEC.[5] As stated in that determination, the submission was filed with the Secretariat by an individual and a non-governmental organization, asserting that Mexico has failed to effectively enforce various articles of the LGEEPA, the RRP, the CPF and NOM-057. These provisions qualify as "environmental law" under NAAEC Article 45(2). Also, the Secretariat determined that the assertions met the temporal requirement of Article 14(1) because they referred to matters for which enforcement action could be taken at the time the submission was filed. The submission was filed in Spanish, the language designated by Mexico for such purposes. The Submitters clearly identify themselves in the submission, indicating that their domiciles are in the city of Hermosillo, Sonora, Mexico. The Secretariat determined that the information and documents provided by the Submitters are sufficient to review the submission, particularly considering that they have tried to obtain additional information that allegedly has been denied to them. The Secretariat concluded that the submission is not aimed at harassing industry but rather to promote the enforcement of environmental law in Mexico. The submission also asserts that the matter has been communicated in writing to the pertinent authorities in Mexico, principally through citizen complaints, information requests and *amparo* suits.

The Secretariat reviewed the submission considering the criteria under Article 14(2) of the NAAEC, and in its determination of 24 April 2001 concluded that the submission warranted a response from the Party.[6] The submission addresses the remedies available under the laws of the Party that have been pursued, and the Secretariat considers that a reasonable effort has been made to pursue them. The Submitters indicate that they have initiated several administrative and judicial proceedings, including a citizen complaint, a denunciation of alleged environmental crimes, a complaint before the State Human Rights Commission and four *amparo* suits.[7] The submission does not appear to be based exclusively on media reports, although the Submitters do refer to some news reports. The Submitters assert that "the harm caused to all residents of Hermosillo, Sonora by the existence of the Cytrar hazardous waste landfill is evident, polluting the soil and atmosphere with toxic waste exposed to the open air, and which will imminently pollute the

5. SEM-01-001 (Cytrar II), Determination pursuant to Article 14(1) (24 April 2001).
6. *Ibid*.
7. See exhibits 5, 8, 12, 13, 15, 17, 27, 31 and 32 of the submission.

water tables at the site, if they have already been polluted [*sic*]." (translation from original) The information included in the submission does not provide any certainty as to the existence of harm relating to the landfill, although there also does not appear to be publicly available information concerning compliance (by Cytrar, S.A. de C.V. and its predecessors) with the obligations and specifications required under Mexican environmental law to prevent the hazardous waste landfill from causing harm to human health and the environment, as stated in the submission.[8] Lastly, the Secretariat considered that further study in this process of the matters raised in the submission, regarding the effective enforcement of environmental law on final disposal of hazardous waste and access to related information by interested parties, would contribute to furthering the goals of the NAAEC. Based on the above, on 24 April 2001, the Secretariat requested a response from Mexico to the submission.

The Party notified the Secretariat on 4 June 2001 that the matter raised in the submission is subject to an international proceeding and thus, in accordance with NAAEC Article 14(3)(a), the Secretariat should proceed no further. After examining the communication received, the Secretariat informed the Party that it did not have sufficient information to determine that it was impeded from continuing to process the submission in accordance with NAAEC Article 14(3)(a). The Secretariat indicated that Mexico still had 30 days to provide a response to the matters raised in the submission and/or the information necessary to determine whether the matter raised in submission SEM-01-001 (Cytrar II) is the same as the matter subject to the international dispute [ARB(AF)/00/2] involving Mexico.

In its response to the Secretariat's determination, received 30 July 2001, Mexico provided additional information on the matter of the international dispute. Neither of the two communications sent to the Secretariat included a response by the Party to the matters raised in the submission.

B. Should the Secretariat proceed with the submission in accordance with NAAEC Article 14(3)(a)?

Under NAAEC Article 14(3)(a), when the matter raised in a submission is subject to a pending proceeding, the Secretariat terminates the process of the submission without further analyzing whether the development of a factual record is warranted. To apply this exceptional

8. See pages 7 through 9 and exhibits 5, 8, 13, 15, 17, 20 through 23, 25, 26, 30, 32, 40 and 41 of the submission.

condition for terminating a submission, the Secretariat must ascertain that there is a "pending judicial or administrative proceeding" and that the matter raised in the submission is the subject matter involved in such proceeding.[9] Also, there must be a reasonable expectation that the "pending judicial or administrative proceeding" invoked by the Party will address and potentially resolve the matters raised in the submission. In the case of this submission, and based on the Party's communications of 4 June 2001 and 30 July 2001, the Secretariat determines that the conditions under Article 14(3)(a) for terminating the process are not satisfied.

Mexico is the defendant in an arbitration proceeding to resolve an international dispute with the company Técnicas Medioambientales Tecmed, S.A. The proceeding is before the International Center for Settlement of Investment Disputes (ICSID), registered under case number ARB(AF)/00/2 and listed as number 27 of pending cases. The Party argues:

> The international dispute arises because investments made in the territory of the United Mexican States, by the company "CYTRAR, S.A. DE C.V." owner of the hazardous waste landfill of the same name, located in the area of Hermosillo, municipality of Hermosillo, Sonora, Mexico have allegedly been affected [...]
>
> The international dispute derives from the enforcement of environmental law by the then-existing Semarnap [Secretariat of Environment, Natural Resources and Fisheries], given that on 25 November 1998 the renewal of the landfill's operating authorization was denied and its closure ordered. That is, the international dispute subject to arbitration centers on the authority's act denying an authorization, in this case for operation [...]
>
> In addition, the cause of the Cytrar II submission arises, from the standpoint of the submitters' arguments, because of the issuance or denial of authorizations or permits, since each of the four petitionary points refer, in essence, to the authority's act authorizing the operation of the hazardous waste landfill, the movement of contaminated soil, the construction of landfill cells or access to environmental information, as the case may be.
>
> Based on the above, establishing the *connexity of causes*,[10] understood to be an identity existing between two diverse actions with identity of causes,

9. See in this regard SEM-99-001 (Methanex), Determination pursuant to Article 14(3) (30 June 2000), and the definition of "pending judicial or administrative proceeding" in NAAEC Article 45(3), including "an international dispute resolution proceeding to which the Party is party."
10. The theses of jurisprudence supporting the connexity, in accordance with the Supreme Court of Justice's interpretation of the Laws of the United Mexican States, is attached. [note from original].

> between the Cytrar II submission and the international dispute subject to an ICSID arbitration proceeding, it is clearly demonstrated that "the matter (Cytrar II) is the subject of a pending judicial or administrative proceeding" under the provisions of Article 14.3(a) of the NAAEC, and given that this proceeding began procedurally before the Cytrar II submission, as established in point 4 of this communication, the United Mexican States considers that submission should be deemed fully and absolutely concluded." (translation from original) [emphasis added][11]

Article 14(3)(a) provides: "The Party shall advise the Secretariat ... whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further." The Secretariat considered whether the NAAEC contemplates termination of a submission due to "connexity of causes" (as defined by Mexico in its response) with a pending proceeding. Connexity of causes, as used by Mexico, would appear to apply to proceedings ultimately caused by the same triggering event, but involving different legal and factual issues. NAAEC Article 45 contains definitions for purposes of Article 14(3), but it does not include a definition of "matter." However, neither the text nor the objectives of the Agreement suggest that the term "matter" should be given the broad construction as would derive from applying the principle of connexity of causes. The Secretariat has previously construed provisions of the Agreement narrowly when a broader reading could defeat the objectives of the Agreement by too liberally allowing Article 14(3)(a) to cut off further review.[12]

It is incumbent upon the Party invoking NAAEC Article 14(3)(a) to show that the matters raised in a submission are the same as those subject to a pending proceeding. In the current case, while the submission and the pending arbitration both refer to the Cytrar landfill, they address different issues. As Mexico indicates, the arbitration centers on the *denied renewal of the authorization* to operate the Cytrar landfill, which allegedly caused harm to Tecmed's investment. By contrast, the submission centers on alleged *failures to effectively enforce* environmental laws with respect to presumed violations of the LGEEPA, the RRP, the CPF and NOM-057-ECOL-1993 in connection to the Cytrar landfill (alleged failure to conduct an environmental impact assessment, alleged illegal disposal of waste, alleged violation of general cell construction specifications and denied access to information).

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11. See pages 3 through 5 of Mexico's response of 30 July 2001.
12. See SEM-97-006 (Oldman River II) Notification pursuant to Article 15(1) (19 July 1999); SEM-97-001(BC Hydro) Notification pursuant to Article 15(1) (27 April 1998); SEM-98-004 (BC Mining) Notification pursuant to Article 15(1) (11 May 2001); and SEM-00-004 (BC Logging) Notification pursuant to Article 15(1) (27 July 2001).

Moreover, the arbitration does not refer to a failure to effectively enforce environmental law; nor does the submission refer to the interests of Cytrar investors or to the denied renewal of the authorization to operate the landfill in 1998. Thus, Mexico has not argued that any of the factual or legal matters raised in the submission would necessarily arise in the arbitration, and the Secretariat has no reason to believe this would happen. For Article 14(3)(a) to apply so as to terminate a submission, there must be a reasonable expectation that the "pending judicial or administrative proceeding" invoked by the Party will address and potentially resolve the matters raised in the submission. As far as the Secretariat can foresee, the arbitration is not likely to address, and potentially resolve, the Submitters' concern that Mexico is failing to effectively enforce its environmental law with respect to the Cytrar landfill. Nor is there any reason to believe that a factual record would interfere with the arbitration.

In the case of the Methanex submission (SEM-99-001), for example, the Secretariat determined that it was impeded from continuing the process because the same allegations raised in the submission were, along with others, the subject of a Chapter 11 arbitration under the North American Free Trade Agreement (NAFTA).[13] In that case, the submission and the international arbitration were both initiated by the same person (Methanex Corporation), and the matter raised in the Methanex submission (that the United States and the state of California were not effectively enforcing their environmental law on underground gasoline storage tanks) was expressly the subject, among others, of the Methanex NAFTA proceeding.

Because the matters raised in the submission are not subject to a pending proceeding, the Secretariat determines that it is not barred from continuing the process of submission SEM-01-001, under NAAEC Article 14(3)(a).

C. Reasons why the submission warrants development of a factual record

In accordance with NAAEC Article 15(1), the Secretariat considers that the submission warrants the development of a factual record. Absent a response from Mexico to the allegations in the submission, the Secretariat's consideration at this stage is based solely on the submission and on the objectives of the NAAEC.

13. See SEM-99-001 (Methanex) Determination pursuant to Article 14(3) (30 June 2000).

The submission contains allegations that Mexico has failed to effectively enforce its environmental law with respect to the Cytrar landfill by: failing to require an environmental impact assessment, allowing the final disposal in Cytrar of hazardous waste from Alco Pacífico, failing to enforce specifications for the construction of landfill cells, failing to prosecute alleged environmental crimes, and denying access to environmental information.

1. Allegations concerning environmental impact assessment

The Submitters assert that Mexico failed to effectively enforce Articles 28, 29 and 32 of the LGEEPA, with respect to the hazardous waste landfill currently known as Cytrar, by failing to require an environmental impact statement prior to the construction and operation of the landfill and by allowing the subsequent owners to operate the landfill without the appropriate environmental impact authorization. The submission asserts that the landfill never obtained an environmental impact authorization and cites an excerpt from a memorandum by the Head of Legal Affairs at the National Institute of Ecology, dated 28 January 1998, which states:

> It should be noted, with regard to the environmental impact statement and risk study that you request, that the company in question (referring to CYTRAR, S.A., DE C.V.) did not have the obligation to file those studies, because when it began procedures with the General Bureau of Environmental Pollution Prevention and Control [...], in the year 1986, it complied with the provisions of the Federal Law of Environmental Protection [...][14] (translation from original)

The Submitters claim that the environmental impact evaluation was required of the landfill from the start, under Article 9 of the LFPA. According to the submission, even if that were not the case, an environmental impact authorization would be required of the landfill under the 1988 LGEEPA. The Submitters argue that application of the LGEEPA to require an environmental impact authorization of an existing landfill would not violate the constitutional provision against retroactive application of the law, because the environmental impact requirement stems from a law of public order and social interest.[15] According to the Submitters, despite the government's assertion that the environmental impact assessment requirement was not applicable to Cytrar S.A. de C.V., that company prepared an environmental impact statement in 1994, which

14. See quote on page 11 of the submission.
15. See pages 3, 9 through 12 and exhibits 10 and 19 of the submission.

allegedly was never approved. This raises questions about what triggered it and how the government processed it.

The Secretariat considers that development of a factual record with respect to this submission is warranted, particularly in the absence of a response from the Party, to gather information on the enforcement by Mexico of the environmental impact assessment obligations of Cytrar, S.A. de C.V., after 1 January, 1994, when the NAAEC entered into force.

2. *Allegations concerning final disposal of hazardous waste from Alco Pacifico in Cytrar*

Another assertion by the Submitters is that Mexico is failing to sanction the alleged violation of Article 153 of the LGEEPA and Article 7 of the RRP, purportedly committed by the final disposal in Cytrar of hazardous waste that the Submitters claim should have been repatriated to the United States. Article 153 of the LGEEPA and Article 7 of the RRP prohibit the import of hazardous waste for final disposal in Mexican territory and require the repatriation of hazardous waste generated under the temporary import regime.[16]

According to the Submitters, in 1997 the Cytrar landfill received for final disposal contaminated soil and other hazardous waste abandoned by the company Alco Pacífico, S.A. de C.V. The Submitters state that Alco Pacífico lead smelter operated under the maquila regime at El Florido, Tijuana, BC., and was shut down by the environmental authorities in April 1991. The submission claims that Alco Pacífico abandoned contaminated soil and hazardous waste illegally imported from the United States, as well as waste generated from raw materials brought into the country under the temporary import regime, all of which should have been returned to the country of origin. According to the submission, the Mexican government arranged for the final disposal in Cytrar of the waste abandoned by Alco Pacífico. The Los Angeles Superior Court,[17] in the United States, presumably provided for that purpose US $2 million, which was apparently part of a fine imposed by the same court on the carrier company S.R.S./Quemetco for the illegal transport of hazardous waste to the Alco Pacífico site.[18]

16. See pages 3 through 6, 12 and 13, and exhibits 15 and 37 through 39 of the submission.
17. The reference for this decision of the Superior Court of California, County of Los Angeles was not provided.
18. See pages 6 to 8, and exhibits 20 to 23 of the submission.

The Secretariat considers that development of a factual record with respect to this submission is warranted, particularly absent a response from the Party, to gather information on the final disposal of the Alco Pacífico waste in Cytrar, and on the effective enforcement of Article 153 of the LGEEPA and Article 7 of the RRP in connection with that matter.

3. Allegations concerning construction specifications for landfill cells

The third assertion in the submission is that Mexico has failed to take enforcement action against Cytrar's alleged failure to observe the specifications of Mexican Official Standard *NOM-057-ECOL-1993*[19] in the construction of the landfill cells. According to the authorizations issued by the National Institute of Ecology to Cytrar, the landfill had one cell with a capacity of 16,200 m^3 in 1996 and a new cell with a capacity of 110,000 m^3 in 1997.[20]

To support the assertion that the NOM-057 specifications were not met, the submission includes an excerpt of an environmental impact statement filed by Cytrar in 1994, describing the cell design.[21] The Submitters assert that "... the containment walls of the Cytrar landfill cells do not have the cement layer mentioned in [the environmental impact statement] and in some areas there does not appear to be a 30 cm sand layer. The materials used as an alternative for the 60 cm concrete wall required in paragraph 5.1.5 of Mexican Official Standard NOM-CRP-006-ECOL/1993 [currently NOM-057] do not even remotely have a resistance of 240 kg/cm^2.[22]" (translation)

As stated in the 24 April 2001 request for a Party response to this submission, the Submitters as private parties do not have powers of verification and may be limited by technical and economic reasons from obtaining information from sources other than the environmental authority.[23] The Submitters claim that the authorities have refused their requests that compliance with the construction specifications be verified. The submission indicates that, despite the refusal to verify the cells, the government announced in July 1998 that it would perform an environmental audit to ensure that, if necessary, prevention or remediation measures would be taken before sealing the landfill cells. The Submitters claim that the government has no intention of performing that audit,

19. Establishing the requirements for the design, construction and operation of controlled hazardous waste landfill cells.
20. See exhibits 3 and 4 of the submission.
21. Which the environmental authority did not approve, according to the Submitters.
22. See pages 6, 7 and 12 and exhibit 19 of the submission.

because, in February 2001, the government announced that it had given the company a 45-day period to seal the landfill. The Secretariat has no information on whether any of these actions has been carried out.

The Secretariat considers that development of a factual record with respect to this allegation of the submission is warranted, particularly absent a response from the Party that may have allowed for a better understanding of Mexico's enforcement of the landfill cells specifications in NOM-057 with respect to Cytrar.

4. Allegations concerning environmental crimes

The fourth allegation in the submission is that the Party has failed to effectively enforce Article 415 of the CPF, which provides for a penalty of three months to six years of imprisonment and a fine of the equivalent to 1,000 to 20,000 times the daily minimum wage, for undertaking any activity with hazardous materials or waste that causes or may cause harm to public health, natural resources, fauna, flora or the ecosystems, without authorization from the federal competent authority or in contravention of the permit specifications.[24] On 8 December 1997 and 3 December 1998, the Submitter denounced as environmental crimes the alleged lack of an environmental impact authorization, the alleged illegal disposal of hazardous waste from Alco Pacífico in Cytrar, and the alleged violation of the specifications for the construction of landfill cells, referred to in the preceding sections.[25] Under LGEEPA Article 182 any person may denounce alleged environmental crimes with the agency responsible for criminal investigations and prosecutions (*Ministerio Público Federal*). The Secretariat considers that development of a factual record is warranted, particularly in the absence of a response from the Party, to gather information on the processing of the denunciation by the Submitter and the status of any criminal investigation thereof.

5. Allegations concerning access to environmental information

Lastly, the submission asserts that Mexico has failed to effectively enforce the right to environmental information contemplated in Article 159 Bis 3 of the LGEEPA, by failing to provide the Submitters various items of environmental information relating to Cytrar. On 16 July 1998,

23. SEM-01-001 (Cytrar II) Determination pursuant to Article 14(1) (24 April 2001).
24. The penalties set forth in this article were modified by the Decree of 1 February 2002, published in the DOF.
25. See pages 6, 14 and 15 and exhibits 8 and 15 of the submission.

the Submitter filed a request for information, principally on the nature and origin of the waste deposited in the Cytrar landfill. On 28 June 1999, the government declined to provide the information and the Submitters filed an *amparo* suit against this refusal. On 12 July 2000, the federal judiciary found the government's decision to be lacking justification, in violation of the guarantees of legality provided in Constitutional Articles 14 and 16. The court thus ordered the environmental authority to issue a well-founded and justified response to the information request, which had not been issued at the time the submission was filed.[26] The Submitters assert the Party is thereby failing to effectively enforce its environmental law concerning access to environmental information.

Other information the government allegedly refused to provide to the Submitters includes information concerning the agreement whereby which the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—PROFEPA) and the Los Angeles Superior Court arranged for the disposal in Cytrar of the waste abandoned by Alco Pacífico.[27]

As the Secretariat noted in its determination of 24 April 2001, the Submitters' concerns appear to be largely based on the lack of information that could change their perception that the Cytrar hazardous waste landfill failed to comply with environmental law and poses a high health risk to the city of Hermosillo. Specifically, there does not appear to be publicly available information on compliance (by Cytrar and its predecessors) with the obligations and specifications applicable to hazardous waste landfills under Mexican environmental law.[28] The Secretariat considers that development of a factual record is warranted with respect to the allegations in this submission of a failure to provide access to environmental information in connection to Cytrar.

In sum, the conditions under Article 14(3)(a) for terminating the process are not satisfied because the matter raised in the submission is not the subject of the pending proceeding invoked in the Party's communications of 4 June 2001 and 30 July 2001. Particularly absent a response from Mexico to the allegations in the submission, all of the matters raised in the submission remain open and the Secretariat considers that they warrant development of a factual record. Compliance with and effective enforcement of environmental law regarding final disposal of

26. See exhibit 32 of the submission.
27. See pages 6 through 8 and exhibits 20 to 23 of the submission.
28. See SEM-01-001 (Cytrar II) Determination pursuant to Article 14(1) (24 April 2001) and pages 7 through 9 and exhibits 5, 8, 13, 15, 17, 20 through 23, 25, 26, 30, 32, 40 and 41 of the submission.

hazardous waste and access to relevant information by interested parties are relevant to the NAAEC's goals to enhance the effective enforcement of environmental laws, achieve higher levels of environmental protection and compliance with the Parties' laws, and to promote transparency and citizen participation.[29]

V. RECOMMENDATION

For the reasons set forth in this notification, the Secretariat hereby notifies the Council that it considers submission SEM-01-001 (Cytrar II) warrants the development of a factual record. The submission raises questions that remain open about the effective enforcement of Articles 28, 29, 32, 153 and 159 Bis 3 of the LGEEPA, Article 7 of the RRP, Article 415 of the CPF and NOM-057-ECOL-1993 in connection with the Cytrar hazardous waste landfill in Hermosillo, Sonora, Mexico. Developing a factual record with respect to the Cytrar II Submission would contribute to furthering the goals of the NAAEC, particularly those of enhancing the effective enforcement of environmental laws and promoting public participation through access to information.

Respectfully submitted for your consideration on this 29 of July 2002.

Victor Shantora
Acting Executive Director

29. See NAAEC Preamble, fifth and sixth paragraphs, and Articles 1(a), (e), (g), (h) and 5(1).

SEM-02-001

(Ontario Logging)

SUBMITTERS: SIERRA LEGAL DEFENCE FUND ET AL.

PARTY: CANADA

DATE: 6 February 2002

SUMMARY: The Submitters assert that Canada is failing to effectively enforce section 6(a) of the *Migratory Birds Regulations* (MBR) against the logging industry in Ontario. Section 6(a) of the MBR makes it an offence to disturb, destroy or take a nest or egg of a migratory bird without a permit. The Submitters claim that in 2001 clear-cutting activity destroyed over 85,000 migratory bird nests in areas of Central and Northern Ontario.

SECRETARIAT DETERMINATIONS:

ART. 15(1) (12 November 2002)	Notification to Council that a factual record is warranted in accordance with Article 15(1).
ART. 15(1) (17 December 2003)	Notification to Council pursuant to Council Resolution 03-05 that a factual record is warranted in accordance with Article 15(1).

Secretariat of the Commission for Environmental Cooperation of North America

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-02-001** (Ontario Logging)
Submitters:	Canadian Nature Federation Canadian Parks and Wilderness Society Earthroots Federation of Ontario Naturalists Great Lakes United Sierra Club (United States) Sierra Club of Canada Wildlands League
Represented by:	Sierra Legal Defence Fund (SLDF)
Concerned Party:	Canada
Date of Receipt:	6 February 2002
Date of this Notification:	12 November 2002

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines, based on factors contained in Article 14(2), whether the submission merits requesting a

response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).

On 6 February 2002, the Submitters filed with the Secretariat a submission alleging "the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario.[1]" On 25 February 2002, the Secretariat determined that the submission meets the requirements of Article 14 of the NAAEC and requested a response from the Party in accordance with Article 14(2). The Party submitted its response on 25 April 2002.[2] In its response, Canada identifies wildlife enforcement priorities and asserts that it is currently engaged in compliance promotion activities in the forestry context, although it is committed to acting on any instances of non-compliance it becomes aware of and to pursuing the most effective remedy possible. Canada further states that "because the submitters did not provide any actual case, the Canadian Government was not able to respond in a meaningful and factual way to their main assertion" and "[f]or this reason, as well as the submitters' failure to otherwise make a complaint to [the Canadian Wildlife Service] that a logging operation in Ontario was in violation of subsection 6(a) of the [*Migratory Birds Regulations*], the Government of Canada believes that a factual record is not warranted." In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the Party's response, warrants developing a factual record, and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* ("MBR")[3] adopted under the *Migratory Birds Convention Act, 1994* ("MBCA")[4] in regard to the logging industry in Ontario. Section 6(a) of the MBR provides that "[...] no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird [...] except under authority of a permit therefor." Violations of s. 6(a) of the MBR may be prosecuted by

1. Submission at 1.
2. "Response to submission SEM-02-001 Prepared by the Government of Canada Submitted to the Secretariat of the Commission for Environmental Cooperation" dated 11 April 2002 [the "response"].
3. C.R.C., c. 1035.
4. S.C. 1994, c. 22.

way of summary conviction or as an indictable offence.[5] The Submitters allege that Environment Canada ("EC"), through its Canadian Wildlife Service ("CWS"), is primarily responsible for enforcing the MBCA.[6]

The Submitters claim that their research, based on statistical data, estimates that in the year 2001, clear-cutting activity destroyed over 85,000 migratory bird nests in areas of central and northern Ontario.[7] The Submitters further assert that "despite the estimated widespread destruction of bird nests,[8]" an access-to-information request filed in 2001 revealed no investigations or charges in Ontario for violations of s. 6(a) of the MBR.[9]

The Submitters assert that logging activity in Ontario is carried out under forest management plans ("FMPs") prepared under the supervision of the Ontario Ministry of Natural Resources ("MNR") in accordance with provincial standards and without any input from federal authorities on matters related to enforcing the MBCA, which is a federal statute.[10] They assert that while EC can be contacted for input on FMPs and has produced a non-binding guideline[11] directing that activities be avoided during critical periods of migratory birds' lifecycles, "EC fails to take enforcement activities to ensure that this requirement [...] is adhered to.[12]"

According to the Submitters, the CWS considers nest destruction during logging to be "incidental" kill and the CWS has decided not to use proactive enforcement measures against the logging industry because violations of s. 6(a) of the MBR that occur during logging

5. Section 13 of the MBCA provides that for a summary conviction offence, a company faces a maximum fine of $100,000, an individual a maximum $50,000 fine. Individuals are also liable to jail terms of up to six months, or a combination of jail and a fine. For indictable offences, the maximum fines are $250,000 for a company and $100,000 for an individual. Individuals are also liable to jail terms of up to five years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled.
6. Submission at 3.
7. Submission at 4 and Appendix 6 of the Submission: Dr. Elaine MacDonald & Kim Mandzy, "*Migratory Bird Nest Destruction in Ontario*" (Toronto: Sierra Legal Defence Fund (SLDF), 2001).
8. Submission at 1.
9. Submission at 6 and Appendices 7 and 8 of the submission (access to information request respecting enforcement efforts under s. 6(a) of the MBR dated 13 July 2001 from Elaine MacDonald, SLDF to Michael Bogues, Chief Access to Information and Privacy Secretary, Environment Canada, and materials received in response to access to information request).
10. Submission at 5.
11. *Environmental Assessment Guideline for Forest Habitat of Migratory Birds.*
12. Submission at 5, note 32.

operations are not intentional.[13] The Submitters claim that the MBCA does not distinguish between intentional and unintentional violations, and that like other public welfare laws, when it is infringed, it is often the result of unintentional, not wilful, conduct.[14]

The Submitters allege that the CWS favours conservation initiatives over enforcement in regard to the logging industry even though it lacks evidence that this approach is more effective. Further, they contend that even though logging has been an important industry in Canada and Ontario for many decades, when the MBCA was updated in 1994, the Canadian government did not exempt the logging industry from laws to protect migratory birds or their nests.

Finally, the Submitters assert that by giving the logging industry special consideration, Canada is not following the requirement of the *Compliance and Enforcement Policy for Wildlife Legislation*, which states that "[c]ompliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada.[15]" They also argue that "prosecutorial discretion" must be exercised on a case-by-case basis and cannot support a decision not to engage in prosecutions on an industry-wide basis.[16]

The Submitters claim that a reasonable exercise of enforcement discretion would require an environmental assessment of a proposed FMP or logging operation in order to weigh the relative costs associated with each option, something which, they claim, has not been done. They also advance several arguments in support of their view that the cost of enforcing section 6(a) of the MBR need not have a significant impact on EC's enforcement budget.[17]"

III. SUMMARY OF THE RESPONSE

In its response, Canada advises that the Submitters did not adequately inform the Secretariat of remedies, such as complaints to CWS, which were available to them.[18] Canada asserts that prior to the filing of the submission, it received only one written complaint of nest destruction pursuant to logging in Ontario, and this complaint, which was duly investigated, was not filed by one of the Submitters.[19] Canada notes

13. Submission at 8.
14. *Ibid.*
15. Submission at 11.
16. Submission at 10.
17. Submission at 10.
18. *Ibid.*
19. Response at 1.

that the Submitters sent only two written communications to relevant authorities before filing the submission and that CWS officials replied to these communications, committing to pass along further information as it became available.

Canada points out that CWS staff had been trying to set up a meeting with several of the Submitters as well as other interested nongovernmental organizations long before the filing of the submission. The purpose of the meeting would have been to allow the CWS to explain the legal basis of the MCBA regulations; the overall approach to the conservation of migratory birds, including enforcement; and the foundations of the current policy on enforcement of the regulations. The CWS would also have sought input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. Canada claims that the Submitters delayed scheduling a meeting with the CWS until after the filing of the submission, and expresses concern that the decision to do so "is not reflective of the letter and spirit of the NAAEC.[20]" According to Canada, at least one Submitter, the Canadian Nature Federation, did participate in a workshop on migratory bird issues, including enforcement of the MBR, on 12-13 October 2001.

Canada claims that the Submitters' assertions are not based on any actual case where a failure to effectively enforce the MBR may or may not be occurring, and that as a result, the Canadian Government is precluded from addressing in a direct and factual manner the assertions made by the Submitters.[21]

Despite these reservations, Canada provided a response to the submission. In its response, Canada states that EC and its agency, the CWS, are responsible for the conservation and protection of migratory birds in Canada.[22] It notes that CWS programs address migratory bird conservation on several fronts, including law enforcement, habitat stewardship, scientific research and other conservation actions. Canada states that annual priorities for wildlife enforcement respond to public complaints, international commitments, and wildlife conservation goals, and reflect a balancing of public concern, conservation science, and international commitments. It remarks that given that resources and staff are limited, and that enforcement of the MBR must take place over a very large geographical range, some components of the migratory bird conservation program, including the range of enforcement options, will necessarily

20. Response at 2.
21. Response at 2.
22. Response at 4.

receive more attention than others. Canada states that enforcement activities aim both to proactively address key conservation goals, as defined by the CWS, and to respond to public concerns and emerging conservation issues.

Canada states that the CWS must work cooperatively "with other federal departments and agencies, provincial and territorial governments, as well as industry, NGOs, and the research community, to make choices that promote a healthy landscape in an increasingly complex environment.[23]"

Canada states that forestry legislation and guidelines in Ontario provide for protection of the environment, including biodiversity, and that federal agencies are invited to public consultations to provide input in the development of FMPs. Canada disputes the Submitters' apparent view that a proposed FMP can routinely trigger the federal environmental assessment process under the *Canadian Environmental Assessment Act*. Canada states that approval of a provincial FMP does not absolve companies of their responsibilities under the federal MBCA.

Canada denies the Submitters' assertion that it has a sweeping policy not to enforce the MBR against the logging industry.[24] The response states that in regard to wildlife law enforcement, Canada traditionally targets hunting, and, in recent years, illegal import and export of wildlife and derivatives. Current enforcement priorities at the national level include commercial smuggling and migratory bird protection, primarily off- and near-shore spills that result in oiled birds. Canada notes that the regional offices of EC establish a subset of these priorities so that the Department can obtain the most effective coverage possible with the resources available.

Canada contends that it is addressing the issue of nest destruction during logging activities, mainly through compliance promotion.[25] In January 2001, the CWS met with industry representatives and told them that the taking of migratory bird nests is prohibited except under the authority of a permit and that compliance with s. 6(a) of the MBR is mandatory. In October 2001, the CWS held a workshop on the topic of compliance with the MBCA and associated regulations and conservation of migratory birds in the forestry context that was attended by industry groups, Canadian Nature Federation, government representatives and specialists.

23. *Ibid.*
24. Response at 7.
25. *Ibid.*

Canada states that compliance promotion and education are a necessary first step in a long-term enforcement approach in the forestry context that will eventually facilitate arguments in court that a given logging company will have been aware of the impacts of its actions. Canada "is concerned that obtaining limited results in a court of law for non-compliance at this stage would devalue the offence, and would be counterproductive to conservation of migratory birds.[26]" Canada states that EC is nevertheless committed to acting on any instances of non-compliance that it becomes aware of and to pursuing the most effective remedy possible, including prosecutions where appropriate.

Canada asserts that the CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general.[27]

In conclusion, Canada asserts that because the Submitters failed to provide any actual case, and because of their failure to otherwise make a complaint to the CWS that a logging operation in Ontario was in violation of s. 6(a) of the MBR, the Government of Canada believes that a factual record is not warranted.

IV. ANALYSIS

The Secretariat considers that the submission, in light of the response provided by the Party, warrants developing a factual record as recommended in this notification. The reasons for the Secretariat's recommendation are set forth below.

Why preparation of a factual record is warranted

Migratory birds are a cherished and valuable resource in North America. The study of migratory bird populations yields clues about long-range environmental impacts of local activities. Birds play a very important role in insect pest control, plant pollination and seed dispersal.[28] Birdwatchers, hunters and photographers contribute significantly to a large ecotourism industry.[29]

26. Response at 8.
27. Response at 9.
28. Submission at 4.
29. *Ibid.*

Canada and the United States recognized the importance of protecting this shared resource when they signed the Canada-U.S. Migratory Birds Convention in 1916. In Canada, the MBCA and MBR translate Canada's commitments under the Convention into legal requirements that are enforceable against companies and individuals, under penalty of high fines and even prison time. By prohibiting the unauthorized destruction of nests and eggs of migratory birds, s. 6(a) of the MBR is potentially a powerful provision for the protection of migratory birds and for the fulfillment of Canada's commitments under the Convention. Only aboriginals are exempted from the prohibition contained in s. 6(a) of the MBR, consistent with aboriginal and treaty rights recognized under the Constitution.[30]

Primary resource industries have always played an important role in Canada's economy, and forestry is central among these industries. In many communities, forestry is the backbone of the local economy, and because forest products are the first link in the supply chain of many other industries, the performance of the forestry sector is often used as one indicator in assessing the strength of Canada's economy. As well, concern for sustainability can condition consumer demand for forest products and create incentives to identify and address environmental impacts of activities carried on in this sector.

Both the submission and Canada's response recognize that destruction of migratory bird nests is a frequent environmental consequence of logging.[31] The importance in Canada of both protecting migratory birds and maintaining a healthy and sustainable forestry sector underscores the value in examining enforcement of s. 6(a) of the MBR so as to better understand its role in achieving the resource conservation goals of the MBCA within the resource development context of forest development.

Together, the submission and response demonstrate that enforcing s. 6(a) of the MBR in connection with logging poses a significant challenge.[32] First, gathering evidence necessary to enforce s. 6(a) of the MBR consistently across the logging sector would require ongoing efforts over large areas.[33] Second, the federal government – not the provinces – is responsible for enforcing the MBCA and the MBR, but the provinces own the natural resources within their boundaries and play a primary

30. See Section s. 2(3) of the MBCA and Article II of the Convention, as amended by a 1994 Protocol.
31. Submission at 4-5 and Response at 7-9.
32. Submission at 5-8 and Response at 8-9.
33. Response at 7.

role in regulating the industries that bring those resources to market.[34] Finally, the text of s. 6(a) of the MBR suggests that forestry activities which result in destruction of migratory bird nests and eggs could be legalized through the issuance of federal permits, but the MBR does not contain any provisions for the issuance of such permits.[35]

Nevertheless, both the submission and response point to measures that have been taken by Canada to address the issue of compliance with the MBR in the forestry sector. For example, Canada has issued a guideline outlining measures to protect migratory birds in the context of forest management planning.[36] Canada has organized information and education sessions to make the forest industry aware of its obligations under s. 6(a) of the MBR.[37] Canada mentions that "CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general.[38]" Finally, Canada has indicated that it enforces s. 6(a) of the MBR on the basis of specific complaints, and that when such complaints are brought to its attention, it takes appropriate actions.[39]

The submission and the response, taken together, are insufficient to dispel central questions regarding whether Canada is failing to effectively enforce s. 6(a) of the MBR in the context of logging in Ontario. Missing from the materials provided to the Secretariat, for example, is specific information regarding how the federal guidelines are implemented in practice, in particular in connection with the FMPs covering the harvest areas mentioned in the submission. Similarly, it would be useful to obtain information regarding whether and how federal information and education sessions have resulted in changes in forestry company practices and procedures, in the hiring or training of personnel and in investment in new equipment and scientific studies, and whether Canada has put in place measures to ensure that its industry outreach initiatives are improving compliance rates. Information is also needed regarding the new initiatives that Canada mentions in its response. A factual record would provide an opportunity to gather such information, as well as information regarding the type and outcome of actions taken in response to specific complaints, with a view to considering whether, in light of all of these federal actions, Canada is failing to effectively enforce s. 6(a) of the MBR.

34. Submission at 5 and Response at 5.
35. Response at 8.
36. Submission at 5, note 32.
37. Response at 8-9.
38. Response at 9.
39. Response at 8.

Canada claims that the submission is not based on any actual case where a failure to effectively enforce may or may not be occurring, and that

> [i]t is our firm belief that in order to examine whether there has been a failure to effectively enforce an environmental law, one has to look at the facts of a particular instance, or instances. Without those facts, there can be no examination of whether the law has been enforced or not.[40]

In the past, the Secretariat has determined that the Article 14 and 15 citizen submission process lends itself both to allegations of a widespread or systemic failure to effectively enforce an environmental law as well as to submissions concerning single violations.[41] In fact, the Secretariat has found that "[...] [t]he larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal.[42]"

The question before the Secretariat is therefore not whether there can be an inquiry under Article 15 of the NAAEC into an alleged pattern of failing to effectively enforce an environmental law, but rather what kind of information Submitters must present in support of such an allegation, and how, from a practical perspective, the Secretariat might go about preparing a factual record in connection with a submission making such an allegation. The answer will depend on the nature of the allegation.

The Secretariat has already found that the submission meets the requirements of Articles 14(1) and (2) of the NAAEC and has provided its reasons.[43] The Secretariat explains below how the Submitters have supported their assertions, and it identifies potential sources of additional information relevant to a consideration of these assertions in the context of a factual record.

The submission alleges that Canada is failing to effectively enforce s. 6(a) of the MBR against the logging industry in Ontario[44] and states

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40. *Ibid*.
41. See SEM-00-004 (BC Logging), Article 15(1) Notification (27 July 2001); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001); SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000); SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999); and SEM-97-001 (BC Hydro), Article 15(1) Notification (27 April 1998).
42. SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000).
43. SEM-02-001 (Ontario Logging), Article 14(1) & (2) Determination (25 February 2002).
44. Submission at 1.

that "[t]his is a widespread pattern of ineffectual enforcement [...][45]" The Submitters refer to e-mail statements of enforcement authorities as evidence that there is a general policy of non-enforcement vis-à-vis the logging sector,[46] and they cite an access-to-information request which yielded no information on specific enforcement actions.[47] They also reference clearcutting activities under fifty-nine provincial FMPs that they estimate will result in, or have resulted in, the destruction of approximately 85,000 nests, with no enforcement taken in response.[48]

The Secretariat considers that this information, which, taken together, reinforces the Submitters' concerns regarding how and whether s. 6(a) of the MBR is enforced, is relevant to whether Canada is failing to effectively enforce that provision. By focusing their assertions on fifty-nine provincial FMPs, the Submitters suggest that gathering and developing information regarding activities undertaken under those FMPs would be an appropriate way to anchor a factual record inquiry. The Secretariat agrees.

Within each of the forest management units covered by the selected FMPs, the Submitters identified the planned harvest areas pursuant to the FMPs.[49] The Submitters matched these specific harvest areas to one of eight eco-regions in Ontario and calculated a breeding bird density discounted to account only for the presence of birds both actually found in those specific areas and included under the MBCA.[50] They also confirmed that logging occurred during the 2001 bird breeding season and regularly occurs within the breeding season, and they cross checked and determined that numerous breeding birds were observed in areas that were clearcut during the breeding season.[51] While the Submitters admit that the estimate of 85,000 destroyed nests in those areas is not exact, the estimate is compelling. The only information missing is a

45. Submission at 10.
46. Submission at 6-7 and Appendix 8. In particular, an e-mail dated 22 May 2001 from Yvan Lafleur, Director, Wildlife Enforcement, Environment Canada, to Robert Mclean, Director, Wildlife Conservation, Environment Canada, stating "Bob, as I said in an earlier e-mail I have met with a representative of the Pulp and Paper industry. We had an open discussion about the impact of the lumber operations on migratory birds and express clearly that we were not planning any enforcement operations to charge the industry. I also said that we are concerned and that we would like to work with them and Steve Wendt [Chief, Migratory Birds Conservation, Environment Canada] to better understand the situation and support positive actions taken by the companies. [...]"
47. Submission at 6.
48. Submission at 4-5.
49. Submission at note 25 and Appendix 6.
50. *Ibid.*
51. *Ibid.*

more precise identification of the areas actually harvested in those forests in 2001, the identities of the timber harvesters and, to the extent it exists, additional information regarding the actual destruction of migratory bird nests during logging operations.

This information could readily be developed in a factual record. For example, a factual record would afford an opportunity to examine in detail the harvesting that actually took place in the FMP harvest areas identified in the submission and to present facts regarding Canada's efforts to promote compliance with or take enforcement action under s. 6(a) of the MBR in regard to the timber operators who conducted those harvests. This compliance promotion and enforcement information could be a source of information regarding the actual number of nests destroyed during logging operations, since enforcement cases would likely provide evidence regarding actual nest destruction. At the same time, gaps in available information regarding the extent of actual nest destruction might also be relevant to whether Canada is failing to effectively enforce s. 6(a) of the MBR as alleged in the submission. Identifying such information gaps could reveal an area where additional efforts to obtain information – through surveys, inspections, investigations or other activities – could improve efforts to enforce or otherwise achieve compliance with s. 6(a) of the MBR.

Enforcement necessarily involves the exercise of discretion in setting priorities and making decisions about the allocation of resources. In its response to the submission, Canada explains in part how it exercises certain discretionary powers in the context of wildlife enforcement. A factual record would provide an opportunity to gather valuable additional information regarding how Canada has exercised its discretion, thereby providing meaningful context for any individual enforcement actions documented in a factual record. This would involve, for example, gathering information used to establish current enforcement priorities; information on methods used to balance priorities; information on regional (particularly Ontario) priorities and how they are set; information supporting the decision to engage in compliance promotion in the forestry context; information supporting the position that compliance promotion activities are a necessary precursor to prosecution; and information on current initiatives. Information would also be gathered regarding the manner in which resources are allocated in the context of administering the migratory bird conservation program.

A factual record is therefore warranted to present a detailed factual account of the full range and effectiveness of Canada's compliance promotion and enforcement efforts in the specific context of actual harvests

in 2001 in the forest harvest areas identified in the submission, including relevant contextual information on enforcement priorities, resource allocation and recent initiatives. A detailed description of relevant information is provided below.

V. INFORMATION TO BE CONSIDERED IN A FACTUAL RECORD

The submission, taken together with the response, leaves open central questions regarding whether Canada has effectively enforced s. 6(a) of the MBR in 2001 in connection with the logging industry in Ontario, and in particular the areas harvested under fifty-nine FMPs referenced in the submission. This section identifies information relevant to a consideration of these open questions.

In respect of the harvest areas referenced in the submission, information required for an assessment of the Submitters' allegations would include information regarding species of migratory birds found in those areas, timing of their nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities. Also required is information on provincial FMPs for those areas, including specific information on the role and outcome of any consultations with federal officials during the development of those FMPs, as regards compliance with s. 6(a) of the MBR; on whether the federal guidelines and/or any other federal conditions related to protection of nests of migratory birds are referenced in the FMPs and if so, whether the FMPs require compliance with such conditions; and on whether any provincial conditions under those FMPs require compliance with s. 6(a) of the MBR or equivalent provincial statutory provisions. The Secretariat would also need to review information regarding compliance promotion activities organized by EC officials in the harvest areas referenced in the submission, attendance by personnel from forestry companies operating in those areas, and effectiveness of such activities in helping achieve compliance with s. 6(a) of the MBR.

Specific information is also required regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out, with precise information on locations and timing; data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during

clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

Information is also required regarding efforts by federal officials to monitor compliance with s. 6(a) of the MBR in connection with clearcutting activities carried out in 2001 in harvest areas referenced in the submission. Such information includes information regarding the scope, operation and budget of any monitoring program, data used to anticipate species and numbers of migratory bird nests in different areas, and information obtained through monitoring or inspection. The Secretariat would also need to consider actions taken in response to suspected violations of s. 6(a) of the MBR, including actions taken in response to any failure to implement conditions in an FMP relating to protection of migratory bird nests; follow-up measures to test effectiveness of compliance promotion activities; actions taken to follow up on any monitoring results indicating potential violations of s. 6(a) of the MBR; and responses to complaints.

In addition to the information provided in Canada's response, information relevant to a consideration of the effectiveness of federal enforcement and compliance promotion actions in connection with clearcutting activities in the forest harvest areas referenced in the submission also includes information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion, and how financial and human resources are allocated in this area, including at the regional level in Ontario. Also relevant is information regarding current initiatives and programs related to enforcing and promoting compliance with s. 6(a) of the MBR in the forestry sector in Ontario, and specifically, how such initiatives address any compliance issues noted in the harvest areas referenced in the submission.

VI. PRIVATE REMEDIES

The NAAEC provides that a Party, in responding to a submission, may advise the Secretariat "whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.[52]" In its response, Canada claims that the Submitters did not adequately inform the Secretariat of remedies, such as complaints to the CWS, which were available to them but which were not pursued. Pursuant to Article 15(1) of the NAAEC and for the reasons outlined below, the Secretariat has

52. Article 14(3)(b)(ii) of the NAAEC.

considered this assertion and finds that preparation of a factual record is warranted nonetheless.

The texts of Articles 14(2)(c) and 14(3)(b)(ii) of the NAAEC, relating to the pursuit of private remedies, do not make the identification[53] or pursuit of such remedies a condition precedent to the Secretariat's requesting a response from the Party or recommending the preparation of a factual record.[54] Rather, the opening words of Article 14(2)[55] and the text of Article 15(1)[56] suggest that the existence and pursuit of private remedies is a factor, among others, to be considered by the Secretariat in determining whether a particular submission merits further review under the Article 14 and 15 citizen submission process. The weight to be accorded this factor in determining whether to move forward with a particular submission depends on the facts of each submission.

This submission identifies two types of remedies – civil suits and private prosecutions – and explains why, in the Submitters' opinion, legal, practical and policy obstacles effectively put those remedies out of reach as a means of compelling enforcement of the MBCA.

First, the Submitters believe they would be denied standing to bring a civil suit to compel the logging industry in Ontario to comply with s. 6(a) of the MBR.[57] They cite caselaw affirming the principle that infringement of a private right, or proof of special and personal damages, is required before a private individual or organization can bring a suit in its own name to protect a public interest (such as the public interest in the conservation of migratory birds), absent the consent of the

53. The *Guidelines for Submissions on Enforcement Matters under Article 14 and 15 of the North American Agreement on Environmental Cooperation* ("Guidelines") state at s. 5.6 that "[...] the Submission should address [...] (c) The actions, including private remedies, available under the Party's law *that have been pursued*" [emphasis added]. Thus, submitters are asked to provide information regarding remedies they have pursued; they are not required to list all potential remedies.

54. Previous Secretariat determinations have made this observation. See *e.g.* SEM-98-006 (*Aquanova*), Article 15(1) Notification (4 August 2000); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001); SEM-97-007 (Lake Chapala), Article 15(1) Notification (14 July 2000); SEM-97-002 (*Río Magdalena*), Article 15(1) Notification (5 February 2002).

55. "In deciding whether to request a response, the Secretariat shall be *guided by* whether [...] (c) private remedies available under the Party's law have been pursued" [emphasis added].

56. "If the Secretariat considers that the submission, *in the light of any response provided by the Party*, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons" [emphasis added].

57. Submission at 14 and 15 and Appendix 13: *Manitoba Naturalists Society Inc.* v. *Ducks Unlimited Canada*, [1992] 2 W.W.R. 377 (Man. Q.B.) [hereinafter "*Manitoba Naturalists Society*"].

Attorney General.[58] The interest of conservationists in protecting a natural resource has been qualified as "special," but not equivalent to a private right.[59] While the courts have discretion to grant standing to challenge legislation or the statutory authority for administrative actions, a court has specifically denied standing to a private organization seeking to enforce s. 6(a) of the MBR.[60]

Second, the Submitters state that charges sworn by private individuals are arguably an alternative to a civil suit, but they claim that they are not a viable alternative. Private citizens, they argue, do not have the financial resources or access rights needed to gather evidence required for a prosecution in connection with violations of s. 6(a) of the MBR by logging companies, and gathering evidence in areas where logging is occurring is potentially very hazardous. In addition, the Submitters argue that prosecutions are after-the-fact events that do not remedy the harm done.

The NAAEC instructs the Secretariat, in determining whether a submission merits requesting a response from the Party, to be guided by whether, among other things, private remedies available under the Party's law have been pursued.[61] In its 25 February 2002 Determination in Accordance with Article 14(1) and (2) of the NAAEC, the Secretariat considered the arguments of the Submitters regarding private remedies and concluded that "[i]t therefore appears from the submission that private remedies may in effect not be available." On the basis of this finding, along with a consideration of the other factors listed in Article 14(2), the Secretariat requested a response from the Party.

Pursuant to Article 14(3)(b)(ii) of the NAAEC, Canada's response to the submission cites complaints to the CWS as a remedy that was available to the Submitters and was not pursued. However, the response does not explain the source of this remedy, and the Secretariat has been unable to identify any provision of the MBCA, the MBR, or the *Compliance and Enforcement Policy for Wildlife Legislation* that creates such a

58. *Manitoba Naturalists Society* at 380.
59. *Ibid.* at 381.
60. *Ibid.* at 382.
61. Article 14(2)(c) of the NAAEC. Section 7.5 of the Guidelines provides that "[i]n considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether: (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases."

remedy. This raises the question of what characteristics a particular form of redress must possess to qualify as a "private remedy" pursuant to the NAAEC.[62]

Article 14(2)(c) of the NAAEC refers to "private remedies available under the Party's *law*" [emphasis added], whereas Article 14(3)(b)(ii) refers to "private remedies in connection with the matter [...]" Since complaints to the CWS are not mentioned in the MBCA or the MBR, it seems reasonable for the Submitters not to have mentioned them in the submission. However, Article 14(3)(b)(ii) does not contain the condition that the private remedy be "available under the Party's law." Other indications are therefore needed to determine whether complaints to the CWS qualify as a private remedy under the NAAEC.

Article 6 of the NAAEC, entitled "Private Access to Remedies," makes the Parties responsible for implementing measures to give redress to those aggrieved by environmental wrongs. It imposes different requirements on a Party depending on whether a complainant is an "interested person" or has a "legally recognized interest under its law in a particular matter.[63]" On the basis of the caselaw discussed above, it can be said that the Submitters are "interested persons," as defined in Article 6 of the NAAEC, since they do not appear to have a "legally recognized interest" in the enforcement of s. 6(a) of the MBR.[64] Under Article 6(1) of the NAAEC, remedies available to "interested persons" must give such persons the right to "request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations" and must require the Party to "give such requests due consideration in accordance with law."

The *Canadian Environmental Protection Act, 1999* ("CEPA") contains provisions that meet the requirements found in Article 6 of the

62. The Secretariat has previously found that a citizen complaint process provided for under environmental legislation constituted a private remedy for the purposes of the NAAEC. See SEM-97-007 (*Lake Chapala*), Article 15(1) Notification (14 July 2000); SEM-98-006 (*Aquanova*), Article 15(1) Notification (4 August 2000); and SEM-97-002 (*Río Magdalena*) Article 15(1) Notification (5 February 2002).

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

64. See discussion above regarding standing to bring a civil suit.

NAAEC.[65] Under CEPA, a person need only be 18 years of age and resident in Canada to be entitled to request the Minister of the Environment to investigate an alleged offence under CEPA.[66] Individuals who are dissatisfied with the Minister's response may bring an "environmental protection action" before the courts.[67] Since neither the MBCA nor the MBR contain these types or similar types of provisions, and in the absence of information in the Party's response concerning the source, rules and functioning of the CWS complaints process, the Secretariat declines to conclude that complaints to the CWS qualify as a private remedy under the NAAEC.

Even if complaints to the CWS were considered a private remedy pursuant to the NAAEC, however, the Secretariat notes that the Submitters raise concerns about alleged violations that are geographically widespread and vast in number – 85,000 nests allegedly destroyed under fifty-nine FMPs. It is not evident in the response that the CWS complaints procedure on which Canada relies is conceived to address complaints of this nature.

Furthermore, it appears that the Submitters did bring their concerns about non-enforcement of s. 6(a) of the MBR to the attention of EC in a letter dated 16 January 2001, and that EC replied on 13 February 2001, saying that it was gathering relevant information.[68] The Submitters claim that they never received a reply to their follow-up request for information on compliance measures.[69] In addition, an e-mail quoted in the submission and reproduced in an appendix to the submission suggests that EC employees are aware of the destruction of migratory bird nests and eggs during logging.[70] The author of the e-mail states that "[...] the NGOs are pushing us to take action.[71]"

As Canada's response to the submission does not indicate what types of procedures have been established to process complaints from the public and to give them "due consideration in accordance with law" as provided by Article 6(1) of the NAAEC, and because Canada has

65. Sections 17-40 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.
66. Section 17(1) of CEPA.
67. Section 22 of CEPA.
68. Submission 12-13 and Appendix 9.
69. Submission at 13. The Secretariat has previously found that the requirements of Article 14(2)(c) were satisfied where concerns were communicated and information requests made to environmental authorities by way of regular correspondence. See. SEM-98-007 (*Metales y Derivados*), Article 15(1) Notification (6 March 2000).
70. Submission at 13 and Appendix 8.
71. *Ibid.*

listed public complaints as one of the bases for enforcing, and setting enforcement priorities for, s. 6(a) of the MBR, a factual record would provide an opportunity to develop information regarding the functioning of the complaints procedure and its role in ensuring effective enforcement of s. 6(a) of the MBR.

VII. RECOMMENDATION

For the reasons stated above, the Secretariat has determined that the submission, in light of the Party's response, warrants development of a factual record. The Submitters have raised central questions that Canada's response leaves open regarding enforcement of s. 6(a) of the MBR by Canada with respect to the logging industry in Ontario, with particular reference to clearcut logging carried out in areas of central and northern Ontario in 2001.

As noted in detail above, additional information required for a consideration of the Submitters' assertions through a factual record includes information regarding the state of the migratory bird resource in the forest harvest areas referenced in the submission and information regarding timing and extent of clearcut logging activities carried out in those areas during 2001. Particularly relevant is information on measures taken by foresters to identify migratory bird nests and avoid their destruction during clearcut logging in those areas, and the success of those measures in preventing violations of s. 6(a) of the MBR. Information is also required regarding FMPs for those areas, including any FMP provisions on protection of migratory bird nests and eggs and the federal role in the development and enforcement of FMP conditions related to protection of the migratory bird resource. Also relevant is additional information regarding federal compliance promotion efforts in the harvest areas referenced in the submission, including information on the effectiveness of those efforts in reducing or avoiding violations of s. 6(a) of the MBR during clearcut logging in 2001 in those areas. Information is also required regarding any federal compliance monitoring and responses to suspected violations. Finally, relevant additional information includes information on how the CWS establishes and balances wildlife enforcement priorities, how resources are allocated and how the new initiatives and programs referenced in Canada's response to the submission are promoting compliance with s. 6(a) of the MBR.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by

developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 12th day of November, 2002.

per: Victor Shantora
Acting Executive Director

Secretariat of the Commission for Environmental Cooperation of North America

Notification to Council pursuant to Council Resolution 03-05 recommending preparation of a factual record

Submission Number:	**SEM-02-001** (Ontario Logging)
Submitters:	Canadian Nature Federation Canadian Parks and Wilderness Society Earthroots Federation of Ontario Naturalists Great Lakes United Sierra Club (United States) Sierra Club of Canada Wildlands League
Represented by:	Sierra Legal Defence Fund (SLDF)
Concerned Party:	Canada
Date of Receipt:	6 February 2002
Date of this Notification:	17 December 2003

I. INTRODUCTION

On 6 February 2002, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (CEC) a submission alleging "the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario.[1]" On 25 February 2002, the Secretariat determined that the submission meets the requirements of Article 14(1) of the *North American Agreement on Environmental Cooperation* (NAAEC) and requested a response from the Party in accordance with Article 14(2).

1. Submission at 1.

The Party submitted its response on 25 April 2002.[2] On 12 November 2002, the Secretariat notified the Council that the submission, in light of the Party's response, warrants the development of a factual record.[3] On 22 April 2003, in Council Resolution 03-05, the Council voted unanimously:

> TO DEFER consideration of the Secretariat's notification of 12 November 2002, pending the following:
>
> a) the submitters being provided a period of 120 calendar days from the date of this resolution to submit the requisite sufficient information in support of the allegations set forth in SEM-02-001;
>
> b) the termination of the submission process for SEM-02-001 if the submitters elect not to provide further information within the 120 calendar day time frame;
>
> c) in the event such further information is provided, the Secretariat determining whether that information warrants a response from Canada or whether the submission process should be terminated;
>
> d) in the event such a response is requested and provided by Canada, the Secretariat, after considering both the new information provided by the submitters and the response of Canada to that information, notifying Council whether it recommends the preparation of a factual record.

On 20 August 2003, within the 120 calendar day time frame provided in Council Resolution 03-05, the Submitters provided the Secretariat with further information.[4] On 21 August 2003, pursuant to Council Resolution 03-05, the Secretariat determined that the further information provided by the Submitters merited requesting a response from Canada and requested a response.[5] On 16 October 2003, Canada submitted its response.[6] Pursuant to Council Resolution 03-05, and after consideration of both the new information provided by the Submitters and the

2. Government of Canada, "Response to submission SEM-02-001 submitted to the Secretariat of the Commission for Environmental Cooperation" (11 April 2002) [hereinafter "Canada's response to the original submission"].
3. SEM-02-001 (Ontario Logging), Article 15(1) Notification (12 November 2002) [hereinafter "Article 15(1) Notification"].
4. Submitters, "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (19 August 2003).
5. SEM-02-001 (Ontario Logging), Notification Pursuant to Council Resolution 03-05 (21 August 2003).
6. Government of Canada, "Response to supplemental information submitted to the Secretariat of the Commission for Environmental Cooperation" (16 October 2003) [hereinafter "Response to Supplemental Information"].

response of Canada to that information, the Secretariat recommends the preparation of a factual record.

II. SUMMARY OF NEW INFORMATION PROVIDED BY THE SUBMITTERS

On 20 August 2003, pursuant to Council Resolution 03-05, the Secretariat received from the Submitters a document entitled "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (the "Supplementary Submission").

In the Supplementary Submission, the Submitters state that they interpret Council Resolution 03-05 "as an attempt to scope our request for a factual record in a manner that goes beyond the Council's mandate under the NAAEC.[7]" They add "[n]onetheless, in an effort to avoid any further delay in the preparation of a factual record, we have obtained all additional 'facts' and the 'sufficient information' currently available to respond to the Council Resolution.[8]"

The Submitters explain that when they drafted their submission, they based their calculations on projected figures for clearcut harvest areas contained in *Forest Management Plans* (FMPs) rather than actual numbers, because those numbers were not available when the submission was filed, in February of 2002.[9] They note that in its Article 15(1) Notification, the Secretariat stated "[t]he only information missing is a more precise identification of the areas actually harvested in those forests in 2001" and that such information "[...] could readily be developed in a factual record.[10]"

Section II of the Supplementary Submission, entitled "The Supplementary Evidence," describes the process engaged by the Submitters to gather additional information in response to Council Resolution 03-05, and the information obtained.

The Submitters contacted the Ontario Ministry of Natural Resources ("OMNR") for information regarding areas actually harvested in 2001. They were told that the information they were seeking is reported annually to the OMNR by logging companies for each forest

7. Supplementary Submission at 3.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.* and note 6, referencing the Article 15(1) Notification at 10.

management unit ("FMU"), in a report table titled *Annual Report of Depletion Area*.[11] Reports are prepared on a fiscal year basis (1 April -31 March), and they are due by 15 November following fiscal year end.[12] Once submitted, they are reviewed by OMNR, which provides comments.[13] Finalization of the reports can take several months.[14] When the Submitters contacted the OMNR in May 2003, only 15 of the 59 FMUs referenced in the submission had completed reports for the fiscal year beginning 1 April 2001.[15]

OMNR provided the Submitters with a list of OMNR telephone numbers to allow them to gather information concerning harvest data for the 44 FMUs whose reports were not yet complete.[16] According to the Submitters, this proved fruitful in some cases and additional data was obtained.[17] In others, the information could not be released by the OMNR because the annual reports had not yet been finalized and approved by district managers.[18] As a last resort, the Submitters contacted FMP authors directly.[19] They report that in many cases, FMP authors were forthcoming with information and actual harvest data was obtained for 49 of the 59 FMUs included in the original submission.[20] The Submitters explain that "[o]f the remaining 10 units, five had been amalgamated with other units, one logging license had been revoked, and clearcut harvest data was not yet available from any of the sources we contacted for four units.[21]" The Supplementary Submission provides detailed information regarding attempts made by the Submitters to obtain information regarding the remaining four units.[22]

The Supplementary Submission contains a table listing the 59 FMUs referenced in the original submission.[23] For each FMU, it provides information on the planned clearcut area (drawn from the FMPs used to prepare the original submission) and on the actual clearcut area (drawn from annual reports and telephone interviews referenced in the Supplemental Submission).[24] For each FMU, the table also lists the

11. *Ibid.* at 4 and note 7.
12. *Ibid.* at 4.
13. *Ibid.*
14. *Ibid.*
15. *Ibid.* at 5 and note 10.
16. *Ibid.* at 5.
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.* at 6, note 13.
23. *Ibid.* Table 1. "Comparison of Planned and Actual Clearcut Areas for 2001-02."
24. *Ibid.*

source of the information.[25] The Submitters remark that information they gathered regarding the number of hectares clearcut in fiscal year 2001-2002 indicates that numbers were lower than projected.[26] They explain that this is due in part to the absence of data regarding four FMUs.[27] They add that since FMPs contain projected harvest information for five-year periods, the original submission simply divided those figures by five to obtain a one-year estimate.[28] The Submitters explain that the rate of cutting varies over the course of a five-year period for various reasons, including weather conditions, contractor availability and First Nations issues, and they add that when asked about the variations, OMNR consistently replied that while rate of harvesting may vary from year to year, it typically balances out after five years.[29]

The Supplementary Submission then addresses whether clearcut logging occurred during the migratory bird nesting season.[30] The Submitters begin by remarking that OMNR does not collect harvest data on a monthly basis.[31] They explain that in order to determine whether and how much logging may have taken place during the migratory bird nesting season, they relied on lumber scaling data obtained from OMNR.[32] They assert that this data can be used as an indicator of the rate of logging on a monthly basis throughout the year.[33] The Submitters report that the 2001-2002 scaling data shows that more logging occurred during the winter months than the summer and spring months.[34] They add that the nesting period occurs predominantly between April and August and lasts one month, starting when nest construction begins and ending once the brood has fledged.[35] The Submitters totaled the percentage of the annual harvest scaled from April to August 2001 and determined that approximately 27 % of annual harvest occurred during that period.[36] By then prorating for one month to coincide with the average length of nesting, they estimated that on average 5.3 % of the annual harvest occurred during nesting.[37] Using the breeding bird density data gathered for the original submission, the Submitters calculated the number of nests destroyed by multiplying the discounted breeding bird

25. *Ibid.*
26. *Ibid.* at 8.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.* at 9.
31. *Ibid.*
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*
37. *Ibid.*

density per hectare by the number of hectares clearcut in 2001-2002 multiplied by a factor of 0.0536 to account for the seasonal variation in the logging rate and a nesting period of one month.[38] Based on this calculation, the Submitters estimated at approximately 43,700 the total number of nests destroyed.[39]

In sections III and IV of the Supplemental Submission, entitled "The nature of the evidence that can reasonably be expected from a citizen group" and "The Problem with Scoping," the Submitters assert that their submission sets out evidence about a wide-scale failure of the Government of Canada to effectively enforce s. 6(a) of the MBR and they state that they have asked that a factual record be prepared for each of the FMUs in which clearcutting takes place.[40] They maintain that statistical or modeling information is appropriate where it is the best information that is reasonably available to a citizen's group.[41] They note that the object of the NAAEC citizen submission process is not to meet the standard of proof applicable in legal proceedings, but rather to provide sufficient information to allow the Secretariat to review the allegation of non-enforcement.[42] They contend that there is little merit in investigating specific instances when all of the evidence, particularly government records, points to both a widespread problem of nest destruction and a widespread failure to enforce the law.[43]

III. SUMMARY OF CANADA'S RESPONSE TO NEW INFORMATION PROVIDED BY THE SUBMITTERS

Canada's Response to Supplemental Information contains comments on the additional information provided by the Submitters as well as a description of the Canadian Wildlife Service ("CWS") approach to bird nest conservation and some observations concerning enforcement activities within the 49 FMUs for which the Submitters presented additional information in the Supplemental Submission.[44]

Canada remarks that unlike the original submission, the Supplemental Submission asserts, rather than hypothesizes, that harvesting

38. *Ibid.* at 10.
39. *Ibid.*
40. *Ibid.* at 12.
41. *Ibid.* at 12-13.
42. *Ibid.* at 13.
43. *Ibid.* at 15.
44. Response to Supplemental Information at 3.

took place during the migratory bird nesting season, by relying on actual harvest data and the application of a method for determining how much logging took place during each month of the year.[45] Canada states that the Submitters have found that actual harvesting during the migratory bird nesting season was far less than hypothesized in the original submission.[46] It remarks that in the Supplementary Submission, the Submitters did not reveal any complaints in addition to the one identified by the CWS in Canada's response to the original submission.[47]

Regarding the Submitters' calculations, Canada notes that

> [t]o arrive at an estimate of the number of nests potentially destroyed as a result of the logging that likely took place during the nesting season, the submitters continue to use the same simple method that was used in the original submission.[48]

According to Canada, in quantifying the density of sixteen selected breeding birds using data from the Canadian Breeding Bird (Mapping) Census Database, the Submitters did not take into consideration important variability displayed in the breeding density of those species and the possibility of stratifying the data.[49] Canada asserts that for this reason, the Submitters' estimate of the number of nests potentially destroyed as a result of logging during the migratory bird nesting season remains very imprecise.[50] Canada asserts that "[t]he NAAEC Article 14/15 submission process should be grounded in specific instances of alleged failures to effectively enforce a Party's environmental law.[51]" It remarks that although the Submitters' estimate "is still based on extrapolations from a simple model, rather than on evidence of specific bird nests having been destroyed by specific logging operations, the supplemental information does provide some specific information.[52]" Canada states that given the particular circumstances of this submission, the supplemental information now provides sufficient information to enable the Government of Canada to provide a meaningful response.[53]

45. *Ibid.*
46. *Ibid.*
47. *Ibid.*
48. *Ibid.*
49. *Ibid.*
50. *Ibid.*
51. *Ibid.* at 4.
52. *Ibid.*
53. *Ibid.*

Canada then describes the CWS approach to bird nest conservation, stating

> CWS continues, in addition to inspections, investigations and prosecution, to utilize education, compliance promotion, regulation development and public reporting, as means to achieve bird conservation.[54]

Canada recalls that no permitting system has been created pursuant to s. 6(a) of the *Migratory Birds Regulations* ("MBR") "[...] to recognize circumstances where industry has taken considerable measures that will benefit the conservation of migratory birds, for example through the preparation and implementation of conservation plans.[55]" Canada observes that "[t]his has created legal uncertainty for the Forestry industry because even after they have implemented conservation plans that would benefit migratory bird populations, they would still be at risk for prosecution should any small limited incidental take of nests occur during the course of their activities.[56]" Canada explains that as a result, CWS has been involved in a joint effort with industry and nongovernmental organizations to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity.[57]

Canada's response refers to workshops held in October 2001, February 2002, and March 2003, in which Environment Canada staff met with the Forest Products Association of Canada, some nongovernmental organizations, and other stakeholders.[58] According to Canada, the first workshop affirmed the significance of the forest environment for the conservation of a large number of migratory bird species and the difficult compliance issues faced by industry.[59] In the second workshop, CWS explained that its approach on regulations and enforcement has two main objectives: to ensure the sustainability of migratory birds, and to ensure that CWS officials, as agents of the Minister of Environment, fulfill their legal responsibilities.[60] CWS organized the meeting to obtain input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations.[61] At the third meeting, also attended by representatives of the natural resources departments of Ontario, British Columbia, New

54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. *Ibid.* at 5.
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*

Brunswick and Alberta, the focus was on discussing conservation and compliance issues with the MBR.[62] Canada reports that the outcome of the workshop was a general agreement by participants on a draft framework to deal with migratory bird conservation within the forestry context.[63] A working group was tasked with further developing the framework, with recommendations to be made by the end of December 2003.[64] Canada anticipates that regulatory changes may be required to allow for an approval system to deal with the destruction of nests that may result from industrial operations.[65]

Canada explains that the CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders to sustain viable populations of migratory birds within the forests of Canada.[66] Canada's response notes that "[n]o federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered.[67]" Canada adds that "[g]iven the nature of the submission, which references areas in boreal forest to a large extent, it follows that the Submitters have not established a case that any threatened or endangered species were involved.[68]" Canada notes that a major project running until 2006 has been undertaken to compile additional information on migratory birds in the boreal forests of Ontario to assist Environment Canada in determining locations and trends of migratory birds in Ontario and provide a baseline for monitoring species populations and habitat change.[69]

Regarding enforcement activities in the 49 FMUs for which additional information was provided in the Supplemental Submission, Canada remarks that the CWS enforcement program received no complaints from the Submitters regarding the 49 FMPs referenced in the original submission during the period referenced in the submission.[70] In regard to the one complaint received by the CWS and referenced in Canada's response to the original submission, Canada notes that the complaint was received on 12 July 2001, that receipt was acknowledged on 1 August 2001, and that wildlife officers determined that it did not warrant further action since the logging operations had ceased some time before and OMNR indicated that no other logging was planned.[71]

62. *Ibid.*
63. *Ibid.*
64. *Ibid.* at 5-6.
65. *Ibid.* at 6.
66. *Ibid.*
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*
70. *Ibid.*
71. *Ibid.* at 6-7.

IV. ANALYSIS

The Secretariat has considered the Supplemental Submission and Canada's Response to Supplemental Information. For the reasons contained in the Secretariat's Article 15(1) Notification and in light of the considerations set out below, preparation of a factual record is warranted in order to gather additional information concerning the matters raised in submission SEM-02-001/Ontario Logging that is necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging activities carried out in 2001 in harvest areas referenced in the original submission. Section V of the Article 15(1) Notification, which contains a description of information the Secretariat recommends gathering during development of a factual record, is reproduced as Appendix 1 to this Notification. Additional information the Secretariat recommends gathering during development of a factual record is identified below.

The Supplemental Submission contains some information which the Secretariat proposed, in its Article 15(1) Notification, to gather in the context of a factual record investigation, namely information regarding "timing of [...] nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities" and

> [s]pecific information [...] regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out [...].

However, as Canada points out in its Response to Supplemental Information, this information could be refined further.[72] Developing a factual record would allow the Secretariat to gather additional information regarding migratory bird populations in the harvest areas identified by the Submitters, including as regards variability in the breeding bird density across species and the possibility of stratifying the data.

The Party's Response to Supplemental Information contains information not included in the Party's response to the original submission. Canada suggests that the forest industry may be taking considerable measures, including conservation plans, to protect migratory birds.[73] Canada also provides additional information about CWS workshops on migratory bird conservation.[74] Canada explains that CWS wants to focus its efforts on species of conservation priority.[75] It states that CWS

72. *Ibid.* at 3.
73. *Ibid.*
74. *Ibid.* at 5-6.
75. *Ibid.* at 6.

uses inspections, investigations and prosecutions as a means to achieve bird conservation,[76] and it provides some additional information concerning a complaint referenced in Canada's response to the original submission.[77] However, the Response to Supplemental Information does not contain certain types of information which the Secretariat identified in its Article 15(1) Notification as being necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging in 2001 in harvest areas referenced in the original submission.

For example, missing is information regarding any measures adopted by industry in the harvest areas referenced by the Submitters to achieve or increase compliance with s. 6(a) of the MBR. In the Article 15(1) Notification (see Appendix 1, below), the Secretariat recommends gathering information on

> [...] data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

While the Response to Supplemental Information mentions that industry may be taking considerable measures that will benefit the conservation of migratory birds,[78] additional information is required for a consideration of the role of any such measures in promoting compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission, including information on the nature, extent and timing of measures adopted, information used to design and evaluate those measures, and overall success of those measures in achieving (or increasing) compliance with s. 6(a) of the MBR during logging identified by the Submitters in the original submission. In the context of developing a factual record, the Secretariat would gather information regarding any conservation plans or other measures that have been prepared and implemented in the harvest areas identified by the Submitters in the original submission,[79] as well as information regarding the "difficult compliance issues faced by industry[80]" and the joint effort by CWS, industry and nongovernmental organizations "to develop solutions to improve the

76. *Ibid.* at 4.
77. *Ibid.* at 6-7.
78. Response to Supplemental Information at 4.
79. *Ibid.*
80. *Ibid.* at 5.

regulatory framework as it applies to the conservation of birds affected by industrial activity" referenced in the Response to Supplemental Information.[81]

The Response to Supplemental Information does not contain information regarding any compliance promotion activities carried out by CWS in regard to the harvest areas referenced in the original submission, except as regards three workshops on migratory bird conservation held between October 2001 and March 2003. With regard to those workshops, the Response to Supplemental Information does not contain information such as meeting agendas, meeting minutes and related correspondence, or a copy of the draft framework to deal with migratory bird conservation in the forestry context.[82] Such information would be gathered by the Secretariat in the context of preparing a factual record.

The Response to Supplemental Information indicates that CWS wants to focus its efforts on species of conservation priority.[83] The legal provision identified by the Submitters in the original submission, s. 6(a) of the MBR, states "[...] no person shall [...] disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird;" s. 2(1) of the MBR provides a definition of "migratory bird.[84]" Neither

81. *Ibid.* at 4.
82. *Ibid.*
83. *Ibid.* at 6.
84. S. 2(1) of the MBR defines "migratory bird" as follows: "migratory birds" or "birds" means migratory game birds, migratory insectivorous birds and migratory non-game birds as defined in the Act, and includes any such birds raised in captivity that cannot readily be distinguished from wild migratory birds by their size, shape or colour, and any part or parts of such birds. S. 2(1) of the MBCA defines "migratory bird" as follows: "migratory bird" means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird. The 1994 Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States states at Article I: "In order to update the listing of migratory birds included in the terms of this Convention in a manner consistent with their current taxonomic (Family and Subfamily) status, Article I of the Convention is deleted and replaced by the following:
The High Contracting Powers declare that the migratory birds included in the terms of this Convention shall be as follows:
1. Migratory Game Birds:
Anatidae, or waterfowl (ducks, geese and swans); Gruidae, or cranes (greater and lesser sandhill and whooping cranes); Rallidae, or rails (coots, gallinules and rails); Charadriidae, Haematopodidae, Recurvirostridae, and Scolopacidae, or shorebirds (including plovers and lapwings, oystercatchers, stilts and avocets, and sandpipers and allies); and Columbidae (doves and wild pigeons).
2. Migratory Insectivorous Birds:
Aegithalidae (long-tailed tits and bushtits); Alaudidae (larks); Apodidae (swifts); Bombycillidae (waxwings); Caprimulgidae (goatsuckers); Certhiidae

provision makes reference to the notion of "species of conservation priority" as qualifying the general prohibition set out in s. 6(a) of the MBR. The Response to Supplemental Information does not contain information regarding the legal or policy basis for focusing on species of conservation priority in Canada's enforcement of s. 6(a) of the MBR. Since the Article 15(1) Notification recommends gathering information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion (see Appendix 1, below), in the context of preparing a factual record, the Secretariat would gather information regarding the basis for CWS's intention to focus on species of conservation priority in the context of enforcing and seeking compliance with s. 6(a) of the MBR.

In the Response to Supplemental Information, Canada remarks that no migratory bird species in the boreal region of the province of Ontario is currently identified as threatened or endangered, and points out that since the Submitters refer to the boreal region of Ontario, "[...] they have not established that any threatened or endangered species were involved.[85]" As noted above, s. 6(a) of the MBR and the definition of migratory birds in the MBR do not refer to the notion of "species of conservation priority". Similarly, these provisions do not refer to "threatened" or "endangered" species. Nonetheless, information regarding any special consideration given to threatened or endangered species in enforcing s. 6(a) of the MBR in the harvest areas referenced in the submission would be appropriate for inclusion in a factual record. For example, the Response to Supplemental Information suggests that information required to establish a baseline for measuring species population and habitat change – which may be relevant to determining whether any species are threatened or endangered – is being gathered as part of a project that began in 2000 and will end in 2006; information related to this project would be appropriate for inclusion in a factual

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(creepers); Cinclidae (dippers); Cuculidae (cuckoos); Emberizidae (including the emberizid sparrows, wood-warblers, tanagers, cardinals and grosbeaks and allies, bobolinks, meadowlarks, and orioles, but not including blackbirds); Fringillidae (including the finches and grosbeaks); Hirundinidae (swallows); Laniidae (shrikes); Mimidae (catbirds, mockingbirds, thrashers, and allies); Motacillidae (wagtails and pipits); Muscicapidae (including the kinglets, gnatcatchers, robins, and thrushes); Paridae (titmice); Picidae (woodpeckers and allies); Sittidae (nuthatches); Trochilidae (hummingbirds); Troglodytidae (wrens); Tyrannidae (tyrant flycatchers); and Vireonidae (vireos).

3. Other Migratory Nongame Birds:

Alcidae (auks, auklets, guillemots, murres, and puffins); Ardeidae (bitterns and herons); Hydrobatidae (storm petrels); Procellariidae (petrels and shearwaters); Sulidae (gannets); Podicipedidae (grebes); Laridae (gulls, jaegers, and terns); and Gaviidae (loons)."

85. Response to Supplemental Information at 6.

record. Information regarding threatened or endangered species considerations would also be relevant in conjunction with the recommendation in the Article 15(1) Notification to gather information on data used by CWS to anticipate species and numbers of migratory bird nests in different areas in monitoring compliance with s. 6(a) of the MBR.

The Response to Supplemental Information does not contain information on enforcement activities, such as inspections, investigations and prosecution, undertaken by Environment Canada or CWS pursuant to s. 6(a) of the MBR in the harvest areas referenced in the original submission. The Response to Supplemental Information provides summary information regarding CWS follow-up on a complaint referred to by Canada in its response to the original submission. A factual record would provide an opportunity to gather information on enforcement activities undertaken by Environment Canada and CWS in the harvest areas identified in the original submission, as well as information concerning processing of complaints regarding non-compliance with s. 6(a) of the MBR.

In regard to complaints to the CWS, in its Article 15(1) Notification (see Appendix 1, below), the Secretariat recommended gathering information concerning actions taken by CWS and Environment Canada in response to suspected violations of the MBR, including responses to complaints. In the Response to Supplemental Information, Canada remarks that in their Supplemental Submission, "[...] the Submitters have not revealed additional complaints other than the one identified by CWS in its response.[86]" It also states "[t]he enforcement program of CWS received no complaints from the submitters related to the 49 Forest Management Plans identified in the SEM-02-001 during the period referenced in the submission.[87]" In the context of developing a factual record, the Secretariat would gather information regarding the role of complaints from the public in the enforcement of s. 6(a) of the MBR, including as regards resources expended by Environment Canada to respond to complaints in comparison to carrying out routine inspections, and effectiveness of public complaints as a vehicle for monitoring and enforcing compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission.

86. *Ibid*. at 3.
87. *Ibid*. at 6.

In regard to the complaint referenced in Canada's response to the original submission and Response to Supplemental Information, Canada noted that

> [t]he letter of complaint referred to the fact that the Contingency Forest Management Plan, which encompassed the brief period of July 12 to September 1, 2001, included a number of clear-cuts and claimed that these clear-cuts would destroy the nests of migratory birds during nesting season.[88]

The Response to Supplemental Information states that the complaint was received on July 12, 2001, the first day on which logging was authorized under the Contingency Forest Management Plan.[89] It explains that wildlife officers dealing with the complaint determined that it did not warrant further investigation after consultation with the OMNR, and it states that "[s]ince the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction.[90]" In the Supplemental Submission, the Submitters maintain that there are good practical and public policy reasons why eyewitness evidence of violations should not be expected from the public, including lack of legal access to logging areas, the danger of falling trees, and the onus this puts on the public.[91] In developing a factual record, the Secretariat would gather information regarding the role of CWS consultation with the OMNR in the enforcement of s. 6(a) of the MBR; the timing of CWS follow-up on complaints from the public and any effects on the ability of the CWS to gather evidence of violations of s. 6(a) of the MBR; and the type of information required for a complaint from the public to lead to enforcement action by the CWS in regard to suspected violations of s. 6(a) of the MBR. Accordingly, the Secretariat would gather information regarding whether and how the CWS has followed up on the Submitters' allegation that an estimated 43,700 nests were destroyed by clearcut logging during the period and in the areas referenced in the original submission.

In light of the above considerations, after review of the Response to Supplemental Information, central questions remain regarding whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging activities carried out in 2001 in areas of central and northern Ontario referenced in the original submission.

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88. *Ibid.*
89. *Ibid.*
90. *Ibid.* at 7.
91. Supplemental Submission at 13.

V. RECOMMENDATION

Pursuant to Council Resolution 03-05, and after consideration of both the new information provided by the Submitters and the response of Canada to that information, the Secretariat recommends the preparation of a factual record to gather information identified by the Secretariat in Section V of the Article 15(1) Notification (reproduced at Appendix 1 to this determination) and Section IV of this determination, except the information identified in Section IV of this determination already provided to the Secretariat by the Submitters in the Supplemental Submission.

Respectfully submitted on this 17th day of December 2003.

per: William Kennedy
Executive Director

APPENDIX 1

INFORMATION TO BE CONSIDERED IN A FACTUAL RECORD
(Section V of the Article 15(1) Notification)

"The submission, taken together with the response, leaves open central questions regarding whether Canada has effectively enforced s. 6(a) of the MBR in 2001 in connection with the logging industry in Ontario, and in particular the areas harvested under fifty-nine FMPs referenced in the submission. This section identifies information relevant to a consideration of these open questions.

In respect of the harvest areas referenced in the submission, information required for an assessment of the Submitters' allegations would include information regarding species of migratory birds found in those areas, timing of their nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities. Also required is information on provincial FMPs for those areas, including specific information on the role and outcome of any consultations with federal officials during the development of those FMPs, as regards compliance with s. 6(a) of the MBR; on whether the federal guidelines and/or any other federal conditions related to protection of nests of migratory birds are referenced in the FMPs and if so, whether the FMPs require compliance with such conditions; and on whether any provincial conditions under those FMPs require compliance with s. 6(a) of the MBR or equivalent provincial statutory provisions. The Secretariat would also need to review information regarding compliance promotion activities organized by EC officials in the harvest areas referenced in the submission, attendance by personnel from forestry companies operating in those areas, and effectiveness of such activities in helping achieve compliance with s. 6(a) of the MBR.

Specific information is also required regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out, with precise information on locations and timing; data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

Information is also required regarding efforts by federal officials to monitor compliance with s. 6(a) of the MBR in connection with clearcutting activities carried out in 2001 in harvest areas referenced in the submission. Such information includes information regarding the scope, operation and budget of any monitoring program, data used to anticipate species and numbers of migratory bird nests in different areas, and information obtained through monitoring or inspection. The Secretariat would also need to consider actions taken in response to suspected violations of s. 6(a) of the MBR, including actions taken in response to any failure to implement conditions in an FMP relating to protection of migratory bird nests; follow-up measures to test effectiveness of compliance promotion activities; actions taken to follow up on any monitoring results indicating potential violations of s. 6(a) of the MBR; and responses to complaints.

In addition to the information provided in Canada's response, information relevant to a consideration of the effectiveness of federal enforcement and compliance promotion actions in connection with clearcutting activities in the forest harvest areas referenced in the submission also includes information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion, and how financial and human resources are allocated in this area, including at the regional level in Ontario. Also relevant is information regarding current initiatives and programs related to enforcing and promoting compliance with s. 6(a) of the MBR in the forestry sector in Ontario, and specifically, how such initiatives address any compliance issues noted in the harvest areas referenced in the submission."

SEM-02-002

(Mexico City Airport)

SUBMITTERS: JORGE RAFAEL MARTÍNEZ AZUELA ET AL.

PARTY: MEXICO

DATE: 7 February 2002

SUMMARY: The submitters assert that Mexico is failing to effectively enforce its environmental laws with respect to the noise emissions originating at the Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México–AICM). According to the Submitters, there are studies showing that the noise emissions of the AICM exceed the limits established in environmental law, causing irreversible damage to the thousands of persons living near the airport.

SECRETARIAT DETERMINATIONS:

ART. 15(1) (25 September 2002) Determination under Article 15(1) that development of a factual record is not warranted.

Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

Determinación del Secretariado en conformidad con el artículo 15(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-02-002** (Aeropuerto de la Ciudad de México)
Peticionarios:	Jorge Rafael Martínez Azuela Jorge Martínez Sánchez Raúl Morelos C. José Alberto Téllez Murillo Saúl Gutiérrez Hernández Norma Guadalupe Viniegra Cantón
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	7 de febrero de 2002
Fecha de la determinación:	25 de septiembre de 2002

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición. A la luz de la respuesta de la Parte, el Secretariado puede notificar al Consejo que amerita la elaboración de un expediente de hechos, en conformidad con el artículo 15. El Consejo, con el

voto de las dos terceras partes de sus miembros, puede entonces instruir al Secretariado para que elabore un expediente de hechos. El expediente de hechos final se pone a disposición pública, también mediante el voto de las dos terceras partes de los miembros del Consejo.

Esta determinación contiene el análisis realizado por el Secretariado, conforme al artículo 15(1) del ACAAN, respecto de la petición presentada el 7 de febrero de 2002 por Jorge Rafael Martínez Azuela y otros vecinos de la zona circundante al Aeropuerto Internacional de la Ciudad de México (AICM) (los "Peticionarios"). Los Peticionarios aseveran que el gobierno de México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de las emisiones de ruido originadas por ese aeropuerto, y respecto de una denuncia popular y una denuncia ciudadana presentadas a la Profepa y al Gobierno del Distrito Federal en relación con ese asunto.

El 22 de febrero de 2002, el Secretariado determinó que la petición satisface los requisitos del artículo 14(1) del Acuerdo, y que ameritaba solicitar una respuesta a la Parte mexicana conforme al artículo 14(2). El 23 de mayo de 2002 la Parte envió al Secretariado su respuesta conforme al artículo 14(3) del ACAAN. México reconoce el problema de la emisión de ruido, pero afirma que la norma oficial mexicana que establece límites a la emisión de ruido de fuentes fijas, citada en la petición, no es aplicable respecto de las emisiones de ruido que generan las aeronaves, que son fuentes móviles y están sujetas a los límites señalados en otra norma. México señala en su respuesta que el 30 % de la flota aérea nacional ha reducido las emisiones de ruido en los tiempos establecidos por la norma correspondiente, y que por ello ha cumplido con la aplicación efectiva de su legislación ambiental. La respuesta de México también detalla el trámite que las autoridades respectivas han dado a las denuncias que el Peticionario presentó en octubre y noviembre de 2001 sobre el asunto planteado en la petición.

Habiendo examinado la petición a la luz de la respuesta de la Parte en conformidad con el artículo 15(1) del ACAAN, el Secretariado informa a los Peticionarios y al Consejo que la petición no amerita la elaboración de un expediente de hechos. Aunque el Secretariado no se ha persuadido de que la NOM-081-ECOL-1994 no sea aplicable al AICM, a falta de una interpretación judicial al respecto, ésta es una cuestión abierta aún. Además, sin perjuicio de que sea legítima la preocupación que los Peticionarios han expresado por los efectos potenciales del ruido proveniente del AICM en la población que vive en sus inmediaciones, para que se amerite la elaboración de un expediente de hechos debe haber mayor certeza que la que se desprende de la petición a la luz de la

respuesta de México, sobre si de hecho las emisiones de ruido del AICM violan la legislación ambiental. El análisis de estas cuestiones se detalla en la sección IV de este documento.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que existen estudios que muestran que las emisiones de ruido del AICM exceden los límites establecidos en la legislación ambiental, causando daños irreversibles a las miles de personas que residen en la periferia de ese aeropuerto. Los Peticionarios afirman que las autoridades ambientales federales y locales han omitido aplicar de manera efectiva los artículos 5 fracciones V y XIX, 8 fracción VI, 155 y 189 al 204 de la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA), la Norma Oficial Mexicana NOM-081-ECOL-1994 *Que establece los límites máximos permisibles de emisión de ruido de las fuentes fijas y su método de medición*[1] (NOM-081-ECOL-1994) y los artículos 80 al 84 de la Ley Ambiental del Distrito Federal (LADF).

Los Peticionarios argumentan que conforme a los artículos 5 fracciones V y XIX y 155 de la LGEEPA la autoridad ambiental federal está obligada a lo siguiente respecto del AICM: "...(i) vigilar el cumplimiento de la NOM-081-ECOL-1994; (ii) adoptar medidas para evitar que se transgredan los límites máximos permisibles de emisión de ruido establecidos en la NOM-081-ECOL-1994, y (iii) aplicar las sanciones correspondientes en caso de que se transgredan dichos límites." Señalan también que "el artículo 8, fracción VI de la LGEEPA, en relación con el artículo 9 del mismo ordenamiento, confiere al gobierno del Distrito Federal la facultad de aplicar las disposiciones jurídicas relativas a la prevención y control de la contaminación por ruido, proveniente de fuentes fijas que funcionen como establecimientos de servicios".[2]

La petición afirma que como consecuencia de la falta de aplicación por parte de México de su legislación ambiental en este caso, los vecinos del AICM han sufrido daños al sistema auditivo, diversos efectos negativos por la interrupción del sueño y la merma del desarrollo académico de los niños de la zona, cuyas clases se interrumpen por el paso de un avión aproximadamente cada 7 minutos. Según los Peticionarios, los estudios concluyeron que "[n]o existe procedimiento alguno que pueda mitigar el ruido aeroportuario cercano al AICM".[3]

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1. Publicada en el *Diario Oficial de la Federación* (DOF) el 13 de enero de 1995.
2. Ambas citas vienen de la página 5 de la petición.
3. El estudio que citan los Peticionarios dice literalmente: "There are few, if any, mitigating procedures that could be implemented to reduce noise exposure at the AICM".

La petición afirma:

> Es claro, por lo tanto, que la forma de proteger el ambiente y salvaguardar la integridad física de los habitantes de las inmediaciones del AICM es cerrar la fuente fija que produce las emisiones de ruido por encima de los estándares legal y mundialmente aceptables. En la alternativa, solicitamos una recomendación en el sentido de que se tomen las medidas pertinentes para reducir el ruido y que se valore la posibilidad de compensar económicamente por los daños sufridos a los vecinos del AICM.[4]

Además, la petición asevera que México incurre en omisiones respecto de los procedimientos de denuncia popular y denuncia ciudadana iniciados por los Peticionarios ante el gobierno federal y del Distrito Federal, respectivamente, relativos a las posibles violaciones del artículo 155 de la LGEEPA y de la NOM-081-ECOL-1994.

III. RESUMEN DE LA RESPUESTA DE LA PARTE

El Secretariado recibió la respuesta de México a la petición el 23 de mayo de 2002. En ella México reconoce el problema de la emisión de ruido. Sin embargo, la Parte aclara que la Norma Oficial Mexicana NOM-081-ECOL-1994 citada en la petición no es aplicable respecto de las emisiones de ruido que generan las aeronaves en sus maniobras de despegue y aterrizaje. La respuesta explica que las aeronaves están clasificadas como fuentes móviles de emisión de ruido e indica que la norma aplicable a las emisiones de ruido que éstas producen es la NOM-036-SCT3-2000 *Que establece dentro de la República Mexicana los límites máximos permisibles de emisión de ruido producido por las aeronaves de reacción subsónicas, propulsadas por hélice, supersónicas y helicópteros, su método de medición, así como los requerimientos para dar cumplimiento a dichos límites*[5] (NOM-036-SCT3-2000). México señala en su respuesta que el 30 % de la flota aérea nacional ha reducido las emisiones de ruido en los tiempos establecidos por la NOM-036-SCT3-2000, y que por ello ha cumplido con la aplicación efectiva de su legislación ambiental.

La respuesta de México afirma que los artículos 8 fracción VI, 80 al 84 de la LADF que fundamentan parcialmente la petición, no son aplicables en el presente asunto debido a que éste corresponde a la competencia del fuero federal.

La respuesta de México también detalla el trámite que las autoridades correspondientes han dado a las denuncias populares que el

4. Página 7 de la petición.
5. Publicada en el DOF el 19 de febrero de 2001.

Peticionario presentó en octubre y noviembre de 2001 sobre el asunto planteado en la petición. Sobre la denuncia ciudadana presentada el 23 de noviembre de 2001 por el señor Jorge Rafael Martínez Azuela ante la Secretaría de Medio Ambiente del Gobierno del Distrito Federal, la respuesta indica que la Dirección General de Regulación y Gestión Ambiental del Agua, Suelo y Residuos turnó la denuncia ciudadana a la Procuraduría Federal de Protección al Ambiente (Profepa) por considerar que el asunto era del orden federal, mediante el oficio número SMA/DGRGAASR/DVA/6009/2002 de fecha 22 de abril de 2002, y que se marcó copia al denunciante.[6]

Sobre la denuncia popular presentada por el Peticionario ante la Profepa el 31 de octubre de 2001, la respuesta de México indica que se le asignó el número de expediente 0111/235/DI/09, y se turnó con el oficio número DG/004/DI/1358/2001 de fecha 26 de noviembre de 2001 a la Dirección General de Aeronáutica Civil (DGAC) de la Secretaría de Comunicaciones y Transportes (SCT) para su trámite. La Parte señala que ese oficio se intentó notificar al Peticionario, pero debido a que la oficina de correos del Servicio Postal Mexicano no encontró el domicilio, el oficio fue devuelto a la autoridad.[7] El 8 de abril de 2002, la DGAC envió el oficio 101.205.00539 al Peticionario en respuesta a su denuncia popular, comunicándole que la norma oficial mexicana aplicable a los vehículos aéreos era la NOM-036-SCT3-2000.[8] Además, se turnó la denuncia popular a la Delegación Venustiano Carranza del Distrito Federal y a la Dirección General de Regulación y Gestión Ambiental de Agua, Suelo y Residuos. La primera emitió el oficio número DGDD/065-0 de fecha 15 de enero de 2002 (que se menciona en la petición) y la segunda procedió a la acumulación del expediente y lo turnó nuevamente a la Profepa.[9]

Respecto de la aseveración de que la Parte ha incurrido en la omisión de la aplicación efectiva de la legislación ambiental por incumplimiento a lo dispuesto por la NOM-081-ECOL-1994, la respuesta de México afirma que "**dicha norma oficial mexicana no es aplicable respecto de las emisiones de ruido que generan las aeronaves en sus maniobras de despegue y aterrizaje, ya que de conformidad con lo establecido por el artículo 6 del reglamento para la protección del ambiente contra la contaminación originada por la emisión del ruido de la LGEEPA [...], las aeronaves son consideradas como fuentes**

6. Véanse las páginas 2 y 3 y el anexo 1 de la respuesta de México.
7. Véanse las páginas 4 a 6 y los anexos 2 y 3 de la respuesta de México.
8. Véase el anexo 4 de la respuesta de México.
9. Véanse la página 6 y el anexo 5 de la respuesta de México, y el oficio presentado en la petición como anexo 4.

móviles de emisión de ruido, y no así como fuentes fijas" (líneas destacadas en el original).[10]

La respuesta señala:

> México reconoce que el problema de la emisión de ruido representa un gran reto para el país y una preocupación enorme, sobre todo para proporcionar a los ciudadanos un ambiente adecuado para su desarrollo. En esa virtud, la Parte emitió la norma oficial mexicana NOM-036-SCT3-2000 para combatir el problema que representan las emisiones de ruido producidos por las aeronaves. México está consciente [de] que es una tarea difícil y por ello se han establecido tiempos para cumplir con dicha norma oficial.[11]

La respuesta explica que esa norma oficial mexicana establece en su numeral 13 los siguientes plazos para que las aeronaves cumplan con los límites de emisión de ruido:[12]

Fecha de cumplimiento	**Tipo de Aeronave**
31 de diciembre de 2001	Aeronaves propulsadas por hélice y helicópteros, aeronaves de reacción subsónicas y supersónicas. Peso máximo al despegue: menor de 34,000 kg (75,000 libras)
31 de diciembre de 2001	El 30 % de la flota aérea nacional (aeronaves de reacción subsónica y supersónica). Peso máximo al despegue: mayor de 34,000 kg (75,000 libras)
31 de diciembre de 2002	El 60 % de la flota aérea nacional (aeronaves de reacción subsónica y supersónica). Peso máximo al despegue: mayor de 34,000 kg (75,000 libras)
31 de diciembre de 2003	El 80 % de la flota aérea nacional (aeronaves de reacción subsónica y supersónica). Peso máximo al despegue: mayor de 34,000 kg (75,000 libras)
31 de diciembre de 2004	El 100 % de la flota aérea nacional (aeronaves de reacción subsónica y supersónica). Peso máximo al despegue: mayor de 34,000 kg (75,000 libras).

La Parte indica que la DGAC de la SCT vigila el cumplimiento de esta norma a través del programa de cumplimiento por las empresas aéreas regionales, troncales, de fletamento y de carga.[13] Señala que la

10. Véanse las páginas 5 a 7 de la respuesta de México.
11. Véase la página 10 de la respuesta de México.
12. Véanse las páginas 6 a 9 de la respuesta de México.
13. El anexo 6 de la respuesta de México contiene un listado de las aeronaves.

DGAC ha otorgado un total de 417 certificados de homologación de ruido a los concesionarios, permisionarios u operadores aéreos, 168 de los cuales corresponden a certificados otorgados a los concesionarios de transporte aéreo nacional.[14] Finalmente, la respuesta afirma: "Esta Parte considera que ha cumplido con la aplicación efectiva de su legislación ambiental y prueba de ello son los 417 certificados de homologación de ruido otorgados al 30 % de la flota aérea en los que se constata la reducción de emisiones de ruido en los tiempos establecidos por la norma".[15]

IV. ANÁLISIS

A. Antecedentes

Esta determinación se refiere a la etapa del proceso que corresponde al artículo 15(1) del ACAAN. El Secretariado determinó previamente que la petición cumple con los requisitos del artículo 14(1) y que amerita solicitar una respuesta de la Parte conforme a los criterios del artículo 14(2).

El 22 de febrero de 2002, el Secretariado determinó que la petición cumplía con todos los requisitos señalados en el artículo 14(1) del ACAAN.[16] La petición cumple con los requisitos establecidos en los incisos (a), (b), (d) y (f) del artículo 14(1) porque se presentó por escrito en español, uno de los idiomas oficiales de las Partes;[17] los Peticionarios se identificaron claramente en la petición como particulares con domicilio en la Ciudad de México, D.F., México.[18] Las aseveraciones de la petición se ajustan a lo dispuesto en el preámbulo del artículo 14(1), que plantea que una petición debe aseverar "que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". La petición parece encaminada a promover actividades de aplicación de la legislación ambiental y no a hostigar una industria, porque se centra en la presunta falta de aplicación por la autoridad ambiental de las disposiciones legales sobre la emisión de ruido y se refiere a la presunta exposición de miles de personas que residen en las inmediaciones del AICM a los efectos nocivos para la salud relacionados con las emisiones de ruido, supuestamente ilícitas, generadas por el AICM.

14. El anexo 7 de la respuesta de México contiene copias de los certificados mencionados.
15. Véase la página 10 de la respuesta de México.
16. SEM-02-002 (Aeropuerto de la Ciudad de México), Determinación conforme a los artículos 14(1) y (2) (22 de febrero de 2002).
17. Véase también el encabezado 3.2 de las Directrices para la presentación de peticiones.
18. Páginas 1, 2 y 8 de la petición.

Se consideró cumplido también el requisito señalado en el inciso (c) porque la petición y sus anexos contienen suficiente información para analizar las aseveraciones que se plantean. La petición incluyó información sobre la exposición de las personas que residen en las inmediaciones del AICM al ruido generado por las operaciones de ese aeropuerto[19] y sobre la legislación ambiental aplicable.[20] Los Peticionarios sustentan sus aseveraciones en dos estudios realizados en torno a los efectos en la salud de las personas expuestas a esas emisiones de ruido, y anexan a la petición uno de ellos, de septiembre de 2001, titulado "Análisis de Ruido, Aeropuerto Internacional de la Ciudad de México".[21]

La petición invoca los objetivos planteados por el ACAAN, que consisten en alentar la protección y el mejoramiento del medio ambiente en el territorio de las Partes, para el bienestar de las generaciones presentes y futuras [artículo 1(a)]; y en mejorar la observancia y la aplicación de las leyes y reglamentos ambientales [artículo 1(g)].[22] En cuanto al inciso (e) del artículo 14(1), el Secretariado determinó que las aseveraciones de la petición se refieren a asuntos que se han comunicado a las autoridades pertinentes de la Parte mediante una denuncia popular y una denuncia ciudadana.[23]

El Secretariado evaluó la petición considerando en conjunto los criterios del artículo 14(2) del ACAAN, y concluyó en su determinación del 22 de febrero de 2002 que dicha petición ameritaba una respuesta de la Parte.

Según los Peticionarios, de los estudios que citan se desprende que los habitantes localizados dentro de un radio de 51 km^2 alrededor del AICM padecen emisiones de ruido violatorias de la NOM-081-ECOL-1994 y superiores a los estándares mundialmente aceptables.[24] El número de personas afectadas por estas operaciones se estima entre medio y dos millones.[25] Señalan la pérdida de la audición, entre otros

19. Véanse las páginas 3 y 4 de la petición.
20. Véanse las páginas 1, 2, 4 y 5 de la petición.
21. Véanse las páginas 2, 5 a 7 y los anexos 1 y 2 de la petición.
22. Véase el artículo 14(1)(d) del ACAAN, el apartado 5.4 de las Directrices y la página 3 de la petición.
23. Véanse las páginas 3, 9 a 12 y los anexos 3 y 4 de la petición.
24. Esta medida es claramente incorrecta. El estudio que se acompaña a la petición como anexo 1 no se refiere a un radio de esa magnitud. El documento proporcionado indica que con base en las operaciones aéreas del 10 de agosto de 2001 (escenario 1) se calculó un nivel de ruido mayor o igual a 60 (dBA) en un área de 50.95 km^2 alrededor del AICM, y en un área de 51.35 km^2 con base en las operaciones de la madrugada del 25 de agosto de 2001.
25. Véase el anexo 1 de la petición.

efectos de las emisiones de ruido en cuestión.[26] [artículo 14(2)(a).] El Secretariado consideró que la ulterior revisión en este proceso de los asuntos planteados en esta petición contribuiría a la consecución de las metas del Acuerdo y promovería el acceso de los interesados a información adicional sobre la presunta falta de aplicación de la legislación ambiental en materia de ruido respecto del AICM [artículo 14(2)(b)]. La petición aborda los recursos disponibles conforme a la legislación de la Parte a los que se ha acudido, y el Secretariado considera que se ha hecho un esfuerzo razonable para acudir a esos recursos [artículo 14(2)(c)].[27] Finalmente, la petición no parece basarse en noticias de los medios de comunicación [artículo 14(2)(d)].

Como consecuencia de la determinación del Secretariado del 22 de febrero de 2002, la Parte presentó su respuesta el 23 de mayo de 2002, de acuerdo con el artículo 14(3) del ACAAN.

B. ¿La petición amerita la elaboración de un expediente de hechos?

En conformidad con el artículo 15(1) del ACAAN, el Secretariado considera que a la luz de la respuesta de México la petición no amerita la elaboración de un expediente de hechos por las razones que se explican enseguida. La petición contiene dos aseveraciones: 1) que México incurre en omisiones en la aplicación efectiva de su legislación ambiental (artículos 5 fracciones V y XIX, 8 fracción VI y 155 de la LGEEPA y la NOM-081-ECOL-1994) por la nula vigilancia y aplicación de sanciones al AICM, no obstante que sus operaciones rebasan los límites máximos permisibles de emisión de ruido; y 2) que México incurre en omisiones respecto de los procedimientos de denuncia popular y denuncia ciudadana (artículos 189 al 204 de la LGEEPA y 80 al 84 de la LADF) iniciados ante los gobiernos federal y del Distrito Federal, respectivamente, relativos a las posibles violaciones del artículo 155 de la LGEEPA y la NOM-081-ECOL-1994 por el AICM.

1. Aplicación efectiva de los artículos 5, fracciones V y XIX; 8 fracción VI, y 155 de la LGEEPA y de la NOM-081-ECOL-1994

Los artículos de la LGEEPA en cuestión establecen:

> Artículo 5. Son facultades de la Federación:
>
> > V.- La expedición de las normas oficiales mexicanas y la vigilancia de su cumplimiento en las materias previstas en esta Ley; [...]

26. Véanse las páginas 3 y 4 de la petición.
27. Véanse las páginas 9 a 11 de la petición.

> XIX.- La vigilancia y promoción, en el ámbito de su competencia, del cumplimiento de esta Ley y de los demás ordenamientos que de ella deriven. [...]
>
> Artículo 8.- Corresponden a los Municipios, de conformidad con lo dispuesto en esta Ley y las leyes locales en la materia, las siguientes facultades [...]
>
> VI.- La aplicación de las disposiciones jurídicas relativas a la prevención y control de la contaminación por ruido, vibraciones, energía térmica, radiaciones electromagnéticas y lumínica y olores perjudiciales para el equilibrio ecológico y el ambiente, provenientes de fuentes fijas que funcionen como establecimientos mercantiles o de servicios, así como la vigilancia del cumplimiento de las disposiciones que, en su caso, resulten aplicables a las fuentes móviles excepto las que conforme a esa Ley sean consideradas de jurisdicción federal. [...]
>
> Artículo 155.- Quedan prohibidas las emisiones de ruido, vibraciones, energía térmica y lumínica y la generación de contaminación visual en cuanto rebasen los límites máximos establecidos en las normas oficiales mexicanas que para ese efecto expida la Secretaría, considerando los valores de concentración máxima permisibles para el ser humano de contaminantes en el ambiente que determine la Secretaría de Salud... Las autoridades federales o locales, según su esfera de competencia, adoptarán las medidas para impedir que se transgredan dichos límites y, en su caso, aplicarán las sanciones correspondientes.

La NOM-081-ECOL-1994 dispone, en sus secciones más relevantes al asunto planteado en esta petición:

> 1. OBJETO. Esta norma oficial mexicana establece los límites máximos permisibles de emisión de ruido que genera el funcionamiento de las fuentes fijas y el método de medición por el cual se determina su nivel emitido hacia el ambiente.
>
> 2. CAMPO DE APLICACIÓN. Esta norma oficial mexicana se aplica en la pequeña, mediana y gran industria, comercios establecidos, servicios públicos o privados y actividades en la vía pública...
>
> 5. ESPECIFICACIONES
>
> 5.1 La emisión de ruido que generan las fuentes fijas es medida obteniendo su nivel sonoro en ponderación "A", expresado en dB (A).
>
> ...5.3 Para obtener el nivel sonoro de una fuente fija se debe aplicar el procedimiento de actividades siguiente: un reconocimiento inicial; una medi-

ción de campo; un procesamiento de datos de medición, y la elaboración de un informe de medición.

5.3.1 El reconocimiento inicial debe realizarse en forma previa a la aplicación de la medición del nivel sonoro emitido por una fuente fija, con el propósito de recabar la información técnica y administrativa y para localizar las Zonas Críticas.

5.3.1.1 La información a recabar es la siguiente:

5.3.1.1.1 Croquis que muestre la ubicación del predio donde se encuentre la fuente fija y la descripción de los predios con quien colinde. Ver figura Nº 1 del Anexo 1 de la presente norma oficial mexicana.

5.3.1.1.2 Descripción de las actividades potencialmente ruidosas.

5.3.1.1.3 Relacionar y representar en un croquis interno de la fuente fija el equipo, la maquinaria y/o los procesos potencialmente emisores de ruido. Ver figura Nº 2A del Anexo 2 de la presente norma. [...]

5.3.1.2 Con el sonómetro funcionando, realizar un recorrido por la parte externa de las colindancias de la fuente fija con el objeto de localizar la Zona Crítica o zonas críticas de medición. Ver figura Nº 2A del Anexo 2 de la presente norma.

5.3.1.2.1 Dentro de cada Zona Crítica (ZC_i) se ubicarán 5 puntos distribuidos vertical y/u horizontalmente en forma aleatoria a 0.30 m de distancia del límite de la fuente y a no menos de 1.2 m del nivel del piso. Ver figura Nº 2A del Anexo 2 de la presente norma oficial mexicana[...]

5.3.2 Ubicados los puntos de medición conforme a lo señalado en el punto 5.3.1.2.1 se deberá realizar la medición de campo de forma continua o semicontinua, teniendo en cuenta las condiciones normales de operación de la fuente fija. [...]

5.3.3.4.6 Se determinará que la emisión de la fuente fija es contaminante si el nivel sonoro que resulte de la determinación realizada en el punto 5.3.3.4 de la presente norma oficial mexicana supera el límite máximo permisible correspondiente al que se establece en la Tabla 1 del punto 5.4 abajo mostrado. [...]

> 5.4 Los límites máximos permisibles del nivel sonoro en ponderación "A" emitido por fuentes fijas, son [... de 6:OO a 22:OO horas, 68 dB(A); y de 22:OO a 6:OO horas, 65 dB(A)]...
>
> 6. VIGILANCIA...
>
> 6.1 La Secretaría de Desarrollo Social, por conducto de la Procuraduría Federal de Protección al Ambiente, así como los Estados y en su caso los Municipios, son las autoridades competentes para vigilar el cumplimiento de la presente norma oficial mexicana.

La respuesta de México señala que el asunto que plantea la petición es de competencia federal, por lo que considera que el artículo 8 fracción VI de la LADF (sic) citado en la petición no es aplicable.[28] La lectura integral de los artículos 5, 8 y 155 de la LGEEPA y de la NOM-081-ECOL-1994 parece indicar que la responsabilidad por la vigilancia del cumplimiento de los límites de emisión de ruido recae en la autoridad federal (Profepa), sin excluir que las autoridades locales en la esfera de su competencia adopten "medidas para evitar que se transgredan dichos límites". La petición señala también que "el artículo 8, fracción VI de la LGEEPA, en relación con el artículo 9 del mismo ordenamiento, confiere al gobierno del Distrito Federal la facultad de aplicar las disposiciones jurídicas relativas a la prevención y control de la contaminación por ruido proveniente de fuentes fijas que funcionen como establecimientos de servicios".[29] Sin embargo, según muestra la respuesta de México, esa autoridad se declaró incompetente en este asunto, al considerar que el AICM es competencia de la Profepa y de la SCT por ser "un inmueble destinado a prestar servicios de los Poderes Federales".[30]

Ahora bien, la cuestión sustantiva que la petición plantea es que el artículo 155 de la LGEEPA y la NOM-081-ECOL-1994 no se han aplicado de manera efectiva respecto del AICM. El artículo 155 de la LGEEPA prohíbe las emisiones de ruido por encima de los límites que dispongan las normas oficiales mexicanas para prevenir daños a la población.

La respuesta de México señala:

> México reconoce que el problema de la emisión de ruido representa un gran reto para el país y una preocupación enorme, sobre todo para proporcionar a los ciudadanos un ambiente adecuado para su desarrollo. En esa virtud, la Parte emitió la norma oficial mexicana NOM-036-SCT3-2000

28. Véase la página 4 de la respuesta de México.
29. Ambas citas vienen de la página 5 de la petición.
30. Véase la página 2 del anexo 1 de la respuesta de México.

> para combatir el problema que representan las emisiones de ruido producidos por las aeronaves. México está consciente [de] que es una tarea difícil y por ello se han establecido tiempos para cumplir con dicha norma oficial.[31]

Respecto de la NOM-081-ECOL-1994 en concreto, México en su respuesta afirma que:

> [...] dicha norma oficial mexicana no es aplicable respecto de las emisiones de ruido que generan las aeronaves en sus maniobras de despegue y aterrizaje, ya que de conformidad con lo establecido por el artículo 6 del reglamento para la protección del ambiente contra la contaminación originada por la emisión del ruido de la LGEEPA[...], las aeronaves son consideradas como fuentes móviles de emisión de ruido, y no así como fuentes fijas.[32]

Conforme al artículo 6 del Reglamento para la Protección del Ambiente contra la Contaminación Originada por la Emisión de Ruido (RR), es claro que las aeronaves (aviones y helicópteros) son fuentes móviles de emisión de ruido y que los aeropuertos son fuentes fijas.[33] Como bien señala la Parte en su respuesta, la NOM-081-ECOL-1994 no es aplicable a las aeronaves. Sin embargo, la petición no asevera que las aeronaves sean fuentes fijas, ni que los límites que establece la NOM-081-ECOL-1994 sean aplicables a las aeronaves. La petición afirma que esos límites son aplicables al AICM como fuente fija, y se refiere a las emisiones derivadas de las operaciones del AICM en su conjunto.[34]

A falta de una interpretación de estas cuestiones por las autoridades judiciales competentes, el Secretariado analizó las normas NOM-081-ECOL-1994 y NOM-036-SCT3-2000 a la luz de los principios generales de interpretación y aplicación de las normas jurídicas, y de las disposiciones respectivas de la legislación civil, para dilucidar si la NOM-036-SCT3-2000 deroga la NOM-081-ECOL-1994, o establece una excepción a su aplicación respecto de los aeropuertos. Los artículos 9 y 11 del Código Civil Federal disponen respectivamente:

> Artículo 9.- La ley sólo queda abrogada o derogada por otra posterior que así lo declare expresamente o que contenga disposiciones total o parcialmente incompatibles con la ley anterior. [...]

31. Véase la página 10 de la respuesta de México.
32. Véanse las páginas 5 a 7 de la respuesta de México.
33. Publicado en el DOF el 6 de diciembre de 1982.
34. Véanse las páginas 5 y 6 de la petición.

> Artículo 11.- Las leyes que establecen excepción a las reglas generales, no son aplicables a caso alguno que no esté expresamente especificado en las mismas leyes.[35]

La NOM-036-SCT3-2000 es posterior a la NOM-081-ECOL-1994, pero no la derogó de manera expresa ni implícita. La NOM-036-SCT3-2000 tampoco establece una excepción expresa a la aplicación a los aeropuertos (clasificados expresamente como fuentes fijas) de la NOM-081-ECOL-1994, que es la norma general en materia de ruido proveniente de fuentes fijas.

La norma NOM-036-SCT3-2000 y la NOM-081-ECOL-1994 no parecen ser total o parcialmente incompatibles, conforme a los principios de interpretación aplicables. Ante todo, esas normas no regulan el mismo hecho. Aunque ambas normas regulan fuentes emisoras de ruido, se refieren a fuentes distintas. Además, los sujetos obligados por una y otra también son distintos.

La NOM-036-SCT3-2000 dispone:

> 1. Objetivo y campo de aplicación. La presente Norma Oficial Mexicana establece dentro de la República Mexicana los límites máximos permisibles de emisión de ruido generado por las aeronaves de reacción subsónicas, propulsadas por hélice, supersónicas y helicópteros, su método de medición, así como los requerimientos para dar cumplimiento a dichos límites, y aplica a todos los concesionarios, permisionarios u operadores aéreos nacionales o extranjeros que operen o pretendan operar dentro de la República Mexicana y su espacio aéreo. [...]
>
> 3.1 Todo concesionario, permisionario u operador aéreo de aeronaves, nacional o extranjero, que opere o pretenda operar dentro de la República Mexicana y su espacio aéreo, con aeronaves de reacción subsónicas, propulsadas por hélice, supersónicas, helicópteros, deberá cumplir con lo prescrito en la presente Norma Oficial Mexicana.

En contraste, la NOM-081-ECOL-1994 establece:

> 1. Objeto. Esta norma oficial mexicana establece los límites máximos permisibles de emisión de ruido que genera el funcionamiento de las fuentes fijas y el método de medición por el cual se determina su nivel emitido hacia el ambiente.

35. Código Civil para el Distrito Federal en materia común y para toda la República en materia federal, publicado en el *Diario Oficial de la Federación* el 26 de marzo de 1928.

> 2. Campo de aplicación. Esta norma oficial mexicana se aplica en la pequeña, mediana y gran industria, comercios establecidos, servicios públicos o privados y actividades en la vía pública.

Estas normas tampoco parecen ser incompatibles con base en los métodos de medición del ruido dispuestos por cada una. La medición del nivel de emisión de ruido de las fuentes fijas conforme a la NOM-081-ECOL-1994 consiste en la medición de los niveles sonoros en "zonas críticas" desde el exterior del inmueble y no implica la medición del nivel de emisión de ruido de las aeronaves individualmente. El nivel sonoro que emiten las fuentes fijas debe medirse a partir de su barda perimetral (o puntos equivalentes) y en su medición se consideran en conjunto las operaciones de la fuente. Por su parte, la NOM-036-SCT3-2000 regula el nivel de ruido emitido por las aeronaves de manera individual e independiente del aeropuerto en el que operen. En términos generales, la medición debe hacerse tomando en cuenta tres puntos relativos a la aeronave (uno lateral, uno de sobrevuelo en el despegue y uno de aproximación en el aterrizaje). La ubicación del perímetro del aeropuerto en que operen las aeronaves, que sería el punto de medición relevante para la NOM-081-ECOL-1994, no se toma en cuenta para determinar los puntos de medición del ruido emitido por las aeronaves conforme a la NOM-036-SCT3-2000. La NOM-081-ECOL-1994 tampoco establece un procedimiento para descontar el ruido atribuible a una fuente móvil ligada a una fuente fija.

Por último, la NOM-081-ECOL-1994 y la NOM-036-SCT3-2000 no parecen ser incompatibles de modo que la aplicación de una haga imposible la aplicación de la otra. Es concebible que las aeronaves individuales puedan cumplir con la NOM-036-SCT3-2000 al mismo tiempo que sus emisiones conjuntas de ruido, combinadas con otro ruido generado por un aeropuerto, también puedan resultar en el cumplimiento por parte de ese aeropuerto de la NOM-081-ECOL-1994. Por ello, el cumplimiento de la NOM-081-ECOL-1994 parece depender del total de aeronaves individuales y el tráfico aéreo total.

Aunque el análisis anterior no parece apoyar la interpretación que sugiere México en su respuesta al afirmar que la NOM-081-ECOL-1994 no es aplicable al AICM, a falta de una interpretación jurídica emitida por la autoridad judicial competente, la cuestión de si la NOM-036-SCT3-2000 deroga la NOM-081-ECOL-1994, o de si establece una excepción a su aplicación respecto de los aeropuertos, sigue siendo una cuestión abierta.

Ahora bien, aunque la petición se refiere a la aplicación de la NOM-081-ECOL-1994 respecto del AICM como fuente de emisión de ruido, y no a las aeronaves en particular, la información que proporcionó México en su respuesta sobre la aplicación de la NOM-036-SCT3-2000 es relevante al asunto que se plantea en la petición. La respuesta no detalla este aspecto, pero es lógico suponer que la aplicación efectiva de la NOM-036-SCT3-2000 respecto de las aeronaves que operan en la República Mexicana contribuye al abatimiento del ruido emitido por el AICM. La respuesta de México afirma que la DGAC de la SCT vigila el cumplimiento de la NOM-036-SCT3-2000 y que conforme a esa norma ha otorgado un total de 417 certificados de homologación de ruido a los concesionarios, permisionarios u operadores aéreos, correspondientes al 30 % de la flota aérea nacional.[36] Esos certificados de homologación, que se anexan a la respuesta de México, son muestra clara de la aplicación de la NOM-036-SCT3-2000 respecto de las aeronaves que operan en territorio mexicano.

Los Peticionarios aseveran que existen estudios que muestran que las emisiones de ruido del AICM exceden los límites establecidos en la NOM-081-ECOL-1994. El estudio que citan se basa en una modelación de los niveles de ruido conforme a un procedimiento de la Agencia de Protección Ambiental de Estados Unidos (US EPA) y con base en datos de las aeronaves que operaron en el AICM en uno de los dos meses más activos del año, los días 10 y 25 de agosto de 2001.[37] El modelo empleado para calcular el nivel de ruido del AICM en que los Peticionarios apoyaron su petición bastó, a pesar de sus limitaciones, para plantear cuestiones sobre la aplicación efectiva de la NOM-081-ECOL-1994 respecto del AICM que justificaron solicitar a México una respuesta. Sin embargo, a la luz de la información que México proporcionó en su respuesta, es cuestionable si el estudio muestra efectivamente que el AICM viola la NOM-081-ECOL-1994. La duda surge por la fecha de operaciones en que se basó la estimación del estudio citado, y el hecho de que la estimación no se realizó conforme a los métodos establecidos en la NOM-081-ECOL-1994, o en la NOM-036-SCT3-2000, que disponen mediciones directas, sino en una modelación que no parece haber incluido ninguna medición directa.

En su respuesta, la Parte no admite ni niega que el AICM rebase los límites de emisión de ruido que establece la NOM-081-ECOL-1994. Aunque la Parte afirma que el AICM no está sujeto a esos límites de emisión de ruido para fuentes fijas, la respuesta reconoce que existe un problema

36. Véanse la página 10 y los anexos 6 y 7 de la respuesta de México.
37. Véanse las páginas 2, 5 a 7 y los anexos 1 y 2 de la petición.

de ruido ligado a la aviación comercial y muestra que se han realizado acciones para resolverlo: la expedición de la NOM-036-SCT3-2000 y su cumplimiento, a partir del 31 de diciembre de 2001, por el 30 % de la flota aérea nacional. Para el 31 de diciembre de 2004, el 100 % de la flota aérea deberá cumplir con esta norma. El estudio en el que se basa la petición no parece haber considerado el posible efecto de estas acciones sobre el nivel de ruido emitido por el AICM. De no haberlo considerado, es concebible que la estimación del nivel de ruido emitido por el AICM haya sido obsoleta al momento de presentarse la petición, en febrero de 2002. Además, es previsible que el nivel de ruido siga modificándose conforme el resto de las aeronaves cumplan con los límites establecidos en la NOM-036-SCT3-2000 en los plazos correspondientes. La cuestión de si México incurre en omisiones en la aplicación efectiva de los límites de emisión de ruido respecto del AICM es un aspecto técnico y puntual del problema de ruido causado por el tráfico aéreo de la Ciudad de México. Sin cuestionar la importancia de este problema, para que esta cuestión puntual amerite la elaboración de un expediente de hechos, debe haber mayor certeza que la que se desprende de la petición a la luz de la respuesta de México, sobre si de hecho las emisiones de ruido del AICM violan la legislación ambiental.

En vista de los aspectos equívocos (de hecho y de derecho) que se han identificado a la luz de la respuesta de México, el Secretariado considera que la aseveración de que México incurre en omisiones en la aplicación efectiva de los artículos 155 de la LGEEPA y la NOM-081-ECOL-1994 respecto del AICM no amerita la elaboración de un expediente de hechos. Esta determinación se hace sin perjuicio de que sea legítima la preocupación que los Peticionarios han expresado por los efectos potenciales del ruido proveniente del AICM en la población que vive en sus inmediaciones.

2. *Aplicación efectiva de los artículos 189 al 202 de la LGEEPA y 80 al 84 de la LADF*

En lo que concierne a las aseveraciones de que la Parte está incurriendo en omisiones en la aplicación efectiva de los artículos 189 al 202 de la LGEEPA y 80 al 84 de LADF, respecto de la denuncia popular y la denuncia ciudadana presentadas por el señor Jorge Rafael Martínez Azuela en octubre y noviembre de 2001, respectivamente, la respuesta de México proporcionó información detallada sobre el trámite que las autoridades dieron a esas denuncias posteriormente a la presentación de esta petición.

En cuanto a la denuncia popular del 31 de octubre de 2001, al momento de presentarse la petición (en enero de 2002), la Dirección General de Desarrollo Delegacional de la Delegación Venustiano Carranza del Distrito Federal ya había respondido al denunciante mediante el oficio DGDD/065-0 de fecha 15 de enero de 2002.[38] Por su parte, la SCT y el Gobierno del Distrito Federal enviaron al Peticionario en el mes de abril de 2002 sus respuestas respectivas.[39]

En cuanto a la denuncia ciudadana presentada por el Peticionario ante el Gobierno del Distrito Federal, mediante acuerdo del 22 de abril de 2002 (Oficio SMA/DGRGAASR/DVA6009/2002), la Dirección General de Gestión y Regulación Ambiental del Agua, Suelo y Residuos de la Secretaría de Medio Ambiente se declaró incompetente en la materia de la denuncia.[40] En ese mismo oficio, la autoridad local notificó el asunto a la Profepa e informó al denunciante "que deberá reiniciar los trámites ante la autoridad competente ya mencionada".[41]

El Secretariado considera que ha quedado suficientemente documentado el trámite que recayó a ambas denuncias.[42] Aunque podrían señalarse algunas posibles irregularidades en el trámite de estas denuncias, el Secretariado considera que son asuntos demasiado puntuales y de alcance limitado, que en este caso no ameritan la elaboración de un expediente de hechos.[43] El Secretariado no considera que elaborar información adicional sobre estas presuntas omisiones contribuiría a la consecución de las metas del ACAAN.[44]

V. DETERMINACIÓN DEL SECRETARIADO

El Secretariado de la CCA ha revisado la petición SEM-02-002 (Aeropuerto de la Ciudad de México) presentada por Jorge Rafael

38. Véase el anexo 4 de la respuesta de México.
39. Véanse las páginas 4 a 6 y los anexos 2, 3 y 4 de la respuesta de México.
40. Véase la página 2 del anexo 1 de la respuesta de México.
41. *Idem*, página 3.
42. Véanse: *Supra*, página 4, las páginas 2 a 6 y los anexos 1 a 5 de la respuesta de México, y el oficio presentado en la petición como anexo 4.
43. Las posibles irregularidades que se observan consisten en la falta de determinación oportuna al denunciante sobre el trámite que se dio a su denuncia popular (artículo 191 de la LGEEPA, tercer párrafo), y la aparente omisión de la Profepa de llevar a cabo las diligencias necesarias con el propósito de determinar la existencia de actos, hechos u omisiones constitutivos de la denuncia (artículo 192 de la LGEEPA, segundo párrafo).
44. Esto sin perjuicio de que en otras ocasiones el Secretariado sí considere meritorio abordar en un expediente de hechos supuestas omisiones en la aplicación efectiva del trámite de la denuncia popular. Véase por ejemplo, SEM-00-006 (Tarahumara) Determinación conforme al artículo 15(1) (29 de agosto de 2002).

Martínez Azuela, *et Al.*, conforme al artículo 15(1) del ACAAN. En vista de los aspectos equívocos (de hecho y de derecho) que se han identificado a la luz de la respuesta de México, y que se explican en esta determinación, el Secretariado considera que la aseveración de que México incurre en omisiones en la aplicación efectiva de los artículos 155 de la LGEEPA y la NOM-081-ECOL-1994 respecto del AICM no amerita la elaboración de un expediente de hechos. Para que esta cuestión puntual amerite la elaboración de un expediente de hechos debe haber mayor certeza que la que se desprende de la petición a la luz de la respuesta de México, sobre si de hecho las emisiones de ruido del AICM violan la legislación ambiental. El Secretariado también considera que ha quedado suficientemente documentado el trámite que recayó a las denuncias respecto de las que, según la petición, México está incurriendo en omisiones en la aplicación efectiva de los artículos 189 al 202 de la LGEEPA y 80 al 84 de LADF. Por ello, sin perjuicio de que sea legítima la preocupación que los Peticionarios han expresado por los efectos potenciales del ruido proveniente del AICM en la población que vive en sus inmediaciones, el Secretariado considera que esta petición no amerita la elaboración de un expediente de hechos.

Conforme a lo dispuesto por el apartado 9.6 de las Directrices, el Secretariado da por concluido el proceso respecto de la petición SEM-02-002 (Aeropuerto de la Ciudad de México) y explica sus razones a los Peticionarios y al Consejo de la CCA en este documento. Esta determinación se refiere exclusivamente a los alegatos contenidos en esa petición, y no contempla otros aspectos del asunto planteados fuera de la petición, o que pudieran plantearse en una petición distinta.

Secretariado de la Comisión para la Cooperación Ambiental

por: Victor Shantora
Director Ejecutivo Interino

cc: Dra. Olga Ojeda Cárdenas, Semarnat
Sra. Norine Smith, Environment Canada
Sra. Judith Ayres, US-EPA
Sr. Jorge Rafael Martínez Azuela

SEM-02-003

(Pulp and Paper)

SUBMITTERS: SIERRA LEGAL DEFENCE FUND ET AL.

PARTY: CANADA

DATE: 8 May 2002

SUMMARY: The submitters allege that Canada is failing to effectively enforce the pollution prevention provisions of the *Fisheries Act* and provisions of the *Pulp and Paper Effluent Regulations*, or PPER, against pulp and paper mills in Quebec, Ontario and the Atlantic provinces. Section 36 of the Fisheries Act prohibits the deposit of a deleterious substance in water frequented by fish, except as authorized by regulations such as the PPER. Failure to comply with these regulations is punishable by fines and jail time.

SECRETARIAT DETERMINATIONS:

ART. 15(1) (8 October 2003) Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-02-003** (Pulp and Paper)
Submitter(s):	Friends of the Earth Union Saint-Laurent, Grands Lacs Conservation Council of New Brunswick Ecology Action Centre Environment North
Represented by:	Sierra Legal Defence Fund (SLDF)
Concerned Party:	Canada
Date of Receipt:	8 May 2002
Date of this Notification:	8 October 2003

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC) creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines, based on factors contained in Article 14(2), whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted

(Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 8 May 2002, the Submitters listed above filed a submission, along with supporting materials, asserting that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the *Pulp and Paper Effluent Regulations* (PPER) promulgated in 1992, against pulp and paper mills in Ontario, Quebec and the Atlantic provinces (i.e., New Brunswick, Nova Scotia and Newfoundland). Section 36 of the *Fisheries Act* prohibits the deposit of a deleterious substance in water frequented by fish unless the deposit is authorized by regulation, such as the PPER. The Submitters allege that, despite reductions in pulp mill effluent pollution since the coming into force of the PPER, in the period from 1995 to 2000 there were more than 2,400 documented violations of the PPER at mills in central and eastern Canada, and very few prosecutions. The submission and its appendices provide information on alleged violations at approximately 70 of the 116 mills that the Submitters identify, with twelve mills highlighted as mills of particular concern to the Submitters. The Submitters request the preparation of a factual record.

On 7 June 2002, the Secretariat determined that the submission meets the requirements of Article 14(1) of the NAAEC and requested a response from the Party in accordance with Article 14(2).[1] Canada submitted its response on 6 August 2002. The response explains Canada's general approach to enforcing the PPER and the *Fisheries Act* and provides the general policy framework for the decisions taken in connection with mills identified in the submission. Canada then provides information with respect to federal enforcement responses from 1995–2000 in regard to the twelve mills for which the Submitters raised particular concerns.[2] For five mills, although some information was provided, Canada explained that it would not provide further information in light of investigations that were ongoing at the time the response was prepared.

The Secretariat has concluded that the response leaves open central questions that the submission raises regarding enforcement of s. 36(3) and the PPER at the mills of concern in the submission and the information attached to it. Accordingly, in accordance with Article 15(1), the Secretariat hereby informs the Council that the Secretariat considers that the submission, in light of the Party's response, warrants developing a factual record and provides its reasons.

1. SEM-02-003 (Pulp and Paper), Determination under Articles 14(1) and (2) (7 June 2002).
2. For ten of the mills, only information from 2000 is provided.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce sections 34, 36, 40, 78 and 78.1 of the federal *Fisheries Act* and sections 5 and 6 and Schedules I and II of the PPER against pulp and paper mills in Ontario, Quebec and the Atlantic provinces.

A. General Assertions

The Submitters first provide general assertions regarding the amount and pollutant content of effluent from Canada's 157 pulp and paper mills, contending the mills have "added tonnes of harmful substances to our waterways and caused extensive harm to aquatic ecosystems.[3]" They claim that the pulp and paper industry made progress in investing in environmental upgrades in the early 1990s but that those investments have dropped sharply since 1995.[4]

Next, the Submitters describe the pollution prevention provisions of the *Fisheries Act* and the PPER that they contend Canada is failing to effectively enforce in Ontario, Quebec and the Atlantic provinces. They note that under the *Fisheries Act*, "it is an offense to deposit a deleterious substance of any type in water frequented by fish that renders the water deleterious to fish or fish habitat, unless the deposit is authorized by regulation.[5]" They identify as relevant to their submission two provisions of the federal *Fisheries Act Habitat Protection and Pollution Prevention Provisions Compliance and Enforcement Policy* (*Compliance and Enforcement Policy*). First is the policy that "fair, predictable, and consistent enforcement govern the application of the law, and responses by enforcement personnel to alleged violations.[6]" Second is the intent stated in the *Compliance and Enforcement Policy* "to ensure that violators will comply with the *Fisheries Act* within the shortest possible time, that violations are not repeated and that all available enforcement tools are used.[7]"

The Submitters note that the 1991 PPER regulations, which took effect in July 1992, define acutely lethal effluent, biochemical oxygen demand (or BOD) matter and total suspended solids (or TSS) as deleterious under the *Fisheries Act*. According to the Submitters, the PPER authorize levels of BOD and TSS that do exceed specified maximum quantities as long as certain conditions are met, but (at least since 1995)

3. Submission at 3.
4. Submission at 3.
5. Submission at 3. See *Fisheries Act* s. 36(3).
6. Submission at 4 (quoting *Compliance and Enforcement Policy*, Introduction).
7. Submission at 4.

they strictly prohibit acutely lethal effluent.[8] The Submitters describe the conditions for discharges of TSS and BOD matter as "relating to monitoring equipment, monitoring reports, preparing a remedial plan in case the effluent fails certain acute-lethality tests, preparing and implementing an emergency response plan, and preparing environmental effects monitoring studies.[9]"

They also describe the test methods and effluent monitoring requirements for BOD, TSS and acute lethality and note that each day on which the PPER are violated constitutes a separate offense. They note that trout acute-lethality test failure is an automatic PPER (and hence *Fisheries Act*) violation that requires accelerated follow-up testing, and that failure of an acute-lethality test for *Daphnia magna*, while not an automatic violation, also requires follow-up test procedures. For both kinds of acute-lethality test, failure to conduct follow-up test procedures as required violates the PPER and the *Fisheries Act*. Testing for BOD levels and TSS is described as more straightforward. If testing shows levels of BOD or TSS above those authorized, the deposit is not authorized, violates the PPER and is an offense under the *Fisheries Act*. The submitters say that according to the *Compliance and Enforcement Policy*, every suspected violation is to be examined for action ranging from a warning to prosecution. Violations of s. 36(3) are punishable on summary conviction by a fine not exceeding C$300,000 for a first offense and C$300,000 plus imprisonment not exceeding six months for subsequent offenses, and for an indictable offense a fine not exceeding $1 million for a first offense and a fine not exceeding $1 million and imprisonment not exceeding three years for subsequent offenses.

B. Assertions Regarding Mills in Ontario, Quebec and the Atlantic Provinces

The Submitters next present in detail their assertion that Canada is failing to effectively enforce the *Fisheries Act* and the PPER in regard to pulp and paper mills in Ontario, Quebec and the Atlantic provinces. The two categories of noncompliance for which they contend enforcement is deficient are (1) failure to meet a "deleterious substances" effluent test (that is, either a BOD test, a TSS test or a trout acute-lethality test) and (2)

8. Submission at 5. The submitters describe transitional authorizations under the PPER. Under ss. 20-26, subject to conditions with a view to coming into compliance, mills unable to comply were allowed to exceed PPER limits and discharge acutely lethal effluent between 1 December 1992, and 31 December 1993, or under "extraordinary circumstances" and for reasons "beyond the control" of the mill operator, until 31 December 1995.
9. Submission at 5.

failure to conduct follow-up testing as required when there is an effluent test failure. The submission and its appendices provide information on alleged violations at approximately 70 of the 116 mills that the Submitters identify, with twelve mills highlighted as mills of particular concern to the Submitters.

In regard to Quebec, the Submitters obtained data that they claim show 960 acute-lethality, BOD and TSS violations from 1995 to 2000 at nine mills. They claim that in 2000, 26 Quebec mills had 171 violations (presumably acute lethality, BOD and TSS violations); 24 mills failed the trout acute-lethality test, 33.3 percent of which also violated follow-up test procedures; and 28 mills, after failing the *Daphnia magna* acute-lethality test, violated the acute-lethality follow-up procedures.[10] In all, the Submitters claim that there were at least 250 reported potential offenses for failure to follow the PPER follow-up test procedures throughout Quebec in 2000. The Submitters claim that, despite these offenses, they could find no *Fisheries Act* prosecutions or convictions of any Quebec mills, and they state that they are particularly concerned about apparent lack of effective enforcement at six mills, based on data from 2000. Of these, they highlight especially the Tembec Inc. mill in Témiscaming, for which they claim no prosecution was brought for non-compliance with either federal or provincial effluent regulations despite an alleged 275 reported violations from 1995 through 2000.

With regard to Ontario's 33 regulated pulp and paper mills, the Submitters highlight the data for 13 mills that had over 225 acute-lethality, BOD and TSS test failures between 1996 and 2000. In 2000 alone, the Submitters claim that 7 mills were responsible for 18 such test failures, that six of those mills failed the trout acute-lethality test and that two of the mills also failed the trout lethality test follow-up procedures. They also claim that nine mills violated the *Daphnia magna* follow-up procedures. In all, the Submitters claim there were at least 94 follow-up test procedure violations at Ontario mills in 2000. The Submitters assert that from 1995 to 2000, six Ontario mills were prosecuted under the PPER, which they believe explains the lower number of alleged violations in Ontario as compared to Quebec and the Atlantic provinces, where the Submitters claim there have been fewer prosecutions. Nonetheless, on the basis of 2000 data, the Submitters identify two Ontario mills for which they "have concerns about the apparent lack of effective enforcement of the federal laws.[11]"

10. Appendix 6 to the submission provides a flowchart showing the acute lethality testing procedures and the points at which violations occur.
11. Submission at 9.

The Submitters obtained only partial data for the approximately 22 mills in the Atlantic provinces for the years 1995 to 2000 and claim therefore that they understate the number of alleged violations in those provinces. According to the Submitters, the data they obtained show that 19 mills reported 1,081 acute-lethality, BOD and TSS violations from 1995 to 2000. The Submitters did not calculate alleged follow-up test procedure violations for the Atlantic provinces. They claim that despite the number of alleged test failure violations, they found only "two prosecutions of mills in the Atlantic Region under the federal laws since the PPER came into force.[12]" Based on 2000 data, the Submitters are particularly concerned about the apparent lack of effective enforcement regarding four mills in the Atlantic provinces. According to the Submitters, the mill in the Atlantic provinces with the most alleged violations from 1995 to 2000, the Irving Saint John mill, was prosecuted under the federal laws in 1998 but still had 22 alleged test failure violations and an unknown number of alleged follow-up test violations in 2000.

The Submitters contend that the exclusions in NAAEC Article 45(1) from the definition of "failure to effectively enforce environmental law" do not apply. They claim that Canada's alleged failure to effectively enforce the *Fisheries Act* and the PPER do not reflect a reasonable exercise of discretion or result from *bona fide* decisions to allocate resources to other enforcement matters within the meaning of Article 45(1). Among other things, they assert that "[i]t is not a reasonable exercise of discretion where an available enforcement tool, such as prosecutions, is used so infrequently in the face of widespread and numerous violations.[13]"

C. Request for a Factual Record

Finally, the Submitters present information in support of their contention that the submission meets the requirements of Article 14(1)(a)-(f) and that the submission merits requesting a response from Canada based on the criteria in Article 14(2). They ask the CEC to prepare a factual record on enforcement of cited provisions of the *Fisheries Act* and the PPER with respect to the mills in Quebec, Ontario and the Atlantic provinces that they identify in the submission.

III. SUMMARY OF THE RESPONSE

Canada's response provides clarifying information on the general basis of the enforcement decisions of the Government of Canada and a

12. Submission at 10.
13. Submission at 11.

description of enforcement decisions regarding specific cases raised by the Submitters.

A. Clarifying Information

Canada first provides "clarifying information" regarding Canada's approach to enforcing the PPER and the *Fisheries Act*, so as to "assist the reader in understanding the facts pertaining to the specific cases identified in the submission as of particular concern to the Submitters.[14]" Canada describes the role of fishery inspectors in conducting inspections and investigations and choosing the appropriate response if the inspector has reason to believe that an offense has been committed.[15] Canada states that, consistent with the *Compliance and Enforcement Policy*, it will "choose the appropriate response such as a warning, inspector's direction, prosecution, etc.[16]" Canada explains that "[t]he response to a violation will be chosen taking into account the nature of the violation, the likelihood of achieving the desired result (i.e., compliance with the *Fisheries Act* in the shortest possible time and no further occurrence of violations), and consistency in enforcement.[17]" The response provides criteria taken into account in assessing these factors. Canada states that the "ultimate decision on whether or not to proceed with a prosecution of the charges rest [*sic*] with the Attorney General of Canada.[18]"

Canada then describes methodologies for determining compliance under the PPER. Canada notes that the margins of error in the methodologies for determining compliance of effluent with the regulated limits for biological oxygen demand (BOD), and total suspended solids (TSS) may affect decisions on enforcement, especially as to whether a conviction may be obtained in accordance with the criminal burden of proof (guilt beyond a reasonable doubt).[19]

B. Enforcement Decisions for Specific Mills

The main body of Canada's response is a discussion of its actions in connection with twelve specific mills identified in the submission, divided into sections on the Atlantic provinces, Quebec and Ontario.

14. Response at 2.
15. Response at 3.
16. *Ibid.*
17. *Ibid.*
18. Response at 4.
19. Response at 4-5.

1. Atlantic provinces

In regard to four mills in the Atlantic provinces, Canada states that it subjected the mills' monthly effluent reports to an "off-site inspection" or review of the data. In cases of exceedance of TSS or BOD limits or the prohibition on acutely lethal effluent, the response states that from 1995–2000, it was routine practice of Environment Canada *Fisheries Act* inspectors to discuss the exceedances with Environment Canada specialists in the operation of pulp and paper mills.

a. Irving Pulp and Paper Ltd., Saint John, New Brunswick

The response provides information regarding the Irving Pulp and Paper Ltd. in Saint John, New Brunswick, for the period 1995 through 2000. The response states that this mill did not come into compliance with the PPER as required at the end of 1995 because of delays in environmental assessment approval from the province for a conventional treatment facility and the subsequent inability of the mill to complete in time the internal mill process changes it pursued as an alternate route to compliance.

In 1996, of the mill reported 481 test failures, including 157 failures of the trout acute-lethality test. In January, Environment Canada began an investigation of alleged PPER violations at the mill. Environment Canada closed the investigation after the mill indicated that modifications to the mill would achieve compliance by September. Federal inspectors also conducted an on-site inspection and issued the mill a written warning in July for exceedances of the BOD limit and for acute lethality. An effluent sample taken in December failed the trout lethality test.

In 1997, the mill reported 127 test failures. At an April meeting between representatives of Environment Canada, the provincial department and the mill, Irving presented a plan to meet the requirements of the PPER. In June, Environment Canada requested a tighter schedule and after project delays in August and September, "began to examine enforcement options.[20]"

In 1998, the mill reported 80 test failures. In the early spring of 1998, effluent collected under a search warrant failed the trout test and the mill was charged for *Fisheries Act* violations. In August, the mill was charged a second time under s. 36(3) for the discharge of green liquor and the

20. Response at 7.

company pled guilty and was fined $50,000. After the company "fine-tuned the operation of the internal treatment systems it had installed to meet the regulatory limits,[21]" reports and tests showed a reduced number of acute-lethality test failures, some non-lethal samples and improved, but still non-conforming, levels of BOD that the mill began to address. Following consultations with Environment Canada officials, in October 1998, the Attorney General advised that a prosecution was not warranted.

In 1999, the mill reported a total of 11 test failures. The internal changes made in 1998 generally allowed the Irving mill to meet all discharge limits except the monthly limit on BOD. Environment Canada process specialists indicated that the mill was making progress on this problem. The mill subsequently failed some acute-lethality tests, but by October, the effluent passed.

In 2000, the mill reported 25 exceedances, including six failures of trout acute-lethality tests. Two trout test failures came in February, attributed by the mill to start-up after a shutdown; and two more in April said to be due to a membrane leak in the treatment reverse osmosis unit. The response states: "In a manner consistent with the factors to consider before taking action with respect to an alleged violation, Environment Canada decided that the mill had reported corrective action and that no action on the inspector's part was required.[22]" The mill attributed a further failure in June to maintenance work. Environment Canada subsequently conducted an on-site inspection and all the samples taken passed the trout lethality test. The mill reported failure of a trout lethality test failure in December, after which the follow-up tests passed as required. Hence Environment Canada took no action. The mill explained that the 19 reported failures of TSS and BOD tests were due to maintenance activities or were corrected, and some exceedances were within the margin of precision. Environment Canada therefore took no action.[23]

b. AV Cell Inc. at Atholville, New Brunswick

The response reports 35 alleged violations by this mill in 2000. As regards 10 failures of the trout acute-lethality test, the mill set up a "trouble-shooting" team but the test failures continued. Both Environment Canada and the New Brunswick Environment Department conducted

21. *Ibid.*
22. Response at 9.
23. Response at 10-11.

on-site sampling, and the province proceeded with a prosecution for failure of the trout lethality tests. In these circumstances, Environment Canada took no enforcement measures. The mill pled guilty to the provincial charge and was fined $30,000. The mill reported failures of the TSS limits in every month from January to May and of BOD in February, March and July. The mill attributed these test failures to maintenance, a temporary shutdown and a process change, and took corrective action. Environment Canada decided not to act. Canada says that the PPER allows for an authorization for higher emissions associated with process changes, and that the mill applied and received such an authorization in May 2000.

c. Abitibi-Consolidated Inc., Grand Falls, Newfoundland

This mill reported nine failures of the trout acute-lethality test in April, May, June, November and December of 2000. Process changes made prior to December did not prevent the December test failure. Environment Canada inspectors conducted on-site inspections in June and July and executed a search warrant and took effluent samples in December. All of the Environment Canada samples passed the trout lethality test.

d. Bowater Mersey Paper Company Ltd., Brooklyn, Nova Scotia

In 2000, this mill reported 16 test failures, including 13 trout acute-lethality test failures and three daily TSS failures. On the basis of an "adequate compliance history" and "ongoing corrective measures," Environment Canada took no immediate action for two trout test failures reported in January.[24] Following another acute-lethality test in June, Environment Canada took samples that passed the test, and the mill took corrective action. The mill reported no test failures after October, and an Environment Canada sample taken in January 2001 passed. In view of the mill's corrective action, Environment Canada decided to take no action in regard to the trout test failures. After the mill reported a TSS test failure in January, it installed a new system for removing solids, which was complete in December. The mill attributed TSS test failures in April 2000 to the dredging of its treatment system.

2. Quebec

With respect to mills in Quebec, Canada's response explains that consistent with the spirit of an expired federal-provincial agreement, the

24. Response at 15.

six mills discussed in the response submitted monthly effluent reports under the PPER to the province, which served as a "single window" for information required under both provincial and federal legislation. The province then forwarded the information to Environment Canada. The federal-provincial agreement expired in 2000.[25]

a. Tembec Inc., Témiscaming, Québec

The response explains that this mill had a transitional authorization that expired in December 1995 and that the mill had complied with the conditions of the authorization. The response then provides information regarding the mill for the years 1996 through 2000.

For 1996, the mill reported 25 failures of the monthly trout lethality test and 82 failures of the weekly follow-up trout lethality test, with failures of both in every month of the year. Environment Canada reviewed the effluent reports and contacted the Quebec Ministry of the Environment (QME), which issued notices of violation of the provincial law in May and September 1996 and January and February 1997. The QME requested a corrective action plan, which the mill finalized in July 1996. Environment Canada took into account the actions of the province.

In 1997, the mill failed monthly or weekly trout acute-lethality tests in every month, for a total of 66 failures. The mill also reported four failures of TSS or BOD tests. Environment Canada inspector reviewed the effluent reports and consulted with the province. QME indicated that it issued notices of violation in April, July, September, October, November and December 1997 and in January and February 1998. Environment Canada took into account the actions of the province.

In 1998, the mill reported failures of trout acute-lethality tests in every month. The mill reported failure of daily TSS tests on 16 occasions. QME requested a corrective plan from the mill and approved it in May 1998. QME also issued notices of infraction in every month from May to October 1998 and in February 1999. Environment Canada initiated an investigation in April 1998.[26]

In 1999, the mill reported 20 failures of the monthly or weekly trout acute-lethality tests and nine failures of the daily TSS test. The mill reportedly continued to work to achieve the requirements of its 1998 corrective action plan, and QME issued notices of infraction every month

25. Response at 17.
26. Response at 21.

from March through September. Environment Canada's investigation continued.

In 2000, the mill reported five failures of the monthly or weekly trout acute-lethality test and three failures of the daily TSS limit. QME issued notices of infraction in April and July. In October, the Attorney General advised Environment Canada that a prosecution was not warranted. The mill took corrective action that according to Canada "significantly improved its rate of conformity from 1997 to 2000.[27]"

b. The five other Quebec mills

For the remaining five Quebec mills discussed in the response, Canada provides information for the year 2000. For the Fjordcell Inc. mill at Jonquière, the Tembec Inc. mill at St. Raymond and the La Compagnie J. Ford Ltd. mill at Portneuf, Canada provides a summary of the effluent reports for each mill but limited additional information because of investigations that were pending at the time of the response. The investigations were initiated in July, August and September 2000. The response states that the Uniforêt-Pâte Port Cartier Inc. mill at Port-Cartier reported 24 failures of daily TSS and BOD tests and monthly trout acute-lethality tests and that Environment Canada issued written warnings. The response states that the mill ceased operating in February 2001. The response indicates that the F.F. Soucy Inc. mill at Rivière-du-Loup was in compliance throughout 2000.

3. Ontario

The response addresses the concerns raised by the Submitters with respect to two Ontario mills in 2000, the Abitibi-Consolidated Inc., mill in Iroquois Falls and the Interlake Papers mill in St. Catherines. In light of investigations begun at the Abitibi Consolidated mill in October 2001 and at the Interlake Papers mill in October 2000, both of which were ongoing at the time of the response, Canada provided only limited information regarding these two mills.

IV. ANALYSIS

The Secretariat considers that the submission, in light of Canada's response, warrants developing a factual record as recommended in this

27. Response at 23.

notification.[28] The reasons for the Secretariat's recommendation are set forth below.

To reach this stage, the Secretariat must first determine that a submission meets the criteria in Article 14(1) and that it merits requesting a response from the Party based upon a review of the factors in Article 14(2). As indicated above, on 7 June 2002, the Secretariat determined that the submission meets the criteria for continued review included in Article 14(1) and that, based on the factors in Article 14(2), the submission warranted a response from the Party.[29]

A. Why a factual record is warranted

This submission seeks a factual record regarding enforcement of the *Fisheries Act*, one of the principal federal environmental statutes in Canada, in regard to one of Canada's important industrial sectors, the pulp and paper industry. In the submission and supporting materials attached to it, the Submitters describe the environmental, economic and trade significance of the pulp and paper industry. They call it "Canada's largest net export sector[30]" and describe the significant water use and discharge of organic waste and chemicals associated with pulp and paper production processes used in Canada.[31] They note the public concern regarding pollutant discharges from pulp and paper mills that led to the promulgation of the PPER in 1991. Both the submission and the response allude to the challenges that the pulp and paper industry and the government face in striving to achieve compliance with the *Fisheries Act* and the PPER in the pulp and paper sector. The submission emphasizes the Submitters' concern over a perceived lack of prosecutions to enforce and assure compliance with the PPER and the *Fisheries Act*.

Canada's response to the submission provides a considerable amount of information regarding the federal government's actions in regard to twelve specific mills mentioned in the submission. Nonetheless, it leaves open central questions regarding Canada's enforcement of the relevant provisions of the *Fisheries Act* and the PPER at the mills of

28. On 16 October 2002, the Submitters sent to the Secretariat a brief "reply" to Canada's response. Neither the NAAEC nor the Guidelines make any provision for a reply to a response. Consistent with its practice to date, the Secretariat did not consider the Submitters' reply in conducting its review under Article 15(1) but will retain the reply for possible consideration during the preparation of a factual record, should the Council instruct the Secretariat to prepare one.
29. SEM-02-003 (Pulp and Paper), Determination in accordance with Article 14(1) and (2) (7 June 2002).
30. Submission at 2.
31. Submission at 2-3.

concern. A factual record would afford a thorough and detailed factual examination relevant to those open questions so as to allow a more comprehensive consideration of whether Canada is failing to effectively enforce those laws as the Submitters assert.

Although the primary focus of the submission is on twelve specific mills, the Submitters provide information regarding the *Fisheries Act* and PPER compliance record for 1995 through 2000 at approximately 116 mills in eastern Canada, noting over 2,400 alleged violations. Appendices 5 and 7 to the submission, in particular, provide considerable detail regarding those alleged violations. The Secretariat considered the information regarding the twelve mills of heightened concern in light of the extensive information provided in regard to numerous other mills as well. With this comprehensive view of the submission in mind, the following sections explain why a factual record is warranted to present detailed information regarding matters that the submission and Canada's response leave open.

1. Failure to conduct acute-lethality tests and follow-up tests

The submission focuses in part on Canada's alleged failure to effectively enforce the *Fisheries Act* and PPER when pulp and paper mills do not conduct required acute-lethality tests and follow-up tests.[32] A factual record is warranted to present a clearer and more comprehensive set of factual information regarding acute-lethality test failures and failures to conduct follow-up as required.

Additional information is especially warranted in regard to follow-up testing. Appendix 7 to the submission provides detailed information regarding 344 alleged failures to conduct follow-up tests as required by 48 mills in Ontario and Quebec in 2000. The federal government's investigation of two of the Ontario mills, discussed in Canada's response, indicates that Canada considers failure to conduct follow-up tests to be a potential compliance problem meriting investigation.[33] Although the response provides some information on some of the mills' reporting of follow-up tests for trout lethality,[34] the picture it presents regarding follow-up testing for trout lethality is far from complete, and it provides almost no information regarding testing and follow-up testing for *Daphnia* lethality. The response also does not address the Submitters' emphasis on the magnification of the extent of alleged noncompliance that occurs because each day of noncompliance constitutes a separate

32. Submission, at 5 and 8.
33. Response at 27-28.
34. See, e.g., Response at 8, 9, 11, 13, 15, 18, 19, 20, 24 and 27.

offense under the *Fisheries Act*. Under this continuing offense provision, the Submitters contend that the 344 alleged failures to conduct follow-up tests as required resulted in 1,406 alleged violations.

In addition, unexplained discrepancies exist between the submission and response regarding the number of test failures at the mills of concern. For example, for the F.F. Soucy Inc. mill in Rivière-du-Loup, Quebec, Canada indicates that it found no instances of noncompliance in 2000.[35] By contrast, the Submitters allege that in 2000 the mill had four test failure violations and 36 violations for failure to conduct follow-up tests as required.[36] Discrepancies between the submission and response also exist in regard to test failures at the Irving Pulp and Paper mill at Saint John,[37] the AV Cell mill at Atholville,[38] the Tembec mill at Témiscaming,[39] and the Fjordcell mill in Jonquière.[40] A factual record would afford an opportunity to develop and present factual information in regard to such discrepancies, in particular those for which the submission alleges a greater number of failures than are reported in Canada's response.

2. *Canada's consideration of provincial enforcement action*

Several times in its response, Canada makes note of provincial enforcement action and in some cases states that Canada took such

35. Response at 26.
36. Submission at 8, Appendix 5 at 2, Appendix 7 at 9-10.
37. Compare Submission, Appendix 5 at 14 (106 BOD test failures and 97 trout lethality test failures in 1996) with Response at 6 (324 BOD test failures and 157 trout lethality test failures in 1996); compare Submission, Appendix 5 at 14 (49 trout lethality test failures in 1997) with Response at 6 (51 trout lethality test failures in 1997); and compare Submission, Appendix 5 at 15 (7 monthly BOD test failures and 5 trout lethality test failures in 2000) with Response (9 monthly BOD test failures and 6 trout lethality test failures in 2000).
38. Compare Submission, Appendix 5 at 15 (4 monthly TSS test failures and 9 trout lethality test failures in 2000) with Response at 11 (5 monthly TSS test failures and 10 trout lethality test failures in 2000).
39. Compare Submission, Appendix 5, at 5 (1 daily TSS test failure and 25 trout lethality test failures in 1996) with Response at 18 (no daily TSS test failures and 21 trout lethality test failures in 1996); compare Submission, Appendix 5 at 6 (5 daily TSS test failures and 65 trout lethality test failures in 1997) with Response at 19 (1 daily TSS test failure and 66 trout lethality test failures in 1997); compare Submission, Appendix 5 at 6 (7 daily TSS test failures and 44 trout lethality test failures in 1998) with Response at 20 (16 daily TSS test failures and 78 trout lethality test failures in 1998); compare Submission, Appendix 5 at 6 (8 daily TSS test failures and 25 trout lethality test failures in 1999) with Response at 22 (9 daily TSS test failures and 20 trout lethality test failures in 1999); and compare Submission, Appendix 5 at 8 (2 daily TSS test failures in 2000) with Response at 23 (3 daily TSS test failures in 2000).
40. Compare Submission, Appendix 5 at 8 (28 BOD test failures and 9 trout lethality test failures in 2000) with Response at 24 (28 BOD test failures and 7 trout lethality test failures in 2000).

action into account in determining how to respond to possible noncompliance with the PPER or the *Fisheries Act* at various mills.[41] The Submitters do not assert that any of the provinces are failing to effectively enforce provincial environmental laws, and the Secretariat is not proposing that a factual record is warranted to consider any such assertion. However, information regarding provincial enforcement action may be relevant to a consideration of whether the federal government is failing to effectively enforce provisions of the *Fisheries Act* and the PPER if the federal government took provincial action into account in determining its own enforcement response. A factual record is warranted to present in more detail facts regarding the manner and extent to which the federal government took into account action, such as approval of corrective action plans, notices of infractions or other enforcement-related measures, that provincial officials took in regard to certain mills.[42] More detailed information than is included in Canada's response regarding federal-provincial administrative agreements or other federal-provincial arrangements on enforcement of the *Fisheries Act* would also be relevant to understanding Canada's consideration of provincial enforcement activity.

By way of illustration, factual information regarding the relation of provincial enforcement actions to federal enforcement responses is relevant in regard to the Submitters' assertion of a total absence of federal prosecution for alleged violations of the *Fisheries Act* and the PPER in connection with Quebec mills.[43] The Submission gives minimal information on prosecutions of pulp and paper mills under Quebec law.[44] Similarly, Canada's response indicates in several places that QME's issuance of notices of infraction was a factor relevant to federal decisions on compliance and enforcement responses.[45] However, the response does not explain the nature and terms of those notices of infraction, the effect those notices had in achieving compliance, any sanctions obtained in connection with the notices or other information regarding the notices that may have been relevant to the federal government's consideration of them. To present a complete picture, a factual record would also allow for a more detailed presentation of facts regarding other examples, such as Canada's decision not to take enforcement in connection with alleged ongoing discharge of acutely lethal effluent by the AV Cell mill in New Brunswick in view of provincial charges leading to a fine of $30,000.[46]

41. Response at 12, 18, 19, 21-25, 27.
42. Response at 7, 11-12, 18-19, 21, 22-27.
43. Submission at 7-8.
44. Submission at 8, Appendix 5 at 1.
45. Response at 18, 19, 21, 22, 23, 25, 27.
46. Response at 11-12.

3. Canada's use of the full set of options under the Compliance and Enforcement Policy

The submission highlights the Submitters' primary concern regarding the alleged lack of prosecutions of pulp and paper mills and does not discuss in detail other possible enforcement responses. Nonetheless, both the submission and Canada's response note the full range of available enforcement responses under the *Compliance and Enforcement Policy*.[47] These responses include actions short of court proceedings, such as warnings, directions by Fishery inspectors, authorizations, and ministerial orders, as well as court actions, such as injunctions, prosecution, court orders upon conviction and civil suits for recovery of costs.[48] Canada explains that, following an inspection or investigation, "[t]he response to a violation will be chosen taking into account the nature of the violation, the likelihood of achieving the desired result (i.e., compliance with the *Fisheries Act* in the shortest possible time and no further occurrence of violations), and consistency in enforcement.[49]"

For the twelve mills highlighted in the submission, Canada's response recounts several instances in which Canada issued warnings and notes one federal prosecution resulting in the payment of a fine. Canada does not mention any instances in which ministerial orders, as to which the *Compliance and Enforcement Policy* indicates failure to comply may result in prosecution,[50] were used to seek compliance. In several instances, Canada indicates that its enforcement response took into account a mill's corrective action, but in no case is there any indication that the corrective action plan was part of a binding, enforceable order or agreement. In addition, the response indicates occasions on which warnings were sent to mills, at least two of which became the subject of *Fisheries Act* investigations.[51] The *Compliance and Enforcement Policy* indicates that prosecution is the preferred course of action where "the alleged violator had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the violation.[52]"

A factual record is warranted to examine in further detail Canada's consideration and use in connection with the pulp and papers mills discussed in the submission of the full range of enforcement options

47. Submission at 4; Response at 3.
48. Compliance and Enforcement Policy (July 2001) at 5 (attached to Submission as Appendix 4).
49. Response at 3.
50. Compliance and Enforcement Policy (July 2001) at 23.
51. E.g., Response at 25, 27.
52. Compliance and Enforcement Policy (July 2001) at 24.

described in the *Compliance and Enforcement Policy*, including ministerial orders, warnings and prosecutions, and the results obtained. In connection with fines imposed, relevant information would include facts regarding the factors taken into account in recommending sentences under the *Compliance and Enforcement Policy*, such as the benefit gained, the number and nature of previous convictions, deterrence of future violations, prevalence and trends in the type of violation involved generally and sentencing precedents in similar cases.

4. Self-reporting, inspections and investigations

The large number of instances of alleged noncompliance with the *Fisheries Act* and PPER as reflected in mandatory reporting by individual mills lies at the heart of the submission. Canada's response reveals no instance in which Canada initiated a prosecution without tests by government inspectors that confirmed reports from mills of discharges with levels of TSS or BOD that exceed PPER limits or discharges of acutely lethal effluent. In addition, the response indicates instances in which the results of Environment Canada's on-site sampling differed from the results reported by mills. One possibly relevant factor, mentioned in Canada's response, is the range of precision for the monitoring tests for TSS and BOD.[53]

The federal government has relied on self-reported data in prosecutions in other contexts.[54] A factual record would afford the opportunity to present detailed facts regarding the application of the *Compliance and Enforcement Policy* in connection with self-reported instances of noncompliance and, in particular, in regard to the practice of consulting with Environment Canada pulp and paper mill specialists and conducting on-site testing and investigations to confirm the results of test failures.

A factual record is also warranted to present detailed information regarding the investigations that Canada has undertaken at several of the mills. For example, in the case of the Tembec mill in Témiscaming, Quebec, Canada refers to an investigation file that was opened by

53. Response at 4.

54. In 1995, the Supreme Court of Canada held in *R.* v. *Fitzpatrick*, [1995] 4 S.C.R. 154, that on charges of exceeding a fishing quota under the *Fisheries Act* and its regulations, the Crown could introduce into evidence "hail reports" required to be made by the fisherman. Their use was held not to offend the *Canadian Charter of Rights and Freedoms* right not to be deprived of the right against self-incrimination as included in the s. 7 protection of the liberty and security of the person except in accord with the principles of fundamental justice.

Environment Canada in April 1998 and remained "active" until October 2000, when "the Attorney General advised that a prosecution was not warranted given the particular facts of this case.[55]" During the period in which the investigation was underway, the response reveals several instances of reported test failures and noncompliance with the *Fisheries Act* and PPER, contacts between Environment Canada and the mill operators, off-site federal inspections and a number of provincial notices of infraction and corrective plans. There appears to have been in that period some improvement in compliance by the mill. For this and other investigations, a factual record would provide an opportunity to present additional factual information regarding the concrete steps in the investigation, its results and the federal decisions that followed.[56]

5. Information regarding compliance promotion

The *Compliance and Enforcement Policy* makes a distinction between enforcement and measures to promote compliance. Compliance-promoting activities listed in the policy include communication and publication of information, public education, consultation with parties affected by the pollution prevention and habitat protection provisions of the *Fisheries Act* and technical assistance.[57] Preparation of a factual record regarding the open questions discussed above would provide an opportunity to present relevant information regarding Canada's actions, in addition to the kinds of enforcement measures listed in the *Compliance and Enforcement Policy*, to promote compliance at the mills of concern in the submission. It would also provide an opportunity to present information regarding Canada's use of those appropriate governmental actions set out in Article 5 of the NAAEC that are relevant to assertions in the submission.

In addition, a factual record would afford an opportunity to provide further information regarding the challenges that the pulp and paper sector has faced in seeking to achieve compliance with the *Fisheries Act* and the PPER. This would include information regarding the nature, environmental limitations and compliance potential of various pulp and paper technologies mentioned in the submission;[58] the kinds of process, facility and equipment changes required to achieve

55. Response at 21-23.
56. The Secretariat is aware that certain information regarding investigations might be subject to confidentiality, as recognized in the NAAEC and the Guidelines. See, e.g., NAAEC Articles 11(8), 39; Guideline 17.
57. *Compliance and Enforcement Policy* (July 2001) at 5. See also the activities listed on pages 14–18 of the policy.
58. Submission at 2-4, Appendix 3.

compliance; the economic costs of compliance; and the variability in these factors across the mills of concern in the submission.

B. Consideration of Canada's pending investigations at certain mills

Canada declined to provide further facts with regard to the record of certain mills on the basis of ongoing investigations by Environment Canada.[59] Canada does not state that these investigations are pending judicial or administrative proceedings that bar the Secretariat from proceeding further.[60] However, with previous submissions, the Secretariat has noted that ongoing, timely and active investigations, especially with a view to penal proceedings, may in appropriate cases militate against proceeding with a factual record that could interfere with or jeopardize those proceedings.[61]

Canada's response indicates that the five Environment Canada investigations mentioned were commenced in July 2000, August 2000, September 2000, October 2000 and October 2001. The factual record recommended here need not include information regarding instances of noncompliance for which a pending administrative or judicial proceeding or a timely and active investigation, capable of leading to charges, is underway. However, for the mills under investigation at the time of the response, a factual record is warranted to present information regarding: 1) investigations that have been concluded, 2) alleged violations for which no investigation was undertaken, and 3) alleged violations for which the two-year limitation period for summary conviction criminal proceedings has run or an indictment is no longer a realistic option.[62]

V. RECOMMENDATION

For the foregoing reasons, the Secretariat considers that this submission, in light of Canada's response, warrants the development of a factual record and hereby so informs the Council. The submission and response leave open matters for which a more detailed presentation of factual information will assist in considering whether Canada is failing to effectively enforce the *Fisheries Act* and the PPER in Ontario, Quebec

59. Response at 24 (Fjordcell), 25 (Tembec and St-Raymond), 27 (J. Ford), 27 (Abitibi Consolidated), 28 (Interlake Paper).
60. See NAAEC Article 14(3)(a).
61. SEM-00-004 (BC Logging), Article 15(1) Notification, at 15-17.
62. *Fisheries Act* s. 82. Section 40 of the *Fisheries* Act creates hybrid offenses, and in proceedings by way of indictment (subject to the relations of ss. 7 and 11 (b) of the *Canadian Charter of Rights and Freedom*) no limitation period applies.

and the Atlantic provinces, as the Submitters allege. As discussed above in detail, a factual record is warranted to develop and present, in connection with all of the mills of concern in the submission, detailed factual information regarding: (1) the federal response to alleged effluent test failures and failures to conduct follow-up tests as required under the PPER; (2) Canada's consideration of provincial action in enforcing the PPER; (3) Canada's use of the full set of options under the *Compliance and Enforcement Policy* in enforcing the PPER; (4) the system of self-reporting, inspections and investigations that Canada employs in enforcing the PPER; and (5) federal efforts to promote compliance with the PPER. Information regarding offenses for which a timely and active investigation, capable of leading to charges, is underway need not be included in the factual record. In light of the comprehensive information presented in the Appendices 5 and 7 to the submission in addition to the detailed information regarding the twelve mills of particular concern, the factual record should present facts regarding specific mills in the context of factual information regarding the broader enforcement concerns throughout eastern Canada that frame the submission.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 8th day of October 2003.

per: William V. Kennedy
Executive Director

SEM-02-004

(El Boludo Project)

SUBMITTERS: ARCADIO PESQUEIRA SENDAY ET AL.

PARTY: MEXICO

DATE: 23 August 2002

SUMMARY: The Submitters assert that Mexico is failing to effectively enforce its environmental laws with respect to the "El Boludo" mining project on the site called "El Tiro," owned by the Submitters and located in the Municipality of Trincheras, Sonora, Mexico. According to the Submitters, the company Minera Secotec, S.A. de C.V. has exploited the low-grade placer gold deposit of the "El Boludo" project without complying with several conditions of the environmental impact authorization.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (19 September 2002)	Determination that criteria under Article 14(1) have not been met.

REVISED SUBMISSION

ART. 14(1)(2) (26 November 2002)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.
ART. 15(1) (17 May 2004)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

Determinación conforme al artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-02-004** (Proyecto "El Boludo")
Peticionarios:	Leoncio Pesqueira Senday Fernanda Pesqueira Senday Milagro Pesqueira Senday Arcadio Pesqueira Senday
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	23 de agosto de 2002
Fecha de la determinación:	19 de septiembre de 2002

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 23 de agosto de 2002, Arcadio, Leoncio, Fernanda y Milagro Pesqueira Senday (los "Peticionarios") presentaron al Secretariado una petición de conformidad con los artículos 14 y 15 del ACAAN. Los Peticionarios aseveran que México está incurriendo en omisiones en la

aplicación efectiva de su legislación ambiental respecto del proyecto minero "El Boludo" en el predio "El Tiro", propiedad de los Peticionarios, ubicado en el municipio de Trincheras, Sonora, México.

Según los Peticionarios, la empresa Minera Secotec, S.A. de C.V., ha realizado el aprovechamiento y tratamiento del depósito de oro de placer de baja ley correspondiente al proyecto "El Boludo" sin observar diversas condicionantes de su autorización en materia de impacto ambiental y en presunta violación de la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA), las fracciones III y IV del artículo 15 de su Reglamento en materia de residuos peligrosos y la Ley Minera y su Reglamento.

El Secretariado determina que esta petición no satisface lo dispuesto por el artículo 14(1) del Acuerdo por las razones que se expresan en esta determinación.

II. RESUMEN DE LA PETICIÓN

La petición asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto del proyecto minero "El Boludo" ubicado dentro del predio "El Tiro", propiedad de los Peticionarios, en el municipio de Trincheras, Sonora, México. Los Peticionarios indican que su terreno está dedicado a la explotación pecuaria, contando en la actualidad con 526 cabezas de ganado mayor.

Los Peticionarios afirman que la empresa Minera Secotec, S.A. de C.V., ha incumplido disposiciones contenidas en la LGEEPA, las fracciones III y IV del artículo 15 de su Reglamento en materia de residuos peligrosos y la Ley Minera y su Reglamento, además de diversas condicionantes de la autorización en materia de impacto ambiental del proyecto "El Boludo". Según la petición, la empresa obtuvo la autorización para ese proyecto el 9 de septiembre de 1997. La petición incluye lo que parece ser una trascripción de las condicionantes previstas en la presunta autorización de impacto ambiental, relativas a distintas etapas del proyecto: preparación del sitio, construcción, operación, mantenimiento y abandono.[1]

Según la petición, el proyecto "El Boludo" consiste en el aprovechamiento y tratamiento de un depósito de oro de placer de baja ley. La extracción del suelo con valores de oro se realizará con una excavadora a

1. Páginas 5 a 10 de la petición.

un espesor promedio de dos metros. El material se someterá a un proceso de separación granulométrica, con aditamentos centrífugos en seco, para obtener concentrado de minerales pesados con valores de oro que será lavado, separando el producto comercial, las arcillas y el agua en un sistema de diferenciación gravimétrica.[2]

La petición asevera que la empresa minera ha destruido un área aproximada de 300-00-00 hectáreas, y que ha dañado el ecosistema de la región, eliminando tanto flora como fauna catalogada de protección especial. Según los Peticionarios, en el acta de inspección practicada el 15 de abril del 2002 constan graves irregularidades, que condujeron a una orden de clausura parcial temporal y adopción de medidas correctivas, dictada el 11 de junio de 2002. La petición afirma que, a pesar de no "haber dado cumplimiento a todas las irregularidades detectadas, sorpresivamente la empresa minera celebra convenio con la Procuraduría Federal de Protección al Ambiente Delegación Sonora y levanta la suspensión parcial temporal sin darnos oportunidad de hacer manifestación alguna".[3]

Los Peticionarios afirman que Secotec, pese a que no ha cumplido con las condiciones que le fueron impuestas para el proyecto "El Boludo", solicitó la constitución de servidumbres superficiales de paso y ocupación temporal relacionadas con otros lotes mineros que se encuentra dentro de la propiedad de los Peticionarios, e indican que la Dirección General de Minas declaró procedentes las solicitudes.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;

2. Página 2 de la petición.
3. Página 11 de la petición.

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;

(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[4] El Secretariado revisó la petición con tal perspectiva en mente.

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en los incisos a), b) y f) del artículo 14(1), por las razones siguientes. La petición se presentó por escrito en español,[5] que es el idioma designado por México. Los Peticionarios se identificaron claramente en la petición como personas que residen en el territorio de la Parte mexicana, en Caborca, Sonora, México.[6] Sin embargo, la petición no satisface el requisito del inciso c), porque no contiene información suficiente para que el Secretariado pueda analizarla, ni acompaña las pruebas documentales que puedan sustentarla. Por ejemplo, la petición no anexa ninguno de los documentos que en ella se mencionan.

La petición no contiene información suficiente sobre la supuesta omisión de México en la aplicación efectiva de la legislación citada, que permita analizar la cuestión umbral de si la petición "asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental", ni para evaluar el requisito señalado en el inciso d) del artículo 14(1). La petición afirma que la empresa ha violado la legislación ambiental, pero no incluye información suficiente ni información de apoyo sobre los presuntos hechos violatorios de la legislación ambiental. La petición tampoco contiene una explicación de la forma en que México presuntamente ha omitido aplicar su legislación ambiental de manera efectiva respecto de esos hechos. La petición afirma que la empresa ha destruido un área aproximada de "300-00-00 hectáreas", y que ha

4. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999).
5. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las *Directrices para la presentación de peticiones*.
6. Véanse los artículos (14)(1)(b) y (f) del ACAAN.

dañado el ecosistema de la región al eliminar tanto flora como fauna catalogada de protección especial, pero no proporciona ninguna información de apoyo que permita comprender en qué consisten los daños y de qué especies se trata.[7]

Por último, los Peticionarios indican que presentaron denuncias a diversas autoridades sobre las presuntas violaciones a la legislación ambiental por parte de la empresa minera,[8] y que la autoridad ambiental realizó una inspección en la que encontró "graves irregularidades", impuso medidas y celebró un convenio con la empresa. Sin embargo, tampoco se acompaña documento alguno que apoye estas afirmaciones y que permita evaluar el requisito previsto en el inciso e) del artículo 14(1).

IV. DETERMINACIÓN DEL SECRETARIADO

Por las razones que se explican en este documento, el Secretariado determina que la petición SEM-02-004 (Proyecto "El Boludo"), presentada por Arcadio, Leoncio, Fernanda y Milagro Pesqueira Senday, no satisface el artículo 14(1) del ACAAN, por lo que el Secretariado no procederá a examinar la petición.

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, el Secretariado notifica esta determinación a los Peticionarios y les informa que, de acuerdo con el apartado 6.2 de las Directrices, cuentan con 30 días para presentar una petición que cumpla con el artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: Victor Shantora
Director Ejecutivo Interino

cc: Dra. Olga Ojeda, Semarnat
Sra. Norine Smith, Environment Canada
Sra. Judith Ayres, US-EPA
Sr. Arcadio Pesqueira Senday

7. Página 3 de la petición.
8. La petición afirma que los hechos se denunciaron a las autoridades siguientes: la Delegación en Sonora de la Procuraduría Federal de Protección al Ambiente (Profepa), a la Comisión Nacional del Agua (CNA), a la Dirección General de Minas de la Secretaría de Economía, al Ministerio Público del Fuero Común del Distrito Judicial de Caborca, al Ministerio Público Federal adscrito al Distrito Judicial de Caborca y a la Secretaria de Fomento Ganadero del Gobierno del Estado.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-02-004** (Proyecto "El Boludo")
Peticionario:	Leoncio Pesqueira Senday Fernanda Pesqueira Senday Milagro Pesqueira Senday Arcadio Pesqueira Senday
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	23 de agosto de 2002
Fecha de la determinación:	26 de noviembre de 2002

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 23 de agosto de 2002, Arcadio, Leoncio, Fernanda y Milagro Pesqueira Senday (los "Peticionarios") presentaron al Secretariado una petición en la que aseveran que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto del proyecto

minero "El Boludo" en el predio "El Tiro", propiedad de los Peticionarios, ubicado en el municipio de Trincheras, Sonora, México.

Al revisar la petición por primera vez, el Secretariado determinó que esa no satisfacía los requisitos establecidos en los incisos (c), (d) y (e) del artículo 14(1) del ACAAN.[1] De conformidad con el apartado 6.1 de las *Directrices para la presentación de peticiones ciudadanas* (las "Directrices"), el 19 de septiembre de 2002, el Secretariado notificó a los Peticionarios que no procedería a seguir examinando la petición y que, de acuerdo con el apartado 6.2 de las Directrices, los Peticionarios contaban con 30 días hábiles para presentar una petición que cumpliera con todos los criterios del artículo 14(1) del ACAAN. El 10 y el 24 de octubre de 2002, el Secretariado recibió una petición revisada acompañada de anexos. Esta Determinación contiene el análisis de la petición revisada con base en los artículos 14(1) y (2) del ACAAN.

II. RESUMEN DE LA PETICIÓN

La petición asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto del proyecto minero "El Boludo" ubicado dentro del predio "El Tiro", propiedad de los Peticionarios, en el municipio de Trincheras, Sonora, México. Los Peticionarios indican que su terreno está dedicado a la explotación pecuaria, contando en la actualidad con 526 cabezas de ganado mayor.

Según la petición, el proyecto "El Boludo" consiste en el aprovechamiento y tratamiento de un depósito de oro de placer de baja ley.[2] Los Peticionarios afirman que la empresa Minera Secotec, S.A. de C.V. ("Secotec") obtuvo una autorización de impacto ambiental para ese proyecto el 9 de septiembre de 1997 (la "AIA"). La petición incluye una trascripción de los términos y condicionantes previstas en la AIA.[3] Los Peticionarios afirman que Secotec ha incumplido disposiciones de la Ley General del Equilibrio Ecológico y la Protección al Ambiente ("LGEEPA") y sus Reglamentos en materia de impacto ambiental y residuos peligrosos al no haber cumplido con todos los términos y condicionantes de la AIA.[4] Aseveran que Secotec ha destruido un área aproximada de 300 hectáreas, y que ha dañado el ecosistema de la región, eliminando tanto flora como fauna catalogada de protección especial.

1. Ver más adelante la Sección III.
2. Página 2 de la petición.
3. Páginas 4 a 11 de la petición.
4. Páginas 1 y 2 de la petición.

Según los Peticionarios, en una inspección practicada el 15 de abril del 2002, representantes de la Procuraduría Federal de Protección al Ambiente ("Profepa") constataron graves irregularidades, que condujeron a una orden de clausura parcial temporal y adopción de medidas correctivas, dictada el 11 de junio de 2002. La petición afirma que, a pesar de no "haber dado cumplimiento a todas las irregularidades detectadas, sorpresivamente la empresa minera celebra convenio con la Procuraduría Federal de Protección al Ambiente Delegación Sonora y levanta la suspensión parcial temporal sin darnos oportunidad de hacer manifestación alguna".[5]

Los Peticionarios afirman que Secotec, pese a que no ha cumplido con las condiciones que le fueron impuestas para el proyecto "El Boludo", solicitó la constitución de servidumbres superficiales de paso y ocupación temporal relacionadas con lotes mineros que se encuentran dentro de la propiedad de los Peticionarios, e indican que la Dirección General de Minas declaró procedentes las solicitudes.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

5. Páginas 3 y 11 de la petición.

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

El 19 de septiembre de 2002, el Secretariado determinó que la petición cumple con los requisitos establecidos en los incisos (a), (b) y (f) del artículo 14(1). La petición se presentó en español, que es el idioma designado por México. Además, los Peticionarios se identificaron claramente, y son personas que residen en México.

Conforme al artículo 14(1)(c), la petición revisada proporciona información suficiente que permite al Secretariado revisarla, e incluye las pruebas documentales que pueden sustentarla. Los artículos 28 y 35 de la LGEEPA y el artículo 20 de su Reglamento en materia de impacto ambiental vigente al momento de expedirse la AIA[6], establecen que las obras o actividades que puedan causar desequilibrio ecológico deberán sujetarse a las condiciones que establezca la Secretaría de Medio Ambiente y Recursos Naturales a través del procedimiento de evaluación del impacto ambiental. La petición afirma que la Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto del incumplimiento de Secotec con diversas condicionantes establecidas en su AIA.[7] En específico, la petición hace referencia a las condicionantes nueve, once, dieciséis, diecinueve, veintidós, veintiséis y treinta y uno de la AIA. Asimismo, la petición afirma que Secotec incurrió en diversos incumplimientos en materia de residuos peligrosos. De la documentación anexa a la petición, se desprende que esto último se refiere a la condicionante doce de la AIA.[8] Los Peticionarios afirman también que Secotec solicitó la constitución de servidumbres superficiales de paso y ocupación temporal relacionadas con lotes mineros que se encuentran dentro de la propiedad de los Peticionarios, e indican que la Dirección General de Minas declaró procedentes las solicitudes.

En la petición, se afirma que el acta de inspección practicada el 15 de abril de 2002 por la Delegación Sonora de la Profepa[9] detalla estas visitas en materia de residuos peligrosos, y que derivado de las irregularidades detectadas, el 11 de junio de 2002 se decretó a Secotec clausura parcial temporal y orden de adopción de medidas correctivas.[10] Según los Peticionarios, el 24 de junio de 2002, Secotec celebró con la Profepa un

6. Publicado en el *Diario Oficial de la Federación* el 7 de junio de 1988
7. Páginas 1, 2 y 11 de la petición.
8. Página 6 del Anexo 7.
9. Ver Anexo 43b).
10. Ver Anexos 43e) y f).

convenio que prevé la corrección de algunas de las irregularidades identificadas por la Profepa (el "Convenio"). Afirman que en virtud del Convenio, se decretó el levantamiento de la clausura parcial temporal.[11] La petición asevera que la Parte está omitiendo aplicar su legislación ambiental al haber decretado el levantamiento de la clausura parcial temporal a Secotec sin que Secotec hubiera cumplido con todas las condicionantes y los términos de la AIA.

La información proporcionada al Secretariado permite destacar que los Peticionarios están aseverando que la autoridad ambiental no está aplicando de manera efectiva los artículos 28 y 35 de la LGEEPA, 20 de su Reglamento en materia de impacto ambiental y 8 fracciones III, VI, VIII, X, XI, 15 fracciones III y IV, 23 y 25 de su Reglamento en materia de residuos peligrosos, al omitir sancionar a Secotec por las violaciones a esas disposiciones y a los términos de la AIA. Los Peticionarios proporcionaron al Secretariado copias de la AIA, del acta de inspección, de la orden de clausura parcial temporal, y del Convenio, además de numerosos otros documentos.[12]

La petición parece encaminada a promover actividades de aplicación de la legislación ambiental y no a hostigar una industria, ya que se enfoca principalmente en la forma en que la autoridad ambiental presuntamente ha incurrido en omisiones en la aplicación efectiva de su legislación ambiental respecto del proyecto minero "El Boludo", por lo que el Secretariado considera cumplido el requisito contenido en el inciso (d) del artículo 14(1).

En la petición se señala que las presuntas violaciones a la legislación ambiental por parte de Secotec fueron comunicadas por escrito a diversas autoridades de la Parte entre el 17 de agosto de 1998 y el 26 de junio de 2002[13]. El Secretariado recibió copias de diversos documentos que apoyan estas afirmaciones y que contienen algunas de las respuestas de la Parte, mismos que permitieron evaluar el cumplimiento con el requisito del inciso (e) del artículo 14(1)[14].

11. Ver Anexo 43d).
12. La petición revisada se acompañó de 45 anexos.
13. La petición afirma que los hechos se denunciaron a las autoridades siguientes: la Delegación en Sonora de la Profepa, a la Comisión Nacional del Agua, a la Dirección General de Minas de la Secretaría de Economía, al Ministerio Público del Fuero Común del Distrito Judicial de Caborca, al Ministerio Público Federal adscrito al Distrito Federal de Caborca y a la Secretaría de Fomento Ganadero del Gobierno del Estado.
14. Anexos 8, 10, 16, 17, 18, 23, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40 y 42 de la petición.

Además de los requisitos listados en el artículo 14(1), el preámbulo de ese artículo plantea que una petición debe aseverar "que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". Esto lo hace la petición, en la que se asevera que la Parte sigue incurriendo en omisiones en la aplicación de su legislación ambiental, y hace referencia a los artículos 28 y 35 de la LGEEPA, 20 de su Reglamento en materia de impacto ambiental y 8 fracciones III, VI, VIII, X, XI, 15 fracciones III y IV, 23 y 25 de su Reglamento en materia de residuos peligrosos. Estas disposiciones son "legislación ambiental" conforme a los artículos 14(1) y 45(2) del ACAAN, ya que su propósito principal es la protección del medio ambiente y la prevención de un peligro contra la vida o la salud humana.

El Secretariado considera que la aseveración de los Peticionarios en el sentido de que la Dirección General de Minas otorgó indebidamente a Secotec servidumbres superficiales de paso y la ocupación temporal sobre diversos lotes mineros ubicados dentro la propiedad de los Peticionarios no cumple con los requisitos contenidos en el preámbulo del artículo 14(1). No se asevera una omisión en la aplicación efectiva de una ley, y además, esos derechos están regulados por disposiciones de la Ley Minera que no tienen como propósito principal la protección del medio ambiente o la prevención de un peligro contra la vida o la salud humana, por lo que no se trata de "legislación ambiental" en virtud del artículo 45(2) del ACAAN.

IV. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(2) DEL ACAAN

Una vez que el Secretariado ha determinado que las aserciones de una petición satisfacen los requisitos del artículo 14(1), el Secretariado analiza la petición para determinar si ésta amerita solicitar una respuesta a la Parte. Conforme al artículo 14(2) del ACAAN, son cuatro los criterios que guían la decisión del Secretariado en esta etapa:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

En relación con la consideración contenida en el inciso 14(2)(a), la petición asevera que los Peticionarios son los propietarios del terreno en el que se ubica el proyecto minero "El Boludo", el cual, afirman, "*ha destruido y desbastado* (sic.) *un área aproximada de 300-00-00 hectáreas... afectándose no sólo el área impactada sino también la circundante dañando el ecosistema de la región, eliminando con la complacencia de las autoridades tanto Flora como Fauna la cual de conformidad con las Leyes Ambientales son de protección especial*".[15]

En cuanto al inciso (b) del artículo 14(2), el Secretariado considera que la petición plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, porqué se refiere a la aplicación efectiva, en el sector minero, de la legislación en materia de impacto ambiental y residuos peligrosos, contribuyendo a evitar la creación de distorsiones o de nuevas barreras en el comercio (artículo 1(e) del ACAAN) y a mejorar la observancia y aplicación de las leyes y reglamentos ambientales (artículo 1(g) del ACAAN).

Los Peticionarios indican que se presentaron denuncias a diversas autoridades sobre las presuntas violaciones a la legislación ambiental por parte de Secotec.[16] En particular, la petición afirma que se presentaron denuncias populares ante la Profepa el 17 de agosto de 1998, el 26 de mayo de 2000, el 28 de noviembre de 2000, el 8 de octubre de 2001 y el 13 de febrero de 2002 y ante la Comisión Nacional del Agua el 15 de abril de 2002, así como denuncia penal ante el Ministerio Público Federal el 26 de junio de 2002, por lo que el Secretariado estima que los Peticionarios han acudido a los recursos disponibles conforme a la legislación de la Parte (artículo 14(2)(c)).

Por lo que se refiere al artículo 14(2)(d), la petición no parece basarse en noticias de los medios de comunicación, sino en el conocimiento directo de los hechos por ocurrir en terrenos propiedad de los Peticionarios.

V. DETERMINACIÓN DEL SECRETARIADO

Después de analizar la petición revisada y sus anexos, el Secretariado determina que ésta cumple con todos los requisitos contenidos en el artículo 14(1) del Acuerdo. Asimismo, tomando en consideración los criterios establecidos en el artículo 14(2), el Secretariado determina que la petición amerita solicitar una respuesta de la Parte.

15. Página 3 de la petición.
16. Página 3 de la petición.

Por lo tanto, el Secretariado solicita una respuesta del gobierno de México con respecto a la petición, dentro de un plazo de 30 días, conforme a lo establecido en el artículo 14(3) del Acuerdo. Dado que ya se ha enviado a la Parte interesada una copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Secretariado de la Comisión para la Cooperación Ambiental

por: Katia Opalka,
Oficial Jurídica,
Unidad sobre Peticiones Ciudadanas

cc: Dra. Olga Ojeda, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith Ayres, US-EPA
Sr. Arcadio Pesqueira Senday

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-02-004** (El Boludo Project)
Submitters:	Leoncio Pesqueira Senday Fernanda Pesqueira Senday Milagro Pesqueira Senday Arcadio Pesqueira Senday
Concerned Party:	United Mexican States
Date of Receipt:	23 August 2002
Date of this Notification:	17 May 2004

I. INTRODUCTION

The Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may examine submissions from any person or non-governmental organization asserting that a Party to the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement") is failing to effectively enforce its environmental law, if the Secretariat determines that the submission meets the requirements of Article 14(1) of the NAAEC. If the submission warrants a response, based on the factors listed in Article 14(2), the Secretariat may request a response from the concerned Party. In light of the response provided by the Party, the Secretariat may notify the Council that the submission warrants the preparation of a factual record, in accordance with Article 15(1). The Council may then instruct the Secretariat to prepare a factual record by a two-thirds vote of its members. The final factual record is made public upon a two-thirds vote of the Council.

This determination contains the Secretariat's analysis, in accordance with NAAEC Article 15(1), of submission SEM-02-004/El Boludo Project, filed on 23 August 2002, by Arcadio, Leoncio, Fernanda and Milagro Pesqueira Senday (the "Submitters"). The Submitters assert that Mexico is failing to effectively enforce its environmental law with respect to the "El Boludo" mining project in the lot called "El Tiro," which is owned by the Submitters and located in the municipality of Trincheras, Sonora, Mexico.

On 26 November 2002, the Secretariat determined that the submission meets the requirements of NAAEC Article 14(1) and warranted requesting a response from the Party pursuant to Article 14(2). On 8 January 2003, the Party filed its response with the Secretariat in accordance with NAAEC Article 14(3) (the "Response"). Pursuant to Article 14(3)(a),[1] Mexico requested the Secretariat to proceed no further in reviewing the submission since, in October 2001, the Submitters filed a public complaint (*denuncia popular*) with the competent authority which, according to the Party, concerns the same matter as the submission and is the subject of a pending administrative proceeding.

Having reviewed the submission in the light of the Party's response and pursuant to NAAEC Articles 14(3)(a) and 15(1), the Secretariat hereby informs the Council that the submission warrants the development of a factual record as further explained below. Based on the information it obtained, the Secretariat does not consider the administrative proceeding to which the Party refers in its response to be a pending administrative proceeding in terms of NAAEC Article 14(3)(a) and the NAAEC objectives. The rationale for this conclusion is set forth in section IV of this Notification.

II. SUMMARY OF THE SUBMISSION

The submission asserts that Mexico is failing to effectively enforce its environmental law with respect to the "El Boludo" mining project located on the "El Tiro" lot, which is owned by the Submitters and located in the municipality of Trincheras, Sonora, Mexico. The Submitters indicate that their land is used to run a livestock operation consisting of 526 adult head of cattle.

1. Article 14(3): "The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further..."

According to the Submitters, the "El Boludo" project involves mining and processing a low-grade placer gold deposit.[2] The Submitters assert that Minera Secotec, S.A. de C.V. ("Secotec") obtained an environmental impact authorization (*autorización de impacto ambiental*—AIA) for this project on 9 September 1997 (the "AIA"). The submission includes a transcription of the terms and conditions of the AIA.[3] The Submitters assert that Secotec violated provisions of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and its environmental impact and hazardous waste regulations by failing to comply with all the terms and conditions of the AIA.[4] The information provided to the Secretariat indicates that the Submitters are asserting that the environmental authority is failing to effectively enforce LGEEPA Articles 28 and 35, Article 20 of the Environmental Impact Regulation[5] and Articles 8 III, VI, VIII, X and XI, 15 III and IV, 23, and 25 of the LGEEPA Regulation Respecting Hazardous Waste by failing to sanction Secotec for violating these provisions and conditions 9, 11, 16, 19, 22, 26 and 31 of the AIA. They assert that Secotec destroyed an area of approximately 300 ha and damaged the region's ecosystem, eliminating flora and fauna classified as subject to special protection.

According to the Submitters, serious irregularities were observed during an inspection carried out on 15 April 2002, by representatives of the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), leading to orders for temporary partial closure and corrective measures issued on 11 June 2002. The submission asserts that although "the company did not comply with the orders issued in response to the irregularities detected, the mining company suddenly entered into an agreement with the Sonora State Branch of the Profepa that rescinded the temporary partial suspension without giving us any opportunity to comment.[6]"

The Submitters assert that although Secotec did not comply with the authority's conditions for the "El Boludo" project, it applied for the

2. Submission, p. 2.
3. Submission, pp. 4–11.
4. Submission, pp. 1–2.
5. LGEEPA Articles 28 and 35 (published in the Official Gazette of the Federation (*Diario Oficial de la Federación*–DOF) on 8 January 1988) and Article 20 of the version of the Regulation to the LGEEPA Respecting Environmental Impact (published in the DOF on 7 June 1988) that was in force at the time the AIA was issued establish that works or activities that may cause ecological imbalance shall adhere to the conditions imposed by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*–Semarnat) through the environmental impact assessment procedure.
6. Submission, pp. 3 and 11.

creation of rights of way and licenses of temporary occupation relating to mining lots located within the Submitters' property, and they indicate that the Mining Branch (*Dirección General de Minas*) approved the applications.

On 26 November 2002, the Secretariat determined that the allegations in the submission meet the requirements of NAAEC Article 14(1) except as regards the creation of rights of way and licenses of temporary occupation. These latter assertions do not meet the threshold requirement of NAAEC Article 14(1) since they do not allege a failure of environmental law enforcement.[7] Pursuant to Article 14(2), the Secretariat requested a response from Mexico in regard to the remaining assertions in the submission.

III. SUMMARY OF THE RESPONSE

The Secretariat received Mexico's response to the submission on 9 January 2003. Mexico summarizes the Secretariat's processing of the submission as of the date it was first filed in August 2002. Mexico asserts as follows:

> In light of the foregoing and as justified by NAAEC Article 14(3)(a), this Party hereby requests the Secretariat of the CEC to proceed no further in reviewing the submission since, on 8 October 2002 [*sic* 3 October 2001], Leoncio, Fernanda and Milagro Pesqueira Senday filed a *denuncia popular* with the Office of the Federal Attorney for Environmental Protection (Profepa) against the mining company "SECOTEC, S.A. de C.V." that concerns the same matter as submission SEM-02-004/El Boludo Project.
>
> It should be noted that the *denuncia popular* filed with Profepa is the subject of a pending administrative proceeding bearing file number 37/2002.[8]

IV. ANALYSIS

This Notification corresponds to the stages of the process delineated in NAAEC Articles 14(3) and 15(1). The Secretariat determined previously that the submission met the requirements of Article 14(1) and

7. SEM-02-004 (El Boludo Project), Determination under Articles 14(1) and 14(2) (26 November 2002), p. 5.
8. The Secretariat notes as well that file 37/2002, to which the Party refers in its response in support of its argument that the *denuncia popular* filed with Profepa is the subject of a pending judicial or administrative proceeding, does not correspond to a *denuncia popular* filed by the Submitters on 8 October 2002, but rather to a *denuncia popular* filed on 8 October 2001.

warranted a response from the party in view of the criteria of Article 14(2). A response was received from the Party on 9 January 2003.

The Secretariat is obligated to include in this Notification its reasons for determining that the development of a factual record is warranted. First, however, the Secretariat discusses Mexico's assertion that the Secretariat should proceed no further because the matter set out in the submission is subject to a pending administrative proceeding.

A. Pending Judicial or Administrative Proceedings under NAAEC 14(3)(a)

NAAEC Article 14(3)(a) establishes that the Party, when it is requested by the Secretariat to respond to a submission, "shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."

In NAAEC Article 45(3)(a), "judicial or administrative proceeding" is defined for the purposes of Article 14(3) as:

> a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions 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.[9]

In previous determinations, the Secretariat has read Article 14(3)(a) as indicating the Parties' intent "to foreclose a review of enforcement matters actively being pursued by any Party.[10]" Moreover, it determined that "in view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.[11]" Accordingly, the Secretariat established that "to apply this exceptional

9. NAAEC Article 45(3)(a).
10. See SEM-97-001 (BC Hydro), Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (27 April 1998).
11. SEM-01-001 (Cytrar II) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001).

condition for terminating a submission, the Secretariat must ascertain that there is a 'pending judicial or administrative proceeding' and that the matter raised in the submission is the subject matter involved in such proceeding. Also, there must be a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission.[12]"

In submission Oldman River I (SEM-96-003), the Secretariat determined that the interpretation of the concepts "judicial or administrative proceeding" and "pursued by the Party" contained in NAAEC Article 45(3)(a) should be construed as meaning those judicial or administrative proceedings initiated by a Party to the Agreement.

> In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.[13]

In sum, for an action to constitute a judicial or administrative proceeding, it must be pursued: (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party's law and must (iv) belong to one of the categories set forth in Article 45(3). As regards the requirement of proceeding in a timely fashion, it is relevant to consider whether the action is pursued in accordance with time limits established by law and without undue delay.

B. Proceedings Referred to in the Submission and the Parties' Response

As noted above, proceedings not initiated by a Party to the Agreement do not fall within the meaning of judicial or administrative proceeding under Article 45(3)(a). Because a *denuncia popular* is not initiated by the Party, it is not a "judicial or administrative proceeding" within the meaning of Article 45(3)(a), although a *denuncia popular* may under certain circumstances lead to inspection and surveillance (*inspección y vigilancia*) proceedings, brought by the Party, that could meet the Article 45(3)(a) definition.

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12. See SEM-01-001 (Cytrar II) Article 15(1) Notification to Council that Development of a Factual Record is Warranted (29 July 2002).
13. See SEM-96-003 (Oldman River I), Determination pursuant to Articles 14 & 15 (2 April 1997).

In addition, whereas the Party asserts in its response that the *denuncia popular* relates to the same matter as the submission, the information provided to the Secretariat indicates that the submission not only encompasses the alleged failures to enforce mentioned in the *denuncia popular* of October 2001 but also refers to additional failures to enforce such as those relating to hazardous waste noted during an inspection of Secotec by Profepa on 15 April 2002.[14]

The *denuncia popular* to which the Party refers was filed in October 2001. Profepa conducted inspections giving rise to the issuance, on 11 June 2002, of an order for temporary partial closure and a corrective measures order.[15] In notifying Secotec of these orders, Profepa informed Secotec that as of the effective date of the notice of these orders, it was initiating a proceeding of an administrative nature against the company. It thus informed the company of its right to submit a written defense and evidence within 15 working days and that "once the aforementioned period has elapsed, an Administrative Decision on the merits will be issued as prescribed by Article 167 of the General Law on Ecological Balance and Environmental Protection.[16]" Unlike the *denuncia popular*, the proceeding initiated on 11 June 2002 against Secotec was initiated by the Party and is the kind of proceeding that is explicitly included in Article 45(3)(a), although it did not include all of the matters that are included in the submission.

Secotec filed comments in the days following the orders, with the result that on 21 June 2002, it obtained a decision from Profepa permitting it to sign an agreement with that authority to rescind the order for temporary partial closure. Such an agreement was signed on 24 June 2002.[17]

The agreement signed by Profepa with Secotec in June 2002 referred to some of the problems detected during the inspection of the company. However, the agreement did not refer to all the discrepancies noted in the notice of 11 June 2002, with which the administrative proceeding commenced. Evidence of this is provided by the fact that Profepa reminded the company, on 24 June 2002, that

14. A list of these alleged failures to enforce is given below.
15. Submission, Appendix 43(e): *oficio* no. PFPA-DS-SJ-0654/2002 from Profepa, Sonora State Office, Legal Affairs Section, 11 June 2002, in re "Notice of summons, temporary partial closing order, corrective measures order and deadline for comment"; no. 037/2002.
16. *Ibid*.
17. Submission, Appendix 43(c): *oficio* no. PFPA-DS-SJ-1017/2002 from Profepa, Sonora State Office, Legal Affairs Section, 21 June 2002, in re "Agreement", administrative file no. 037/2002 I.A.

> [...] all points not contemplated in [photocopy illegible] this decision shall remain covered by the decision issued [illegible] under *oficio* no. PFPA-DS-SJ-0654/2002 [notice of 11 June 2002] or, failing that, the provisions [illegible] General Law on Ecological Balance and Environmental Protection, its [illegible] Environmental Impact Assessment regulation, as well as the Forestry Law and its Regulation and [illegible] legal [illegible] applicable to the case.[18]

The party in its response to the submission did not provide information related to matters not referred to in the aforementioned agreement and in consequence there is no evidence as to any follow-up to verify Secotec's compliance with those issues. At the same time, no evidence was provided to the Secretariat with respect to whether the company addressed the issues that were included within the agreement between Secotec and Profepa.

C. Timeliness with which Administrative Proceedings Must Be Resolved in Mexico

In Mexican administrative law there exists a concept known as the lapsing or running (*caducidad*) of administrative proceedings. According to Mexican courts, the purpose of this concept is to "give certainty to and enhance the efficiency of a proceeding in terms of time, not leaving to the authorities' own discretion the possibility of their acting or failing to do so but, rather, ensuring that they observe and punctually adhere to the rules establishing when a power arises and is extinguished so as not to create uncertainty and arbitrariness.[19]" Thus, the Federal Administrative Procedure Law (*Ley Federal de Procedimiento Administrativo*—LFPA), which is applied in supplemental fashion to laws such as the LGEEPA,[20] provides in Article 57 paragraph IV that one cause for terminating an administrative procedure is its being declared lapsed. The LFPA indicates two separate cases and periods in which lapsing operates. Article 60 provides that "in proceedings initiated by the interested party, where these are paralyzed for reasons attributable to the interested party...

18. Profepa, *oficio* no. PFPA-DS-SJ-1017/2002, in re "Agreement," administrative file no. 37/2002 I.A.
19. LAPSING OF ADMINISTRATIVE PROCEEDINGS INITIATED AS OF RIGHT. OPERATES WHERE THE CORRESPONDING DECISION IS NOT ISSUED WITHIN THE PERIOD OF FOUR MONTHS PRESCRIBED BY ARTICLE 92, LAST PARAGRAPH, PLUS THE THIRTY DAYS CONTEMPLATED IN ARTICLE 60 OF THE FEDERAL ADMINISTRATIVE PROCEDURE LAW. Novena Época, Tribunales Colegiados de Circuito, Semanario Judicial de la Federación and Gazette, Vol. XVII; January 2003, Tesis I.4.A.368, p. 1735.
20. LFPA Article 2 provides that "This Law, except as regards title 3A, shall apply in suppletive fashion to the various administrative laws. The Federal Code of Civil Procedure shall apply, again suppletive to this Law, and as applicable."

upon the expiry of a period of three months, the proceeding shall lapse.... In the case of proceedings initiated as of right, these shall be deemed to lapse, and shall be archived, at the request of the interested party or as of right, 30 days following the expiry of the period provided for issuance of a decision."

Profepa has asserted that *denuncia popular* proceedings and inspection and monitoring are independent of one another and that, specifically, inspection and monitoring proceedings are proceedings as of right.[21] The Secretariat infers that the time period elapsed with respect to the *denuncia popular* and the inspection and monitoring proceedings appear to correspond to the time periods contemplated in the LFPA for operation of lapsing in both cases. In order to resolve the issue of the time when an administrative proceeding may be formally considered to have lapsed, the Secretariat notes that the Tribunales Colegiados de Circuito (circuit courts) in Mexico have interpreted that in order for lapsing to operate fully, only two criteria must be met: "the elapsing of a given period of time and the inactivity that consists in the absence of acts relating to the proceeding.[22]" By this principle, lapsing operates even without any explicit decision to that effect since, in the opinion of the same court, such a decision would have to be made by the authority in mandatory form or as of right.[23]

In view of the existing criteria and interpretations relating to the lapsing of administrative procedures, the Secretariat's view is that where an administrative proceeding lapses due to the expiry of the period in which the authority must issue a decision, it ceases to be pending and ceases to be an "administrative action pursued by the Party *in a timely fashion and in accordance with its law*" (emphasis added) for the purposes of the NAAEC. Accordingly, and consistent with the other factors discussed above, the Secretariat concludes that neither the *denuncia*

21. Submission, Appendix 43(a): PROFEPA, Sonora Office, Legal Affairs Section. Oficio PFPA-DS-SJ-1248/2002 of 19 July 2002 in re "Reasoned report issued in *amparo* case No. 506/2002".
22. CADUCIDAD DE LA INSTANCIA. PROCEDE DECLARARLA EN LOS PROCEDIMIENTOS ADMINISTRATIVOS INICIADOS DE OFICIO, CUANDO PREVIAMENTE SE HA CONSUMADO EL PLAZO PARA QUE AQUÉLLA OPERE. Novena Época. Tribunales Colegiados de Circuito. Semanario Judicial de la Federación and Gazette, Vol. XVI, July 2002. Tesis: I.7o.A.173 A Page 1258 in re: Isolated Administrativa *Tesis*.
23. CADUCIDAD DE LOS PROCEDIMIENTOS ADMINISTRATIVOS. PRESUPUESTOS O CONDICIONES PARA DECLARARLA DE OFICIO, CONFORME A LA LEY FEDERAL DE PROCEDIMIENTO ADMINISTRATIVO. Novena Época, Tribunales Colegiados de Circuito, Semanario Judicial de la Federación and Gazette, Vol. XVI, September 2002. Tesis: I.4o.A.369 A, Page 1340.

popular filed on 8 October 2001 nor the proceeding initiated on 11 June 2002 are pending administrative proceedings requiring the Secretariat to proceed no further.

D. The Submission Warrants Development of a Factual Record

Pursuant to NAAEC Article 15(1) and in light of Mexico's response, the Secretariat considers the submission to warrant the development of a factual record for the reasons set out below.

In the case of the "El Boludo" project, the Submitters assert that Secotec is failing to comply with the terms of the AIA as well as the LGEEPA and its regulations as regards the restoration of areas impacted by its mining activities and as regards hazardous waste management, in terms of waste documentation and shipping as well as spill clean-up. In inspecting Secotec's operations, Profepa noted these failures as well as a significant delay in the restoration of the mined areas, which was to have proceeded at the same pace as the mining operations. The company was failing to grade the land; moreover, it was failing to comply by not storing topsoil and native plants for subsequent reforestation of the lot. Additional instances of noncompliance involved the failure to protect plants classified as subject to special protection during vegetation removal operations.[24] A listing is presented below of the instances of noncompliance noted by Profepa during the inspection visit of 15 April 2002 and their relationship to the assertions in the submission.

Alleged noncompliance by Secotec with the terms and conditions of the AIA as noted in the inspection report

The alleged instances of noncompliance set out below are taken in their entirety from the inspection report of 15 April 2002. Some of these were alleged by the Submitters specifically, while others, though not mentioned explicitly in the Submission, are included by virtue of the fact that the Submitters make generic reference to all irregularities detected in the inspection report.[25]

24. See Appendix 43(b) of the submission: Profepa, Sonora State Office, Inspection and Enforcement Section, inspection report, El Boludo project, 15 April 2002, and Appendix 7 of the submission: National Institute of Ecology, Environmental Land-use Planning and Impact Branch, no. D.O.O.DGOEIA.05647 (Environmental Impact Authorization for Secotec "El Boludo" Project), 9 September 1997.
25. Submission, p. 11.

Alleged environmental impact-related noncompliance

1. On the date of the inspection report, approximately 56 ha of the total area worked were observed to be outside the authorized concession area.[26]

2. Secotec failed to exhibit documentation attesting to compliance with its obligation to notify the workers of the legal provisions and sanctions relating to the protection of wild flora and fauna as well as of the actions taken to guarantee observance of these provisions by the workers.[27]

3. Secotec failed to exhibit documentation demonstrating compliance with the Mexican Official Standards on air and noise emissions from its equipment and machinery; nor did it exhibit its preventive maintenance program.[28]

4. The inspection visit found that there was no temporary greenhouse infrastructure and that the company was failing to spray water constantly during its mining activities in order to keep down dust.[29]

5. Secotec failed to exhibit the salvage program for flora and fauna subject to special protection, since seven desert ironwood plants (*Olneya tesota*, a species subject to protection under NOM-059-ECOL-1994) were observed at the edge of one of the worked areas, as were piles of specimens of this species that had been affected previously.[30]

6. Secotec failed to store material obtained by clearing and removal of vegetation.[31]

7. It was observed that no type of soil salvage was performed prior to the mining operations[32] and that while mining activities had taken

26. See first term of AIA, in relation to inspection report, p. 13, and *oficio* PFPA-DS-DQPS-061/2002 of 30 April 2002.
27. See fifth condition of sixth term of AIA in relation to inspection report, p. 7.
28. See tenth condition of sixth term of AIA, in relation to inspection report, p. 7
29. See sixteenth condition of sixth term of AIA, in relation to inspection report, pp. 9–10.
30. See nineteenth condition of sixth term of AIA, in relation to inspection report, p. 10
31. See twenty-second condition of sixth term of AIA, in relation to inspection report, p. 10.
32. See twenty-fourth condition of sixth term of AIA, in relation to inspection report, p. 12.

place on 163 ha, Secotec had only carried out restoration work on 22.5 ha.[33]

8. Secotec failed to exhibit its General Site Restoration Plan.[34]

9. Secotec failed to exhibit its Participatory Conservation and Enforcement Program.[35]

Alleged hazardous waste-related noncompliance

1. Various soil areas were found to be contaminated by hydrocarbons.[36]

2. A piece of sheet metal with mercury was found on the ground, exposed to the elements. Mercury was also found on bare ground in the amalgamation area over a surface of approximately seven square meters.[37]

3. Secotec failed to install devices to prevent hydrocarbons from contaminating the ground occupied by the workshop.[38]

4. Hazardous waste was found uncovered outside the temporary warehouse and in a disused truck.[39]

5. An automotive battery was found on bare ground, exposed to the elements.[40]

6. The hazardous waste had no identification indicating its name and hazardousness characteristics.[41]

7. The recipient's signature was lacking on the delivery, shipping, and receipt manifests bearing numbers 3132, 3133, and 3070, as well as the unnumbered manifest bearing the shipping date 20 March 2002.[42]

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33. See twenty-sixth condition of sixth term of AIA, in relation to *oficio* PFPA-DS-SJ-0654/2002, 11 June 2002, p. 4.
34. See twenty-sixth condition of sixth term of AIA, in relation to inspection report, p. 12.
35. See thirty-first condition of sixth term of AIA, in relation to inspection report, p. 12.
36. See ninth condition of sixth term of AIA, in relation to inspection report, p. 7.
37. See sixteenth condition of sixth term of AIA, in relation to inspection report, p. 9.
38. See eleventh condition of sixth term of AIA, in relation to inspection report, p. 7.
39. See twelfth condition of sixth term of AIA, in relation to inspection report, pp. 8–9.
40. *Ibid*.
41. *Ibid*.
42. *Ibid*.

8. The storage area lacked retaining walls, ditches, and gutters.[43]

9. Secotec failed to file semi-annual hazardous waste movement reports for both half-year periods of 2001.[44]

10. The entry and exit log for the hazardous waste warehouse did not indicate destinations and exit dates.[45]

The AIA provides that Profepa shall enforce compliance with the terms of the AIA as well as the applicable environmental provisions and that, for that purpose, it shall exercise, among others, the powers with which it is invested by Article 20 of the LGEEPA Regulation Respecting Environmental Impact.[46] According to the terms of the AIA, noncompliance with any of its terms invalidates the AIA without prejudice to the application of the sanctions provided by the LGEEPA and any other applicable provisions.[47] The AIA further provides that where the works, during their different stages, cause impacts that alter ecological balance, they may be required to be removed and compensation programs may be required to be implemented.[48] Moreover, where ecological balance is at risk or unforeseen environmental impacts occur, Semarnat may reassess the Environmental Impact Statement, General Form,[49] or request any other document it considers necessary, in accordance with Article 23

43. *Ibid*.
44. *Ibid*.
45. *Ibid*.
46. See fifteenth term of AIA.
Article 20.- (published in the DOF on 7 June 1988) Upon evaluation of the environmental impact statement for the work or activity in question, filed in the appropriate form, the Ministry shall formulate a decision and notify the interested parties thereof, in which decision it may:
I. Authorize the performance of the work or activity under the terms and conditions set out in the corresponding statement;
II. Authorize the performance of the projected work or activity conditional on modification or relocation of the project, or
III. Deny such authorization.
In the cases of paragraphs I and II of this article, the Ministry shall specify the term of the corresponding authorizations. The performance of the work or activity in question shall adhere to the provisions of the corresponding decision. The Ministry may make use of its inspection and enforcement powers at any time to verify that the work or activity in question is or was carried out in accordance with the corresponding authorization and in a manner that meets the requirements of the applicable environmental technical provisions and standards.
47. See fourteenth term of AIA.
48. See tenth term of AIA.
49. The Secretariat did not obtain a copy of this document.

of the relevant LGEEPA regulation,[50] for the purpose of revalidating, amending, or suspending the AIA.[51]

The information obtained by the Secretariat shows that Profepa took some action in response to the Submitters' *denuncia popular* and that it acted in accordance with the LGEEPA in an attempt to compel Secotec to adhere to the requirements of the AIA and the LGEEPA. However, and in view of the fact that in its response Mexico did not respond to the submission's assertions, central questions remain outstanding for a consideration of whether, in the case of the "El Boludo" project, the Party is failing to effectively enforce its environmental law. The development of a factual record would enable the Secretariat to compile the information necessary for such a consideration.

For example, a factual record would make it possible to compile relevant information as to why Profepa, when ordering corrective measures and temporary partial closing on 11 June 2002, did not include in those orders all the irregularities detected during the inspection visit of 15 April 2002. Following is a list of these irregularities:

Alleged environmental impact-related noncompliance

1. On the date of the inspection report, approximately 56 ha of the total area worked were observed to be outside the authorized concession area. [52]

2. Secotec failed to exhibit documentation attesting to compliance with its obligation to notify the workers of the legal provisions and

50. Article 23.- (published in the DOF on 7 June 1988) In those cases in which supervening causes of environmental impact not foreseen in the statements filed by the interested parties arise as a result of *force majeure* or acts of God subsequent to the issuance of the environmental impact authorization contemplated by Article 20 of the Regulation, the Ministry may, at any time, reassess the environmental impact statement in question. In such cases, the Ministry shall require the interested party to file any additional information necessary to assess the environmental impact of the work or activity in question.
The Ministry may revalidate the authorization and amend, suspend or revoke it where ecological balance is at risk or unforeseen harmful environmental impacts are caused.
Where the Ministry issues the decision contemplated in the preceding paragraph, it may, further to a hearing granted to the interested parties, order the temporary partial or total suspension of the work or activity in cases of imminent danger of ecological imbalance or contamination with dangerous consequences for ecosystems, their components, or public health.
51. See twelfth term of AIA.
52. See first term of AIA, in relation to inspection report, p. 13, and *oficio* no. PFPA-DS-DQPS-061/2002, 30 April 2002.

sanctions relating to the protection of wild flora and fauna as well as of the actions taken to guarantee observance of these provisions by the workers.[53]

3. Secotec failed to exhibit documentation demonstrating compliance with the Mexican Official Standards on air and noise emissions from its equipment and machinery; neither did it exhibit its preventive maintenance program.[54]

4. The inspection visit found that there was no temporary greenhouse infrastructure and that the company was failing to spray water constantly during its mining activities to keep down dust.[55]

Alleged hazardous waste-related noncompliance

1. The recipient's signature was lacking on the delivery, shipping, and receipt manifests bearing numbers 3132, 3133, and 3070, as well as the unnumbered manifest bearing shipping date 20 March 2002.[56]

Among the documents provided to the Submitters by the Department of Environmental Petitions, Complaints, and Civic Participation (copies included as appendices to the submission), there is no copy of a technical report corresponding to the inspection of 15 April 2002, and mentioned in the notice of 11 June 2002, which might contain information relevant to this issue.[57] Regarding the technical report, the Secretariat has only the following information: a copy of a letter from the Sonora State Deputy Attorney for Natural Resources to the Director of the Profepa Department of Environmental Petitions, Complaints and Civic Participation, which was given to the Submitters as part of the *denuncia popular* proceeding and states as follows:

> On the 15th day of this month [15 April 2002], an inspection visit was made to the company Minera Secotec, S.A. de C.V. Inspection report 14042002-SIV-Q-008 was produced and referred to the decision-making unit under file no. 037/2002. This report indicated that the company had not in fact complied with all the terms and conditions under which the project was originally authorized. It was further observed that 34.3 percent (56-00-00

53. See fifth condition of sixth term of AIA, in relation to inspection report, p. 7.
54. See tenth condition of sixth term of AIA, in relation to inspection report, p. 7
55. See sixteenth condition of sixth term of AIA, in relation to inspection report, pp. 9–10.
56. *Ibid*.
57. See notice of 11 June 2002, Appendix 43(e) of the submission, p. 2.

> ha) of the total worked were located outside of the authorized concession area and that at the time of the visit, the company had worked on approximately 163-00-00 ha of the 300-00-00 authorized. The reforestation carried out by the company was insufficient in terms of both the area reforested and the manner in which this was done, since it was low density and the rate of survival was minimal.[58]

Furthermore, the Secretariat has no information about Profepa's assessment of Secotec's comments after Secotec received a copy of the inspection report of 15 April 2002.[59] This information would be relevant for consideration in a factual record.

Also lacking is information concerning Profepa's decision to rescind the order for temporary partial closure. Profepa issued the order as a safety measure on 11 June 2002,[60] and, in doing so, stated as follows:

> [...] it was found that the Establishment has carried out mining activities on 163 ha and only carried out restoration activities on 22.5 ha, plus 8 additional ha indicated in the quarterly report filed with this office on 8 May 2002, the foregoing to the detriment of the site's flora and fauna with possibly irreversible negative consequences...[61]

In the development of a factual record, information would be gathered on the reasons why Profepa decided to rescind the order for temporary partial closure upon signing the agreement of 24 June 2002, with Secotec, despite the fact that it had stated in the notice of 11 June 2002, that the order for closure would be rescinded "when [Secotec] carries

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58. *Oficio* no. PFPA-DS-DQPS-061/2002 from the Deputy Attorney for Natural Resources, Dr. José Ramón Nuñez Soto, to the Director of the Department of Environmental Petitions, Complaints, and Civic Participation of Profepa, Lic. Beatriz Eugenia Carranza Meza, 19 April 2002 in re "Complaint."
59. Appendix 43(e) of the submission; memo no. 14042002-SIV-Q-008 to the Profepa Attorney for the State of Sonora, Lic. Otto Guillermo Clausen Iberri, from Francisco Arturo Bayardo Tiznado, on behalf of Secotec, 24 April 2002, in re "Presenting Observations." On p. 2 of the notice of 11 June 2002, Appendix 43(e) of the submission, it is stated that these observations were noted, without further details.
60. Pursuant to LGEEPA Article 170: Where there exists an imminent risk of ecological imbalance or damage to or severe degradation of natural resources, or cases of contamination with dangerous consequences for ecosystems, their components, or public health, the Ministry may, with due justification, order any of the following safety measures: I. Temporary partial or total closing of pollution sources, as well as facilities managing or storing specimens, products or subproducts of wild flora or fauna species, forest resources, [... II. ...] as well as property, vehicles, tools and instruments directly related to the conduct giving rise to the imposition of the safety measure, or...
61. Appendix 43(e) of the submission, p. 5.

out the following actions and provides proof thereof to this office...", pursuant to LGEEPA Article 170 Bis.[62] The actions to which Profepa subjected the rescission of the order for temporary partial closure were as follows: 1) Secotec's grading of 40 ha previously mined, and 2) Secotec's filing with Profepa a study or expert opinion issued by a respected organization or professional indicating whether or not there is a loss of fertile soil in the graded and mined area. The conditions contained in the agreement were as follows: 1) grade a minimum of 10 ha of land per month in the mined areas; 2) by 31 December 2002, provide proof of having graded 80 percent of the areas mined to date, and maintain that proportion with respect to the areas where mining was ongoing; 3) carry out a reforestation program; 4) post a performance bond with Profepa in an amount of P$400,000.00 to guarantee compliance with the corrective measures stipulated in the agreement.

The only information obtained by the Secretariat as to why the order for temporary partial closure was rescinded two weeks after it was issued is found in a report issued by Profepa on 19 July 2002, in the context of a judicial review proceeding in which the Submitters challenged the validity of the agreement.[63] Profepa stated that this type of agreement is contemplated by LGEEPA Article 168, that it "specifically defines the actions to be taken by the company in performance of the corrective measures necessary to comply with the terms and conditions imposed by means of the decision rendered in file no. D.O.O.O.DGNA.-005647 [the AIA] of 9 September 1997," and that "the Office of the Federal Attorney for Environmental Protection reserves the right to exercise any of its powers in case of noncompliance with the aforementioned terms of the agreement in question...[64]"

Likewise, a factual record would make it possible to gather information on whether the Party has taken the actions necessary to ensure and, as applicable, require compliance by Secotec with the agreement of 24 June 2002,with any stipulations in the notice of 11 June 2002 not

62. LGEEPA Article 170 Bis: Where the Ministry orders any of the safety measures contemplated by this Law, it shall indicate to the interested party, as applicable, the actions that the latter shall take to correct the irregularities justifying the application of said measures, as well as the deadlines for carrying them out, in order for the safety measures order to be rescinded once these actions are completed.

63. Appendix 43 of the submission: *oficio* PFPA-DS-SJ-1248/2002 from the Profepa Attorney for the State of Sonora, Lic. Otto Guillermo Clausen Iberri, to the First District Judge of the State of Sonora, 19 July 2002, in re "Reasoned Report Filed," amparo proceeding no. 506/2002; Complainants: Leoncio, Fernanda and Milagro Pesqueira Senday; File: Principal.
Mexico does not mention this proceeding in its response.

64. *Ibid.*, p. 16.

covered by that agreement, and with any remaining instances of noncompliance noted in the inspection report of 15 April 2002. If none of said instances of noncompliance were remedied, the Secretariat would gather information regarding follow-up by Profepa in order to determine, among other things, whether Profepa ever found it necessary to terminate the agreement of 24 June 2002 and execute the bond posted by the company in order to carry out restoration of the affected site itself.

The Secotec AIA issued in September 1997 specifies that its period of validity is two years and that the company may apply for renewal within the 30 calendar days prior to expiry. The application must include the validation of the company's last report of compliance with the conditions imposed by Profepa as well as the following: a) a report of the results of the restoration program, including maps with geographical coordinates; b) current status of the lot; c) area and location on maps with geographical coordinates of the sites to be exploited in the next two years; d) video and photographic record indicating the progress achieved.[65] The authorization was renewed for the first time in October 2000.[66] For the development of a factual record, information would be gathered to determine how the Party granted to Secotec the renewal of these authorizations and whether it gave the appropriate follow-up to these applications and decisions.

V. SECRETARIAT'S DETERMINATION

In the case of submission SEM-02-004/El Boludo Project, the Secretariat reviewed the Party's response in accordance with Article 14(3)(a) in light of Article 45(3)(a) and the relevant provisions of the Party's law, in this case, the LGEEPA. The Secretariat finds, based on the information received by the Secretariat, that for the purposes of the NAAEC, the matter addressed by the submission is not the subject of a pending administrative proceeding. The Secretariat reviewed the submission for the purposes of Article 15(1) and finds that it raises central issues relating to whether the Party is failing to effectively enforce its environmental law in the case of the "El Boludo" project, issues that remain outstanding as the Party did not respond to the assertions in the submission. Therefore, the Secretariat hereby notifies the Council, pursuant to NAAEC Article 15(1), that it considers the submission to warrant the development of a factual record.

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65. See second term and condition 3 of sixth term of AIA.
66. Appendix 32 of the submission; *oficio* no. D.O.O.DGOEIA.-006278 to Secotec from National Institute of Ecology, Environmental Land Use Planning and Impact Branch, 17 October 2000.

Respectfully submitted for your consideration on 17 May 2004.

Secretariat of the Commission for Environmental Cooperation

per: William V. Kennedy
Executive Director

SEM-02-005

(ALCA-Iztapalapa)

SUBMITTERS: ÁNGEL LARA GARCÍA

PARTY: MEXICO

DATE: 25 November 2002

SUMMARY: The Submitter, Ángel Lara García, asserts that the manufacturing facility of ALCA, S.A. de C.V. releases highly toxic contaminants into the neighborhood of Santa Isabel Industrial, where Mr. Lara García lives. The health and economic effects allegedly attributable to the emissions produced by the company are cited in the 183 documents submitted by Mr. Lara García. He claims that the factory should close or relocate since, "according to environmental standards, which have not been respected, it is a source of pollutants." The documents make multiple references to the presence of strong odors from fuels and solvents. And Mr. Lara García claims that complaints lodged with the *Procuraduría Federal de Protección al Ambiente* (Federal Attorney for Environmental Protection) and other agencies have been to no avail.

SECRETARIAT DETERMINATIONS:

ART. 14(1)
(17 December 2002) Determination that criteria under Article 14(1) have not been met.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-02-005** (ALCA-Iztapalapa)
Peticionario:	Ángel Lara García
Parte:	Estados Unidos Mexicanos
Fecha de petición:	25 de noviembre de 2002
Fecha de la determinación:	17 de diciembre de 2002

I. INTRODUCCIÓN

Con fecha 25 de noviembre de 2002, el Sr. Ángel Lara García (el Peticionario) presentó al Secretariado de la Comisión para la Cooperación Ambiental ("el Secretariado") una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo"). La petición asevera que México ha omitido aplicar de manera efectiva su legislación ambiental respecto de la presunta emisión de contaminantes altamente tóxicos por parte de la empresa, ALCA, S.A. de C.V. en la colonia Santa Isabel Industrial, Iztapalapa, Ciudad de México, D.F. Según el ACAAN, el Secretariado podrá examinar las peticiones que cumplan con los requisitos establecidos en el artículo 14(1). El Secretariado ha determinado que esta petición no cumple con varios de los requisitos del artículo 14(1) para su examen en este proceso y en este documento expone las razones de esta determinación.

II. RESUMEN DE LA PETICIÓN

El Peticionario asevera que en la colonia Santa Isabel Industrial, Iztapalapa, Ciudad de México, D.F., la empresa ALCA, S.A. de C.V., ubicada en el predio colindante al domicilio del Peticionario, tiene emisiones altamente contaminantes de partículas y gases, tales como tuluol, hexano, heptano y xilox, entre otros. Según el Peticionario, al llevar a cabo sus actividades de inspección y vigilancia con relación a la operación de la empresa, la autoridad ambiental ha cometido diversas irregularidades, evitando con ello la reubicación o clausura de la misma. Aparentemente, el Peticionario afirma que tales hechos constituyen delitos ambientales y que, a pesar de estar plenamente comprobadas tales conductas delictivas, la autoridad ha omitido castigar a los responsables. Finalmente, el Peticionario sugiere que la operación y ubicación de la empresa en cuestión, transgrede diversas normas ecológicas.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
>
> (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios, en esta etapa se requiere al menos de cierta revisión inicial para verificar que la petición cumple con estos requisitos.[1] Por lo tanto, el Secretariado examinó la petición en cuestión con tal perspectiva en mente.

La primera cuestión es si la petición "asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". El Secretariado determinó que la petición sí satisface este requisito umbral, por las siguientes razones.

El Peticionario "asevera" que el objetivo de su petición es exponer "diversas omisiones en la aplicación de la legislación ambiental.[2]" Del mismo modo, el Peticionario sostiene que desde 1995 "a la fecha los verificadores ambientales han cometido diversas irregularidades evitando que esta fabrica se reubique o se clausure".[3] A partir de estas afirmaciones del Peticionario, puede inferirse que las irregularidades supuestamente cometidas por las autoridades ambientales mexicanas, se han prolongado en el tiempo desde 1995 y que continúan cometiéndose hasta el momento de la presentación de la petición.

La petición parece referirse a legislación ambiental toda vez que alude a "delitos ecológicos" y "normas ecológicas".[4] Sin duda, las

1. En este sentido, véanse (SEM-97-005/Animal Alliance of Canada, et al) Determinación conforme al artículo 14(1) (26 de mayo de 1998); y (SEM-98-003/Department of the Planet Earth, et al) Determinación conforme a los artículos 14(1) y (2) respecto de la versión revisada de la petición (8 de septiembre de 1999).
2. Página 1 de la petición.
3. Página 1 de la petición.
4. El artículo 45(2) del ACAAN establece:

   Para los efectos del Artículo 14(1) y la Quinta Parte:

   (a) **"legislación ambiental"** significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:

   (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

   (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

   (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

   (b) Para mayor certidumbre, el término "legislación ambiental" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

disposiciones legales que tipifican y sancionan conductas delictivas perpetradas en contra del ambiente, así como aquellas normas técnicas que establecen límites para la emisión de contaminantes, califican como legislación ambiental para efectos de los artículos 45(2) y 14 del ACAAN, porque son disposiciones cuyo propósito principal coincide con "... la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de: ... la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales...".

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en los incisos a), b), e) y f) del artículo 14(1), por las siguientes razones. La petición se presentó por escrito en español, que es el idioma designado por México.[5] El Peticionario se identificó como Ángel Lara García, con residencia en México, específicamente en la Delegación Iztapalapa en el Distrito Federal; esto es, se trata de una persona que reside en el territorio de la Parte mexicana.[6] De igual forma, el Peticionario afirma haber iniciado diversos procesos legales y penales ante diversas dependencias en México relacionadas con la protección del ambiente con motivo de las supuestas omisiones por parte de México en la aplicación de su legislación ambiental.[7] Adicionalmente, el Peticionario adjunta a su petición diversos documentos en donde se corrobora esta circunstancia.

Sin embargo, el Secretariado juzga que la petición no satisface el requisito del inciso c) porque no contiene información suficiente para analizarla, ni proporciona información suficiente para determinar si se satisface el requisito establecido en el inciso d) de dicho artículo.

La petición es muy breve, constando de dos páginas y 66 anexos, y no contiene suficiente información para que el Secretariado pueda

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(c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.

Aun cuando el Secretariado no se rige por el principio de *stare decisis*, en ocasiones anteriores, al examinar otras determinaciones, ha señalado que las disposiciones citadas deben satisfacer la definición de legislación ambiental. Véanse las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).

5. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las Directrices para la presentación de peticiones.
6. Véanse los artículos 14(1)(b) y (f) del ACAAN.
7. Página 1 de la petición.

revisarla en este proceso.[8] En particular, el Peticionario no expresa claramente las disposiciones legales cuya aplicación ha sido, en su opinión, indebidamente omitida. Al respecto, el punto 5.2 de las *Directrices para la presentación de peticiones* establece:

> 5.2. El Peticionario deberá identificar la ley o el reglamento aplicable, o su disposición, tal como se define en el artículo 45(2) del Acuerdo. En el caso de la Ley General del Equilibrio Ecológico y la Protección al Ambiente de México, el Peticionario deberá identificar el capítulo o la disposición aplicable de la Ley.

En la petición misma, no se refiere ningún cuerpo legal en específico. Sólo es en algunos anexos de la petición[9] donde se mencionan el Título Vigésimo Quinto, Capítulo Único: Delitos Ambientales del Código Penal Federal; la Norma Oficial Mexicana NOM-002-ECOL-1996;[10] y la Norma Oficial Mexicana NOM-085-ECOL-1994.[11] Sin embargo, el Peticionario no expresa la relación que esas disposiciones guardan con las afirmaciones contenidas en la petición.

Asimismo, el Peticionario no señala la función de sus anexos en el argumento de que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental en este asunto, sino que afirma que anexa "documentos comprobatorios de dichos delitos ecológicos" y que considera "que los delitos están claramente comprobados".

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8. Aunque la petición indica que se acompaña de un total de 183 documentos, de hecho sólo se distinguen 66 en términos de contenido. Entre los 183 documentos anexos, algunos eran cartas sustantivamente iguales pero dirigidas a diferentes destinatarios o correspondientes a diferentes fechas y otros estaban repetidos.
9. Véase, por ejemplo: Carta del Lic. Genaro Carillo Elvira, C. Agente del Ministerio Publico de la Federación Titular de la Mesa I-FEPII dirigida al C. Juez de Distrito en Materia Penal en Turno del D. F., del 1º de diciembre de 1997; Carta del Dip. Eco. Javier Serna Alvarado, Presidente de la Comisión de Salud y Asistencia Social dirigida al Lic. Aron Mastache Mondragón, Secretario del Medio Ambiente en el D. F., del 31 de julio de 2000; y Carta del Dip. Arnold Ricalde de Jager, Presidente Comisión de Preservación del Medio Ambiente y Protección Ecológica destinada a la Dra. Claudia Sheinbaum Prado, Secretaria di Medio Ambiente del D. F., del 7 de noviembre de 2001.
10. Que establece los límites permisibles de contaminantes en descargas de aguas residuales en los sistemas de drenaje y alcantarillado urbano o municipal.
11. Que establece los niveles máximos permisibles de emisión a la atmósfera de humos, partículas suspendidas totales, bióxido de azufre y óxidos de nitrógeno y los requisitos y condiciones para la operación de los equipos de calentamiento indirecto por combustión; así como los niveles máximos permisibles de emisión de bióxido de azufre en los equipos de calentamiento directo por combustión.

Como se ha dicho, si bien la petición incluye anexos que contienen información sobre el problema planteado por el Peticionario respecto de la empresa ALCA, S.A. de C.V., en la petición misma no se explica concretamente cómo se relaciona esa información con el asunto específico materia de la petición. Es decir, la petición no contiene suficiente información sobre la supuesta omisión en la aplicación efectiva de la legislación ambiental (sean los artículos 414 al 420 del Código Penal Federal o alguna norma oficial mexicana relativa a emisiones de sustancias tóxicas). Esta omisión de la petición es relevante particularmente considerando que la petición es tan breve.

Además, la insuficiencia de información no permite al Secretariado determinar si la petición cumple o no con el requisito establecido en el inciso d) del artículo 14(1). La petición no parece encaminada a hostigar a una industria, sino a promover la aplicación de la ley para proteger la salud de la comunidad vecina a la planta de ALCA, S.A. de C.V., y no parece que el Peticionario sea un competidor que podría beneficiarse económicamente con la petición. Sin embargo, los alegatos de la petición no se centran en los actos u omisiones de la Parte, como lo dispone el inciso d) y el apartado 5.4(a) de las *Directrices para la presentación de peticiones*, sino en el cumplimiento de esa compañía en particular. Sobre este asunto, la información proporcionada no es suficiente para determinar si se satisface el requisito de este inciso d) del artículo 14(1).

Habiendo revisado la petición de conformidad con el artículo 14(1), el Secretariado determinó que la petición no satisface todos los requisitos en él establecidos, por las razones arriba descritas.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado ha revisado la petición en conformidad con el artículo 14(1) del ACAAN y considera que no cumple con todos los requisitos allí establecidos, porque no contiene suficiente información para determinar si cumple con uno de tales requisitos, y porque no contiene suficiente información que permita al Secretariado revisar la petición.

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica al Peticionario que no procederá a examinar la petición. No obstante, de acuerdo con el apartado 6.2 de las

Directrices, el Peticionario cuenta con 30 días para presentar una petición que cumpla con los requisitos del artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: Victor Shantora
Director Ejecutivo Interino

cc: Dra. Olga Ojeda, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. Ángel Lara García

SEM-03-001

(Ontario Power Generation)

SUBMITTERS: WATERKEEPER ALLIANCE ET AL.

PARTY: CANADA

DATE: 1 May 2003

SUMMARY: The submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from Ontario Power Generation's (OPG) coal-powered facilities pollute the air and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the *Canadian Environmental Protection Act*, which, they claim, obligate the Minister of the Environment to take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* against the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance may enter such water.

SECRETARIAT DETERMINATIONS:

ART. 14(1) **(15 July 2003)**	Determination that criteria under Article 14(1) have not been met.

REV. SUBM.

ART. 14(1)(2) (19 September 2003)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.
ART. 15(1) (28 May 2004)	Determination under Article 15(1) that development of a factual record is not warranted.

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation

Submission Number: **SEM-03-001** (Ontario Power Generation)

Submitters:

Eliot Spitzer, Attorney General of the State of New York
Richard Blumenthal, Attorney General of the State of Connecticut
Patrick C. Lynch, Attorney General of the State of Rhode Island
Adirondack Communities and Conservation Program
Adirondack Mountain Club, Inc.
American Lung Association of the City of New York
American Lung Association of Connecticut
American Lung Association of Maine
American Lung Association of Massachusetts, Inc.
American Lung Association of New Hampshire
American Lung Association of New Jersey
American Lung Association of Rhode Island
Appalachian Mountain Club
Audubon New York
Breast Cancer Coalition of Rochester
Citizen´s Environmental Coalition
Connecticut Public Interest Research Group
Conservation Law Foundation
Delaware-Otsego Audubon Society, Inc.

Submitters:
(*following*)

Environmental Advocates
Environmental & Society Institute
Finger Lakes Trail Conference
Fishkill Ridge Caretakes, Inc.
Global Warming Action Network
Great Lakes United
Green Education and Legal Fund, Inc.
Greenpeace Canada
Greenpeace USA
Hudson River Sloop Clearwater, Inc.
Lake Clear Association
Massachusetts Public Interest Research Group
Natural Resources Defense Council
Massachusetts Public Interest Research Group
Natural Resources Defense Council
New Hampshire Public Interest Research Group
New Jersey Public Interest Research Group
New York Public Interest Research Group
New York State Community of Churches
Northeast Organic Farming Association of New York, Inc.
Ohio Public Interest Research Group
Ontario Clean Air Alliance
PennEnvironment
Rainbow Lake Association, Inc.
Resident´s Committee to Protect the Adirondacks
Rhode Island Public Interest Research Group
Scenic Hudson, Inc.
Sierra Club, including Sierra Club of Canada
Sierra Club of Canada, Eastern Canada Chapter
Toronto Environmental Alliance
Town of Chesterfield
Town of Wilmington
U.S. Public Interest Research Group
Vermont Public Interest Research Group
Waterkeeper Alliance
WNY Sustainable Energy Association

Concerned Party:	Canada
Date of Receipt:	1 May 2003
Date of this Determination:	15 July 2003

I. INTRODUCTION

On 1 May 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines under Article 14(2) whether the submission merits requesting a response from the Party named in the submission, in this case Canada.

The Secretariat has determined that the submission does not meet all of the requirements in Article 14(1) for further consideration. Specifically, the submission does not satisfy Article 14(1)(c) because the Submitters have not submitted sufficient information to allow the Secretariat to consider all of the factors in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE SUBMISSION

The submission, filed on 1 May 2003 by the attorneys general of the states of New York, Connecticut and Rhode Island, along with 48 Canadian and United States non-governmental organizations and two towns in New York State, asserts that Canada is failing to effectively enforce the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants. The submission focuses primarily on OPG's Nanticoke, Lambton and Lakeview generating stations, but the submission encompasses all six of OPG's fossil fuel powered facilities.

The Submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from OPG's coal-powered facilities pollute the air

and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the *Canadian Environmental Protection Act, 1999* (CEPA), which, they claim, obligate the Minister of the Environment to take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance may enter water frequented by fish.

The Submitters attach portions of a 2001 report indicating that OPG's six fossil fuel fired facilities generate 14.7 % of the nitrogen oxides, 23.7 % of the sulfur dioxide and 22.6 % of the mercury emitted in Ontario.[1] The submission describes the transport of emissions of sulfur dioxide and nitrogen oxides and their deposition as acidic precipitation and asserts that the prevailing westerly winds in North America transport OPG's emissions of these substances to Quebec, the Maritime Provinces, New York, Connecticut, Rhode Island and other New England states. The submission cites (and attaches portions of) studies indicating that Ontario is the source of 23 % of the sulfur deposition on Whiteface Mountain in the Adirondacks and 22 % of the sulfur deposition in the western Adirondacks.[2] The submission also provides information regarding the adverse environmental and human health impacts that they claim result from the downwind deposition of OPG's mercury, sulfur dioxide and nitrogen oxides emissions in eastern Canada and northeastern United States.

The submission describes the efforts of some of the Submitters to communicate to the Canadian Minister of the Environment and others their concerns regarding the alleged downwind impacts of OPG's air emissions. The Submitters claim that "Canada has responded to these communications by promising attention to the matter but by doing little about it.[3]" They contend that "[t]he only concrete changes at the OPG plants discussed by Canada have been the installation of pollution control equipment on certain units to reduce NO_x emissions in an effort to meet obligations under the 2000 Ozone Annex to the Canada-United States Air Quality Agreement.[4]"

1. Submission at 5, Appendix C.
2. Submission at 7, Appendix C.
3. Submission at 13.
4. *Ibid.*

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,[5] Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.

A. Opening sentence of Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]."

Article 45(1) of the NAAEC defines a "non-governmental organization" as "any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government." The Submitters include 48 non-governmental organizations within the meaning of this definition. Five of the Submitters – the three state attorneys general and the towns of Chesterfield and Wilmington – are governmental entities. In view of the Article 45(1) definition of "non-governmental organization," the Secretariat concludes that the two towns and the three attorneys general, who joined the submission in their capacities as attorneys general, are not non-governmental organizations or persons within the meaning of Article 14. Any further proceedings in connection with this submission will reference the 48 non-governmental organizations as the Submitters.

The submission alleges that a Party, Canada, is failing to effectively enforce ss. 166 and 176 of CEPA and s. 36(3) of the *Fisheries Act*. All of these provisions come clearly within the definition of "environmental law" found in Article 45(2)(a).

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5. See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98- 003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

The submission alleges "failure to effectively enforce" these sections against OPG, not a deficiency in the provisions themselves or in standard-setting under the provisions. CEPA ss. 166 and 176 both provide that the Environment Minister shall take certain prescribed action if the Environment Minister and the Health Minister have reason to believe that a substance released from a Canadian source into the air or water creates, or may reasonably be anticipated to create, air or water pollution either (1) in a foreign country that provides substantially the same rights to Canada as Canada provides in ss. 166 and 176 or (2) that violates or is likely to violate an international agreement on prevention, control or correction of pollution.[6] In regard to alleged non-federal sources of pollution such as OPG, the ministerial action that ss. 166 and 176 contemplate is, first, consultation with the relevant non-federal government to determine whether that government can address the transboundary pollution and, second, if the non-federal government cannot or does not take action, either the publication of a notice requiring preparation and implementation of a pollution prevention plan under CEPA s. 56(1) or recommendation of regulations to the Governor in Council regarding the pollution. In a previous submission, the Secretariat determined that assertions similar to those regarding ss. 166 and 176 were assertions of a failure to effectively enforce or fulfill a specific legal obligation that the Secretariat could consider under Article 14.[7] The assertion regarding enforcement of *Fisheries Act* s. 36(3) likewise satisfies the requirement that it refer to an alleged failure to effectively enforce.

B. Six specific criteria under Article 14(1)

Article 14(1) then lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

a) is in writing in a language designated by that Party in a notification to the Secretariat;

b) clearly identifies the person or organization making the submission;

c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

6. *See* CEPA ss. 166 and 176.
7. *See* SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (8 September 1999).

d) appears to be aimed at promoting enforcement rather than at harassing industry;

e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

f) is filed by a person or organization residing or established in the territory of a Party.[8]

The submission meets all of these criteria except Article 14(1)(c). Consistent with Article 14(1)(a), the submission is in English, a language designated by the Parties. As Article 14(1)(b) requires, it clearly identifies the organizations making the submission. The submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d) of the NAAEC. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, and the Submitters are not competitors of OPG.[9] The Secretariat does not find the submission to be frivolous.[10] The submission meets the criterion contained in Article 14(1)(e) of the NAAEC, in that it indicates that the matter has been communicated in writing to the relevant Canadian authorities and their response.[11] The submission provides copies of correspondence sent to the Canadian Minister of the Environment, and copies of the replies received. Finally, because the Submitters are established in the United States or Canada, the submission satisfies Article 14(1)(f).

Overall, the submission does not meet the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission.[12] Regarding the Submitters' substantive assertions, the submission and the documentary evidence attached to it do provide information regarding 1) the amount of nitrogen oxides, sulfur dioxide and mercury that OPG's facilities emit, and their percentage contribution to overall emissions in Ontario;[13] 2) the downwind movement of these pollutants to northeastern United States and eastern Canada, including some information regarding the percentage contribution of Ontario emissions;[14] and 3) the harm to human health and the

8. Article 14(1)(a)-(f).
9. See Guideline 5.4(a).
10. See Guideline 5.4(b).
11. Submission at 12-15.
12. Article 14(1)(c); Guideline 5.3
13. Submission at 5-6 and documents cited (Appendix C).
14. Submission at 6-7 and documents cited (Appendix C).

environment that deposition of mercury and acid precipitation resulting from emissions of sulfur dioxide and nitrogen oxides cause in eastern Canada and northeastern United States.[15] The submission, with supporting documentation, asserts that acid rain has resulted in "large losses of fish and aquatic communities in over 30,000 sensitive lakes in southern Ontario and Quebec." The submission also contains information on at least some of Canada's efforts to address power plant emissions.[16]

Taken together, this information provides some support for the assertion that, in respect to CEPA ss. 166 and 176, there is reason to believe that OPG air emissions create, or may reasonably be anticipated to create, air or water pollution in the United States, which appears to provide substantially the same rights to Canada as Canada provides to other countries in sections 166 and 176.[17] The information is therefore sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(a) and 176(1)(a). The information also relates to the assertion that Canada has not taken sufficient action to meet nitrogen oxides requirements under the Ozone Annex to the Canada-United States Air Quality Agreement, such that those emissions violate or are likely to violate an international agreement on prevention, control or correction of pollution.[18] The information in the submission is therefore also sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(b) and 176(1)(b).

The Submitters' assertions regarding s. 36(3) appear to suggest a largely untested application of the provision to air emissions that eventually fall into water frequented by fish. Although it is possibly unprecedented, the Secretariat finds no basis for rejecting outright the application of s. 36(3) that the Submitters propose. The definition of "deposit" in s. 34(1) includes any "emitting" or "spraying" of a substance.[19] Further, the "deposit" need not be directly into the water, as s. 36(3) also encompasses the deposit "in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter" water frequented by fish. The information in the submission regarding the OPG emissions, their downwind movement and their potential impacts

15. Submission at 8-9 and documents cited (Appendix C).
16. Submission at 13.
17. See Submission at 2-3 (citing provisions of the U.S. *Clean Air Act* and *Clean Water Act*).
18. Submission at 13.
19. Section 34(1) defines a deposit as "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing."

on numerous water bodies in Ontario, Quebec and the Atlantic Provinces, as well as on Canada's alleged lack of an adequate enforcement response, is sufficient to allow the Secretariat to review the Submitters' assertions regarding section 36(3).

The submission fails to meet fully the requirement in Article 14(1)(c) because the Submitters have provided insufficient information regarding whether private remedies available under Canada's law have been pursued, a factor the Secretariat must consider under Article 14(2) in determining whether to request a response to the submission. The letters attached to the submission referencing concerns regarding enforcement of CEPA ss. 166 and 176 and *Fisheries Act* s. 36(3) in connection with OPG's emissions do not provide the information needed for the Secretariat's consideration of Article 14(2)(c).

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that although submission SEM-03-001 (Ontario Power Generation) meets some of the requirements of Article 14(1), it does not meet all of them, in particular Article 14(1)(c). Pursuant to Guideline 6.2 of the *Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat will terminate the Article 14 process with respect to this submission, unless remaining Submitters (that is, those who are nongovernmental organizations or persons within the meaning of Article 14(1)) provide the Secretariat with a submission that conforms to the criteria of Article 14(1) and the guidelines within 30 days after receipt of this Notification.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

per: Victor Shantora
Acting Executive Director

cc: Norine Smith, Environment Canada
Olga Ojeda, SEMARNAT
Judith E. Ayres, US-EPA
Submitters

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Articles 14(1) and (2) of the North American Agreement for Environmental Cooperation

Submission Number: **SEM-03-001** (Ontario Power Generation)

Submitters:

Adirondack Communities and Conservation Program
Adirondack Mountain Club, Inc.
American Lung Association of the City of New York
American Lung Association of Connecticut
American Lung Association of Maine
American Lung Association of Massachusetts
American Lung Association of New Hampshire
American Lung Association of New Jersey
American Lung Association of New York
American Lung Association of Rhode Island
Appalachian Mountain Club
Audubon New York
Breast Cancer Coalition of Rochester
Citizen´s Environmental Coalition
Connecticut Public Interest Research Group
Conservation Law Foundation
Delaware-Otsego Audubon Society, Inc.
Environmental Advocates
Environmental and Society Institute
Finger Lakes Trail Conference
Fishkill Ridge Caretakes, Inc.
Global Warming Action Network
Great Lakes United

Submitters: (*following*)	Green Education and Legal Fund, Inc. Greenpeace Canada Greenpeace USA Hudson River Sloop Clearwater, Inc. Lake Clear Association Massachusetts Public Interest Research Group Natural Resources Defense Council New Hampshire Public Interest Research Group New Jersey Public Interest Research Group New York Public Interest Research Group New York State Community of Churches Northeast Organic Farming Association of New York, Inc. Ohio Public Interest Research Group Ontario Clean Air Alliance PennEnvironment Rainbow Lake Association, Inc. Resident´s Committee to Protect the Adirondacks Rhode Island Public Interest Research Group Scenic Hudson, Inc. Sierra Club, including Sierra Club of Canada Sierra Club of Canada, Eastern Canada Chapter Toronto Environmental Alliance U.S. Public Interest Research Group Vermont Public Interest Research Group Waterkeeper Alliance WNY Sustainable Energy Association
Party:	Canada
Date of Receipt:	14 August 2003
Date of receipt of the original submission:	1 May 2003
Date of this Determination:	19 September 2003

I. INTRODUCTION

On 14 August 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a revised submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). The revised submission contains new information following the Secretariat's determination of 15 July 2003 that the original submission, filed on 1 May 2003, failed to meet fully the requirement in Article 14(1)(c) because the Submitters provided insufficient information regarding whether private remedies available under Canada's law have been pursued.

The Secretariat has determined that the revised submission meets all of the requirements in Article 14(1) for further consideration and, upon consideration of the factors in Article 14(2), that it merits requesting a response from Canada. The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE REVISED SUBMISSION

Like the original submission, the revised submission, filed by 49 Canadian and United States non-governmental organizations,[1] asserts that Canada is failing to effectively enforce the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants. The revised submission focuses primarily on OPG's Nanticoke, Lambton and Lakeview generating stations, but the submission encompasses all six of OPG's fossil fuel powered facilities.

The Submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from OPG's coal-powered facilities pollute the air and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the Canadian Environmental Protection Act, 1999 (CEPA), which, they claim, obligate the Minister of the Environment to

1. Five of the original Submitters are listed as Interested Parties in the submission: the attorneys general of New York, Connecticut and Rhode Island and the Towns of Chesterfield and Wilmington, both in New York State. The submission makes clear that these "Interested Parties" are not submitters. Submission at ii. In its 15 July 2003 determination, the Secretariat concluded that , in view of the Article 45(1) definition of "non-governmental organization," "the two towns and the three attorneys general, who joined the submission in their capacities as attorneys general, are not non-governmental organizations or persons within the meaning of Article 14." SEM-03-001, Determination under Article 14(1) (15 July 2003).

take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance or another deleterious substance may enter water frequented by fish.

The Submitters attach portions of a 2001 report indicating that OPG's six fossil fuel fired facilities generate 14.7 % of the nitrogen oxides, 23.7 % of the sulfur dioxide and 22.6 % of the mercury emitted in Ontario.[2] The revised submission describes the transport of emissions of sulfur dioxide and nitrogen oxides and their deposition as acidic precipitation and asserts that the prevailing westerly winds in North America transport OPG's emissions of these substances to Quebec, the Maritime Provinces, New York, Connecticut, Rhode Island and other New England states. The revised submission cites (and attaches portions of) studies indicating that Ontario is the source of 23 % of the sulfur deposition on Whiteface Mountain in New York State's Adirondack Mountains and 22 % of the sulfur deposition in the western Adirondacks.[3] The revised submission also provides information regarding the adverse environmental and human health impacts that they claim result from the downwind deposition of OPG's mercury, sulfur dioxide and nitrogen oxides emissions in eastern Canada and northeastern United States. The Submitters claim that they or their members are directly and personally affected by the harm described in the revised submission and that natural resources that they use have been degraded in recreational and other value.[4]

The revised submission describes the efforts of some of the Submitters to communicate to the Canadian Minister of the Environment and others their concerns regarding the alleged downwind impacts of OPG's air emissions. The Submitters claim that "Canada has responded to these communications by promising attention to the matter but by doing little about it."[5] They contend that "[t]he only concrete changes at the OPG plants discussed by Canada have been the installation of pollution control equipment on certain units to reduce NO_x emissions in an effort to meet obligations under the 2000 Ozone Annex to the Canada-United States Air Quality Agreement."[6]

2. Revised submission at 5, Appendix C.
3. Revised submission at 7, Appendix C.
4. Revised submission at 14-15.
5. Revised submission at 13.
6. *Ibid.*

The only new information in the revised submission concerns the pursuit of private remedies available under Canadian law in regard to the matters addressed in the submission. The Submitters claim that "[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success."[7]

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,[8] Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.

A. Opening sentence of Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]."

Article 45(1) of the NAAEC defines a "non-governmental organization" as "any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government." The Submitters are 49 nongovernmental organizations within the meaning of this definition.

The revised submission alleges that a Party, Canada, is failing to effectively enforce ss. 166 and 176 of CEPA and s. 36(3) of the *Fisheries Act*. All of these provisions come clearly within the definition of "environmental law" found in Article 45(2)(a).

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7. Revised submission at 12.
8. See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98- 003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

The revised submission alleges "failure to effectively enforce" these sections against OPG, not a deficiency in the provisions themselves or in standard-setting under the provisions. CEPA ss. 166 and 176 both provide that the Environment Minister shall take certain prescribed action if the Environment Minister and the Health Minister have reason to believe that a substance released from a Canadian source into the air or water creates, or may reasonably be anticipated to create, air or water pollution either (1) in a foreign country that provides substantially the same rights to Canada as Canada provides in ss. 166 and 176 or (2) that violates or is likely to violate an international agreement on prevention, control or correction of pollution.[9] In regard to alleged non-federal sources of pollution such as OPG, the ministerial action that ss. 166 and 176 contemplate is, first, consultation with the relevant non-federal government to determine whether that government can address the transboundary pollution and, second, if the non-federal government cannot or does not take action, either the publication of a notice requiring preparation and implementation of a pollution prevention plan under CEPA s. 56(1) or recommendation of regulations to the Governor in Council regarding the pollution. In a previous submission, the Secretariat determined that assertions similar to those regarding ss. 166 and 176 were assertions of a failure to effectively enforce or fulfill a specific legal obligation that the Secretariat could consider under Article 14.[10] The assertion regarding enforcement of *Fisheries Act* s. 36(3) likewise satisfies the requirement that it refer to an alleged failure to effectively enforce.

B. Six specific criteria under Article 14(1)

Article 14(1) then lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

a) is in writing in a language designated by that Party in a notification to the Secretariat;

b) clearly identifies the person or organization making the submission;

c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

9. *See* CEPA ss. 166 and 176.
10. *See* SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) (8 September 1999).

d) appears to be aimed at promoting enforcement rather than at harassing industry;

e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

f) is filed by a person or organization residing or established in the territory of a Party.[11]

The revised submission meets all of these criteria. Consistent with Article 14(1)(a), the submission is in English, a language designated by the Party. As Article 14(1)(b) requires, it clearly identifies the organizations making the submission. The revised submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d) of the NAAEC. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, and the Submitters are not competitors of OPG.[12] The Secretariat does not find the revised submission to be frivolous.[13] The revised submission meets the criterion contained in Article 14(1)(e) of the NAAEC, in that it indicates that the matter has been communicated in writing to the relevant Canadian authorities and their response.[14] The revised submission includes copies of correspondence sent to the Canadian Minister of the Environment, and copies of the replies received. Finally, because the Submitters are established in the United States or Canada, the revised submission satisfies Article 14(1)(f).

Unlike the original submission, the revised submission also meets the requirement in Article 14(1)(c) that it provide sufficient information to allow the Secretariat to review the submission.[15] Regarding the Submitters' substantive assertions, the revised submission and the documentary evidence attached to it provide information regarding 1) the amount of nitrogen oxides, sulfur dioxide and mercury that OPG's facilities emit, and their percentage contribution to overall emissions in Ontario;[16] 2) the downwind movement of these pollutants to northeastern United States and eastern Canada, including some information regarding the percentage contribution of Ontario emissions;[17] and 3) the harm to human health and the environment that deposition of mercury

11. Article 14(1)(a)-(f).
12. See Guideline 5.4(a).
13. See Guideline 5.4(b).
14. Revised submission at 11-13.
15. Article 14(1)(c); Guideline 5.3
16. Revised submission at 5-6 and documents cited (Appendix C).
17. Revised submission at 6 and documents cited (Appendix C).

and acid precipitation resulting from emissions of sulfur dioxide and nitrogen oxides cause in eastern Canada and northeastern United States.[18] The revised submission, with supporting documentation, asserts that acid rain has resulted in "large losses of fish and aquatic communities in over 30,000 sensitive lakes in southern Ontario and Quebec."[19] The submission also contains information on at least some of Canada's efforts to address power plant emissions.[20]

Taken together, this information is relevant to the assertion that, in respect to CEPA ss. 166 and 176, there is reason to believe that OPG air emissions create, or may reasonably be anticipated to create, air or water pollution in the United States, which appears to provide substantially the same rights to Canada as Canada provides to other countries in sections 166 and 176.[21] The information is therefore sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(a) and 176(1)(a). The information also relates to the assertion that Canada has not taken sufficient action to meet nitrogen oxides requirements under the Ozone Annex to the Canada-United States Air Quality Agreement, such that those emissions violate or are likely to violate an international agreement on prevention, control or correction of pollution.[22] The information in the submission is therefore also sufficient to allow the Secretariat to review the submission with respect to CEPA ss. 166(1)(b) and 176(1)(b).

The Submitters' assertions regarding s. 36(3) appear to suggest a largely untested application of the provision to air emissions that eventually fall into water frequented by fish. Although it is possibly unprecedented, the Secretariat finds no basis for rejecting outright the application of s. 36(3) that the Submitters propose. The definition of "deposit" in s. 34(1) includes any "emitting" or "spraying"of a substance.[23] Further, the "deposit" need not be directly into the water, as s. 36(3) also encompasses the deposit of a deleterious substance "in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter" water frequented by fish. The revised submission clearly identifies OPG as the source of the emissions of concern. The information in the revised submission regarding the OPG emissions,

18. Revised submission at 7-11 and documents cited (Appendix C).
19. Revised submission at 8.
20. Revised submission at 12.
21. See Revised submission at 2-3 (citing provisions of the U.S. *Clean Air Act* and *Clean Water Act*).
22. Revised submission at 12.
23. Section 34(1) defines a deposit as "any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing."

their downwind movement and their potential impacts on numerous water bodies in Ontario, Quebec and the Atlantic Provinces, as well as on Canada's alleged lack of an adequate enforcement response, is sufficient to allow the Secretariat to review the Submitters' assertions regarding s. 36(3).

Finally, unlike the original submission, the revised submission provides sufficient information to allow the Secretariat to conduct its review of all of the factors in Article 14(2). In particular, it provides the information needed for the Secretariat's consideration pursuant to Article 14(2)(c) of whether private remedies available under the Party's law have been pursued.

C. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the Party concerned prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

> In deciding whether to request a response, the Secretariat shall be guided by whether:
>
> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.[24]

The Secretariat, guided by the factors listed in Article 14(2), has determined that the revised submission merits requesting a response from the Party, in this case Canada.

24. Article 14(2) of the NAAEC.

The Submitters provide information regarding the adverse impacts of OPG emissions on human health and the environment and assert that they and their members are "directly and personally affected" by those impacts.[25] Similar assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.[26]

The revised submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[27] The Submitters note, *inter alia,* that further study in the citizen submission process would foster the protection and improvement of the environment as contemplated in NAAEC Article 1(a); promote sustainable development based on cooperation and mutually supportive environmental and economic policies, as contemplated in NAAEC Article 1(b); increase cooperation between governments to better conserve, protect and enhance the environment, as contemplated in NAAEC Article 1(c); avoid creating trade distortions or new trade barriers, as contemplated in NAAEC Article 1(e); strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices, as contemplated in NAAEC Article 1(f); enhance compliance with, and enforcement of, environmental law and regulations, as contemplated in NAAEC Article 1(g); and promote pollution prevention policies and practices, as contemplated in NAAEC Article 1(j).[28] The Secretariat agrees that further study of the matters raised in the submission would advance these goals, particularly those set out in NAAEC Articles 1(a), 1(e), 1(g) and 1(j).

The Submitters assert that "[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success."[29] They claim that it is "impractical and unrealistic for individuals and non-governmental entities with limited resources and expertise to seek redress through private remedies for a transnational problem of such scope and com-

25. Revised submission at 7-11, 14-15.
26. In SEM-96-001 (Cozumel), Recommendation to the Council for the Development of a Factual Record (7 June 1996), for example, the Secretariat noted: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC."
27. Article 14(2)(b) of the NAAEC.
28. Revised submission at 15.
29. Revised submission at 12.

plexity."[30] They also claim that bringing private prosecutions, which the government can stay, is a financial burden and not a viable option in light of the number of alleged violations by OPG and their alleged widespread effects on the environment.[31] The Submitters assert that "the better approach is for the government regulator to address the source of the emissions."[32] The Submitters also describe the legal and other obstacles they would face in bringing private tort actions or common law actions.[33] Nonetheless, the Submitters describe efforts to urge the federal government of Canada and the government of Ontario to address the air and water pollution issues presented in the submission.[34] Taking note of the burdens that the Submitters describe, and noting also that the Submitters or others have made federal or provincial authorities in Canada aware of their concerns regarding OPG's emissions on numerous occasions beginning in May 1999,[35] the Secretariat concludes that the approach in regard to pursuit of private remedies was reasonable in light of the circumstances.

Finally, the submission is not based exclusively on mass media reports. As the Submitters note, the submission is based primarily on "government reports and studies and on peer reviewed scientific studies."[36]

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that Canada is failing to effectively enforce provisions of the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants merits a response from Canada.

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that the revised submission SEM-03-001 (Ontario Power Generation) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada subject to the provisions of Article 14(3). A copy of the revised submission and the

30. Revised submission at 13.
31. Revised submission at 13.
32. Revised submission at 13-14.
33. Revised submission at 14.
34. Revised submission at 13-14.
35. Revised submission at 11-12.
36. Revised submission at 14.

supporting information provided with the original submission were previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

per: Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

cc: Norine Smith, Environment Canada
Olga Ojeda, SEMARNAT
Judith E. Ayres, US-EPA
William V. Kennedy, CEC Executive Director
Submitters

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 15(1) of the North American Agreement for Environmental Cooperation

Submission Number: **SEM-03-001** (Ontario Power Generation)

Submitters:

Adirondack Communities and Conservation Program
Adirondack Mountain Club, Inc.
American Lung Association of the City of New York
American Lung Association of Connecticut
American Lung Association of Maine
American Lung Association of Massachusetts
American Lung Association of New Hampshire
American Lung Association of New Jersey
American Lung Association of New York
American Lung Association of Rhode Island
Appalachian Mountain Club
Audubon New York
Breast Cancer Coalition of Rochester
Citizen´s Environmental Coalition
Connecticut Public Interest Research Group
Conservation Law Foundation
Delaware-Otsego Audubon Society, Inc.
Environmental Advocates
Environmental and Society Institute
Finger Lakes Trail Conference
Fishkill Ridge Caretakes, Inc.
Global Warming Action Network
Great Lakes United

Submitters: (*following*)	Green Education and Legal Fund, Inc. Greenpeace Canada Greenpeace USA Hudson River Sloop Clearwater, Inc. Lake Clear Association Massachusetts Public Interest Research Group Natural Resources Defense Council New Hampshire Public Interest Research Group New Jersey Public Interest Research Group New York Public Interest Research Group New York State Community of Churches Northeast Organic Farming Association of New York, Inc. Ohio Public Interest Research Group Ontario Clean Air Alliance PennEnvironment Rainbow Lake Association, Inc. Resident´s Committee to Protect the Adirondacks Rhode Island Public Interest Research Group Scenic Hudson, Inc. Sierra Club, including Sierra Club of Canada Sierra Club of Canada, Eastern Canada Chapter Toronto Environmental Alliance U.S. Public Interest Research Group Vermont Public Interest Research Group Waterkeeper Alliance WNY Sustainable Energy Association
Concerned Party:	Canada
Date of Receipt:	14 August 2003
Date of receipt of the original submission:	1 May 2003
Date of this Determination:	28 May 2004

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement") creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "CEC") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether the submission merits requesting a response from the Party named in the submission. If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform Council and provide its reasons (Article 15(1)). The Secretariat dismisses the submission if it believes that development of a factual record is not warranted.

On 14 August 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a revised submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). The revised submission contains new information following the Secretariat's determination of 15 July 2003 that the original submission, filed on 1 May 2003, failed to meet fully the requirement in Article 14(1)(c). On 19 September 2003, the Secretariat requested a response to the revised submission from Canada. Canada provided its response on 18 November 2003.

The Secretariat has determined that the revised submission does not warrant preparation of a factual record, and provides its reasons below.

II. SUMMARY OF THE REVISED SUBMISSION

Like the original submission, the revised submission, filed by 49 Canadian and United States non-governmental organizations,[1] asserts

1. Five of the original Submitters are listed as Interested Parties in the submission: the attorneys general of New York, Connecticut and Rhode Island and the Towns of Chesterfield and Wilmington, both in New York State. The submission makes clear that these "Interested Parties" are not submitters. Submission at ii. In its 15 July 2003 determination, the Secretariat concluded that , in view of the Article 45(1) definition of "non-governmental organization," "the two towns and the three attorneys general, who joined the submission in their capacities as attorneys general, are not non-governmental organizations or persons within the meaning of Article 14." SEM-03-001, Determination under Article 14(1) (15 July 2003).

that Canada is failing to effectively enforce the *Canadian Environmental Protection Act* and the federal *Fisheries Act* against Ontario Power Generation's (OPG's) coal-fired power plants. The revised submission focuses primarily on OPG's Nanticoke, Lambton and Lakeview generating stations, but the submission encompasses all six of OPG's fossil fuel powered facilities.

The Submitters assert that emissions of mercury, sulfur dioxide and nitrogen oxides from OPG's coal-powered facilities pollute the air and water downwind, in eastern Canada and northeastern United States. They assert that Canada is failing to effectively enforce sections 166 and 176 of the Canadian Environmental Protection Act, 1999 (CEPA), which, they claim, obligate the Minister of the Environment to take action to address Canadian sources of pollution that he has reason to believe are causing air or water pollution in the United States. They also assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the OPG facilities. Section 36(3) prohibits the deposit of a deleterious substance into water frequented by fish or in any place under any conditions where the substance or another deleterious substance may enter water frequented by fish.

The Submitters attach portions of a 2001 report indicating that OPG's six fossil fuel fired facilities generate 14.7 % of the nitrogen oxides (NO_x), 23.7 % of the sulfur dioxide (SO_2) and 22.6 % of the mercury emitted in Ontario.[2] The revised submission describes the transport of emissions of sulfur dioxide and nitrogen oxides and their deposition as acidic precipitation and asserts that the prevailing westerly winds in North America transport OPG's emissions of these substances to Quebec, the Maritime Provinces, New York, Connecticut, Rhode Island and other New England states. The revised submission cites (and attaches portions of) studies indicating that Ontario is the source of 23 % of the sulfur deposition on Whiteface Mountain in New York State's Adirondack Mountains and 22 % of the sulfur deposition in the western Adirondacks.[3] The revised submission also provides information regarding the adverse environmental and human health impacts that they claim result from the downwind deposition of OPG's mercury, sulfur dioxide and nitrogen oxides emissions in eastern Canada and northeastern United States. The Submitters claim that they or their members are directly and personally affected by the harm described in the revised submission and that natural resources that they use have been degraded in recreational and other value.[4]

2. Revised submission at 5, Appendix C.
3. Revised submission at 7, Appendix C.
4. Revised submission at 14-15.

The revised submission describes the efforts of some of the Submitters to communicate to the Canadian Minister of the Environment and others their concerns regarding the alleged downwind impacts of OPG's air emissions. The Submitters claim that "Canada has responded to these communications by promising attention to the matter but by doing little about it."[5] They contend that "[t]he only concrete changes at the OPG plants discussed by Canada have been the installation of pollution control equipment on certain units to reduce NO_x emissions in an effort to meet obligations under the 2000 Ozone Annex to the Canada-United States Air Quality Agreement."[6]

The only new information in the revised submission concerns the pursuit of private remedies available under Canadian law in regard to the matters addressed in the submission. The Submitters claim that "[t]here are no realistic private remedies available and such avenues for redress that may be available have been pursued by Submitters and others without success."[7]

III. SUMMARY OF CANADA'S RESPONSE

In its response, Canada affirms that it is concerned about the harmful effects of NO_X, SO_2 and mercury emissions from OPG's Nanticoke, Lambton and Lakeview Generating Stations on human health and the environment, including on fish and fish habitat.[8] Canada asserts that it has been working cooperatively with the Government of Ontario for many years to ensure that these atmospheric emissions are reduced in a timely fashion, taking into account economic and competitive considerations vis-à-vis the United States.[9]

Canada explains that under a 1998 Canada-Wide Accord on Environmental Harmonization (Harmonization Accord), the federal government and the provinces work together to develop strategies to address environmental issues, and they agree on the development of Canada-Wide Standards (CWS) for emissions of specific pollutants.[10] Canada explains that the Harmonization Accord is used to determine the order of government "best situated" to effectively address the environmental concern in question.[11] However, if that government is unable to

5. Revised submission at 13.
6. *Ibid.*
7. Revised submission at 12.
8. Response at 6, 15.
9. Response at 15.
10. Response at 5.
11. *Ibid.*

fulfill its obligations, the concerned governments will develop an alternative plan. The response indicates that federal, provincial and territorial jurisdictions are all accountable for achieving CWS targets and reporting publicly on their progress.[12] Canada states that in the case of stationary sources of emissions, such as OPG's facilities, Canada's practice is to pursue a multilevel and consensus-based approach when setting expectations, such as a CWS.[13]

Canada states that s. 176 of CEPA 1999, which addresses international water pollution, does not apply to a situation where airborne pollutants blow over international borders and ultimately descend into water.[14] In regard to s. 166 of CEPA 1999, which addresses international air pollution, Canada outlines federal and provincial actions designed to limit emissions of the pollutants identified by the Submitters at OPG's facilities.[15]

Canada explains that NO_x emissions from OPG facilities are being addressed under the *Ozone Annex to the Canada-U.S. Air Quality Agreement* (December 2000) and the *Canada-wide Acid Rain Strategy for Post-2000.* Under the Ozone Annex, Canada has agreed to a 39-kilotonne cap, by 2007, on NO_x emissions from fossil-fuel electric power generation facilities located within a specific area of Ontario.[16] Canada describes steps that Ontario has taken, including a commitment to phase out coal use at the Lakeview Generating Station by 2005 and adoption of Regulation 397/01, which establishes a series of decreasing caps for NO_x for the electricity sector using a hybrid cap-and-trade system.[17] Canada states that under the regulation, emissions trading could prevent attainment of the 39-kilotonne cap and expresses its belief that "the province-wide application of the cap and the flexibility provisions that allow allowances to be purchased from uncapped sources and/or from the U.S. would be inappropriate."[18] Canada is working with the new Ontario provincial government under subparagraph 166(1)(b) of CEPA 1999 to determine whether the province can use its laws to meet the 39-kilotonne cap.[19] If not, Canada will consider appropriate action under federal law.[20] Under the *Acid Rain Strategy*, Canada is funding

12. Response at 6.
13. *Ibid.*
14. Response at 7.
15. *Ibid.*
16. Response at 8.
17. Response at 8-9.
18. Response at 9.
19. *Ibid.*
20. *Ibid.*

nitrogen research which will provide a science basis for determining whether further action on NO_X may be required.[21]

As regards SO_2, Canada asserts that it has cut emissions by more than 45 % since 1980.[22] Under the *Acid Rain Strategy*, Ontario announced in January 2000 a provincial SO_2 reduction target of 50 % by 2015.[23] To reach this target, Ontario is phasing out the use of coal at the Lakeview Generating Station by 2005, eliminating SO_2 emissions there, and is implementing emission caps intended to reduce SO_2 emissions from fossil fuel burning power plants by 25 % by 2007.[24] In light of Ontario's actions, Canada asserts that there is no indication that action by the federal government is warranted.[25]

As regards mercury, Canada asserts that a CWS on mercury emissions originating from the electric power generation sector will be developed by 2005 and is expected to be implemented by 2010.[26] Canada affirms that the federal and provincial governments have also committed to explore the national capture of mercury from coal burned in the range of 60-90 %, based on current and emerging technology.[27] The phase-out of coal-burning at the Lakeview Generating Station by 2005 will eliminate one source of mercury emissions.[28] Concerning section 36(3) of the *Fisheries Act*, which prohibits the deposit of deleterious substances into waters frequented by fish, Canada asserts that there is insufficient evidence of a causal link between mercury emissions originating from OPG's facilities and the mercury found in fish-bearing waters.[29] Consequently, Environment Canada is working on an inspection program in Ontario that will include the "complex and difficult task" of sampling and tracking the fate of mercury emissions from OPG's facilities.[30] Canada notes that OPG's Nanticoke facility reported a discharge of one kilogram of mercury into water in 2001, and states that at this time, the Government of Canada is focusing its efforts on Nanticoke's atmospheric releases of mercury, which in 2001 were 226 times greater than its reported mercury discharge into water.[31]

21. Response at 10.
22. *Ibid.*
23. Response at 12.
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. Response at 13.
29. Response at 13-14.
30. Response at 14.
31. *Ibid.*

IV. ANALYSIS

The revised submission focuses on the impacts of long-range deposition of air pollutants from coal-fired power plants, issues that have long challenged governments in North America, both domestically and, in regard to transboundary movement of those pollutants, in the international domain. For example, Canada's response mentions programs that have been in place, and the progress made, since 1985 in both Canada and the United States to address acid rain caused in part by emissions from coal-fired power plants.[32] The revised submission suggests that emissions from OPG's coal-fired power plants are an obstacle to Canada meeting its commitments under an international agreement with the United States, and it presents substantial information on the potential effects of OPG's coal-fired power plant emissions on human health and the environment.

The revised submission approaches these issues through the lens of specific provisions of law that the Submitters claim Canada is failing to effectively enforce in regard to OPG's coal-fired power plants. In regard to the transboundary movement of power plant emissions and Canada's commitments under an international agreement with the United States, the Submitters assert that the federal government is not fulfilling its obligations under Sections 166 and 176 of CEPA 1999. In regard to potential effects in Eastern Canada of emissions from OPG's coal-fired power plants, the Submitters assert that Canada is failing to enforce section 36(3) of the *Fisheries Act* to address air emissions from OPG's facilities that eventually are deposited into fish-bearing waters downwind. As explained below, the Secretariat has determined that neither set of assertions warrants the development of a factual record.

A. Assertions regarding CEPA 1999

CEPA ss. 166 and 176 both provide that the Environment Minister shall take certain prescribed action if the Environment Minister and the Health Minister have reason to believe that a substance released from a Canadian source into the air or water creates, or may reasonably be anticipated to create, air or water pollution either (1) in a foreign country that provides substantially the same rights to Canada as Canada provides in ss. 166 and 176 or (2) that violates or is likely to violate an international agreement on prevention, control or correction of pollution.[33] In regard to alleged non-federal sources of pollution such as OPG, the

32. Response at 10-11.
33. *See* CEPA ss. 166 and 176.

ministerial action that ss. 166 and 176 contemplate is, first, consultation with the relevant non-federal government to determine whether that government can address the transboundary pollution and, second, if the non-federal government cannot or does not take action, either the publication of a notice requiring preparation and implementation of a pollution prevention plan under CEPA s. 56(1) or recommendation of regulations to the Governor in Council regarding the pollution. The Act does not establish time limits within which Environment Canada must initiate or conclude consultations with the relevant non-federal government or take action where the non-federal government cannot or does not take action.

Canada takes the position that s. 176 does not apply to airborne pollutants that blow over international borders and ultimately descend into water. In view of this position,[34] and because the revised submission focuses on OPG's air emissions, the Secretariat focuses its analysis solely on the Submitters' assertions regarding s. 166. Section 166 states in full:

> **Determination of international air pollution**
>
> (1) Subject to subsection (4), the Minister shall act under subsections (2) and (3) only if the Ministers [of Environment and of Health] have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to
>
> (*a*) air pollution in a country other than Canada; or
>
> (*b*) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.
>
> **Consultation with other governments**
>
> (2) If the source referred to in subsection (1) is not a federal source, the Minister shall

34. Section 176 applies where the Ministers of Environment and of Health have reason to believe that a substance released from a source in Canada into water creates, or may reasonably be anticipated to create, water pollution in another country or water pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution. CEPA 1999, s. 176(1). The Secretariat found no judicial opinions discussing the scope of s. 176. Because the revised submission deals only with air emissions and neither it nor the response presents an issue regarding interpretation of s. 166, the Secretariat sees no reason to discuss in detail legal interpretations that might differ from Canada's interpretation of s. 176.

> (*a*) consult with the government responsible for the area in which the source is situated to determine whether that government can prevent, control or correct the air pollution under its laws; and
>
> (*b*) if the government referred to in paragraph (*a*) can prevent, control or correct the air pollution, offer it an opportunity to do so.
>
> **Ministerial action**
>
> (3) If the source referred to in subsection (1) is a federal source or if the government referred to in paragraph (2)(*a*) cannot prevent, control or correct the air pollution under its laws or does not do so, the Minister shall take at least one of the following courses of action:
>
> (*a*) on approval by the Governor in Council, publish a notice under subsection 56(1); or,
>
> (*b*) recommend regulations to the Governor in Council for the purpose of preventing, controlling or correcting the air pollution.
>
> **Reciprocity with other country**
>
> (4) If the air pollution referred to in paragraph (1)(*a*) is in a country where Canada does not have substantially the same rights with respect to the prevention, control or correction of air pollution as that country has under this Division, the Minister shall decide whether to act under subsections (2) and (3) or to take no action at all.
>
> **Other factors**
>
> (5) When recommending regulations under paragraph (3)(*b*), the Minister shall take into account comments made under subsection 168(2), notices of objection filed under subjection 332(2) and any report of a board of review submitted under subsection 340(1).

The Submitters' assertions regarding s. 166 are similar to those found in the Great Lakes submission (SEM-98-003), for which the Secretariat concluded a factual record was not warranted for claims that the United States was failing to effectively enforce section 115 of the federal *Clean Air Act*.[35] Section 115 of the *Clean Air Act* provides Canada with substantially the same rights as s. 166 of CEPA affords the United States, in that it requires the U.S. Environmental Protection Agency to take action where it has reason to believe that air pollution from a United

35. SEM-98-003 (Great Lakes), Article 15(1) Determination (5 October 2001).

States source harms the environment or human health in a foreign country. In Great Lakes, the Secretariat reasoned as follows in deciding against recommending a factual record:

> As courts in the United States have noted, EPA's flexibility regarding when, whether and how to implement §115 is very broad, and determining whether the factual circumstances warranting an endangerment finding exist is very complicated in general. Based on the submission and the response, it appears that it would be especially complicated to make such a finding regarding any endangerment in Canada due to mercury and dioxin emissions in the United States. Whether the United States is effectively enforcing §115 is intricately tied in this case to the broad scope of the EPA's discretion under that provision, and whether a factual record is warranted must be viewed in light of the complex, dynamic and improving situation described in the United States' responses. Relevant as well is the lack of any indication in the submission or in the materials the United States has provided of any significant noncompliance with emissions regulations applicable to the incinerators at issue in this submission.
>
> In light of these considerations, the Secretariat finds that the submission and the response do not leave open a central question regarding whether the United States is ineffectively addressing an ongoing environmental violation under §115 or exercising its discretion in a manner legally contrary to §115. [36]

Canada states that in regard to NO_x emissions, Environment Canada currently "is working under subparagraph 166(1)(b) of CEPA 1999 with the Government of Ontario to determine whether the province can prevent, control or correct NO_x emissions under its laws, in order to meet the 39-kilotonne cap set out in the *Ozone Annex*."[37] Canada notes its concern that the cap-and-trade approach of the previous Ontario government risked non-attainment of the 39-kilotonne cap, but states that it is "looking forward to seeing a revised NO_x plan from the province" that reflects Canada's commitment to the 39-kilotonne cap.[38] In these circumstances, Canada's response indicates that Ontario may be able to takes steps that ensure the 2007 cap commitment will be met, making action under federal law unnecessary.[39] In light of Ontario's SO_2 emission reduction target of 50 % by 2015, with a 25 % reduction anticipated by 2007 through implementation of Ontario Regulation 397/01, Canada indicates that no federal action is warranted at this time in regard to SO_2 emissions. Regarding mercury emissions, Canada points to the

36. Cite to Great Lakes
37. Response at 9.
38. Response at 7, 9.
39. Response at 9.

development of a CWS by "2005 to reduce mercury emissions from the coal-fired electric power generation sector by 2010."[40]

In addition to these targets, Canada points out that coal use at the Lakeview Generating Station will be phased out by 2005, resulting in elimination of all coal-related emissions from that source. The Secretariat also is aware of numerous press reports of OPG's recent announcement that, consistent with the announced policy of the Ontario government elected in October 2003, it will close five coal-fired power plants in Ontario within four years, including the three on which the submission focuses.[41] These press accounts, issued after Canada filed its response, indicate that OPG wrote off $473 million as a one-time accounting cost to reflect the loss of future revenues from those plants.

Like section 115 of the Clean Air Act, which was at issue in the Great Lakes submission, s. 166 of CEPA 1999 appears to provide a considerable degree of discretion to the Environment Minister. The Submitters essentially assert that Environment Canada is failing to exercise its discretion as required, in that it is not taking the actions that are contemplated under s. 166, namely (1) consulting with Ontario and, if the province can prevent, control or correct the air pollution, providing it an opportunity to do so; (2) publishing a notice (on approval of the Governor in Council) requiring OPG to prepare and implement a pollution prevention plan; or (3) recommending regulations to the Governor in Council. Yet, the Act prescribes neither the time nor the manner in which the Minister must take these actions. Notably, nothing in the Act indicates that Canada has a clear obligation to require a pollution prevention plan or recommend regulations notwithstanding Ontario's adoption of emissions reduction targets (for NO_x and SO_2), federal-provincial

40. Response at 12.

41. *See* R. Mackie, "Ontario's five coal-fired plants to shut down within four years," *The Globe and Mail*, 17 March 2004 (viewed on the internet at http://www.theglobeandmail.com/servlet/ArticleNews/TPPrint/LAC/20040317/HYDRO17/TPNational (17 April 2004); Reuters, "Ontario vows to shut coal plants, critics wary," *Forbes.com*, 17 March 2004, viewed on the internet at http://www.forbes.com/business/energy/newswire/2004/03/17/rtr1302622.html (15 April 2004); "Plant closure report alarms Nanticoke," *The Toronto Star*, 17 March 2004, viewed on the internet at http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1079564621228&call_pageid=968256289824 (15 April 2004); "Ontario Power Generation reports 2003 earnings," *CNW Telbec*, 16 March 2004, viewed on the internet at http://www.cnw.ca/fr/releases/archive/March2004/16/c0843.html (15 April 2004); "Ontario braces for big changes to energy market," *CTV.ca*, 18 March 2004, viewed on the internet at http://www.ctv.ca/servlet/ArticleNews/print/CTVNews/1079543973373_74953173/?hub=TopStories&subhub=PrintStory&articleURL=http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1079543973373_74953173/?hub=TopStories (15 April 2004).

efforts to establish a relevant CWS (for mercury), and the announced elimination of the pollution sources at issue, even if the actual elimination of those sources faces a degree of uncertainty. In fact, s. 166(2)(b) states that "if the government referred to in paragraph (*a*) [in this case, the Ontario government] can prevent, control or correct the air pollution", the federal government "shall offer it an opportunity to do so." The response indicates that Canada is currently providing Ontario this opportunity.

The information before the Secretariat regarding both emission reduction targets and concrete actions, together with reports of the planned closure of some or all of OPG's coal-fired power plants, indicates a dynamic and improving situation in regard to the transboundary pollution of concern to the Submitters, similar to the situation presented in the Great Lakes submission. While the passage of time without any progress on the part of Ontario or the federal Environment Minister may, in the future, raise a question regarding the application of s. 166 in this context, the Secretariat cannot, at this time, identify a central question regarding the Environment Minister's exercise of the discretion given him in s. 166 of CEPA that would warrant preparation of a factual record.

B. Assertions regarding s. 36(3) of the *Fisheries Act*

The Submitters' assertions regarding s. 36(3) appear to suggest an untested application of the provision to air emissions that eventually are deposited into water frequented by fish. Nonetheless, by conducting an inspection of OPG's mercury emissions under the *Fisheries Act*, Canada indicates that OPG's emissions might be considered "a deposit of a deleterious substance . . . under [] conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter [water frequented by fish]" within the meaning of s. 36(3). However, Canada also points out the complexity of tracking air emissions to establish the causal source-receptor link between OPG's emissions and specific fish-bearing waters downwind, as well as the need to establish the elements of an offense under s. 36(3) beyond a reasonable doubt. Canada explains as follows:

> The task of measuring mercury emissions in stack gases is difficult and the scientific techniques are quite complicated. Specialized equipment based on a unique determination of the circumstances is required. Due to these complications, and thus high costs, stack sampling programs are usually carried out once a year or once every few years. As a result data on long term monitoring of emission is very scarce.

> The atmospheric modelling of emissions and the attempt to determine their ultimate fate is even more difficult. First, as described above, the data is scarce; and second, there is not full scientific understanding of atmospheric pathways and chemical interactions with mercury in the atmosphere. This science is in its infancy and is the subject of much study and debate in the scientific community. There are currently no comprehensive models available that can deal with the mercury emissions from these stacks.[42]

In view of the apparently unprecedented nature of the application of s. 36(3) to air emissions that are eventually deposited into waters frequented by fish, Canada's inspection of OPG's mercury emissions with a view to considering whether action is warranted under s. 36(3) is a significant step. Because Canada is early in the process of addressing the complexities inherent in undertaking the sampling and studies involved, and noting as well the announced closing of some or all of OPG's coal-fired facilities, the Secretariat has concluded that a factual record at this early stage in Canada's possible pursuit of s. 36(3) charges would be of limited value.

IV. DETERMINATION

For the foregoing reasons, the Secretariat considers that the revised submission, SEM-03-001 (Ontario Power Generation), does not warrant developing a factual record and pursuant to section 9.6 of the Guidelines hereby notifies the Submitters and the Council of its reasons and that the process is terminated with respect to the submission.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

per: William V. Kennedy
Executive Director

cc: Norine Smith, Environment Canada
José Manuel Bulás, SEMARNAT
Judith E. Ayres, US-EPA
Submitters

42. Response at 14.

SEM-03-002

(Home Port Xcaret)

SUBMITTERS: ALFONSO CIPRÉS VILLAREAL, ET AL.

PARTY: MEXICO

DATE: 14 May 2003

SUMMARY: The Submitters allege "legal violations and irregularities in the permit-granting process for the Home Port Xcaret project," which they assert "will irreparably affect and destroy the natural resources and coral ecosystems, gravely endangering countless marine species."

SECRETARIAT DETERMINATIONS:

ART. 14(1) (31 July 2003) Determination that criteria under Article 14(1) have not been met.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de Petición:	**SEM-03-002** (Home Port Xcaret)
Peticionarios:	Luis Hernández, Movimiento Ecologista del Sureste Arturo Rodríguez, Movimiento Ecologista de Playa del Carmen Nancy De Rosa, Movimiento Ecologista de Acumal José Manuel Castello, Movimiento Ecologista de Cozumel Marciano Toledo, Movimiento Ecologista de la Riviera Maya José Antonio Duclaud González Enrique Montero Montero, Movimiento Ecologista Mexicano, A.C. Marcos Falfán Reyes, Movimiento Ecologista Mexicano, A.C. César Mora, Instituto Politécnico Nacional Luis Treviño, Instituto de Ingeniería de la UNAM
Representados por:	Arq. Alfonso Ciprés Villarreal
Parte:	Estados Unidos Mexicanos
Fecha de la petición:	14 de mayo de 2003
Fecha de la determinación:	31 de julio de 2003

I. INTRODUCCIÓN

Con fecha 14 de mayo de 2003, el Sr. Alfonso Ciprés Villarreal presentó al Secretariado de la Comisión para la Cooperación Ambiental ("el Secretariado") una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo") a nombre de las organizaciones sin vinculación gubernamental y personas arriba mencionadas ("los Peticionarios"). La petición asevera, entre otras cosas, que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de la autorización en materia de impacto ambiental (AIA) de un proyecto de muelle en la Riviera Maya, en Quintana Roo ("el Proyecto"). Según el ACAAN, el Secretariado podrá examinar las peticiones que cumplan con los requisitos establecidos en el artículo 14(1). El Secretariado ha determinado que esta petición no cumple con uno de los requisitos del artículo 14(1) para su examen en este proceso, y en este documento expone las razones de su determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios alegan "violaciones legales e irregularidades en el proceso de otorgamiento de permisos del 'Home Port Xcaret'," obra que, afirman, "afectará irreparablemente y destruirá los recursos naturales y los ecosistemas coralinos, poniendo en grave peligro de extinción una infinidad de especies marinas.[1]" Aseveran que la AIA del Proyecto viola el artículo 34 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* ("la LGEEPA"), así como los artículos 37, 38 y 40 a 43 de su Reglamento en materia de Impacto Ambiental ("el Reglamento"), ya que, según sus afirmaciones, se omitió cumplir con la obligación de poner a disposición del público cierta información respecto del Proyecto y llevar a cabo una consulta o reunión pública de información.[2] Los Peticionarios aseveran además que el Proyecto afectara colonias de coral protegidas y que el promovente omitió tramitar la AIA ante la Secretaría de Desarrollo y Medio Ambiente del Estado de Quintana Roo.[3] La petición se acompaña de un video mostrando vida marina y un sistema arrecifal a proximidad de donde se ubicará el Proyecto, y de numerosos artículos de periódicos.

Además de las afirmaciones mencionadas arriba, la petición asevera que hubo irregularidades en el proceso para la solicitud y el

1. Página 1 de la petición.
2. Página 2 de la petición.
3. *Ibid.*

otorgamiento del título de concesión para el Proyecto por la Secretaría de Comunicaciones y Transportes. Según los Peticionarios: (i) Grupo Xcaret y Carnival Corporation omitieron notificar su concentración a la Comisión Nacional de Competencia de acuerdo con los artículos 16, 18, 20 y 21 de la *Ley Federal de Competencia Económica*;[4] (ii) el Proyecto fue calificado como "de uso particular" cuando se trata más bien de una terminal portuaria de altura para "cruceros de uso público," haciendo necesario, de acuerdo con el artículo 24 de la *Ley de Puertos*, convocar a concurso público o a licitación el otorgamiento del título de concesión;[5] y (iii) el Proyecto se ubicará en una zona de monumentos arqueológicos, y el promovente ha omitido obtener un decreto autorizando el cambio de uso del suelo u otras autorizaciones de acuerdo con la *Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos*, cuyo artículo 27 dispone que monumentos arqueológicos son propriedad de la Nación, inalienables e imprescriptibles.[6]

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

4. Página 3 de la petición.
5. *Ibid*.
6. Páginas 5-6 de la petición.

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios, en esta etapa se requiere al menos de cierta revisión inicial para verificar que la petición cumple con estos requisitos.[7] Por lo tanto, el Secretariado examinó la petición en cuestión con tal perspectiva en mente.

La primera cuestión es si la petición "asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". El Secretariado determinó que algunas de las aseveraciones de la petición sí satisfacen este requisito umbral, mientras otras no, por las siguientes razones.

La primera serie de aseveraciones en la petición se relaciona a la AIA del Proyecto.[8] El Secretariado determinó que estas aseveraciones satisfacen el requisito umbral del artículo 14(1) del ACAAN. Los Peticionarios afirman que "la autorización del proyecto viola lo dispuesto por el artículo 34 de la LGEEPA" porqué se emitió sin que se hubiese cumplido, según los Peticionarios, con disposiciones del artículo 34 de la LGEEPA y del Reglamento que establecen reglas para la publicación de información y la posibilidad de reuniones y consultas públicas respecto de proyectos propuestos. La LGEEPA y el Reglamento son "legislación ambiental" para efectos del ACAAN, porque su propósito principal es la protección del ambiente.[9]

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7. En este sentido, véanse (SEM-97-005/Animal Alliance of Canada, et al) Determinación conforme al artículo 14(1) (26 de mayo de 1998); y (SEM-98-003/Department of the Planet Earth, et al) Determinación conforme a los artículos 14(1) y (2) respecto de la versión revisada de la petición (8 de septiembre de 1999).
8. Página 2 de la petición.
9. El artículo 45(2) del ACAAN establece:
   Para los efectos del Artículo 14(1) y la Quinta Parte:
   (a) **'legislación ambiental"** significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
   (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
   (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
   (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
   (b) Para mayor certidumbre, el término "legislación ambiental" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines

Por lo que se relaciona a las aseveraciones de los Peticionarios en torno al otorgamiento del título de concesión para el Proyecto, el Secretariado determinó que estas aseveraciones no cumplen con el requisito umbral del artículo 14(1) del ACAAN. Los Peticionarios aseveran que la Secretaría de Comunicaciones y Transportes emitió el título de concesión para el Proyecto a pesar de presuntas violaciones del artículo 24 de la *Ley de Puertos*, de los artículos 16, 18, 20 y 21 de la *Ley Federal de Competencia Económica*, y del artículo 27 de la *Ley Federal sobre Monumentos y Zonas Arqueológicos, Artísticos e Históricos*. No se trata de aseveraciones respecto de la falta en la aplicación efectiva de legislación ambiental, dado que ninguna de estas disposiciones tiene como propósito principal "la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana" conforme al artículo 45(2) del ACAAN. En consecuencia, el Secretariado está impedido para examinar estas aseveraciones en este proceso.[10]

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en los incisos a), b), d), e) y f) del artículo 14(1), por las siguientes razones. En cuento al inciso a), la petición se presentó por escrito en español, que es el idioma designado por México.[11] Respecto de los incisos b) y f), la petición identifica claramente a las personas u organizaciones que la presentan, y se trata de personas y organizaciones que residen o están establecidas en el territorio de la Parte mexicana.[12] En lo que se relaciona al inciso d), la petición parece encaminada a promover la aplicación de la ley y no a hostigar una industria: los Peticionarios son representantes de movimientos ecologistas, académicos, y un miembro de la comunidad donde se ubicará el Proyecto, por lo que al parecer, no son competidores que podrían beneficiarse económicamente con la petición. Además, sus afirmaciones se centran en la autorización del Proyecto por la Secretaria de Medio Ambiente y Recursos Naturales ("la Semarnat") y no en el

comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

(c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.

10. Aun cuando el Secretariado no se rige por el principio de *stare decisis*, en ocasiones anteriores, al examinar otras determinaciones, ha señalado que las disposiciones citadas deben satisfacer la definición de legislación ambiental. Véanse las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).
11. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las Directrices.
12. Véanse los artículos (14)(1)(b) y (f) del ACAAN.

cumplimiento de una compañía o negocio en particular. Los Peticionarios alegan que no se cumplió con disposiciones de la LGEEPA sobre la participación pública y el derecho a la información en el contexto del otorgamiento de la AIA para el Proyecto, por lo que la petición no parece intrascendente. En cuanto al inciso e), la petición señala que el asunto ha sido comunicado por escrito a las autoridades, ya que alude a un recurso de revisión interpuesto ante la Semarnat que fue rechazado por falta de interés jurídico, y menciona que "actualmente el asunto se ventila en el Tribunal Fiscal Federal del Poder Judicial."

Sin embargo, el Secretariado juzga que la petición no satisface el requisito del inciso c) del artículo 14(1) del ACAAN porque no contiene información suficiente para analizarla. De acuerdo con este inciso y la sección 5.3 de las Directrices, una petición deberá contener una relación sucinta de los hechos en que se funden las aseveraciones de los Peticionarios, y deberá proporcionar información suficiente que permita al Secretariado examinarla, incluidas las pruebas documentales que puedan sustentar la petición. Las secciones 5.5 y 5.6 de las Directrices señalan al respecto, que el Peticionario deberá adjuntar con la petición copias de cualquier correspondencia pertinente con las autoridades pertinentes, y que la petición debería abordar los factores a ser considerados por el Secretariado conforme al artículo 14(2) del ACAAN.

La petición no contiene detalles respecto de la presunta falta en la aplicación efectiva del artículo 34 de la LGEEPA en relación con el Proyecto, por ejemplo, sobre si la Semarnat recibió alguna solicitud para llevar a cabo una consulta pública respecto del Proyecto. La petición tampoco aborda los siguientes factores que orientan al Secretariado para decidir si amerita solicitar una respuesta de la Parte de acuerdo con el artículo 14(2): la cuestión del daño [a los Peticionarios]; si el estudio ulterior de los asuntos planteados en la petición contribuiría a alcanzar las metas del ACAAN; y la medida en que la petición se base exclusivamente en noticias de los medios de comunicación. La petición se acompaña de un video mostrando vida marina y un sistema arrecifal proximo al sitio propuesto para el Proyecto, y de numerosos artículos de periódicos. Sin embargo, no se acompaña de copias de cualquier correspondencia pertinente con las autoridades o de otra información pertinente, como por ejemplo una copia de la AIA o del recurso de revisión mencionado en la petición.

Habiendo revisado la petición de conformidad con el artículo 14(1), el Secretariado determinó que la petición no satisface todos los requisitos en él establecidos, por las razones arriba descritas.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado ha revisado la petición en conformidad con el artículo 14(1) del ACAAN y considera que no cumple con todos los requisitos allí establecidos, porque no contiene suficiente información que permita al Secretariado revisar la petición.

En cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica al Peticionario que no procederá a examinar la petición. No obstante, de acuerdo con el apartado 6.2 de las Directrices, el Peticionario cuenta con 30 días para presentar una petición que cumpla con los requisitos del artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: Victor Shantora
Director Ejecutivo Interino

cc: Dra. Olga Ojeda, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. Alfonso Ciprés Villarreal

SEM-03-003

(Lake Chapala II)

SUBMITTERS: DR. RAQUEL GUTIERREZ NAJERA, ET AL.

PARTY: MEXICO

DATE: 23 May 2003

SUMMARY: The Submitters assert that Mexico is failing to effectively enforce its environmental law with respect to the Lerma-Chapala-Santiago-Pacífico basin. According to the Submitters, this has resulted in serious environmental deterioration and uneven water distribution in the basin, as well as the risk that Lake Chapala and its migratory birds will eventually disappear.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (19 December 2003) Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Núm. de petición:	**SEM-03-003** (Lago de Chapala II)
Peticionaria(os):	Fundación Lerma-Chapala-Santiago Pacífico, A.C. Sociedad Amigos del Lago de Chapala, A.C. Instituto de Derecho Ambiental, A.C. Vecinos de la Comunidad de Juanacatlán, Jalisco Comité Pro-Defensa de Arcediano, A.C. Amigos de la Barranca, A.C. Ciudadanos por el Medio Ambiente, A.C. AMCRESP, A.C. Red Ciudadana, A.C.
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	23 de mayo de 2003
Fecha de la determinación:	19 de diciembre de 2003

I. ANTECEDENTES

El 23 de mayo de 2003, la Fundación Lerma-Chapala-Santiago-Pacífico, A.C., Sociedad Amigos del Lago de Chapala, A.C., el Instituto de Derecho Ambiental, A.C., Vecinos de la Comunidad de Juanacatlán, Jal., Comité Pro-Defensa de Arcediano, A.C., Amigos de la Barranca, A.C., Ciudadanos por el Medio Ambiente, A.C., Amcresp, A.C. y Red Ciudadana, A.C. (los "Peticionarios"), presentaron al Secretariado de la

Comisión para la Cooperación Ambiental (el "Secretariado") una petición de conformidad con los artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* (el "Acuerdo" o "ACAAN").

Según el ACAAN, el Secretariado podrá examinar las peticiones que cumplan con los requisitos establecidos en el artículo 14(1). Si considera que una petición cumple con esos requisitos, el Secretariado debe determinar si la petición amerita solicitar una respuesta de la Parte. Para llegar a esta determinación, el Secretariado se orienta por las consideraciones listadas en el artículo 14(2) del ACAAN.

El Secretariado ha determinado que la petición SEM-03-003 (Lago de Chapala II) cumple con todos los requisitos establecidos en el artículo 14(1) del ACAAN y que amerita solicitar una respuesta de la Parte con acuerdo al artículo 14(2), por las razones que se exponen en la sección III de la presente determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que México está omitiendo aplicar de manera efectiva su legislación ambiental[1] en relación con la gestión de los recursos hídricos en la Cuenca Hidrológica Lerma-Chapala-Santiago-Pacífico (Región Hidrológica XII) ("la Cuenca").[2] Afirman que eso tiene como consecuencia el grave deterioro ambiental y desequilibrio hídrico de la Cuenca, así como el riesgo de que el Lago de Chapala y el hábitat de aves migratorias que llegan al mismo desaparezcan.[3] Citan como ejemplos el estado de contaminación del río Santiago,[4] al que le atribuyen graves repercusiones en la salud de los habitantes de Juanacatlán,[5] así como el bajo nivel del Lago de Chapala,[6] que según los Peticionarios está poniendo en peligro el hábitat del pelícano blanco.[7]

Según afirman los Peticionarios, la Parte no está garantizando la participación ciudadana de una manera efectiva en la política ambiental

1. Véase la página 7 de la petición: LGEEPA: artículos 1, 2, 5 (fracciones III, IV, XVI, XI, XIX), 18, 78, 79 (fracciones I, III), 80 (fracciones I, VII), 83, 88 (fracciones I, II, III), 89, 133, 157, y 161-170; Reglamento de la LGEEPA en Materia de Impacto Ambiental: artículo 3 (fracciones III-IX); LAN: artículos 1, 2, 3 (fracciones IV, V), 4, 7 (fracciones II, IV, VIII), 9 (fracciones I, XIII); Reglamento de la LAN: artículo 2 (fracciones IV, V, VIII, XII, XIV, XVI-XXV), y Reglamento Interior de la Semarnat: artículo 44.
2. Página 1 de la petición.
3. *Ibid.*
4. Páginas 7 y 12 de la petición, y anexo XXV.
5. Página 7 de la petición.
6. Página 3 de la petición.
7. Páginas 6 y 7 de la petición, y anexo XXIV.

respecto de la Cuenca porque, según sostienen, todas las iniciativas en las que participó la sociedad civil, y que son descritas en la Petición, para solucionar la problemática de la calidad y cantidad de agua en la Cuenca

> [...] no pasaron de eso, de buenas intenciones, y cuyo sinnúmero de borradores se encuentran en los archivos tanto del Secretario del Ambiente como del Director General y Regional de la Comisión Nacional del Agua.[8]

Los Peticionarios aseveran que, en el caso del río Santiago, la Secretaría del Medio Ambiente y Recursos Naturales ("Semarnat") está omitiendo la aplicación efectiva del artículo 133 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* ("LGEEPA") al no realizar un monitoreo sistemático y permanente de la calidad del agua del río con el fin de detectar la presencia de contaminantes o exceso de desechos orgánicos y aplicar las medidas que procedan.[9] Alegan que la Semarnat está omitiendo aplicar los criterios de aprovechamiento sustentable del agua y de los ecosistemas acuáticos del artículo 88 de la LGEEPA al permitir la construcción de una presa en la barranca de Huentitán (Presa Arcediano), en el río Santiago, para abastecer de agua a la zona metropolitana de Guadalajara, a pesar tanto de una declaratoria de protección del gobierno municipal de Guadalajara de 1997 que interdice la construcción de tal obra, como del grado de contaminación del río.[10] Afirman:

> Luego entonces, la autoridad está omitiendo estos criterios de manejo de recursos hídricos, cuando la Autoridad de la Comisión Nacional del Agua y del estado de Jalisco (CEAS) están pretendiendo construir una Presa Arcediano en el Río Santiago, sin antes restaurar el funcionamiento del equilibrio ecológico del mismo, al margen de la política ambiental que hoy en día está explicitada en los diversos instrumentos jurídicos alusivos a la Cuenca en comento.[11]

Los Peticionarios sostienen que la Comisión Nacional del Agua ("CNA") está delegando en el Consejo de Cuenca las decisiones sobre el uso y la distribución del agua en la zona y, por tanto, no está aplicando de manera efectiva las disposiciones de la *Ley de Aguas Nacionales* ("LAN") que le confieren la autoridad y la responsabilidad de tomar decisiones en la materia.[12] Según los Peticionarios, la Parte está impidiendo la corresponsabilidad de la ciudadanía en la protección del ambiente al delegar en el Consejo de Cuenca las decisiones sobre el

8. Página 8 de la petición.
9. Página 12 de la petición.
10. Página 9 de la petición.
11. *Ibid.*
12. Página 10 de la petición.

manejo y distribución del agua en la Cuenca, y sin embargo considerar que las decisiones que de dicho Consejo emanen no son sujetas a ser impugnadas por la ciudadanía mediante los recursos de revisión previstos por la LAN.[13] Afirman:

> Planteada así nuestra premisa, la CNA, debería asumir su Autoridad en materia de distribución y aprovechamiento del recurso hídrico en México, lo que a la fecha ha omitido en virtud de que se ha escudado reiterativamente en el Consejo de Cuenca para evadir la responsabilidad en el marco de la ley de Aguas Nacionales la aplicación de la Ley en el aprovechamiento y distribución del agua, tal es el caso de las respuestas dadas a dos diferentes peticiones realizadas por la Fundación a efecto de conocer el acto de autoridad que estaba decidiendo sobre la distribución del agua y de la que le correspondería al Lago de Chapala como se desprende de los diversos oficios de fechas 26 de Noviembre del 2001, 11 de febrero y 14 de noviembre del 2002 y 10 de Enero del 2003, escritos a los cuales la CNA contesta en forma evasiva lavándose las manos y cuando le conviene a efecto de evadir su responsabilidad, dice que el Consejo de Cuenca no es autoridad y cuando se le pide el acto de autoridad, dice que se resolvió en el consejo de cuencas, incumpliendo de manera impune y reiterativa el contenido del artículo 4, de la Ley Federal del Procedimiento Administrativo de aplicación supletoria a la Ley de Aguas Nacionales [...][14]

Los Peticionarios aseveran que los acuerdos concluidos por el Consejo están viciados de nulidad: primero, al no respetar la prioridad que la LAN otorga al uso doméstico del agua y, segundo, al no cumplir con los requisitos de forma para actos de autoridad señalados en los artículos 3, 4 y 5 de la *Ley Federal de Procedimiento Administrativo*.[15]

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14 DEL ACUERDO

a) El artículo 14(1) del ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;

13. Páginas 4, 5 y 13 de la petición.
14. Página 10 de la petición.
15. Páginas 10 a 12 de la petición.

(b) identifica claramente a la persona u organización que presenta la petición;

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;

(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Para que el Secretariado pueda examinar si la petición cumple con los criterios establecidos en los incisos a)-f) del artículo 14(1) del Acuerdo, la petición debe satisfacer el requisito umbral del artículo 14(1). Esto lo hace, en el sentido de que la presentan varias organizaciones sin vinculación gubernamental y asevera que una Parte, México, está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. Sin embargo, no todas las disposiciones legislativas identificadas por los Peticionarios[16] son disposiciones cuya aplicación se puede revisar dentro del procedimiento de peticiones ciudadanas establecido por los artículos 14 y 15 del ACAAN. A continuación se hace un análisis de las disposiciones de referencia para identificar las que guardan congruencia con los términos del encabezado del artículo 14 del ACAAN.

El Secretariado ya determinó, al analizar peticiones anteriores, que aseveraciones en cuanto a omisiones en la aplicación de disposiciones que establecen derechos procesales de la sociedad civil respecto a asuntos ambientales se ajustan a los requisitos del preámbulo del artículo 14(1) del ACAAN, debido a que las disposiciones mismas se encuadran en la definición de "legislación ambiental" contenida en el ACAAN.[17]

16. Véase la página 7 de la petición: LGEEPA: artículos 1, 2, 5 (fracciones III, IV, XVI, XI, XIX), 18, 78, 79 (fracciones I, III), 80 (fracciones I, VII), 83, 88 (fracciones I, II, III), 89, 133, 157, y 161-170; Reglamento de la LGEEPA en Materia de Impacto Ambiental: artículo 3 (fracciones III-IX); LAN: artículos 1, 2, 3 (fracciones IV, V), 4, 7 (fracciones II, IV, VIII), 9 (fracciones I, XIII); Reglamento de la LAN: artículo 2 (fracciones IV, V, VIII, XII, XIV, XVI-XXV), y Reglamento Interior de la Semarnat: artículo 44.

17. El artículo 45(2) del Acuerdo establece:
Para los efectos del Artículo 14(1) y la Quinta Parte:
(a) "legislación ambiental" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

Al analizar la petición SEM-00-006 (Tarahumara), la cual asevera omisiones en la aplicación de las disposiciones de la LGEEPA en torno al procedimiento de denuncia popular y el recurso de revisión, el Secretariado determinó que

> [e]s claro entonces, que las disposiciones que establecen el recurso de revisión satisfacen la definición de legislación ambiental del ACAAN porque al igual que en el caso de la denuncia popular, estas disposiciones establecen un mecanismo cuyo propósito principal es la protección del medio ambiente mediante la participación de cualquier persona en la vigilancia del cumplimiento de la ley ambiental.[18]

En casos anteriores, para determinar si una petición se refería a una omisión en la aplicación efectiva de la ley, el Secretariado examinaba si los peticionarios aseveraban una omisión en el cumplimiento de una obligación legal específica.[19] El Anexo 1 de esta determinación contiene el texto de las disposiciones legislativas identificadas por los Peticionarios. De estas disposiciones, algunas contienen definiciones,[20] otras contienen listas de atribuciones del gobierno federal de acuerdo con la LGEEPA,[21] y de la CNA y los consejos de cuenca de acuerdo con la LAN.[22] Se incluyen las disposiciones que definen los objetivos y campos de aplicación de la LGEEPA[23] y de la LAN,[24] además de disposiciones que listan asuntos que se consideran de utilidad pública.[25] La petición

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(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas

en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

(b) Para mayor certidumbre, el término "legislación ambiental" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.

18. Véase SEM-00-006 (Tarahumara), Determinación conforme a los artículos 14(1) y (2) (6 de noviembre de 2001) en la página 8.
19. Véase SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999) en la página 7.
20. El artículo 3 del Reglamento de la LGEEPA en materia de impacto ambiental: el artículo 3 de la LAN: el artículo 2 del Reglamento de la LAN.
21. El artículo 5 de la LGEEPA.
22. Artículos 4, 9 y 13 de la LAN y artículo 44 del Reglamento Interior de la Semarnat.
23. Artículo 1 de la LGEEPA.
24. Artículos 1 y 2 de la LAN.
25. Artículo 2 de la LGEEPA y artículo 7 de la LAN.

también enumera disposiciones que listan principios o criterios que el Ejecutivo Federal observará, por ejemplo, para la conducción de la política ambiental,[26] y considerará para la preservación y aprovechamiento sustentable de la flora y fauna silvestre y para el aprovechamiento sustentable del agua y los ecosistemas acuáticos.[27] Se listan las disposiciones de la LGEEPA que enumeran las facultades de vigilancia y inspección de la Semarnat, además de la disposición que faculta a la Semarnat para ordenar medidas de seguridad en materia ambiental.[28]

La petición se basa también en una disposición que prevé que el Ejecutivo Federal promoverá la participación de los distintos grupos sociales en la elaboración de los programas ambientales, y otra que dispone que el Gobierno Federal deberá promover la participación corresponsable de la sociedad en la planeación, ejecución, evaluación y vigilancia de la política ambiental y de recursos naturales.[29] La petición identifica una disposición que establece que la Semarnat deberá formular y ejecutar programas de restauración ecológica en aquellas áreas que presenten procesos de degradación o desertificación, o graves desequilibrios ecológicos.[30] Se identifica también una disposición que prevé que la Semarnat realizará un sistemático y permanente monitoreo de la calidad de las aguas, para detectar la presencia de contaminantes o exceso de desechos orgánicos y aplicar las medidas que procedan.[31]

El Secretariado concluyó que de las disposiciones de referencia, las que contienen definiciones,[32] las que describen el objetivo y campo de aplicación de la LGEEPA[33] y de la LAN,[34] y las listas de lo que se considera de utilidad pública,[35] mientras sirven para interpretar el sentido de las demás disposiciones de estas leyes, no son disposiciones cuya aplicación se puede revisar de acuerdo con el artículo 14 del ACAAN, porqué no confieren a la autoridad alguna facultad, o bien, le imponen alguna obligación. Respecto de las demás disposiciones, el Secretariado determinó que en cuanto su propósito principal es la protección del medio ambiente y confieren a la autoridad alguna atribución o facultad, o le imponen alguna obligación, los alegatos de los Peticionarios respecto de

26. Artículo 15 de la LGEEPA.
27. Artículos 79, 80, 88 y 89 de la LGEEPA.
28. Artículos 161-170 de la LGEEPA.
29. Artículos 18 y 157 de la LGEEPA.
30. Artículo 78 de la LGEEPA.
31. Artículo 133 de la LGEEPA.
32. El artículo 3 del Reglamento de la LGEEPA en materia de impacto ambiental: el artículo 3 de la LAN: el artículo 2 del Reglamento de la LAN.
33. Artículo 1 de la LGEEPA.
34. Artículos 1 y 2 de la LAN.
35. Artículo 2 de la LGEEPA y artículo 7 de la LAN.

presumidas omisiones en su aplicación efectiva se pueden revisar de acuerdo con los criterios establecidos en los incisos a)-f) del artículo 14(1) del Acuerdo.

El Secretariado determinó que la petición cumple con los requisitos a), b) y f) del artículo 14(1) del Acuerdo, toda vez que fue presentada por escrito en español, el idioma designado por México para tales efectos;[36] los Peticionarios se identifican claramente en la petición,[37] y, a partir de la información proporcionada por los Peticionarios, es posible constatar que tienen su domicilio en México.

En cuanto a los requisitos establecidos en los incisos c) y e), el Secretariado determinó que la información y documentos proporcionados por los Peticionarios son suficientes para permitir al Secretariado analizar algunos alegatos de la petición. En la parte V de la petición, que lleva el encabezado "Omisiones en la aplicación de la normatividad ambiental: acuerdo paralelo y legislación mexicana," los Peticionarios aseveran que la Parte está incurriendo en omisiones en la aplicación de ciertas disposiciones de la LGEEPA y la LAN[38] al no: 1) aplicar de manera efectiva las políticas elaboradas con la participación de la sociedad civil en lo que se refiere a la Cuenca (ejemplo de la Presa Arcediano);[39] 2) dar seguimiento a quejas de ciudadanos que vigilan el cumplimiento de la Ley (ejemplo de las quejas de los habitantes de Juanacatlán respecto de la contaminación del Río Santiago);[40] 3) ejercer las atribuciones que confiere la LAN a la CNA en cuanto a firmar y ejecutar acuerdos sobre el uso y distribución del agua en la Cuenca.[41] La petición cuenta con 27 anexos que contienen información que se relaciona a las afirmaciones contenidas en la petición respecto de los asuntos mencionados arriba. Entre los anexos se encuentran copias de correspondencia con las autoridades, informes técnicos, copias de acuerdos de coordinación entre entidades federales y estatales para la gestión del agua en la Cuenca, decretos, fotografías, artículos periodísticos y documentos de otro tipo. La petición también señala que el asunto se comunicó por escrito a la Procuraduría Federal de Protección al Ambiente ("Profepa"), la CNA, la Semarnat y otras autoridades.[42]

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36. Véase también el apartado 3.2 de las *Directrices para la Presentación de Peticiones* ("las Directrices").
37. Página 2 de la petición.
38. Página 7 de la petición. Véase el Anexo 1 de esta determinación.
39. Página 8 y 9 de la petición.
40. Página 12 de la petición.
41. Páginas 9 y 10 de la petición.
42. Véase recurso de revocación, páginas 4 y 5 de la petición y anexos XVI y XVII; documento de reflexión, página 5 de la petición y anexo XX; escrito al Presidente de

El 15 de agosto y el 2 de septiembre de 2003, el Secretariado solicitó a los Peticionarios una copia de un acuerdo de la Profepa, mencionado en un anexo a la petición, notificado al C. Manuel Villagómez Rodríguez, presidente de la Fundación Cuenca Lerma-Chapala-Santiago-Pacífico, A.C., el 28 de marzo de 2003 y que se relaciona con una denuncia popular interpuesta por esta persona.[43] Los Peticionarios entregaron al Secretariado una copia de tal acuerdo el 18 de septiembre de 2003,[44] seguido el 2 de octubre por un oficio de la CNA al que se refiere el multicitado acuerdo de la Profepa. También el 2 de octubre, los Peticionarios proporcionaron al Secretariado copias de artículos periodísticos relacionados a un desvío del trasvase de la presa Solís en el estado de Guanajuato por parte de un grupo de campesinos, y copias de peticiones respecto del estado del Lago de Chapala.[45]

Respecto al inciso d) del artículo 14(1) del Acuerdo, el Secretariado concluyó que la petición no parece estar encaminada a hostigar a una industria, sino a promover la aplicación de la legislación ambiental en México. Esto en virtud de que la petición está esencialmente referida a omisiones de la autoridad en México y no al cumplimiento de una empresa en particular. La petición tampoco plantea una cuestión intrascendente.[46]

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la República, página 6 de la petición y anexo XXII; escrito a la CNA, página 6 de la petición y anexo XXIII; denuncia popular, página 7 de la petición y anexo II; denuncias de los habitantes de Juanacatlán, página 7 de la petición y anexo XXV.

43. Véase el anexo II de la petición, carta de Manuel Villagómez Rodríguez fechada el 10 de abril de 2003 y dirigida al delegado de la Profepa en el estado de Jalisco. Véase también el apartado 5.5 de las Directrices: "La petición deberá indicar que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte en cuestión e indicar la respuesta de la Parte, si la hubiera. El Peticionario adjuntará con la petición, copias de cualquier correspondencia pertinente con las autoridades pertinentes [...]" y el apartado 3.10 de las Directrices: "El Secretariado podrá notificar en cualquier momento al Peticionario la existencia de errores menores de forma en la petición para que éste los rectifique".
44. El oficio recibido por el Secretariado tiene el número P.F.-E27-D.D.Q.-1100-(02) 5698 y lleva la fecha 26 de noviembre del 2002.
45. Carta del Gerente Regional Lerma Santiago Pacífico de la CNA, Raúl Antonio Iglesias Benítez, al delegado de la Profepa para el estado de Jalisco, Oficio No. BOO.00.R12.07.3/86, Asunto: Relativo al oficio No. P.F.-E27.-D.D.A.Q.P.S.-0835-(02) 4270, recibida por la Profepa el 25 de octubre del 2002.
46. Véase también el apartado 5.4 de las Directrices, que señala que el Secretariado, al determinar si la petición está encaminada a promover la aplicación efectiva de la legislación ambiental y no a hostigar a una industria, tomará en cuenta: (i) "si la petición se centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular; especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición"; y (ii) "si la petición parece intrascendente".

b) El artículo 14(2) del ACAAN

El artículo 14(2) del ACAAN dispone que cuando el Secretariado considere que una petición cumple con los requisitos estipulados en el párrafo 1 del artículo 14, determinará si la petición amerita solicitar una respuesta de la Parte. Para decidir si debe solicitar una respuesta, el Secretariado se orientará por las siguientes consideraciones:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Con la orientación de las consideraciones expuestas arriba, el Secretariado determina que la petición amerita solicitar una respuesta a la Parte. De acuerdo con el inciso a) del artículo 14(2), la petición alega daño a las personas y organizaciones que la presentaron: dos de los Peticionarios son habitantes de Juanacatlán, donde, según se asevera, el estado de contaminación del río Santiago está teniendo efectos nocivos en la salud de las personas.[47] Además, todos los Peticionarios aseveran que la presumida falta por parte de la autoridad ambiental de ejercer las atribuciones que le confieren la LAN y la LGEEPA para la protección de los ecosistemas acuáticos "se ha traducido en [...] la imposibilidad material por parte de los denunciantes de ejercer las garantías procesales para acceder a justicia en cuanto a la legalidad de los actos de la autoridad en materia de aguas en México [...].[48]"

Respecto del inciso b) del artículo 14(2), la petición también plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, sobre todo las dispuestas en los incisos (a), (g) y (j) del artículo 1 del ACAAN. En cuanto al inciso c), uno de los Peticionarios ha interpuesto una denuncia popular ante la Profepa, que aborda temas similares a los que se plantean en la petición, por lo que se comprueba haber acudido a los recursos al alcance de los particulares.[49]

47. Página 12 de la petición.
48. *Ibid*.
49. Anexo II de la petición.

Finalmente, con respecto al inciso d), la petición no se basa exclusivamente en noticias de los medios de comunicación, sino también en actas de autoridades ambientales y otros escritos.

Tras haber analizado las aseveraciones contenidas en la parte V de la petición a la luz de la información proporcionada y las disposiciones legislativas citadas por los Peticionarios bajo el rubro "Legislación ambiental mexicana cuya aplicación fue omitida," el Secretariado considera que se amerita solicitar una respuesta a la Parte respecto de la aplicación de las siguientes disposiciones legislativas en cuanto a los siguientes asuntos identificados por los Peticionarios: artículos 88 fracciones II y III, 89 y 157 de la LGEEPA respecto del Proyecto de la Presa Arcediano; artículo 88 fracción I y 133 de la LGEEPA respecto de las quejas ciudadanas de habitantes de Juanacatlán en cuanto al estado de contaminación del Río Santiago; artículos 4, 7 fracción IV y 9 fracción XIII de la LAN en cuanto a la conclusión y ejecución de acuerdos sobre el uso y distribución de agua en la Cuenca.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado examinó la petición SEM-03-003 (Lago de Chapala II) de acuerdo con el artículo 14(1) del ACAAN y determina que algunas aseveraciones de la misma cumplen, según las razones expuestas en esta determinación, con todos los requisitos allí establecidos. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que la petición amerita solicitar una respuesta a la Parte interesada, en este caso los Estados Unidos Mexicanos, a las aseveraciones de los Peticionarios respecto de la aplicación de las siguientes disposiciones legislativas en cuanto a los siguientes asuntos: artículos 88 fracciones II y III, 89 y 157 de la LGEEPA respecto del Proyecto de la Presa Arcediano; artículos 88 fracción I y 133 de la LGEEPA respecto de las quejas ciudadanas de habitantes de Juanacatlán en cuanto al estado de contaminación del Río Santiago, y artículos 4, 7 fracción IV y 9 fracción XIII de la LAN en cuanto a la conclusión y ejecución de acuerdos sobre el uso y distribución de agua en la Cuenca, y así lo hace.

Conforme a lo establecido en el artículo 14(3) del ACAAN, la Parte podrá proporcionar una respuesta a la petición dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a la misma. Dado que a la Parte interesada ya se le enviaron copias de la petición y de los anexos respectivos, no se acompañan a esta determinación.

Secretariado de la Comisión para la Cooperación Ambiental

por: Katia Opalka
Oficial jurídica
Unidad sobre Peticiones Ciudadanas

cc: Lic. José Manuel Bulás, Semarnat
Sra. Norine Smith, Ministerio de Medio Ambiente de Canadá
Sra. Judith E. Ayres, EPA de EU
Dra. Raquel Gutiérrez Nájera, Instituto de Derecho Ambiental, A.C.
Sr. William Kennedy, Director Ejecutivo de la CCA

Anexo 1

LGEEPA

Artículo 1

La presente Ley es reglamentaria de las disposiciones de la Constitución Política de los Estados Unidos Mexicanos que se refieren a la preservación y restauración del equilibrio ecológico, así como a la protección al ambiente, en el territorio nacional y las zonas sobre las que la nación ejerce su soberanía y jurisdicción. Sus disposiciones son de orden público e interés social y tienen por objeto propiciar el desarrollo sustentable y establecer las bases para:

I.- Garantizar el derecho de toda persona a vivir en un medio ambiente adecuado para su desarrollo, salud y bienestar;

II.- Definir los principios de la política ambiental y los instrumentos para su aplicación;

III.- La preservación, la restauración y el mejoramiento del ambiente;

IV.- La preservación y protección de la biodiVéasesidad, así como el establecimiento y administración de las áreas naturales protegidas;

V.- El aprovechamiento sustentable, la preservación y, en su caso, la restauración del suelo, el agua y los demás recursos naturales, de manera que sean compatibles la obtención de beneficios económicos y las actividades de la sociedad con la preservación de los ecosistemas;

VI.- La prevención y el control de la contaminación del aire, agua y suelo;

VII.- Garantizar la participación corresponsable de las personas, en forma individual o colectiva, en la preservación y restauración del equilibrio ecológico y la protección al ambiente;

VIII.- El ejercicio de las atribuciones que en materia ambiental corresponde a la Federación, los Estados, el Distrito Federal y los Municipios, bajo el principio de concurrencia previsto en el artículo 73 fracción XXIX – G de la Constitución;

IX.- El establecimiento de los mecanismos de coordinación, inducción y concertación entre autoridades, entre éstas y los sectores social y privado, así como con personas y grupos sociales, en materia ambiental, y

X.- El establecimiento de medidas de control y de seguridad para garantizar el cumplimiento y la aplicación de esta Ley y de las disposiciones que de ella se deriven, así como para la imposición de las sanciones administrativas y penales que correspondan.

En todo lo no previsto en la presente Ley, se aplicarán las disposiciones contenidas en otras leyes relacionadas con las materias que regula este ordenamiento.

Artículo 2

Se consideran de utilidad pública:

I.- El ordenamiento ecológico del territorio nacional en los casos previstos por ésta y las demás leyes aplicables;

II.- El establecimiento, protección y preservación de las áreas naturales protegidas y de las zonas de restauración ecológica;

III.- La formulación y ejecución de acciones de protección y preservación de la biodiVéasesidad del territorio nacional y las zonas sobre las que la nación ejerce su soberanía y jurisdicción, así como el aprovechamiento de material genético; y

IV.- El establecimiento de zonas intermedias de salvaguardia, con motivo de la presencia de actividades consideradas como riesgosas.

Artículo 5

Son facultades de la Federación:

III.- La atención de los asuntos que afecten el equilibrio ecológico en el territorio nacional o en las zonas sujetas a la soberanía y jurisdicción de la nación, originados en el territorio o zonas sujetas a la soberanía o jurisdicción de otros Estados, o en zonas que estén más allá de la jurisdicción de cualquier Estado;

IV.- La atención de los asuntos que, originados en el territorio nacional o las zonas sujetas a la soberanía o jurisdicción de la nación afecten el equilibrio ecológico del territorio o de las zonas sujetas a la soberanía o jurisdicción de otros Estados, o a las zonas que estén más allá de la jurisdicción de cualquier Estado; [...]

XI.- La regulación del aprovechamiento sustentable, la protección y la preservación de las aguas nacionales, la biodiVéasesidad, la fauna y los demás recursos naturales de su competencia; [...]

XVI.- La promoción de la participación de la sociedad en materia ambiental, de conformidad con lo dispuesto en esta Ley; [...]

XIX.- La vigilancia y promoción, en el ámbito de su competencia, del cumplimiento de esta Ley y los demás ordenamientos que de ella se deriven; [...]

Artículo 18

El Gobierno Federal promoVéaseá la participación de los distintos grupos sociales en la elaboración de los programas que tengan por objeto la preservación y restauración del equilibrio ecológico y la protección al ambiente, según lo establecido en esta Ley y las demás aplicables.

Artículo 78

En aquellas áreas que presenten procesos de degradación o desertificación, o graves desequilibrios ecológicos, la Secretaría deberá formular y ejecutar programas de restauración ecológica, con el propósito de que se lleven a cabo las acciones necesarias para la recuperación y restablecimiento de las condiciones que propicien la evolución y continuidad de los procesos naturales que en ella se desarrollaban.

En la formulación, ejecución y seguimiento de dichos programas, la Secretaría deberá promoVéase la participación de los propietarios, poseedores, organizaciones sociales, públicas o privadas, pueblos indígenas, gobiernos locales, y demás personas interesadas.

Artículo 79

Para la preservación y aprovechamiento sustentable de la flora y fauna silvestre, se considerarán los siguientes criterios:

I.- La preservación de la biodiVéasesidad y del hábitat natural de las especies de flora y fauna que se encuentran en el territorio

nacional y en las zonas donde la nación ejerce su soberanía y jurisdicción; [...]

III.- La preservación de las especies endémicas, amenazadas, en peligro de extinción o sujetas a protección especial; [...]

Artículo 80

Los criterios para la preservación y aprovechamiento sustentable de la flora y fauna silvestre, a que se refiere el artículo 79 de esta Ley, serán considerados en:

I.- El otorgamiento de concesiones, permisos y, en general, de toda clase de autorizaciones para el aprovechamiento, posesión, administración, conservación, repoblación, propagación y desarrollo de la flora y fauna silvestres; [...]

VII.- La creación de áreas de refugio para proteger las especies acuáticas que así lo requieran; [...]

Artículo 83

El aprovechamiento de los recursos naturales en áreas que sean el habitat de especies de flora o fauna silvestres, especialmente de las endémicas, amenazadas o en peligro de extinción, deberá hacerse de manera que no se alteren las condiciones necesarias para la subsistencia, desarrollo y evolución de dichas especies.

La Secretaría deberá promoVéase y apoyar el manejo de la flora y fauna silvestre, con base en el conocimiento biológico tradicional, información técnica, científica y económica, con el propósito de hacer un aprovechamiento sustentable de las especies.

Artículo 88

Para el aprovechamiento racional del agua y los ecosistemas acuáticos se considerarán los siguientes criterios:

I.- Corresponde al Estado y a la Sociedad la protección de los ecosistemas acuáticos y del equilibrio de los elementos naturales que intervienen en el ciclo hidrológico;

II.- El aprovechamiento sustentable de los recursos naturales que comprenden los ecosistemas acuáticos deben realizarse de manera que no se afecte su equilibrio ecológico;

III.- Para mantener la integridad y el equilibrio de los elementos naturales que intervienen en el ciclo hidrológico, se deberá considerar la protección de suelos y áreas boscosas y selváticas y el mantenimiento de caudales básicos de las corrientes de agua, y la capacidad de recarga de los acuíferos, [...]

Artículo 89

Los criterios para el aprovechamiento racional del agua y de los ecosistemas acuáticos, serán considerados en:

I.- La formulación e integración del Programa Nacional Hidráulico;

II.- El otorgamiento de concesiones, permisos, y en general toda clase de autorizaciones para el aprovechamiento de recursos naturales o la realización de actividades que afecten o puedan afectar el ciclo hidrológico;

III.- El otorgamiento de autorizaciones para la desviación, extracción o derivación de aguas de propiedad nacional;

IV.- El establecimiento de zonas reglamentadas, de veda o de reserva;

V.- Las suspensiones o revocaciones de permisos, autorizaciones, concesiones o asignaciones otorgados conforme a las disposiciones previstas en la Ley de Aguas Nacionales, en aquellos casos de obras o actividades que dañen los recursos hidráulicos nacionales o que afecten el equilibrio ecológico;

VI.- La operación y administración de los sistemas de agua potable y alcantarillado que sirven a los centros de población e industrias;

VII.- Las previsiones contenidas en el programa director para el desarrollo urbano del Distrito Federal respecto de la política de reuso de aguas;

VIII.- Las políticas y programas para la protección de especies acuáticas endémicas, amenazadas, en peligro de extinción o sujetas a protección especial;

IX.- Las concesiones para la realización de actividades de acuacultura, en términos de lo previsto en la Ley de Pesca, y

X.- La creación y administración de áreas o zonas de protección pesquera.

Artículo 133

La Secretaría, con la participación que en su caso corresponda a la Secretaría de Salud conforme a otros ordenamientos legales, realizará un sistemático y permanente monitoreo de la calidad de las aguas, para detectar la presencia de contaminantes o exceso de desechos orgánicos y aplicar las medidas que procedan. En los casos de aguas de jurisdicción local se coordinará con las autoridades de los Estados, el Distrito Federal y los Municipios.

Artículo 157

El Gobierno Federal deberá promoVéase la participación corresponsable de la sociedad en la planeación, ejecución, evaluación y vigilancia de la política ambiental y de recursos naturales.

Artículo 161

La Secretaría realizará los actos de inspección y vigilancia del cumplimiento de las disposiciones contenidas en el presente ordenamiento, así como de las que del mismo se deriven.

En las zonas marinas mexicanas la Secretaría, por sí o por conducto de la Secretaría de Marina, realizará los actos de inspección, vigilancia y, en su caso, de imposición de sanciones por violaciones a las disposiciones de esta Ley.

Artículo 162

Las autoridades competentes podrán realizar, por conducto de personal debidamente autorizado, visitas de inspección, sin perjuicio de otras medidas previstas en las leyes que puedan llevar a cabo para Véaseificar el cumplimiento de este ordenamiento.

Dicho personal, al realizar las visitas de inspección, deberá contar con el documento oficial que los acredite o autorice a practicar la inspección o Véaseificación, así como la orden escrita debidamente fundada y motivada, expedida por autoridad competente, en la que se precisará el lugar o zona que habrá de inspeccionarse y el objeto de la diligencia.

Artículo 163

El personal autorizado, al iniciar la inspección, se identificará debidamente con la persona con quien se entienda la diligencia, exhibiéndole, para tal efecto credencial vigente con fotografía, expedida por autoridad competente que lo acredite para realizar visitas de inspección en la materia, y le mostrará la orden respectiva, entregándole copia de la misma con firma autógrafa, requiriéndola para que en el acto designe dos testigos.

En caso de negativa o de que los designados no acepten fungir como testigos, el personal autorizado podrá designarlos, haciendo constar esta situación en el acta administrativa que al efecto se levante, sin que esta circunstancia invalide los efectos de la inspección.

En los casos en que no fuera posible encontrar en el lugar de la visita persona que pudiera ser designada como testigo, el personal actuante deberá asentar esta circunstancia en el acta administrativa que al efecto se levante, sin que ello afecte la validez de la misma.

Artículo 164

En toda visita de inspección se levantará acta, en la que se harán constar en forma circunstanciada los hechos u omisiones que se hubiesen presentado durante la diligencia, así como lo previsto en el artículo 67 de la Ley Federal de Procedimiento Administrativo.

Concluida la inspección, se dará oportunidad a la persona con la que se entendió la diligencia para que en el mismo acto formule observaciones en relación con los hechos u omisiones asentados en el acta respectiva, y para que ofrezca las pruebas que considere convenientes o haga uso de ese derecho en el término de cinco días siguientes a la fecha en que la diligencia se hubiere practicado.

A continuación se procederá a firmar el acta por la persona con quien se entendió la diligencia, por los testigos y por el personal autorizado, quien entregará copia del acta al interesado.

Si la persona con quien se entendió la diligencia o los testigos, se negaren a firmar el acta, o el interesado se negare a aceptar copia de la misma, dichas circunstancias se asentarán en ella, sin que esto afecte su validez y valor probatorio.

Artículo 165

La persona con quien se entienda la diligencia estará obligada a permitir al personal autorizado el acceso al lugar o lugares sujetos a inspección en los términos previstos en la orden escrita a que se hace referencia en el artículo 162 de esta Ley, así como a proporcionar toda clase de información que conduzca a la Véaseificación del cumplimiento de esta Ley y demás disposiciones aplicables, con excepción de lo relativo a derechos de propiedad industrial que sean confidenciales conforme a la Ley. La información deberá mantenerse por la autoridad en absoluta reserva, si así lo solicita el interesado, salvo en caso de requerimiento judicial.

Artículo 166

La autoridad competente podrá solicitar el auxilio de la fuerza pública para efectuar la visita de inspección, cuando alguna o algunas personas obstaculicen o se opongan a la práctica de la diligencia, independientemente de las sanciones a que haya lugar.

Artículo 167

Recibida el acta de inspección por la autoridad ordenadora, requerirá al interesado, cuando proceda, mediante notificación personal o por correo certificado con acuse de recibo, para que adopte de inmediato las medidas correctivas o de urgente aplicación que, en su caso, resulten necesarias para cumplir con las disposiciones jurídicas aplicables, así como con los permisos, licencias, autorizaciones o concesiones respectivas, señalando el plazo que corresponda para su cumplimiento, fundando y motivando el requerimiento. Asimismo, deberá señalarse al interesado que cuenta con un término de quince días para que exponga lo que a su derecho convenga y, en su caso, aporte las pruebas que considere procedentes en relación con la actuación de la Secretaría.

Admitidas y desahogadas las pruebas ofrecidas por el interesado, o habiendo transcurrido el plazo a que se refiere el párrafo anterior, sin que haya hecho uso de ese derecho, se pondrán a su disposición las actuaciones, para que en un plazo tres días hábiles, presente por escrito sus alegatos.

Artículo 168

Una vez recibidos los alegatos o transcurrido el término para presentarlos, la Secretaría procederá, dentro de los veinte días siguientes, a dictar por escrito la resolución respectiva, misma que se notificará al interesado, personalmente o por correo certificado con acuse de recibo.

Durante el procedimiento y antes de que se dicte resolución, el interesado y la Secretaría, a petición del primero, podrán convenir la realización de las acciones de restauración o compensación de daños necesarias para la corrección de las presuntas irregularidades observadas. La instrumentación y evaluación de dicho convenio, se llevará a cabo en los términos del artículo 169 de esta Ley.

Artículo 169

En la resolución administrativa correspondiente, se señalarán o, en su caso, adicionarán, las medidas que deberán llevarse a cabo para corregir las deficiencias o irregularidades observadas, el plazo otorgado al infractor para satisfacerlas y las sanciones a que se hubiere hecho acreedor conforme a las disposiciones aplicables.

Dentro de los cinco días hábiles que sigan al vencimiento del plazo otorgado al infractor para subsanar las deficiencias o irregularidades observadas, éste deberá comunicar por escrito y en forma detallada a la autoridad ordenadora, haber dado cumplimiento a las medidas ordenadas en los términos del requerimiento respectivo.

Cuando se trate de segunda o posterior inspección para Véaseificar el cumplimiento de un requerimiento o requerimientos anteriores, y del acta correspondiente se desprenda que no se ha dado cumplimiento a las medidas previamente ordenadas, la autoridad competente podrá imponer además de la sanción o sanciones que procedan conforme al artículo 171 de esta Ley, una multa adicional que no exceda de los límites máximos señalados en dicho precepto.

En los casos en que el infractor realice las medidas correctivas o de urgente aplicación o subsane las irregularidades detectadas, en los plazos ordenados por la Secretaría, siempre y cuando el infractor no sea reincidente, y no se trate de alguno de los supuestos previstos en el artículo 170 de esta Ley, ésta podrá revocar o modificar la sanción o sanciones impuestas.

En los casos en que proceda, la autoridad federal hará del conocimiento del Ministerio Público la realización de actos u omisiones constatados en el ejercicio de sus facultades que pudieran configurar uno o más delitos.

En los casos en que proceda, la autoridad federal hará del conocimiento del Ministerio Público la realización de actos u omisiones constatados que pudieran configurar uno o más delitos.

Artículo 170

Cuando exista riesgo inminente de desequilibrio ecológico, o de daño o deterioro grave a los recursos naturales, casos de contaminación con repercusiones peligrosas para los ecosistemas, sus componentes o para la salud pública, la Secretaría, fundada y motivadamente, podrá ordenar alguna o algunas de las siguientes medidas de seguridad:

I.- La clausura temporal, parcial o total de las fuentes contaminantes, así como de las instalaciones en que se manejen o almacenen especímenes, productos o subproductos de especies de flora o de fauna silvestre, recursos forestales, o se desarrollen las actividades que den lugar a los supuestos a que se refiere el primer párrafo de este artículo;

II.- El aseguramiento precautorio de materiales y residuos peligrosos, así como de especímenes, productos o subproductos de especies de flora o de fauna silvestre o su material genético, recursos forestales, además de los bienes, vehículos, utensilios e instrumentos directamente relacionados con la conducta que da lugar a la imposición de la medida de seguridad, o

III.- La neutralización o cualquier acción análoga que impida que materiales o residuos peligrosos generen los efectos previstos en el primer párrafo de este artículo.

Asimismo, la Secretaría podrá promoVéase ante la autoridad competente, la ejecución de alguna o algunas de las medidas de seguridad que se establezcan en otros ordenamientos.

REGLAMENTO DE LA LGEEPA EN MATERIADE IMPACTO AMBIENTAL

Artículo 3

Para los efectos del presente reglamento se considerarán las definiciones contenidas en la ley y las siguientes:

[...]

III.- Daño ambiental: Es el que ocurre sobre algún elemento ambiental a consecuencia de un impacto ambiental adVéaseso;

IV.- Daño a los ecosistemas: Es el resultado de uno o más impactos ambientales sobre uno o varios elementos ambientales o procesos del ecosistema que desencadenan un desequilibrio ecológico;

V.- Daño grave al ecosistema: Es aquel que propicia la pérdida de uno o varios elementos ambientales, que afecta la estructura o función, o que modifica las tendencias evolutivas o sucesionales del ecosistema;

VI. Desequilibrio ecológico grave: Alteración significativa de las condiciones ambientales en las que se prevén impactos acumulativos, sinérgicos y residuales que ocasionarían la destrucción, el aislamiento o la fragmentación de los ecosistemas;

VII. Impacto ambiental acumulativo: El efecto en el ambiente que resulta del incremento de los impactos de acciones particulares ocasionado por la interacción con otros que se efectuaron en el pasado o que están ocurriendo en el presente;

VIII. Impacto ambiental sinérgico: Aquel que se produce cuando el efecto conjunto de la presencia simultánea de varias acciones supone una incidencia ambiental mayor que la suma de las incidencias individuales contempladas aisladamente;

IX. Impacto ambiental significativo o relevante: Aquel que resulta de la acción del hombre o de la naturaleza, que provoca alteraciones en los ecosistemas y sus recursos naturales o en la salud, obstaculizando la existencia y desarrollo del hombre y de los demás seres vivos, así como la continuidad de los procesos naturales; [...]

LAN

Artículo 1

La presente ley es reglamentaria del artículo 27 de la Constitución Política de los Estados Unidos Mexicanos en materia de aguas nacionales; es de observancia general en todo el territorio nacional, sus disposiciones son de orden público e interés social y tiene por objeto regular la explotación, uso o aprovechamiento de dichas aguas, su distribución y control, así como la preservación de su cantidad y calidad para lograr su desarrollo integral sustentable.

Artículo 2

Las disposiciones de esta ley son aplicables a todas las aguas nacionales, sean superficiales o del subsuelo. Estas disposiciones también son aplicables a los bienes nacionales que la presente ley señala.

Artículo 3

Para los efectos de esta ley se entenderá por:

[...]

IV.- Cuenca hidrológica: el territorio donde las aguas fluyen al mar a través de una red de cauces que conVéasegen en uno principal, o bien el territorio en donde las aguas forman una unidad autónoma o diferenciada de otras, aún sin que desemboquen en el mar. La cuenca, conjuntamente con los acuíferos, constituye la unidad de gestión del recurso hidráulico;

V.- La Comisión: la Comisión Nacional del Agua, órgano administrativo desconcentrado de la Secretaría de Agricultura y Recursos Hidráulicos; [...]

Artículo 4

La autoridad y administración en materia de aguas nacionales y de sus bienes públicos inherentes corresponde al Ejecutivo Federal, quien la ejercerá directamente o a través de La Comisión.

Artículo 7

Se declara de utilidad pública:

[...]

II.- La protección, mejoramiento y conservación de cuencas, acuíferos, cauces, vasos y demás depósitos de propiedad nacional, así como la infiltración de aguas para reabastecer mantos acuíferos y la derivación de las aguas de una cuenca o región hidrológica hacia otras; [...]

IV.- Reestablecer el equilibrio hidrológico de las aguas nacionales, superficiales o del subsuelo, incluidas las limitaciones de extracción, las vedas, las reservas y el cambio en el uso del agua para destinarlo al uso doméstico; [...]

VIII.- La instalación de los dispositivos necesarios para la medición de la cantidad y calidad de las aguas nacionales.

Artículo 9

Son atribuciones de La Comisión:

I.- Ejercer las atribuciones que conforme a la presente ley corresponden a la autoridad en materia hidráulica, dentro del ámbito de la competencia federal, excepto las que debe ejercer directamente el Ejecutivo Federal; [...]

XIII.- Vigilar el cumplimiento y aplicación de la presente ley, interpretarla para efectos administrativos, y aplicar las sanciones y ejercer los actos de autoridad en la materia que no estén reservados al Ejecutivo Federal; [...]

REGLAMENTO DE LA LAN

Artículo 2

Para los efectos de este "Reglamento", se entiende por:

[...]

IV. Condiciones particulares de descarga: el conjunto de parámetros físicos, químicos y biológicos y de sus niveles máximos permitidos en las descargas de agua residual, determinados por "La Comisión" para un usuario, para un determinado uso o grupo de usuarios o para un cuerpo receptor específico, con el fin de preservar y controlar la calidad de las aguas conforme a la "Ley" y este "Reglamento";

V. Corriente permanente: la que tiene un escurrimiento superficial que no se interrumpe en ninguna época del año, desde donde principia hasta su desembocadura; [...]

VIII. Cuota natural de renovación de las aguas: el volumen de agua renovable anualmente en una cuenca o acuífero; [...]

XII. Humedales: las zonas de transición entre los sistemas acuáticos y terrestres que constituyen áreas de inundación temporal o permanente, sujetas o no a la influencia de mareas, como pantanos, ciénagas y marismas, cuyos límites los constituyen el tipo

de vegetación hidrófila de presencia permanente o estacional; las áreas en donde el suelo es predominantemente hídrico; y las áreas lacustres o de suelos permanentemente húmedos, originadas por la descarga natural de acuíferos; [...]

XIV. Lago o Laguna: el vaso de propiedad federal de formación natural que es alimentado por corriente superficial o aguas subterráneas o pluviales, independientemente que dé o no origen a otra corriente, así como el vaso de formación artificial que se origina por la construcción de una presa; [...]

XVI. Uso agrícola: la utilización de agua nacional destinada a la actividad de siembra, cultivo y cosecha de productos agrícolas, y su preparación para la primera enajenación, siempre que los productos no hayan sido objeto de transformación industrial;

XVII. Uso agroindustrial: la utilización de agua nacional para la actividad de transformación industrial de los productos agrícolas y pecuarios;

XVIII. Uso doméstico: para efectos del artículo 3o., fracción XI de la "Ley", la utilización de agua nacional destinada al uso particular de las personas y del hogar, riego de sus jardines y de sus árboles de ornato, incluyendo el abrevadero de sus animales domésticos que no constituya una actividad lucrativa;

XIX. Uso en acuacultura: la utilización de agua nacional destinada al cultivo, reproducción y desarrollo de cualquier especie de la fauna y flora acuáticas;

XX. Uso en servicios: la utilización de agua nacional para servicios distintos de los señalados en las fracciones XVI a XXV, de este artículo;

XXI. Uso industrial: la utilización de agua nacional en fábricas o empresas que realicen la extracción, conservación o transformación de materias primas o minerales, el acabado de productos o la elaboración de satisfactores, así como la que se utiliza en parques industriales, en calderas, en dispositivos para enfriamiento, lavado, baños y otros servicios dentro de la empresa, las salmueras que se utilizan para la extracción de cualquier tipo de sustancias y el agua aún en estado de vapor, que sea usada para la generación de energía eléctrica o para cualquier otro uso o aprovechamiento de transformación;

XXII. Uso para conservación ecológica: el caudal mínimo en una corriente o el volumen mínimo en cuerpos receptores o embalses, que deben conservarse para proteger las condiciones ambientales y el equilibrio ecológico del sistema;

XXIII. Uso pecuario: la utilización de agua nacional para la actividad consistente en la cría y engorda de ganado, aves de corral y animales, y su preparación para la primera enajenación, siempre que no comprendan la transformación industrial;

XXIV. Uso público urbano: la utilización de agua nacional para centros de población o asentamientos humanos, a través de la red municipal, y

XXV. Usos múltiples: la utilización de agua nacional aprovechada en más de uno de los usos definidos en la "Ley" y el presente "Reglamento", salvo el uso para conservación ecológica, el cual está implícito en todos los aprovechamientos.

REGLAMENTO INTERIOR DE LA SEMARNAT

Artículo 44

La Comisión Nacional del Agua tendrá las atribuciones que se establecen en la Ley de Aguas Nacionales, su Reglamento, este ordenamiento y las demás disposiciones aplicables, las cuales serán ejercidas por las unidades administrativas que la integran, sin perjuicio de su ejercicio directo por parte del Director General de dicha Comisión.

Asimismo, deberá aplicar las políticas y disposiciones emitidas en materia de transparencia y acceso a la información.

SEM-03-004

(ALCA-Iztapalapa II)

SUBMITTERS: ÁNGEL LARA GARCÍA

PARTY: MEXICO

DATE: 17 June 2003

SUMMARY: The Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to a citizen complaint he filed with the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*–Profepa) in 1995. The Submitter alleges that there are environmental irregularities in the operation of a footwear materials factory by ALCA, S.A. de C.V. (ALCA) in the Santa Isabel Industrial neighborhood of Iztapalapa Delegation in Mexico, D.F., where the Submitter lives. He asserts that his health and that of his family have been affected by the pollution generated by the factory.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (9 September 2003)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.
ART. 15(1) (23 August 2004)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Petición número:	**SEM-03-004** (ALCA-Iztapalapa II)
Peticionario:	Ángel Lara García
Parte:	Estados Unidos Mexicanos
Fecha de la petición:	17 de junio de 2003
Fecha de la determinación:	9 de septiembre de 2003

I. ANTECEDENTES

El 25 de noviembre de 2002, Ángel Lara García ("el Peticionario") presentó al Secretariado de la Comisión para la Cooperación Ambiental ("el Secretariado") una petición (SEM-02-005/ALCA-Iztapalapa) en conformidad con los artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo"). El 17 de diciembre de 2002, el Secretariado determinó que dicha petición no cumplía con los requisitos de los incisos (c) y (d) del artículo 14(1) del ACAAN. Con base en el apartado 6.2 de las *Directrices para la presentación de peticiones* ("las Directrices"), el Secretariado advirtió al Peticionario, en el momento de notificarle su determinación, que contaba con 30 días para presentar una petición que cumpliera con los criterios del artículo 14(1) del ACAAN.

El 17 de junio de 2003, el Peticionario, luego de señalar que por falta de recursos le fue imposible enmendar su escrito original en el tiempo señalado, presentó al Secretariado una nueva petición (SEM-03-004/ ALCA-Iztapalapa II) en conformidad con los artículos 14 y 15 del

Acuerdo.[1] El 3 de julio de 2003, el Peticionario confirmó por escrito su intención de que el Secretariado, al revisar la nueva petición, tome en cuenta la información contenida en la petición original.

Según el ACAAN, el Secretariado podrá examinar las peticiones que cumplan con los requisitos establecidos en el artículo 14(1). Si considera que una petición cumple con esos requisitos, el Secretariado debe determinar si la petición amerita solicitar una respuesta de la Parte. Para llegar a esta determinación, el Secretariado se orienta por las consideraciones listadas en el artículo 14(2).

El Secretariado ha determinado que la petición SEM-03-004/ ALCA-Iztapalapa II cumple con todos los requisitos establecidos en el artículo 14(1) y que amerita solicitar una respuesta de la Parte con acuerdo al artículo 14(2), por las razones que a continuación se exponen.

II. RESUMEN DE LA PETICIÓN

El Peticionario sostiene que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de la operación de una fábrica de material para calzado, propiedad de la empresa ALCA, SA de CV ("ALCA"), ubicada en un predio colindante al domicilio del Peticionario en la colonia Santa Isabel Industrial, Iztapalapa, Ciudad de México, DF.[2] El Peticionario afirma que las emisiones atmosféricas de la fábrica y el manejo de sustancias y residuos peligrosos por los empleados de ALCA violan el artículo 150 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* ("la LGEEPA") y los artículos 414 párrafo primero y 415 fracción I del *Código Penal Federal* ("el CPF").[3] En particular, se desprende que el Peticionario asevera que la empresa ilícitamente, sin aplicar las medidas de prevención y seguridad, realiza actividades de almacenamiento, desecho y descarga de sustancias consideradas peligrosas que causan daño al ambiente.[4] El Peticionario también sostiene que ALCA, sin aplicar las medidas de prevención o seguridad, emita, despida o descarga en la atmósfera gases, humos, polvos o contaminantes que ocasionan daños al ambiente.[5] Se destaca por fin que el Peticionario alega que la empresa está omitiendo manejar materiales y residuos peligrosos con arreglo a la LGEEPA y las normas oficiales mexicanas expedidas por la Secretaría de Medio Ambiente y

1. Páginas 1 y 5 de la petición.
2. Páginas 1, 3 y 4 de la petición.
3. Páginas 3 y 4 de la petición.
4. Página 3 de la petición, en letra negrita.
5. *Ibid.*

Recursos Naturales.[6] El Peticionario asevera que estas presuntas violaciones están causando contaminación que daña su salud y la de su familia.[7] Asevera además que la Procuraduría Federal de Protección al Ambiente ("la Profepa"), a pesar de haber comprobado la existencia de violaciones al inspeccionar la fábrica, dio por concluido el trámite de una denuncia popular interpuesta por el Peticionario sin, por lo tanto, tomar las acciones necesarias para poner fin a las presuntas violaciones.[8]

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
>
> (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

6. Página 4 de la petición, en letra negrita.
7. Página 2 de la petición.
8. Páginas 1 y 2 de la petición ulterior, SEM-02-005/ALCA-Iztapalapa, página 2 de la petición y anexo: Acta administrativa de la Subsecretaría de Atención Ciudadana y Normatividad, Dirección General de Atención Ciudadana, Dirección General Adjunta de Atención Ciudadana, Subdirección de Atención Directa y Gestión Inmediata de la Secretaría de Contraloría y Desarrollo Administrativo con fecha 23 de octubre de 2002.

Si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios, en esta etapa se requiere al menos de cierta revisión inicial para verificar que la petición cumple con estos requisitos.[9] Por lo tanto, el Secretariado examinó la petición en cuestión con tal perspectiva en mente.

La primera cuestión es si la petición "asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". En la petición, el Peticionario afirma: "...asevero que el Estado mexicano está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental".[10] La petición hace referencia a los artículos 3 fracción I y 150 de la LGEEPA y a los artículos 414 párrafo primero y 415 fracción I del CPF. De acuerdo con la definición contenida en el artículo 45(2) del ACAAN, estas disposiciones califican como "legislación ambiental" porque su propósito principal coincide con la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de la prevención, el abatimiento o el control de una fuga, descarga o emisión de contaminantes ambientales. Las primeras dos disposiciones se refieren respectivamente a la definición legal del término "ambiente", así como al deber de manejar los materiales y residuos peligrosos con arreglo a la legislación ambiental.[11] Por su parte, los artículos 414 párrafo primero y 415 fracción I del CPF sancionan penalmente a aquellos que ilícitamente o sin aplicar las medidas de prevención y seguridad necesarias realicen, ordenen o autoricen actividades con sustancias consideradas peligrosas o emisiones de gases, humos, polvos o contaminantes que ocasionen daños al ambiente.[12]

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9. En este sentido, véanse la Determinación conforme al artículo 14(1) en relación con la petición SEM-97-005/Animal Alliance of Canada, *et al*., y la Determinación conforme a los artículos 14(1) y (2) relativa a la petición SEM-98-003/Department of the Planet Earth, *et al*., en su versión revisada.
10. Página 1 de la petición.
11. Artículo 3 de la LGEEPA:
"Para los efectos de esta Ley se entiende por:
"I.- Ambiente: El conjunto de elementos naturales y artificiales o inducidos por el hombre que hacen posible la existencia y desarrollo de los seres humanos y demás organismos vivos que interactúan en un espacio y tiempo determinados..."
Artículo 150 de la LGEEPA:
"Los materiales y residuos peligrosos deberán ser manejados con arreglo a la presente Ley, su Reglamento y las normas oficiales mexicanas que expida la Secretaría, previa opinión de las Secretarías de Comercio y Fomento Industrial, de Salud, de Energía, de Comunicaciones y Transportes, de Marina y de Gobernación. La regulación del manejo de esos materiales y residuos incluirá según corresponda, su uso, recolección, almacenamiento, transporte, reúso, reciclaje, tratamiento y disposición final."
12. Artículo 414 del CPF:
"Se impondrá pena de uno a nueve años de prisión y de trescientos a tres mil días multa al que ilícitamente, o sin aplicar las medidas de prevención o seguridad,

El Secretariado determina que la petición también satisface los requisitos establecidos en los seis incisos del artículo 14(1), por las siguientes razones. De acuerdo con el inciso a), la petición se presentó por escrito en español, idioma designado por México.[13] El Peticionario se identificó como Ángel Lara García, con residencia en México, satisfaciendo así los requisitos de los incisos b) y f).[14] De igual forma, la petición cumple con el requisito del inciso e), al señalar que en numerosas ocasiones el asunto se comunicó por escrito a las autoridades pertinentes de la Parte, y proporciona información sobre la respuesta de la Parte, anexando a la petición copias de correspondencias con las autoridades pertinentes.[15]

En su determinación del 17 de diciembre de 2002, el Secretariado concluyó que la petición anterior, SEM-02-005/ALCA-Iztapalapa, no cumplía con los requisitos de los incisos c) y d) del artículo 14(1) porque carecía de información suficiente para permitir al Secretariado analizarla, de acuerdo con el inciso c), y satisfacerse, de acuerdo con el inciso d), que la petición no parecía estar encaminada a hostigar una industria. La nueva petición, SEM-03-004/ALCA-Iztapalapa II, sí contiene información suficiente para permitir al Secretariado analizarla y satisfacerse por cuanto a que la petición no parece estar encaminada a hostigar una industria.

La nueva petición identifica claramente las disposiciones legislativas materia de la petición[16] y se refiere a varias actuaciones del Peticionario ante diversas autoridades para que se sancionen las presuntas violaciones a las disposiciones citadas. En particular, la nueva petición hace referencia a un procedimiento de denuncia popular entablado por el Peticionario que la Profepa dio por concluido el 8 de octubre del 2002

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realice actividades de producción, almacenamiento, tráfico, importación o exportación, transporte, abandono, desecho, descarga, o realice cualquier otra actividad con sustancias consideradas peligrosas por sus características corrosivas, reactivas, explosivas, tóxicas, inflamables, radiactivas u otras análogas, lo ordene o autorice, que cause un daño a los recursos naturales, a la flora, a la fauna, a los ecosistemas, a la calidad del agua, al suelo, al subsuelo o al ambiente."

Artículo 415 del CPF:

"Se impondrá pena de uno a nueve años de prisión y de trescientos a tres mil días multa, a quien sin aplicar las medidas de prevención o seguridad:

"I. Emita, despida, descargue en la atmósfera, lo autorice u ordene, gases, humos, polvos o contaminantes que ocasionen daños a los recursos naturales, a la fauna, a la flora, a los ecosistemas o al ambiente, siempre que dichas emisiones provengan de fuentes fijas de competencia federal, conforme a lo previsto en la Ley General del Equilibrio Ecológico y la Protección al Ambiente."

13. Véanse el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
14. Página 1 de la petición.
15. Páginas 1 y 2 de la petición.
16. Páginas 3 y 4 de la petición.

con base en el artículo 199 inciso VII de la LGEEPA, el cual dispone: "Los expedientes de denuncia popular que hubieren sido abiertos, podrán ser concluidos por las siguientes causas: [...] Por la emisión de una resolución derivada del procedimiento de inspección."

El Peticionario anexó a la nueva petición copia de un oficio de la Profepa en el cual ésta señala haber detectado diversas contravenciones y posibles infracciones a la normatividad ambiental en visitas de inspección practicadas a la fábrica entre 1994 y 2001 en atención a varias denuncias del Peticionario.[17] A la nueva petición también se anexó copia de un oficio de la Profepa que menciona que la Delegación de la Profepa en la Zona Metropolitana del Valle de México hubiera informado a la Dirección General de Denuncias Ambientales, Quejas y Participación Social de la Profepa

> del resultado de las diligencias realizadas en la atención de la denuncia de mérito (promovida por Omar A. Velasco y Ángel Lara García el 19 de noviembre de 1998 y 14 de septiembre del 2000 en contra de la emisión de gases tóxicos por parte de ALCA), en los siguientes términos: que con fecha 7 de septiembre del 2001 se dictó resolución administrativa, No. 1460/01-D, en contra de la empresa denunciada y que todos los procedimientos administrativos abiertos a la empresa ALCA, S.A. de C.V., se encuentran debidamente concluidos.[18]

En un acta administrativa anexa a la nueva petición, el Peticionario declara: "[...] nunca se me hizo del conocimiento tal resolución, es decir, de la supuesta inspección nunca se informó nada al respecto [...]".[19] Afirma que siguen las emisiones que están afectando su salud y la de su familia.[20]

De acuerdo con el inciso (d) del artículo 14(1), la nueva petición parece encaminada a promover la aplicación de la ley y no a hostigar una industria. Si bien la petición se refiere al presumido incumplimiento de una empresa en particular con las normas ambientales, las aseveraciones contenidas en la petición se enfocan en las actuaciones de las

17. Carta de Edgar del Villar Alvelais, Director General, Dirección General de Denuncias Ambientales de la Profepa, dirigida a la diputada Lorena Ríos Martínez, presidenta del Comité de Atención, Orientación y Quejas Ciudadanas de la Asamblea Legislativa del Distrito Federal, Oficio Num.: DG/094/DI/167/2002; FOLIO: 0274/98/2 con fecha 14 de febrero de 2002.
18. Folio No. 0274/98/2; Asunto: Acuerdo resolutivo, con fecha 8 de octubre de 2002.
19. Acta administrativa de la Subsecretaría de Atención Ciudadana y Normatividad, Dirección General de Atención Ciudadana, Dirección General Adjunta de Atención Ciudadana, Subdirección de Atención Directa y Gestión Inmediata de la Secretaría de Contraloría y Desarrollo Administrativo con fecha 23 de octubre de 2002.
20. *Ibid.*

autoridades ambientales respecto de ALCA.[21] Además, el Peticionario no es un competidor de ALCA, y la petición no parece intrascendente.

Por las razones expuestas arriba, el Secretariado determinó que la petición satisface todos los requisitos del artículo 14(1).

IV. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(2) DEL ACAAN

El artículo 14(2) del ACAAN dispone que cuando considere que una petición cumple con los requisitos estipulados en el párrafo 1 del artículo 14, el Secretariado determinará si la petición amerita solicitar una respuesta de la Parte. Para decidir si debe solicitar una respuesta, el Secretariado se orientará por las siguientes consideraciones:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Orientándose por las consideraciones expuestas arriba, el Secretariado determina que la petición amerita solicitar una respuesta a la Parte. De acuerdo con el inciso (a) del artículo 14(2), la petición alega daño a la salud del Peticionario y la de los miembros de su familia.[22] En particular, el Peticionario alega que

> derivado de los desechos tóxicos que expulsa (ALCA) hasta la actualidad en forma de vapores y pestilencias altamente desagradables, es que empecé a tener síntomas como astenia, adinamia, mareos, vértigo, cefalea en región occipital y dolor abdominal, acompañado de náusea y vómito, así como temblor fino en extremidades superiores, dolor de cabeza, irritación de los ojos.[23]

21. Páginas 1 y 2 de la petición.
22. Página 2 de la petición.
23. Acta Administrativa de la Subsecretaría de Atención Ciudadana y Contraloría Social, Dirección General de Atención Ciudadana, Dirección General Adjunta de Atención Ciudadana de la Secretaría de Contraloría y Desarrollo Administrativo con fecha 18 de enero de 2001.

Además, entre los anexos de la petición se encuentran numerosas cartas en las cuales personas que han acudido al domicilio del Peticionario afirman haber sufrido molestia por las emisiones atmosféricas de la fábrica de ALCA.[24] La petición también plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, sobre todo las dispuestas en los incisos (a), (g) y (j) del artículo 1 del ACAAN. El Peticionario ha interpuesto denuncias populares ante la Profepa para obtener que se investigue y se ponga fin a las presuntas violaciones en las que está incurriendo ALCA, por lo que ha comprobado haber acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte.[25] Finalmente, la petición no se basa exclusivamente en noticias de los medios de comunicación, sino en actas de autoridades ambientales y otros escritos.

V. DETERMINACIÓN DEL SECRETARIADO

El Secretariado examinó la petición SEM-03-004/ALCA-Iztapalapa II de acuerdo con el artículo 14(1) del ACAAN y determina que la misma cumple con todos los requisitos allí establecidos según las razones expuestas en esta Determinación. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que la petición amerita solicitar una respuesta a la Parte interesada, en este caso los Estados Unidos Mexicanos, y así lo hace.

Conforme a lo establecido en el artículo 14(3) del ACAAN, la Parte podrá proporcionar una respuesta a la petición dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a la misma. Dado que a la Parte interesada ya se le enviaron copias de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

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24. Véanse, por ejemplo, carta de la representante de la Comisión de Preservación del Medio Ambiente y Protección Ecológica, Cristina Alcayata, dirigida a Antonio Azuela de la Cueva, Procurador Federal del Medio Ambiente, del 17 de enero de 1997; carta del subdirector de Unidades Gerontológicas del Instituto Nacional de la Senectud (ahora Instituto Nacional de Adultos en Plenitud) Alejandro Marín Guerra, dirigida "A Quien Corresponda", del 5 de diciembre de 2001; carta de Miguel Ángel Barragán Reynaga, Audio Mundo de México, S.A. de C.V., dirigida "A Quien Corresponda", del 23 de octubre de 2002.
25. Página 1 de la petición.

Sometido respetuosamente a su consideración el 9 de septiembre de 2003.

Secretariado de la Comisión para la Cooperación Ambiental

por: Katia Opalka
Oficial Jurídica
Unidad de Peticiones Ciudadanas

ccp: Dra. Olga Ojeda Cárdenas, Semarnat
Ms. Norine Smith, Environment Canada
Ms. Judith E. Ayres, US EPA
Sr. Ángel Lara García
Sr. William Kennedy, Director Ejecutivo de la CCA

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number: **SEM-03-004** (ALCA-Iztapalapa II)
Submitter: Ángel Lara García
Concerned Party: United Mexican States
Date of Receipt: 17 June 2003
Date of this Notification: 23 August 2004

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), the Secretariat of the Commission for Environmental Cooperation (CEC) of North America (the "Secretariat") may consider submissions asserting that a Party to NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). The Secretariat may notify the Council that it considers that the submission warrants developing an Article 15 factual record, in light of any response from the Party. By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's Article 15(1) analysis with respect to whether the submission filed 17 June 2003 warrants the development of a factual record.

This submission asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear materials factory owned by the company ALCA, SA de CV (ALCA), located on a property neighboring the Submitter's home in the Santa Isabel Industrial neighborhood of Iztapalapa Delegation in Mexico City.[1]

On 9 September 2003, the Secretariat determined that the submission met the requirements of Article 14(1) of NAAEC. Furthermore, in light of the criteria set forth in NAAEC Article 14(2), the Secretariat considered that the submission warranted a request for a response from the Party. Mexico provided the Secretariat with a response to the submission on 4 December 2003.

Although the submission and Mexico's response provide some information regarding certain proceedings related to the assertions in the submission, central questions regarding those assertions remain. The proceedings discussed in the submission and Mexico's response were all concluded well before the filing of the Submitter's submissions in November 2002 and June 2003, in which the Submitter asserts that ALCA's alleged violations continue despite any action Mexico has taken, and the Secretariat has no information indicating that any action has been taken with respect to the assertions in the submission since the filing of the submissions. Accordingly, as described further in this notification, pursuant to Article 15(1) of NAAEC, the Secretariat hereby notifies the Council that the submission warrants the development of a factual record in accordance with the provisions of section IV below.

II. THE SUBMISSION

A. Background

On 25 November 2002, Ángel Lara García (the "Submitter") submitted to this Secretariat a submission (SEM-02-005/ALCA-Iztapalapa) under Articles 14 and 15 of NAAEC. The Secretariat determined on 17 December 2002 that the submission did not meet the requirements of sections (c) and (d) of Article 14(1) of NAAEC. Based on section 6.2 of the *Guidelines for Submissions on Enforcement Matters* (the "Guidelines"), upon giving notice of its determination, the Secretariat notified the Submitter that he had 30 days to present a submission meeting the NAAEC Article 14(1) requirements.

1. Submission at 1, 3 and 4.

On 17 June 2003, after stating that a lack of resources prevented him from amending his original filing in the time provided, the Submitter submitted a new submission to the Secretariat (SEM-03-004/ALCA-Iztapalapa II).[2] On 3 July 2003, the Submitter confirmed in writing his intention for the Secretariat to consider the information contained in the original submission in its review of the new submission.

Under NAAEC, the Secretariat may examine submissions meeting the requirements of Article 14(1). If it considers that a submission meets those requirements, the Secretariat shall then determine whether the submission warrants requesting a response from the Party. To arrive at this determination, the Secretariat follows the provisions of Article 14(2). The Secretariat determined on 9 September that the submission met the requirements of Article 14(1) and, pursuant to Article 14(2), requested a response from Mexico.

B. Summary of the submission

The Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear materials factory owned by the company ALCA, S.A. de C.V. (ALCA), located on a property neighboring the Submitter's home in the Santa Isabel Industrial neighborhood of Mexico City.[3] The Submitter asserts that the factory's air pollution and ALCA employees' handling of hazardous substances and wastes violate Article 150 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and Articles 414, first paragraph and 415, Section I of the Federal Penal Code (*Código Penal Federal*—CPF).[4] In particular, the Submitter asserts that the company is illegally carrying on the storage, disposal and unloading of environmentally harmful hazardous substances without applying prevention and safety measures.[5] The Submitter also claims that ALCA does not apply prevention or safety measures to prevent the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants.[6] The Submitter asserts that the company is failing to manage hazardous materials and wastes in accordance with LGEEPA and the Mexican Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Secretariat of the Environment and

2. Submission at 1 and 5.
3. Submission at 1, 3 and 4.
4. Submission at 3 and 4.
5. Submission at 3, bolded.
6. *Ibid*.

Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat).[7] The Submitter asserts that these alleged violations are causing pollution harming his and his family's health.[8] He further asserts that the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), despite having found violations during a factory inspection, terminated a citizen complaint filed by the Submitter without taking the actions necessary to stop the alleged violations.[9]

III. SUMMARY OF THE PARTY'S RESPONSE

In its response, Mexico focuses its arguments on what it claims to be the three principal aspects of the Submission: "a) violation of LGEEPA Article 150 by the company ALCA, SA de CV, as raised in a citizen complaint; b) violation of CPF Article 415, Section I as raised in a criminal complaint; and c) lack of resolution of a proceeding filed with the Semarnat's Internal Control Agency, claiming 'collusion between inspectors and the company ALCA, to cover up liabilities and thereby avoid involvement of the judicial authority.'"[10]

As regards the alleged failure to enforce LGEEPA Article 150, Mexico refers to the citizen complaint that the Submitter filed on 10 November 1995, but provides no further information because, it claims, the file was lost in a flood in the file room. However, Mexico asserts the process was concluded pursuant to law without initiation of a criminal investigation.[11] In addition, Mexico states that other proceedings were initiated against ALCA, including: 1) a filing dated 10 November 1998 submitted to the Iztapalapa Delegation by the coordinator of the Public Affairs Center (*Casa de Atención Ciudadana*), Omar A. Velasco, who noted the concern of neighbors residing near the company ALCA, SA de CV, which releases toxic gases such as hexane, heptane, styrene, toluene, xidenol, etc.; 2) a citizen complaint dated 19 November 1998 and filed by the same Omar A. Velasco against ALCA, due to toxic gas releases; and

7. Submission at 4, bolded.
8. Submission at 2.
9. Submission at 1 and 2, and exhibit: Administrative report of the Undersecretariat for Public Affairs and Rules (*Subsecretaría de Atención Ciudadana y Normatividad*), General Bureau of Public Affairs (*Dirección General de Atención Ciudadana*), Adjunct General Bureau of Public Affairs (*Dirección General Adjunta de Atención Ciudadana*), Assistant Bureau of Direct Attention and Immediate Processing (*Subdirección de Atención Directa y Gestión Inmediata*) of the Secretariat of the Comptroller and Administrative Development (*Secretaría de Contraloría y Desarrollo Administrativo*), dated 23 October 2002.
10. Party's response at 1.
11. Party's response at 2.

3) a second citizen complaint filed by Ángel Lara García on 14 September 2000.[12] Mexico states that collectively, these proceedings led to an inspection of ALCA on 27 July 2001, during which facts and omissions constituting offenses under LGEEPA, as well as the air pollution, hazardous waste and environmental impact regulations thereunder, were observed. Based on inspection, on 7 September 2001, ALCA was fined 2,421.00 pesos, equivalent to 60 days' minimum salary for the Federal District.[13] Mexico states that on 8 October 2002, after the fine was imposed, all of the citizen complaints were deemed concluded.[14]

As regards the violation of Article 415, paragraph I of the CPF, Mexico refers to a criminal investigation dated 14 March 1999, referenced by the Submitter under folio 4099/FEDEC/97. Mexico explains that this complaint was filed against Roberto Guillermo Álvarez Cabañas, Guillermo Antonio Álvarez Zarraga, Alejandra Verónica Álvarez Zarraga, Eduardo Álvarez Cabañas, and the company ALCA, SA de CV. Mexico states that, based on a technical opinion, it was decided 22 August 2000 not to undertake a criminal action, as the investigations "did not clearly establish a crime as set forth and penalized under Article 415, Section I of the CPF nor the probable liability of the suspects, as we deduce from the acts that although the asserted facts may constitute a crime, it is impossible to determine whether the crime exists due to irreparable material hindrance, because the proof provided is insufficient to evidence the crime.[15]"

With respect to the lack of resolution of a proceeding filed with the Semarnat Internal Control Agency, Mexico states that the proceedings begun by the Submitter against Profepa officials were concluded without the imposition of penalty because sufficient evidence of the public servants' alleged liability was not found. Mexico provides no further comment or documentary evidence in this regard, arguing that this information was deemed confidential under Article 13, Section V of the Federal Law of Transparency and Access to Governmental Public Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*—LFTAIPG)[16] and Article 26 of the Regulation there-

12. Party's response at 2 and 3.
13. Party's response at 3.
14. *Ibid*.
15. Party's response at 3, 4, 5 and 6.
16. Article 13. Information may be classified as reserved when it may: [...]
V. Cause serious harm to the activities to verify compliance with the law, the prevention or prosecution of crimes, the administration of justice, collections from taxpayers, immigration control operations, and procedural strategies in judicial or administrative proceedings while rulings are pending.

under.[17] The Internal Control Agency classified the information as confidential.

IV. ANALYSIS

A. Introduction

This notification corresponds to the process stages set forth in Articles 14(3) and 15(1) of NAAEC. Previously, on 9 September 2003, the Secretariat determined that the submission met all requirements under Article 14(1) (a)-(f) of NAAEC.[18] The Secretariat then proceeded to evaluate the submission based on the NAAEC Article 14(2) criteria, concluding that the Submission warranted requesting a response from the Party, which was received on 21 November 2003 as noted above. Consistent with Article 15(1), the Secretariat presents below the reasons why it considers this submission to warrant the development of a factual record.

B. Analysis of the reasons why the development of a factual record is warranted

In its response, although Mexico explains certain proceedings undertaken with respect to the company ALCA, it does not provide a comprehensive set of information with respect to the assertions contained in the submission to the effect that ALCA's air pollution releases and handling of hazardous substances and wastes violate Article 150 of the LGEEPA[19] and Articles 414, first paragraph and 415, Section I of

17. Article 26. The heads of the administrative units of agencies and entities shall classify information at the time that:
The information is generated, obtained, acquired or processed, or
An information access request is received, in the case of documents not previously classified.
The classification may refer to a file or to a document.
18. SEM-03-004 (ALCA-Iztapalapa II), Article 14(1) determination (9 September 2003).
19. LGEEPA Article 150. Hazardous materials and wastes must be handled in accordance with this law, the Regulations hereof and any Mexican Official Standards issued by the Secretariat, on prior opinion of the Secretariats of Trade and Industrial Development, of Health, of Energy, of Communications and Transportation, of the Navy, and of the Interior. The regulation of the handling of these materials and substances shall include, as applicable, the use, collection, storage, transport, reuse, recycling, treatment and disposal thereof.
The Regulations and Mexican Official Standards to which the preceding paragraph refers shall contain criteria and lists identifying and classifying hazardous materials and wastes by their degree of hazard, consider the characteristics and volumes thereof, and differentiating those of high and low hazard. The Secretariat is responsible for the regulation and control of hazardous materials and wastes.
Furthermore, in coordination with the secretariats to which this article refers, the Secretariat shall issue the Mexican Official Standards establishing the require-

the CPF.[20] In particular, it does not discuss whether ALCA, without applying prevention and safety measures: i) carries on the storage, disposal and unloading of environmentally harmful hazardous substances; ii) releases or discharges environmentally harmful gas, smoke, dust or pollutants into the atmosphere; or iii) is failing to handle hazardous materials and waste in accordance with the LGEEPA and the environmental NOMs issued by Semarnat.

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ments for the labeling and containment of hazardous materials and wastes and for risk assessment and information on contingencies and accidents that may occur in the handling thereof, particularly in the case of chemical substances.

20. CPF Article 414. A penalty of one to nine years of imprisonment and from 300 to 3,000 days' fine shall be imposed on anyone who illegally, or without applying the prevention or safety measures, undertakes the production, storage, traffic, importation or exportation, transport, abandonment, disposal, discharge, or any other activity with substances deemed hazardous due to their corrosive, reactive, explosive, toxic, flammable, radioactive or other similar characteristics, or so orders or authorizes, causing damage to natural resources, flora, fauna, the ecosystems, water quality, the soil, the subsoil, or the environment.
The same penalty shall apply to persons who illegally undertake the actions with the substances listed in the preceding paragraph, or with ozone-depleting substances, causing a risk of harm to natural resources, flora, fauna, the ecosystems, water quality or the environment.
In the case that the activities to which the preceding paragraphs refer are undertaken in a protected nature area, the penalty of imprisonment shall increase by up to three years and the economic penalty shall increase by up to 1,000 days' fine, except for activities undertaken with ozone-depleting substances.
When the actions referenced in the first and second paragraphs of this article are undertaken in urban zones with used oils or ozone-depleting substances in amounts not exceeding 200 liters, or with waste deemed hazardous by reason of its biological-infectious characteristics, half the penalty set forth in this article shall apply, except in the case of repeat offenses with amounts lower than those provided when they exceed such amount.
Article 415. A penalty of from one to nine years' imprisonment and from three hundred to three thousand days' fine shall be imposed on anyone who, without applying the prevention or safety measures:
I. Emits, releases or discharges into the atmosphere, or who so authorizes or orders, gases, smokes, dusts or pollutants that cause harm to the natural resources, the fauna, the flora, the ecosystems or the environment, provided that such emissions derive from fixed sources under federal jurisdiction, in accordance with the provisions of the General Law of Ecological Equilibrium and Environmental Protection, or
II. Generates emissions of noise, vibrations, thermal energy or light from sources under federal jurisdiction, in accordance with the law set forth in the preceding section, causing harm to the natural resources, the flora, the fauna, the ecosystems or the environment.
The same penalties shall apply to anyone who illegally undertakes the activities described in the foregoing sections causing a risk to the natural resources, the flora, the fauna, the ecosystems or the environment.
In the case that the activities to which this article refers are undertaken in a protected nature area, the penalty of imprisonment shall increase by up to three years and the economic penalty shall increase by up to 1,000 days' fine.

In its response, Mexico refers to the citizen complaint filed by the Submitter on 10 November 1995 (file number 512/1166/09). Mexico states that the file for this citizen complaint was lost in a file room flooding and then refers to other proceedings filed by Omar Velasco on 10 and 19 November 1998, which were joined with a second complaint filed by Ángel Lara García on 14 September 2000. These three proceedings led to a fine against ALCA of 2,421.00 pesos on 7 September 2001. Lastly, the Party refers to criminal investigation 4099/FEDEC/97, presented by the Submitter on 14 March 1997, which resulted in no criminal action pursuant to ruling number 1039/2000 dated 22 August 2000.

Although the information Mexico provides in its response and the attachments to it present some information regarding certain proceedings related to the assertions in the submission concerning Article 150 of LGEEPA and Articles 414, first paragraph and 415, Section I of the CPF, central questions regarding those assertions remain. First, the proceedings discussed in Mexico's response were all concluded well before the filing of the Submitter's submissions in November 2002 and June 2003, in which the Submitter asserts that ALCA's alleged violations continue despite any action Mexico has taken. Mexico provides no information regarding any action it has taken with respect to possible environmental violations since the filing of the submissions.

Further, the Secretariat notes that the documents attached to the Submission include a document issued on 14 February 2002 by the Profepa General Bureau of Environmental Complaints and Public Participation (*Dirección General de Denuncias Ambientales, Quejas y Participación Social*),[21] which cites certain actions undertaken by the authority with respect to ALCA:

- It refers to a citizen complaint filed 5 October 1994 by Ángel Soto Medina, resulting in an inspection visit on 7 December 1994, in which various infractions of federal environmental rules were found. As a result of the inspection, the temporary partial closing of pollution sources was imposed as a safety measure, lifted on 14 August 1996.

- By reason of a citizen complaint filed by Ángel Lara García on 13 January 1997, an inspection visit was performed on 10 March 1997, and given the company's observed noncompliance, on 5 September 1997 an administrative ruling was entered, imposing a fine of 21,160.00 pesos and ordering the undertaking of various corrective measures.

21. Ruling No. DG/094/DI/167/2002, FOLIO 027/4/98/2, dated 14 February 2002, issued by the General Bureau of Environmental Complaints and Public Participation, signed by General Director Edgar del Villar Alvelais.

- An inspection visit was carried out on 17 February 2000, finding irregularities regarding hazardous waste generation.

- An inspection visit on 27 July 2001 found possible offenses regarding hazardous waste, risk and air pollution.

In its response, Mexico provided information only with respect to the last proceeding listed in the Profepa document.

The information provided in the Submission and Mexico's response give some idea as to the history of penalties imposed on ALCA and the complaint and inspection processes carried out with respect to ALCA's operations since 1994. The penalties against ALCA range from the imposition of safety measures, such as the temporary partial closing of its pollution sources, to monetary sanctions.

However, while the information provided by the Submitter shows signs of pollution and health and environmental risks derived from ALCA operations, the respective information provided by Mexico is incomplete. For example, Exhibit 11 to Mexico's response, consisting of a "technical opinion with respect to the advice not to exercise criminal action made by agents of the Public Prosecutor (*Ministerio Público*) assigned to the General Bureau of Criminal Proceeding Control (*Dirección General de Control de Procedimientos Penales*)" is not a complete copy of that document, which purports to disprove the existence of environmental crimes committed by ALCA.

Article 161 of the LGEEPA provides: "The Secretariat shall carry on acts of inspection and oversight of compliance with the provisions contained in this law, and of all provisions hereunder.[22]" Although Mexico has undertaken some inspection and oversight activities, the fact that the Submitter asserts that alleged environmental violations continue despite those activities, compounded with the history of complaints and inspections against ALCA and the penalties thereon since 1994, persuade the Secretariat that a factual record is warranted. Development of a factual record would provide an opportunity to present a detailed and up-to-date set of facts regarding ALCA's alleged environmental violations, the various citizen complaints and proceedings that have arisen in connection with those alleged violations, the actual conduct of inspections and investigations undertaken, and the alleged failure of those proceedings to prevent ALCA's alleged violations from continuing. More specifically, a factual record would contribute not only to allowing

22. LGEEPA Article 161.

for a determination of whether ALCA's air pollution releases and handling of hazardous substances and wastes violated the legal provisions set forth in the Submission,[23] but also to analyzing how and whether follow-up actions and measures intended to prevent repeat offenses were implemented.

A factual record on this submission would enable an analysis of Mexico's actions in undertaking important inspection and oversight proceedings, following through on each proceeding and determining measures to prevent repeat offenses. This focus would contribute to the furtherance of the NAAEC objectives, by potentially encouraging the strengthening of environmental procedures and practices, enhancing compliance and enforcement of environmental laws and regulations, promoting effective environmental measures and promoting pollution prevention policies and practices.[24]

V. RECOMMENDATION

Based on the reasons set forth herein, the Secretariat hereby notifies the Council that, in light of Mexico's response with respect to the operation of the company ALCA in the Iztapalapa Delegation of Mexico City, it considers that the assertions of submission SEM-03-004 – with respect to Article 150 of LGEEPA and Articles 414 and 415 of the CPF – warrant developing a factual record. The submission raised questions left unanswered by the response on the effective enforcement of environmental laws with respect to the company ALCA, regarding the application of prevention and safety measures in the storage, disposal and unloading of environmentally harmful hazardous substances; the release or discharge of environmentally harmful gas, smoke, dust or pollutants; and the failure to handle hazardous materials and wastes in

23. LGEEPA Article 150 and CPF Articles 414, first paragraph and 415, Section I, particularly regarding the application of prevention and safety measures, to prevent: (i) the storage, disposal and unloading of environmentally harmful hazardous substances; (ii) the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants, or (iii) whether hazardous materials and wastes are being handled in accordance with LGEEPA and the environmental NOMs issued by Semarnat.

24. NAAEC Article 1: Objectives
The objectives of this Agreement are to: [...]
(f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
(g) enhance compliance with, and enforcement of, environmental laws and regulations [...]
(i) promote economically efficient and effective environmental measures;
(j) promote pollution prevention policies and practices.

accordance with LGEEPA and the environmental NOMs issued by Semarnat. The factual record would enable a clarification of the unanswered questions and the collection of further information on ALCA's effective compliance with such provisions, as well as an illustration of whether and how the inspection and oversight proceedings served to prevent polluting industries' repeat offenses against environmental laws in Mexico, and contribute to effective enforcement in furtherance of the goals of NAAEC.

Respectfully submitted for your consideration on this 23rd day of August, 2004.

Secretariat of the Commission for Environmental Cooperation

by: William V. Kennedy
Executive Director

SEM-03-005

(Montreal Technoparc)

SUBMITTERS: WATERKEEPER ALLIANCE ET AL.

PARTY: CANADA

DATE: 14 August 2003

SUMMARY: The submission asserts that Canada is failing to effectively enforce the federal *Fisheries Act* against the City of Montreal in regard to the discharge to the St. Lawrence River of toxic pollutants from the city's Technoparc site. The submitters assert that polychlorinated biphenyls (PCBs), polycylic aromatic hydrocarbons (PAHs) and other pollutants are being discharged from Technoparc, the site of an historic industrial and municipal waste landfill. The City of Montreal now owns the site.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (15 September 2003)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.
ART. 15(1) (19 April 2004)	Notification to Council that a factual record is warranted in accordance with Article 15(1).

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Articles 14(1) and (2) of the North American Agreement for Environmental Cooperation

Submission Number:	**SEM-03-005** (Montreal Technopac)
Submitters:	Waterkeeper Alliance Lake Ontario Waterkeeper Société pour Vaincre la Pollution Environmental Bureau of Investigation Upper St. Lawrence Riverkeeper/ Save the River!
Concerned Party:	Canada
Date of Receipt:	14 August 2003
Date of this Determination:	15 September 2003

I. INTRODUCTION

On 14 August 2003, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement"). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that Canada is failing to effectively enforce section 36(3) of the federal *Fisheries Act* in connection with various toxic pollutants that the Submitters allege are being discharged into the St. Lawrence River from the Technoparc site in Montreal, Quebec. The Secretariat has determined that the submission meets all of the requirements in Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II. SUMMARY OF THE SUBMISSION

The Submitters are three Canadian and two United States non-governmental organizations. They assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the alleged discharge of polychlorinated biphenyls (PCBs), polycyclic hydrocarbons (PAHs) and other pollutants into the St. Lawrence River from the Montreal Technoparc, the site of an historic municipal and industrial waste landfill now owned by the city of Montreal. Under s. 36(3), it is an offense to deposit or permit the deposit of a deleterious substance in water frequented by fish or in any place under conditions where a deleterious substance may enter any such water.

The Submitters assert that the Montreal Technoparc site functioned as a landfill for municipal and industrial wastes until it was redeveloped as parking lots for Expo '67 and then, in 1988, as an industrial park.[1] They assert that the city of Montreal has been aware of PCB contamination of the site since at least 1995 and is responsible for discharges of deleterious substances from the site.[2] According to the Submitters, the city's efforts to use booms to contain the contamination are not effective. They cite sampling results from October 2000 to January 2002 showing levels of PCBs up to 941,000 times the Canadian Water Quality Guideline for the Protection of Freshwater Aquatic Life for Total PCBs inside the boom, 820 times the PCB Guideline outside the boom and 8.5M times the PCB Guideline at the discharge point.[3] The Submitters attach an April 2002 biologist's report concluding that PCBs, PAHs and other pollutants are being discharged to the St. Lawrence River from the Montreal Technoparc in concentrations well in excess of provincial, federal and international guidelines.[4] The submission includes a detailed description of the alleged threats to human health and aquatic life of PCBs.[5]

1. Submission at 3.
2. *Ibid.*
3. Submission at 4-5.
4. Submission at 5-6.
5. Submission at 6-10.

The Submitters assert that PCBs are "highly toxic, persistent and bioaccumulative" and that Environment Canada identifies PCBs as persistent toxic substances that are "too dangerous to the ecosystem and to humans to permit their release in any quantity.[6]"

The submission states that, following its receipt of a brief describing the alleged discharges, Environment Canada initiated a *Fisheries Act* investigation of the Montreal Technoparc in April 2002. According to the Submitters, Environment Canada explained in an April 2003 letter that "the investigation was stopped because the source of the contamination could not be determined.[7]" The Submitters assert that their ability to bring a private prosecution in connection with the Montreal Technoparc is in question.[8] They contend that the booms and absorbent pads that have been used to try to contain the alleged discharges are still ineffective and that the discharges are ongoing.[9]

The Submitters assert that the alleged failure to effectively enforce the *Fisheries Act* has resulted in harm to the Submitters and that further study of the matters raised in the submission would advance the goals of the NAAEC.[10] They request the CEC to prepare a factual record.

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,[11] Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.

6. Submission at 6.
7. Submission at 11.
8. *Ibid.*
9. Submission at 12, 13.
10. Submission at 13-14.
11. *See e.g.* SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

A. Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]." The submission meets these requirements. First, the Submitters are nongovernmental organizations as defined in Article 45(1) of the NAAEC. Second, the submission asserts that a Party, Canada, is failing to effectively enforce section 36(3) of the *Fisheries Act*. Third, the pollution prevention provisions of the *Fisheries Act* are environmental law within the meaning of NAAEC Article 45(2)[12] and the submission alleges an ongoing failure to effectively enforce s. 36(3). Last, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.

Article 14(1) then lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

> (a) is in writing in a language designated by that Party in a notification to the Secretariat;
>
> (b) clearly identifies the person or organization making the submission;
>
> (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
>
> (d) appears to be aimed at promoting enforcement rather than at harassing industry;
>
> (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
>
> (f) is filed by a person or organization residing or established in the territory of a Party.[13]

The submission meets these criteria. First, the submission is in English, a language designated by Canada.[14] Second, it clearly identifies the organizations making the submission.[15] Third, the submission provides sufficient information to allow the Secretariat to review the submis-

12. *See* SEM-98-004 (BC Mining), Article 15(1) Notification at 11 (11 May 2001).
13. Article 14(1)(a)-(f).
14. Article 14(1)(a), Guideline 3.2; submission at 12.
15. Article 14(1)(b); submission at i-ii.

sion.[16] The Submitters provide extensive data regarding the alleged discharges and the manner in which they allegedly create an offense under the *Fisheries Act*, as well as information regarding the extent to which Canada has taken enforcement action in response to those alleged violations. Fourth, the submission appears to be aimed at promoting enforcement rather than at harassing industry. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business, the Submitters are not competitors standing to benefit economically from the submission, and the submission does not appear frivolous.[17] Fifth, the Submitters indicate that the matter has been communicated in writing to the relevant Canadian authorities and the Canadian government's response, the letter of 24 April 2003, is attached to the submission.[18] Finally, the Submitters are established in the United States or Canada.[19]

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the Party concerned prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision in the context of the particular assertions in the submission. Article 14(2) lists these four factors as follows:

> In deciding whether to request a response, the Secretariat shall be guided by whether:
>
> (a) the submission alleges harm to the person or organization making the submission;
>
> (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
>
> (c) private remedies available under the Party's law have been pursued; and
>
> (d) the submission is drawn exclusively from mass media reports.[20]

16. Article 14(1)(c), Guideline 5.2, 5.3.
17. *See* Guideline 5.4.
18. Article 14(1)(e); Guideline 5.5; Submission at 10-11, Attachments.
19. Submission at i-ii; Article 14(1)(f).
20. NAAEC Article 14(2).

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits requesting a response from the Party.

First, in addition to describing adverse effects of PCBs on human health and aquatic ecosystems, the submission explicitly alleges harm to the Submitters.[21]

Second, the submission raises matters whose further study in the Article 14 process would advance the goals of the Agreement. The Submitters note, *inter alia,* that further study in the citizen submission process would foster the protection and improvement of the environment as contemplated in NAAEC Article 1(a); ensure that activities in Canada do not cause damage to the environment shared with the United States, consistent with responsibilities reaffirmed in the NAAEC preamble; promote sustainable development based on cooperation and mutually supportive environmental and economic policies, as contemplated in NAAEC Article 1(b); increase cooperation between governments to better conserve, protect and enhance the environment, as contemplated in NAAEC Article 1(c); avoid creating trade distortions or new trade barriers, as contemplated in NAAEC Article 1(e); strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices, as contemplated in NAAEC Article 1(f); enhance compliance with, and enforcement of, environmental law and regulations, as contemplated in NAAEC Article 1(g); and promote pollution prevention policies and practices, as contemplated in NAAEC Article 1(j). The Secretariat agrees that further study of the matters raised in the submission would advance some or all of these goals.

Third, the Submitters describe their successful efforts to request that Environment Canada investigate the alleged discharges from the Montreal Technoparc site and assert that "[n]ow that the Ministry has ended their investigation without denying or confirming that an offense is indeed being committed the Submitters' ability to bring forward a private prosecution is in question.[22]" It appears that in April 2002, rather than initiate a private prosecution on their own, the Environmental Bureau of Investigation and the Société pour Vaincre la Pollution (two of the Submitters) opted to provide Environment Canada "with a full brief, which includes samples, results, notes, pictures, and a biologist's report,[23]" such that the federal government could follow through with

21. Submission at 13-14.
22. Submission at 11.
23. Letter from M. Mattson and D. Green to M. Berard (11 April 2002), attached to the Submission.

its own investigation and address the matters they raised. The Submitters now express concern about the potential impact on a private prosecution of Environment Canada's decision to terminate its recent investigation without taking enforcement action.[24] The Secretariat concludes that the approach taken toward pursuing a remedy to the alleged discharges was reasonable in light of the circumstances.[25]

Finally, the submission is not based exclusively on mass media reports. Water quality data that some of the Submitters obtained at their own initiative are a key element of the information supporting the submission.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* in regard to the Montreal Technoparc merits a response from Canada.

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-03-005 (Montreal Technoparc) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

Geoffrey Garver
Director, Submissions on Enforcement Matters Unit

cc: Norine Smith, Environment Canada
Judith E. Ayres, US-EPA
Olga Ojeda, SEMARNAT
William V. Kennedy, CEC Executive Director
Submitters

24. See Submission at 11.
25. See Guideline 7.5.

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission Number:	**SEM-03-005** (Montreal Technoparc)
Submitters:	Waterkeeper Alliance Lake Ontario Waterkeeper Société pour Vaincre la Pollution Environmental Bureau of Investigation Upper St. Lawrence Riverkeeper/ Save the River!
Concerned Party:	Canada
Date of Receipt:	14 August 2003
Date of this Notification:	19 April 2004

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC) creates a mechanism allowing citizens to file submissions with the Secretariat (the "Secretariat") of the Commission for Environmental Cooperation of North America (CEC) asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat reviews these submissions based on criteria contained in Article 14(1) of the NAAEC. If it finds that these criteria are met, the Secretariat then determines, based on factors listed in Article 14(2), whether the submission merits requesting a response from the Party concerned. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)).

On 14 August 2003, the Submitters listed above filed a submission with the Secretariat, along with supporting materials, asserting that Canada is failing to effectively enforce section 36(3) of the federal *Fisheries Act* against the city of Montreal in connection with the discharge of contaminated groundwater from the city's Technoparc site to the Saint Lawrence River. Section 36(3) of the *Fisheries Act* prohibits the deposit of a deleterious substance into water frequented by fish unless the deposit is authorized by regulation.

On 15 September 2003, the Secretariat determined that the submission meets the requirements of Article 14(1) of the NAAEC and requested a response from the Party in accordance with Article 14(2).[1] Canada submitted its response on 14 November 2003. The response explains Environment Canada's responsibilities in regard to administration of section 36(3) of the *Fisheries Act*, presents summary information concerning the history and environmental condition of the sector of the Montreal Technoparc, and describes enforcement and compliance promotion actions undertaken by Environment Canada in regard to deposits of deleterious substances from the sector of the Montreal Technoparc into the Saint Lawrence River.

The Secretariat has concluded that the response leaves open central questions that the submission raises regarding enforcement of section 36(3) in connection with discharges of deleterious substances to fish-bearing waters from the sector of the Montreal Technoparc site. Consequently, in accordance with Article 15(1), the Secretariat hereby informs the Council that the Secretariat considers that the submission, in light of the Party's response, warrants developing a factual record and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters are three Canadian and two United States nongovernmental organizations. They assert that Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in connection with the alleged discharge of polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs) and other pollutants into the Saint Lawrence River from the Montreal Technoparc, the site of an historic domestic and industrial waste landfill now owned by the city of Montreal. Under section 36(3), it is an offense to deposit or permit the

1. SEM-03-005 (Montreal Technoparc), Determination under Articles 14(1) and (2) (15 September 2003).

deposit of a deleterious substance in water frequented by fish or in any place under conditions where a deleterious substance may enter any such water, unless the deposit is authorized by regulation.

The Submitters assert that the Montreal Technoparc site functioned as a landfill for domestic and industrial wastes until it was redeveloped as a parking lot for Expo '67 and then, in 1988, as an industrial park.[2] They assert that the city of Montreal has been aware of PCB contamination of the site since at least 1995 and is responsible for discharges of deleterious substances from the site.[3] According to the Submitters, the city's efforts to use booms to contain the contamination are not effective. They cite sampling results from October 2000 to January 2002 showing PCB levels at the discharge point up to 8.5 million times the Canadian Water Quality Guideline for the Protection of Freshwater Aquatic Life for Total PCBs, 941,000 times the PCB Guideline inside the boom, and 820 times the PCB Guideline outside the boom.[4] The Submitters attach an April 2002 biologist's report concluding that PCBs, PAHs and other pollutants are being discharged to the Saint Lawrence River from the Montreal Technoparc in concentrations well in excess of provincial, federal and international guidelines.[5] The submission includes a detailed description of the alleged threats to human health and aquatic life of PCBs.[6] The Submitters assert that PCBs are "highly toxic, persistent and bioaccumulative" and that Environment Canada identifies PCBs as a persistent toxic substance that is "too dangerous to the ecosystem and to humans to permit their release in any quantity.[7]"

The submission states that, following its receipt of a brief describing the alleged discharges, Environment Canada initiated a *Fisheries Act* investigation of the Montreal Technoparc in April 2002.[8] According to the Submitters, Environment Canada explained in an April 2003 letter that "the investigation was stopped because the source of the contamination could not be determined.[9]" The Submitters assert that their ability to bring a private prosecution in connection with the Montreal Technoparc is in question.[10] They contend that the booms and absorbent

2. Submission at 4.
3. *Ibid.*
4. Submission at 6. According to the Submitters, the Guideline was established at 0.001 μg/L in 1987.
5. Submission at 6-7.
6. Submission at 7-11.
7. Submission at 7-8.
8. Submission at 12.
9. *Ibid.*
10. Submission at 12-13.

pads that have been used to try to contain the alleged discharges are still ineffective and that the discharges are ongoing.[11]

The Submitters assert that the alleged failure to enforce the *Fisheries Act* has resulted in harm to the Submitters and that further study of the matters raised in the submission would advance the goals of the NAAEC.[12] They request the CEC to prepare a factual record.

III. SUMMARY OF THE RESPONSE

On 15 September 2003, the Secretariat determined that the submission fulfills the criteria set out in Article 14(1) of the NAAEC and merited requesting a response from Canada, in light of the factors listed in Article 14(2).[13] Canada responded to the submission on 14 November 2003.[14] The response contains three sections: 1. Enforcement of the *Fisheries Act*, 2. Description of the Sector Comprising the Technoparc Site; 3. Procedure Followed by Environment Canada.[15] In its introduction to the response, Canada explains that

> the information provided in [chapters 1 and 2] forms the context for the department's actions described in chapter three. These actions related to administrative procedure allow the department to ensure that fish and their habitat are protected within the shortest time possible.[16]

1. Enforcement of the *Fisheries Act*

Under "Enforcement of the *Fisheries Act*," Canada describes Environment Canada's responsibilities regarding the administration of section 36(3) of the *Fisheries Act*, identifies penalties applicable to violations of section 36(3), and describes the compliance promotion and enforcement programs established by Canada to achieve the department's primary objective of preventing pollution of waters frequented by fish through compliance with the *Fisheries Act*.[17]

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11. Submission at 13.
12. Submission at 14-15.
13. SEM-03-005 (Montreal Technoparc) Determination in accordance with Articles 14(1) and (2) (15 September 2003).
14. "Deposits of Deleterious Substances in the Saint Lawrence River Opposite the Technoparc Site / Commission for Environmental Cooperation / Response to submission SEM-03-005," prepared by Environment Canada for the Government of Canada (November 2003).
15. Response at i.
16. Response at 1.
17. Response at 2-4.

Canada explains that the Minister of the Environment is responsible for administering the pollution prevention provisions of the *Fisheries Act*, including section 36(3).[18] Canada states that contravention of section 36(3) is punishable on conviction by a fine and/or imprisonment, with separate offences being counted for every day on which the contravention continues. It notes that proceedings under section 36(3) may be instituted by a public department or a private party.[19]

Canada asserts that Environment Canada's compliance promotion program involves many activities intended to promote compliance with section 36(3), including education and information, consultation on proposed regulations, development of guidelines and reviewing new projects to provide technical advice on means of achieving compliance.[20] The law enforcement program includes two main activities, inspections and investigations, with the objective of requiring compliance with the Act through recourse to administrative and legal measures of law enforcement.[21] The response sets out the law enforcement measures provided for in the *Fisheries Act* in the case of an infraction–inspectors' directions, Minister's orders, injunctions, recovery of costs as the result of prosecution, and penalties imposed by courts on summary conviction—noting that the *Fisheries Act* lists situations in which a particular measure can be used.[22]

In the response, Canada states: "In order to respect basic principles of fairness, predictability and consistency, the department has framed administration of the two approaches [compliance promotion and enforcement] in a policy on compliance and enforcement of the Act.[23]" Canada notes that under the Compliance and Enforcement Policy, "[t]he department also has the administrative option of issuing a warning as a law enforcement measure.[24]" Canada explains that the Compliance and Enforcement Policy contains three criteria for deciding upon the appropriate law enforcement measure in regard to an infraction: the nature of the infraction; the effectiveness of the measure in obliging compliance by the alleged violator or in deterring re-offending; and consistency in enforcement.[25] Canada states that "[...] the measure chosen will be the

18. Response at 2.
19. *Ibid.*
20. Response at 3.
21. *Ibid.*
22. Response at 4.
23. Response at 3, note 7: Environment Canada, *Compliance and Enforcement Policy – Habitat Protection and Pollution Prevention Provisions – Fisheries Act* (November 2001) [hereinafter the "Compliance and Enforcement Policy"].
24. Response at 4.
25. *Ibid.*

measure that will secure compliance within the shortest time possible, or, if the infraction has already been corrected, the measure that will best serve to deter a reoccurrence." Canada asserts:

> In the light of the intended measure, the department has the responsibility of taking that measure, of making a recommendation to ministers or making a recommendation to the Department of Justice. In the latter case, the Department of Justice must also assess certain criteria before deciding to begin judicial proceedings.[26]

2. Description of the Sector Comprising the Technoparc Site

The response then provides a description of the history, physical characteristics and ownership of the sector comprising the Technoparc site. Canada begins by noting that between 1864 and 1888, the city of Montreal acquired land with a view to establishing a dump at the south end of Ash Street in Pointe-Saint-Charles, in an area located on the shore of the Saint Lawrence River, on the south part of the Island of Montreal, between the Victoria and Champlain bridges.[27] Canada states:

> In 1925, noting the southern progression of the Pointe-Saint-Charles dump, the Harbour Commission (Société du Port de Montréal) authorized the city of Montreal to dump garbage on its swampy lands and to do so up to the water limits.[28]

The response includes "an aerial photo of the sector in 1930 with a projection of future lands that would be formed in the riverbed by the garbage backfill.[29]" The response notes that in 1937, the city ceded part of the land at the southern end of Ash Street to Canadian National Railways (CNR) for a switching yard.[30] Later, large-capacity above ground storage tanks were installed there.[31] Canada notes that

> [b]uilt on the riverbed, the dump (in its post-1937 extension) continued to be used for landfill until its closing in 1966. From four to twelve metres of household and industrial waste along with dry material had been dumped in the area.[32]

The response notes that in 1966, the area that now forms the Technoparc site was leveled and covered with a thin coat of gravel, for

26. *Ibid.*
27. Response at 5.
28. *Ibid.*
29. *Ibid.*
30. Response at 6.
31. *Ibid.*
32. *Ibid.*

use as a parking lot during the Universal Exposition of 1967 (EXPO '67). Canada notes that "[a]t that point, problems related to the production of gas by decomposing organic matter were encountered for the first time.[33]" According to the response, also at that time, the Bonaventure Autoroute was built along the southern edge of what is now the Technoparc site, "[...] using large quantities of external landfill dumped directly on the riverbed, between the Victoria and Champlain Bridges.[34]" The response states that after EXPO '67, the land was not used until 1976, when the federal Department of Transport installed a short-takeoff and landing airport in the sector, with a terminal, parking area and fuel storage tanks.[35] The site was again abandoned in 1977, with dismantling of final infrastructure ending in 1991.[36] The response states that in 1984, Via Rail built a maintenance center on the southwest part of the site that is now the Technoparc.[37] It also notes that part of the site was used for storage of granular material and as a snow dump during the winter of 1985.[38]

In regard to the physical characteristics of the site, the response notes that because of the heterogeneous make-up of the subsoil, underground water moves slowly and at varying rates throughout the sector.[39] The response makes reference to environmental site characterization studies carried out between 1990 and 2002 by Environment Canada and different owners of land in the area.[40] A 1990 report prepared for Environment Canada and the Quebec Ministry of the Environment apparently "shows that the soil and water of the sector are contaminated by many substances, and some of them at a significant level.[41]" According to the response, CNR conducted its own studies and in 1996 installed a system to recover floating hydrocarbons in underground water at the southern edge of its land.[42] A 2002 study carried out by SNC-Lavalin for the city of Montreal

> [...] confirmed the presence of a significant concentration of PAHs and PCBs in some of the observation wells located near the banks of the Saint Lawrence River. The SNC-Lavalin study also showed the presence of PCBs in a high number of the wells throughout the Technoparc site.[43]

33. *Ibid.*
34. *Ibid.*
35. *Ibid.*
36. *Ibid.*
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. Response at 7.
41. *Ibid.*
42. *Ibid.*
43. *Ibid.*

In the response, Canada states that during the summer of 2002, the city of Montreal conducted an ecotoxicological study with the participation of Environment Canada. The study "concluded that an analysis of underground water samples were harmful and represent a lethal and sub-lethal effect on fish.[44]"

In regard to site ownership, the response states that the Technoparc site, which covers an area of 456,057 m^2, was sold to the city of Montreal in 1989 by the Crown in right of the Province (Government of Quebec) and the Montreal Port Corporation (legal representative of Her Majesty in right of Canada).[45] The site consists of 30 separate lots, of which the city owns 24.[46] Between 1989 and 1999, the city sold the other six lots to Teleglobe Canada Inc. (1 lot); Bell Mobility Cellular Inc. (1 lot); Cité du cinéma (Mel's) inc. (3 lots); and Société immobilière Partech inc. (1 lot).[47] According to the response, the land immediately north of the Technoparc site is used by CNR as a switching yard, while part of the land immediately south of the site (toward the river), on which is located the Bonaventure Autoroute, is owned in part by the Quebec Ministry of the Environment. The response states that "ownership of the other part is unknown.[48]"

Under the caption "Deposits in the Saint Lawrence River," the response states that at the eastern end of "the sector under study," "deposits in the river, characterized by a floating hydrocarbon phase, [...] are contaminated by PCBs, among others. Booms are now in place to recover the contaminated oil film to the extent possible.[49]"

3. Procedure Followed by Environment Canada

The response contains a description of actions taken by Environment Canada with respect to the Technoparc site since 1991. Canada states:

> Environment Canada is concerned about the deposits in the Saint Lawrence River between the Victoria and Champlain Bridges. Its main objective is protection of the environment. The department has acted and continues to take action to resolve this problem.[50]

44. *Ibid.*
45. *Ibid.*
46. Response at 7-8.
47. Response at 8.
48. *Ibid.*
49. *Ibid.*
50. Response at 9.

Canada states that Environment Canada has employed both compliance promotion and enforcement approaches to resolving the problem of deposits in the river. Canada explains:

> One approach consists of promotion of the *Fisheries Act* by acting as a technical adviser and the other approach is by law enforcement. The two approaches are mutually inclusive in achieving the objective of protecting the environment with the result that they reinforce each other.[51]

Under the caption "Compliance Promotion Program," Canada states:

> Since 1998, the scientific staff of Environment Canada's compliance promotion program has been increasingly concerned by deposits of substances in the Saint Lawrence River bordering on the Bonaventure Autoroute between the Victoria and Champlain Bridges.[52]

Canada explains that as regards compliance promotion, since 1998, Environment Canada has been in talks with the province of Quebec and more recently, with the city of Montreal and owners of other sites in the contaminated sector, to find an overall solution to the problem.[53] In 2002, the city proposed installing a system for containing and recovering floating hydrocarbon phases at the site.[54] Canada states that Environment Canada expressed concerns about the capacity of such a system to contain substances present in a dissolved phase.[55] In the summer of 2002, Environment Canada "participated in an ecotoxicological study of a dissolved phase of the underground water to measure the harmful and lethal and sub-lethal effects on fish.[56]"

Regarding enforcement, Canada states that in August 1991, Environment Canada received information from a representative of the Montreal Port Corporation concerning an oil film on the Saint Lawrence River, under the Victoria Bridge.[57] According to Canada:

> [...] Environment Canada conducted an inspection and took an open water sample. Since the source of the pollution was unknown, Environment Canada incurred the cost of installing an oil containment system in the river. Soon after, CN decided to take charge of the operation. Subse-

51. *Ibid.*
52. *Ibid.*
53. Response at 9-10.
54. Response at 9.
55. *Ibid.*
56. *Ibid.*
57. Response at 10.

> quently, CN and the city of Montreal agreed on cost sharing to maintain booms at locations where deposits were observed and on recovery of hydrocarbons. In 1996, CN withdrew its contribution from the operation for the purpose of working on recovery of floating hydrocarbons on the surface of underground water along the limits of its property.[58]

According to the response, in November 1998, Environment Canada issued a warning to the city of Montreal because of "the poor condition of the booms and the cessation of oil pumping.[59]" From that time until August 2003, Canada states that Environment Canada has carried out twenty visual inspections of the booms and three times asked the city "to correct the situation.[60]" Through regular inspections, Environment Canada says it "ensures that the equipment for containing and recovering hydrocarbons is operational.[61]" Canada recognizes that the booms and pumping of hydrocarbons are not a permanent solution and do not solve the overall problem.[62]

Canada states that, following a request by some of the Submitters in April 2002, Environment Canada conducted an investigation for violation of section 36(3) of the *Fisheries Act*.[63] According to Canada,

> [t]he investigation consisted of an exhaustive search of the different existing studies in the department on soil and underground water contamination in the sector making up the Technoparc site. Information was also collected on departmental actions regarding deposits in the river at that location. As part of the investigation, consultations took place with departmental personnel involved as technical advisers to various parties in the sector to whom the deposits might be attributed. Finally, a search of title documents was made in the Montreal land register of the land registry office, and in documents of the Quebec Ministry of Natural Resources to trace the history of the transfer of title documents and to identify current title owners in the sector comprising the Technoparc.[64]

According to Canada, "the information collected showed that the different lands forming the study sector are contaminated by many pollutants resulting from diverse activities (household and industrial waste burial site, installation of petroleum product tanks and of liquid residue lagoons, snow dumping, and dump for material of unknown origin).[65]"

58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. Response at 13.
63. Response at 10.
64. Response at 11.
65. *Ibid.*

The response states that "[w]hile the owners of the different lots forming what was previously the dump are now known, there is not sufficient proof to attribute the fact that the contaminants deposited in the river come directly from the Technoparc site, from one of the sites of other owners or from all these sites.[66]"

Under the caption "Conclusion of the Investigation," the response states: "Having failed to establish sufficient proof of the infraction covered by section 36(3) of the *Fisheries Act*, an overriding condition for successful pursuit of legal proceedings, the department decided to close the investigation.[67]" The response states that "[f]or these reasons [and following an assessment of the criteria of the Compliance and Enforcement Policy[68]], the department [...] has decided to continue its interventions with the different parties potentially responsible for the deposits in the river to find a lasting solution to this environmental problem.[69]"

The response contains a two-page Annex entitled "Environment Canada clarification of certain statements by the authors of submission SEM-03-005.[70]" Clarifications concern the contents of the Compliance and Enforcement Policy, the lack of information regarding the origin of the contamination responsible for the deposits in the river, Environment Canada's response to a January 2002 phone call reporting an oil slick discharging from the Technoparc site, the purpose of criminal investigations, and the effect of Environment Canada's ending its investigation on the Submitters' ability to bring a private prosecution under the *Fisheries Act*.[71] With regard to a statement by the Submitters that "[t]he Montreal Technoparc is one of Quebec's largest hazardous waste sites [...]",[72] Canada affirms:

> The Technoparc site is part of a sector that used to be a household and industrial waste burial site. It has been the location of and the neighbour of sites where many types of activities have also contributed to the contamination of the Technoparc soil and neighbouring land. By the nature of their foundations, underground water moves according to a complex hydrogeological system, with the result that information concerning the source of substances deposited in the river does not exist.[73]

66. *Ibid.*
67. Response at 12.
68. Response at 13.
69. Response at 12.
70. Response at 14.
71. Response at 14-16.
72. Response at 14, submission at 4.
73. Response at 14.

In the Annex to the response, Environment Canada notes that the Submitters contend that "[...] it is the purpose of a criminal investigation to establish the identity of the accused where the evidence of an offence exists.[74]" Environment Canada states:

> The purpose of a criminal investigation of an infraction of strict responsibility, such as provided for in section 36(3) of the *Fisheries Act*, is to collect sufficient evidence on each of the elements constituting an infraction, and information surrounding the infraction, where there are reasonable grounds for believing that an infraction has occurred. If the law enforcement measure being considered by the department is a criminal penalty imposed by a court, the evidence is assessed by the Attorney General of Canada who also considers the public interest in deciding whether to begin legal proceedings.[75]

IV. ANALYSIS

The Secretariat considers that the submission, in light of Canada's response, warrants developing a factual record as recommended in this notification. The reasons for the Secretariat's recommendation are set forth below.

A. Why a factual record is warranted

The submission, taken together with Canada's response, leaves open central questions regarding whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to Montreal's Technoparc site. As a result, additional information is required for a proper consideration of the allegations contained in the submission. This information would be gathered during development of a factual record. A factual record would present information relevant to a full and objective understanding of Canada's actions to enforce and promote compliance with section 36(3) in connection with the Technoparc site, in particular as regards application of criteria from Environment Canada's Compliance and Enforcement Policy such as the nature of the infraction, the goal of ensuring that alleged violators comply within the shortest time possible, and consistency in enforcement.

74. Response at 15, submission at 12.
75. Response at 15.

i) Infractions of section 36(3)

Section 36(3) of the *Fisheries Act* provides:

> [s]ubject to subsection (4) [authorization by regulation], no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

The submission identifies ongoing contraventions of section 36(3) of the *Fisheries Act* related to discharges of deleterious substances—including PCBs—from the area of a former municipal dump located on the bed and shore of the Saint Lawrence River near downtown Montreal.[76] The Submitters assert that Environment Canada has identified PCBs as a persistent toxic substance that is "too dangerous to the ecosystem to permit their release in any quantity.[77]" In its response to the submission, Canada acknowledges the existence of the deposits[78] and the deleterious nature of the substances being deposited,[79] as well as the growing concern of Environment Canada scientists since 1998 regarding those deposits.[80]

The Submitters claim that "[s]ince October 1995 and possibly before, the city [of Montreal] has been aware of the PCB contamination of the [Technoparc] site. The governments of Quebec and Canada, as past owners of the site, have also been aware of the contamination risks linked to the Technoparc.[81]" In its response, Canada states that in 1990, Environment Canada and the Quebec Ministry of the Environment commissioned a report that showed "[...] that the soil and water of the sector are contaminated by many substances, and some of them at a significant level.[82]" Canada acknowledges that zinc, nickel, silver, cadmium, arsenic, phenols, PAHs and PCBs were detected in soil samples from the sector, while ethylbenzene, benzene, toluene, styrene, xylene, PAHs, chlorophenols, and methylene chloride were detected in ground- and

76. Submission at 5-6.
77. Submission at 8.
78. Response at 8, 15.
79. Response at 7: "During the summer of 2002, the city of Montreal conducted an ecotoxicological study with the participation of Environment Canada. The study concluded that an analysis of underground water samples were harmful and represent a lethal and sub-lethal effect on fish." See also response at 15.
80. Response at 9.
81. Submission at 4.
82. Response at 7.

surface waters.[83] The deleterious nature of many of these chemicals is a factor weighing in favor of development of a factual record.

ii) Inspections for compliance with section 36(3)

In the response, under the caption "Law Enforcement Program," Canada states that in August 1991, Environment Canada received information from a representative of the Montreal Port Corporation[84] concerning an oil film on the Saint Lawrence River under the Victoria Bridge.[85] The response states that Environment Canada conducted an inspection and took an open water sample.[86] It adds: "Since the source of the pollution was unknown, Environment Canada incurred the cost of installing an oil containment system in the river.[87]" According to Canada, operation of that system was soon taken over by CNR, then carried out jointly by CNR and the city of Montreal, and is now conducted solely by the city.[88] The response does not contain information regarding why CNR and the city of Montreal agreed to operate and maintain the oil-pumping system, nor does it contain information about the cost of operating and maintaining the system, or information regarding the system's relative effectiveness in stopping deposits of deleterious substances into waters frequented by fish. This information is relevant to a consideration of whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to the Technoparc site and would be gathered by the Secretariat during development of a factual record.

In the response, Canada states that in November 1998, Environment Canada sent the city of Montreal a warning for an infraction of section 36(3) of the *Fisheries Act* because of the poor condition of the booms and the cessation of oil pumping.[89] Environment Canada's Compliance and Enforcement Policy provides that enforcement personnel may use warnings when they have reasonable grounds to believe that a violation of the *Fisheries Act* has occurred; where the degree of harm or potential harm to the fishery resource, its supporting habitat and to human use of fish or both appears to be minimal; and where the alleged violator has made reasonable efforts to remedy or mitigate the negative impact of the

83. *Ibid.*
84. "Montreal Port Authority" since 1 March 1999.
85. Response at 10.
86. *Ibid.*
87. *Ibid.*
88. *Ibid.*
89. *Ibid.* According to Canada, although warnings are not mentioned in the *Fisheries Act*, Environment Canada "[...] has the administrative option of using a warning as a law enforcement measure." Response at 4.

alleged offenses. In addition to considering whether such reasonable efforts have been taken, enforcement personnel are to consider the alleged violator's *Fisheries Act* compliance history and whether the alleged violator has taken sufficient action to prevent future offenses. Canada asserts that since 1998, Environment Canada has used regular inspections to ensure that the city of Montreal maintains the oil-containment system.[90] According to Canada, "[a]n inspection consists of a verification of compliance with the Act [...].[91]" Canada acknowledges that "[...] the booms and pumping of hydrocarbons are not a permanent solution and do not solve the overall problem.[92]"

In the response, Canada states that pursuant to the Compliance and Enforcement Policy, in selecting among a range of available measures for achieving compliance with section 36(3) of the *Fisheries Act*, "[...] the measure chosen will be the measure that will secure compliance within the shortest time possible [...].[93]" In regard to compliance promotion and enforcement actions taken by Environment Canada with respect to discharges to the Saint Lawrence River from the area of the Technoparc site, Canada has stated: "these actions related to administrative procedure allow the department to ensure that fish and their habitat are protected within the shortest time possible.[94]"

During development of a factual record, the Secretariat would gather information regarding Environment Canada's reliance on inspections as a primary enforcement tool in regard to known, ongoing discharges of deleterious substances to the Saint Lawrence River from the Technoparc sector, both before and after the issuance of a warning in 1998. The Secretariat would also gather additional information on the circumstances surrounding the issuance of a warning in 1998 and actions taken in response to it.

iii) Investigation for an infraction of section 36(3)

Under the caption "Investigation," Canada's response states:

> Following the 11 April 2002 request from SVP and EBI [two of the Submitters], Environment Canada decided to conduct an investigation for an infraction of section 36(3) of the *Fisheries Act* resulting from deposits of del-

90. Response at 10.
91. Response at 3.
92. Response at 13.
93. Response at 4.
94. Response at 1.

> eterious substances in the Saint Lawrence River opposite the Technoparc site.[95]

According to Canada, an investigation is sometimes undertaken by Environment Canada when there are reasonable grounds for believing that an infraction of the Act has been committed.[96] In regard to the Technoparc site, it states:

> Environment Canada conducted an investigation that would allow consideration of legal proceedings so that protection of the environment through compliance with the *Fisheries Act* could be achieved in the shortest time possible.[97]

In light of the above, a factual record is warranted to gather information regarding the lead-up to, timing of, and other circumstances surrounding Environment Canada's investigation in 2002–03 in regard to the ongoing deposits of deleterious substances to the Saint Lawrence River in the area of the Montreal Technoparc. Since Canada states that the decision to conduct an investigation followed a request from the Submitters,[98] the Secretariat would also gather information regarding the role of such a request in prompting an investigation by Environment Canada under section 36(3) of the *Fisheries Act*.[99]

iv) Laying charges and prosecution under section 36(3)

In the response, Canada explains:

> An investigation is conducted, either to gather additional information that will allow a choice of the appropriate law enforcement measure, or to seek proof of the infraction and additional information surrounding the infraction to support legal action, when the measure being considered is a penalty imposed by the court.

In the case of the Technoparc site, Canada states:

> The investigation was carried out with the aim of finding evidence for each of the factors constituting an infraction and for information concerning the infraction, which are essential to support legal proceedings.[100]

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95. Response at 10.
96. Response at 3.
97. Response at 13.
98. *Ibid.*
99. Response at 4.
100. Response at 11.

Although the submission identifies the city of Montreal as being responsible for deposits of deleterious substances to the Saint Lawrence from the Technoparc site,[101] Canada claims that after an exhaustive investigation, "[...] there is not sufficient proof to attribute the fact that the contaminants deposited in the river come directly from the Technoparc site, from one of the sites of other owners or from all these sites.[102]"

Together, the submission and response do not present sufficient information to allow for a full and objective assessment of Canada's decision in regard to the laying of charges under section 36(3) of the *Fisheries Act* in connection with discharges of deleterious substances from the sector of the Technoparc site. In the context of developing a factual record, the Secretariat would gather information on what needs to be known about the source of a deposit to support laying charges under section 36(3) in the case of a contaminated site like the Technoparc. This would include information regarding what constitutes "any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water" for the purpose of laying charges under section 36(3) in connection with multi-owner contaminated sites. A factual record would also present detailed information regarding what is known about the Technoparc sector and what is missing to lay and pursue charges under section 36(3) in connection with discharges from the Technoparc site, as well as any obstacles to prosecution.

Canada's response to the submission does not include any supporting documents. Relevant supporting information referred to in Canada's response that would be gathered in the course of preparing a factual record includes the materials reviewed by Environment Canada during its 2002 investigation. This information consists of existing environmental reports; information on departmental actions regarding deposits in the river; results of consultations with departmental personnel involved as technical advisers to various parties in the sector to whom the deposits might be attributed; and results from a search of title documents.[103] The Secretariat would thus review in detail what is known about the environmental condition of the area that includes the Montreal Technoparc site, with a view to presenting information relevant to Canada's claim that available information does not allow for the identification of the source of the deposits. The Secretariat would also gather or develop information regarding available methods for tracking

101. Submission at 2.
102. Response at 11.
103. *Ibid.*

the source of deposits and for gathering other missing information relevant to taking enforcement action in connection with the Technoparc site, including information on obstacles to employing these methods.

In its response, Canada states that Environment Canada uses a dual approach to addressing the problem of deposits in the river, with some of its staff acting as technical advisers to owners of property in the area and others pursuing law enforcement.[104] According to Canada, "[t]he two approaches are mutually inclusive in achieving the objective of protecting the environment with the result that they reinforce each other.[105]" For a consideration of this assertion in the context of the Technoparc site, in developing a factual record, the Secretariat would review information regarding departmental actions in regard to deposits in the river as well as the views expressed to Environment Canada enforcement personnel by Environment Canada's scientific advisers, and the role of such actions and views in determining further enforcement action by Environment Canada.

In the response, Canada states:

> Since it is not possible to make the link between the activities that led to the contamination responsible for the deposits in the river, it is necessary to determine who has authority over the contaminants that are escaping from the contaminated land or lands. This is a very complex determination in view of the hydrogeological system of sector.[106]

In developing a factual record, to allow for a consideration of the division in land ownership as an obstacle to enforcement of section 36(3) of the *Fisheries Act*, the Secretariat would review information related to each property in the area, including location in relation to the Technoparc site, proximity to the shore, what is known about its environmental condition and history of ownership and use, and what types of environmental conditions were attached to the transfer of title to the property to its current and/or previous owners.

In its response, Canada states: "If the law enforcement measure being considered by the department is a criminal penalty imposed by a court, the evidence is assessed by the Attorney General of Canada who also considers the public interest in deciding whether to begin legal proceedings.[107]" While the response states that the 2002 investigation "[...]

104. Response at 9.
105. *Ibid.*
106. Response at 15.
107. *Ibid.*

did not produce sufficient evidence to assign criminal responsibility to one or more offenders,[108]" the response does not contain information regarding assessment of the evidence and consideration of the public interest by the Attorney General of Canada. Such information would be gathered by the Secretariat, as appropriate, in the course of preparing a factual record.

v) Promoting compliance with section 36(3)

In its response to the submission, Canada identifies compliance promotion activities undertaken by Environment Canada in regard to deposits of deleterious substances from the area of the Technoparc site.[109] These activities consist of: discussions with the Quebec Ministry of the Environment, the city of Montreal, and owners of other properties in the contaminated sector to find an overall solution to the problem;[110] reviewing and expressing concern about a proposal by the city of Montreal to build a containment and recovery system for floating hydrocarbon phases at the Technoparc;[111] and participating in an ecotoxicological study of a dissolved phase of the underground water to measure its harmful and lethal and sub-lethal effects on fish.[112]

In developing a factual record, the Secretariat would gather relevant information on past and ongoing discussions between Environment Canada and other parties regarding "[...] the problem and possible plans for its solution.[113]" This would include information on the extent to which such discussions led to actions consistent with the Compliance and Enforcement Policy's objective of achieving compliance in the shortest time possible.[114]

The Secretariat would gather information regarding Environment Canada's review of the city of Montreal's proposed containment system, and would gather or develop comparative information regarding technical options for addressing pollution of fish-bearing waters from heterogeneous contaminated sites like the Technoparc site.

The Secretariat would also gather information regarding the basis for Environment Canada's participation in an ecotoxicological study

108. Response at 13.
109. Response at 9.
110. Response at 9-10.
111. Response at 9.
112. *Ibid.*
113. *Ibid.*
114. Response at 4.

regarding the effects of the deposits on fish. Although under the Compliance and Enforcement Policy, priority for action to deal with suspected violations is guided by degree of harm or risk of harm to fish, fish habitat or human health, to establish an offense under section 36(3) of the *Fisheries Act*, it is not necessary to prove that the deposit has actually resulted in harmful effects on fish in the environment if the substance deposited is acknowledged to be inherently deleterious to fish.[115]

The response states that Environment Canada's compliance promotion and law enforcement approaches to administration of section 36(3) of the *Fisheries Act* are mutually inclusive in achieving the objective of protecting the environment, "with the result that they reinforce each other.[116]" Under the caption "Conclusion of the Investigation," Canada's response states:

> Having failed to establish sufficient proof of the infraction covered by section 36(3) of the *Fisheries Act*, an overriding condition for successful pursuit of legal proceedings, the department decided to close the investigation.
>
> For these reasons, the department sent notice of the closing of the investigation to the applicants by letter dated April 24, 2003, and has decided to continue its interventions with the different parties potentially responsible for the deposits in the river to find a lasting solution to this environmental problem.[117]

In developing a factual record, the Secretariat would gather information regarding the progress and success of Environment Canada's compliance promotion activities in connection with the sector that includes the Technoparc site since the time Environment Canada closed the investigation for lack of evidence.

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115. In determining whether a substance is deleterious, it is sufficient to prove that the substance deposited is capable of making water harmful to fish. For instance, in *R.* v. *MacMillan Bloedel (Alberni) Limited* (1978), 42 C.C.C. (2d) 70 (B.C. Co. Ct.) at 73-74; affirmed 47 C.C.C. (2d) 118 (B.C.S.C.); leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.), the Court held that "[t]he effect of the Act is to provide that if such a substance has had a harmful effect on fish elsewhere when added to water, then it qualifies as a deleterious substance under the *Fisheries Act*." See also *R.* v. *Abitibi Consolidated* (2000), 190 Nfld. and P.E.I.R. 326; 2000 Nfld. and P.E.I.R. LEXIS 238; 576 A.P.R. 326 (Nfld. Prov. Ct.) at para. 51: "In determining whether the Crown has established that there was a deposit of a deleterious substance beyond a reasonable doubt, I agree with the Crown's assertion that it is not necessary to establish actual harm or damage to fish or fish habitat."
116. Response at 9.
117. Response at 12.

V. RECOMMENDATION

For the foregoing reasons, the Secretariat considers that this submission, in light of Canada's response, warrants the development of a factual record and hereby so informs the Council. The submission and response leave open matters for which a more detailed presentation of factual information will assist in considering whether Canada is failing to effectively enforce section 36(3) of the *Fisheries Act* in regard to Montreal's Technoparc site, as the Submitters allege.

As discussed above in detail, a factual record is warranted to develop and present information regarding the following matters in relation to effective enforcement of section 36(3) of the *Fisheries Act* in regard to deposits of deleterious substances from the area of the Montreal Technoparc site to the Saint Lawrence River: a) Environment Canada's use of inspections and a warning as enforcement tools in connection with ongoing deposits; b) the lead-up to and timing of Environment Canada's decision to undertake an investigation in response to a request from members of the public; c) characteristics and fate of contamination in the sector of the Montreal Technoparc; d) effectiveness and cost of oil containment and pumping system(s) in place since the early 1990s; e) availability and cost of options for addressing pollution of fish-bearing waters from heterogeneous contaminated sites such as the sector of the Montreal Technoparc; f) evidence needed to lay charges for an infraction of section 36(3) of the *Fisheries Act* in the case of multi-owner contaminated sites such as the Montreal Technoparc; g) considerations of the Attorney General in making its determinations in regard to the Montreal Technoparc site, as appropriate; h) the ecotoxicological study carried out in 2002, in regard to enforcement of section 36(3); i) effects of division of ownership in the Technoparc sector on success of enforcement efforts; j) effects, if any, of Environment Canada technical actions and advice on success of enforcement efforts; k) ongoing discussions between Environment Canada, the Quebec Ministry of the Environment, the city of Montreal, and owners of others sites in the sector; l) compliance promotion efforts following the decision not to seek charges.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this notification, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 19th day of April 2004.

per: William V. Kennedy
Executive Director

SEM-03-006

(Cytrar III)

SUBMITTERS: ACADEMIA SONORENSE DE DERECHOS HUMANOS, A.C. AND DOMINGO GUTIÉRREZ MENDÍVIL

PARTY: MEXICO

DATE: 15 AUGUST 2003

SUMMARY: The Submitters allege that Mexico is failing to effectively enforce its environmental law at a hazardous waste landfill owned by Cytrar, S.A. de C.V. in Sonora, Mexico. The Submitters filed two previous submissions regarding the operation of the Cytrar facility. Like the second submission, the new submission asserts that Mexico is failing to effectively enforce its environmental law in relation to the establishment and operation of the Cytrar landfill. The Submitters assert that Cytrar, in violation of applicable environmental laws, operated the site without an environmental impact authorization; did not comply with design specifications regarding cell lining; and allowed hazardous waste from the US to be buried at the site. The Submitters allege that these actions have caused damage to human health and the environment.

SECRETARIAT DETERMINATIONS:

ART. 14(1)(2) (29 August 2003) Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-03-006** (Cytrar III)
Peticionarios:	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	15 de agosto de 2003
Fecha de la determinación:	29 de agosto de 2003

I. INTRODUCCIÓN

El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") puede examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte signataria del *Acuerdo de Cooperación Ambiental de América del Norte* (el "ACAAN" o "Acuerdo") está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición cumple con los requisitos señalados en el artículo 14(1) del ACAAN. Si la petición lo amerita, considerando los criterios del artículo 14(2), el Secretariado puede solicitar a esa Parte que proporcione una respuesta a la petición.

El 15 de agosto de 2003, la Academia Sonorense de Derechos Humanos, A.C. y el Lic. Domingo Gutiérrez Mendivil (los "Peticionarios"), presentaron al Secretariado una petición de conformidad con los artículos 14 y 15 del ACAAN. Los Peticionarios aseveran que el gobierno

de México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de presuntas irregularidades en la construcción y operación del confinamiento de residuos peligrosos conocido como Cytrar, y respecto al negado acceso a los Peticionarios a la información relacionada con esas presuntas irregularidades. Esta es la tercera petición presentada respecto de este asunto. Las primeras dos peticiones pueden consultarse bajo los números de identificación SEM-98-005 y SEM-01-001.

El trámite de la petición SEM-01-001 concluyó con la Resolución de Consejo 02-13 del 10 de diciembre de 2002, la cual registró el voto unánime del Consejo contra la elaboración de un expediente de hechos. La Resolución destacó que México había informado al Secretariado que el asunto de la petición era objeto de un procedimiento pendiente de solución de controversias en el Centro Internacional de Arreglo de Diferencias Relativas a la Inversión ("el CIADRI").

En su carta de presentación para la nueva petición, SEM-03-006, el Peticionario Domingo Gutiérrez Mendívil mencionó que "en atención a que ha dejado de existir la razón por la que no fue posible continuar con el trámite de la anterior petición que se identificó como Cytrar II, estoy planteando de nueva cuenta dicha solicitud en los mismos términos, al permanecer la situación esencialmente igual. En esa virtud, los documentos de prueba de esta petición vienen a ser los que ya se remitieron previamente, sin perjuicio de enviar mas adelante otras constancias adicionales sobre el particular." La petición SEM-03-006 es idéntica a la petición SEM-01-001. Por consiguiente – y tomando en cuenta que, al responder a la petición SEM-01-001, la Parte sólo proporcionó información respecto del procedimiento en el CIADRI, sin responder a lo aseverado en la petición – el texto de esta determinación es igual al que se encuentra en la Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del ACAAN del 24 de abril de 2001.

El Secretariado determina que esta petición satisface los requisitos del artículo 14(1) del Acuerdo, y que amerita solicitar una respuesta a la Parte mexicana conforme al artículo 14(2), por las razones que se expresan en esta Determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran que México ha omitido aplicar de manera efectiva su legislación ambiental en relación con el confinamiento de residuos peligrosos conocido como Cytrar, ubicado en la proximidad de la ciudad de Hermosillo, en el estado de Sonora, México, y

con el derecho a la información ambiental relacionada con ese confinamiento. El confinamiento ya no está operando, debido a que en 1998 la autoridad ambiental negó a Cytrar, S.A. de C.V. la renovación de su autorización de operación. La petición asevera que México ha incurrido en omisiones en la aplicación efectiva del artículo 7 de la *Ley Federal de Protección al Ambiente* de 1982 (LPFA)[1], de los artículos 28, 29, 32, 153 y 159 bis 3 de la *Ley General del Equilibrio Ecológico y la Protección al Ambiente* (en adelante, LGEEPA), del artículo 7 del *Reglamento de la LGEEPA en Materia de Residuos Peligrosos* (en adelante, RRP), del artículo 415 del *Código Penal Federal* (en adelante, CPF), y de la Norma Oficial Mexicana *NOM-057-ECOL-1993 Que establece los requisitos que deben observarse en el diseño, construcción y operación de celdas de un confinamiento controlado de residuos peligrosos* (en adelante, NOM-057).[2]

La petición plantea cinco aseveraciones que se describen separadamente a continuación, si bien la relación entre todas ellas es importante para la consideración de esta petición. La primera aseveración de la petición se refiere a la falta de autorización en materia de impacto ambiental del confinamiento. Los Peticionarios aseveran que la Parte mexicana omitió aplicar de manera efectiva los artículos 28, 29 y 32 de la LGEEPA, respecto del confinamiento de residuos peligrosos ahora conocido como Cytrar, al no requerir una manifestación de impacto ambiental previamente a la realización de las obras y actividades del confinamiento y al permitir su operación a los subsecuentes responsables sin que contaran con autorización en esa materia. Afirman que la evaluación de impacto ambiental era exigible al confinamiento desde el inicio, porque el requisito en la LFPA data de 1982, además de que sería exigible de manera retroactiva, al tratarse de una disposición de orden público e interés social.[3]

La segunda aseveración de los Peticionarios es que la autoridad ambiental omitió aplicar de manera efectiva los artículos 153 de la LGEEPA y 7 del RRP que prohiben la importación de residuos peligrosos para su disposición final en territorio nacional y exigen la repatriación de los residuos peligrosos generados bajo el régimen de

1. La LFPA estuvo en vigor hasta 1988. La LGEEPA que la sustituyó conserva disposiciones en materia de impacto ambiental equivalentes en lo esencial (artículos 28 al 30). En adelante se hace referencia sólo a las disposiciones vigentes.
2. Así como de la anterior Norma Técnica Ecológica *NTE-CRP-010/88,* publicada en el *Diario Oficial de la Federación* (en adelante, "DOF"), el 14 de diciembre de 1988 y la Norma Oficial Mexicana *NOM-PA-CRP-006/93*, la cual quedó con la nomenclatura *NOM-057-ECOL-1993* en virtud del Acuerdo publicado el 22 de octubre de 1993, la cual fue cambia a *NOM-057-SEMARNAT-1993* en virtud del Acuerdo publicado en el DOF el 23 de abril de 2003.
3. Véanse las páginas 3, 9 a 12 y los anexos 10 y 19 de la petición.

importación temporal. Esta afirmación se basa en el hecho de que en 1997 el confinamiento Cytrar recibió tierras contaminadas y otros residuos peligrosos abandonados por la empresa Alco Pacífico, S.A. de C.V. para su disposición final. Según la petición, la fundidora de plomo Alco Pacífico abandonó tierras contaminadas y residuos peligrosos importados ilegalmente desde Estados Unidos y residuos generados a partir de materia prima introducida al país bajo el régimen de importación temporal, que debían haberse retornado al país de origen. Esa empresa operaba bajo el régimen de maquila en el Florido, Tijuana, BC. y fue clausurada por la autoridad ambiental en abril de 1991. Según la petición y la información que la acompaña, la autoridad ambiental gestionó la disposición final de esos residuos en Cytrar, para lo cual recibió 2 millones de dólares estadounidenses asignados por el Juez del Condado de Los Angeles, California, E.E. U.U. A.A. Al parecer, dicha suma fue una parte de la multa impuesta por el mismo juez a la compañía transportista S.R.S./Quemetco en virtud del transporte ilegal de residuos peligrosos al sitio de Alco Pacífico. Esta aseveración se entiende en el sentido de que México está omitiendo sancionar la supuesta violación a los artículos 153 de la LGEEPA y 7 del RRP, que se cometió presuntamente al depositar los residuos peligrosos en Cytrar para su disposición final, siendo que según los Peticionarios, dichos residuos peligrosos deben repatriarse.[4]

La tercera aseveración de la petición es que el confinamiento de residuos peligrosos no observó las especificaciones de la NOM-057 respecto de la construcción de sus celdas y que la Parte mexicana no ha sancionado esta supuesta violación de su legislación ambiental. Según las autorizaciones concedidas por el Instituto Nacional de Ecología a Cytrar, en 1996 el confinamiento contaba con una celda con capacidad de 16,200 m^3, y contaba con una nueva celda con capacidad para 110,000 m^3 en 1997.[5] En apoyo a la afirmación de que se han incumplido estas especificaciones, la petición incluye un extracto de una manifestación de impacto ambiental presentada por Cytrar en 1994, que describe el diseño de las celdas.[6] Los Peticionarios afirman que "... los muros de contención de las celdas del confinamiento CYTRAR no cuentan con la capa de suelo cemento que se menciona en [la manifestación de impacto ambiental] y en algunas áreas al parecer tampoco existe la capa de arena de 30 cm. De ahí que los materiales que se utilizaron como alternativa al muro de 60 cm de concreto que exige en su párrafo 5.1.5 la Norma Oficial Mexicana NOM-CRP-006-ECOL/1993, ni remotamente tienen una resistencia de 240 Kg/cm^2."[7]

4. Véanse las páginas 3 a 6, 12 y 13, y los anexos 15 y 37 a 39 de la petición.
5. Véanse los anexos 3 y 4 de la petición.
6. Misma que la autoridad ambiental no aprobó, según afirman los Peticionarios.
7. Véase las páginas 6, 7 y 12 y el anexo 19 de la petición.

La cuarta aseveración de la petición es que la Parte ha omitido aplicar de manera efectiva el artículo 415 del CPF al no ejercer acción penal tras la denuncia de hechos que el Peticionario presentó el 8 de diciembre de 1997 y que amplió el 3 de diciembre de 1998. La fracción primera del artículo 415 del CPF dispone una pena de tres meses a seis años de prisión y de mil a veinte mil días de multa, a quien sin autorización de la autoridad federal competente o contraviniendo los términos en que haya sido concedida, realice cualquier actividad con materiales o residuos peligrosos que ocasionen o puedan ocasionar daños a la salud pública, a los recursos naturales, la fauna, la flora o a los ecosistemas. La denuncia que presentaron los Peticionarios se refiere a los hechos que son objeto de las tres aseveraciones que se resumieron en los párrafos precedentes. Esto es, a la presunta operación del confinamiento sin que haya mediado autorización en materia de impacto ambiental, a la supuesta disposición final ilegal de residuos peligrosos que debieron repatriarse y al presunto incumplimiento de las especificaciones sobre construcción de las celdas.[8]

Por último, la petición asevera que al negarse a proporcionar diversa información ambiental relacionada con Cytrar a los Peticionarios, la Parte mexicana ha violado el derecho a la información ambiental contemplado en el artículo 159 Bis 3 de la LGEEPA. Se anexa a la petición una solicitud de información escrita que se refirió principalmente a la naturaleza y origen de los residuos depositados en el confinamiento Cytrar. La respuesta mediante la cual la autoridad ambiental negó la entrega de dicha información fue declarada por la justicia federal como violatoria de la garantía de legalidad regulada en los artículos 14 y 16 constitucionales, por falta de motivación.[9] Los Peticionarios indican que a pesar del amparo de la justicia federal, la información solicitada aún no se ha proporcionado y que por ello la Parte está incurriendo en una omisión en la aplicación efectiva de su legislación ambiental.

Por otra parte, la petición afirma que el Secretariado está facultado para elaborar un informe sobre el caso Cytrar según el artículo 13 del ACAAN, por referirse a un asunto relacionado con las funciones de cooperación del Acuerdo.

8. Véanse las páginas 6, 14 y 15 y los anexos 8 y 15 de la petición.
9. Véase el anexo 32 de la petición.

III. ANÁLISIS DE LA PETICIÓN CONFORME A LOS ARTÍCULOS 14(1) Y 14(2) DEL ACAAN

Artículo 14(1) del ACAAN

El artículo 14(1) del Acuerdo establece que:

> El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:
>
> (a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;
>
> (b) identifica claramente a la persona u organización que presenta la petición;
>
> (c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;
>
> (d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;
>
> (e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y
>
> (f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

Si bien el artículo 14(1) no pretende colocar una gran carga sobre los peticionarios, sí se requiere en esta etapa cierta revisión inicial.[10] Con tal perspectiva en mente el Secretariado determina que la petición sí satisface los requisitos de ese artículo y explica a continuación las razones de esta determinación.

Los artículos 28, 29, 32, 153 y 159 bis 3 de la LGEEPA, 415 del CPF y la NOM-057 que invoca la petición satisfacen la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN, que se refiere

10. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999).

al propósito principal de tales disposiciones.[11] De la simple lectura de dichos artículos se desprende claramente que son disposiciones cuyo propósito principal coincide con "... la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de [...] el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello...".[12]

La expresión "está incurriendo" en el artículo 14(1) impone una consideración temporal respecto de las aseveraciones de una petición.[13] Esta consideración se satisface si la Parte correspondiente puede tomar

11. El artículo 45(2) del ACAAN establece:
Para los efectos del Artículo 14(1) y la Quinta Parte:
(a) "**legislación ambiental**" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
(b) Para mayor certidumbre, el término "**legislación ambiental**" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.
El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.
Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998), SEM-98-001 (Guadalajara), Determinación conforme al artículo 14(1) (13 de septiembre de 1999) y SEM-98-002 (Ortiz Martínez), Determinación conforme al artículo 14(1) (18 de marzo de 1999).
12. De modo ilustrativo, se transcribe una de las disposiciones referidas:
LGEEPA, Artículo 153.- La importación o exportación de materiales o residuos peligrosos se sujetará a las restricciones que establezca el Ejecutivo Federal, de conformidad con lo dispuesto en la Ley de Comercio Exterior. En todo caso deberán observarse las siguientes disposiciones:
...III.- No podrá autorizarse la importación de materiales o residuos peligrosos cuyo único objeto sea su disposición final o simple depósito, almacenamiento o confinamiento en el territorio nacional o en las zonas donde la nación ejerce su soberanía y jurisdicción, o cuando su uso o fabricación no esté permitido en el país en que se hubiere elaborado; [...]
...VI.- Los materiales y residuos peligrosos generados en los procesos de producción, transformación, elaboración o reparación en los que se haya utilizado materia prima introducida al país bajo el régimen de importación temporal, inclusive los regulados en el artículo 85 de la Ley Aduanera, deberán ser retornados al país de procedencia dentro del plazo que para tal efecto determine la Secretaría; [...]
13. Véase en este sentido, e.g., SEM-97-004 (Canadian Env. Defence Fund), Determinación conforme al artículo 14(1) (27 de agosto de 1997).

medidas de aplicación de su legislación ambiental respecto de los asuntos materia de la petición y está omitiendo hacerlo, si bien los hechos a los que sea aplicable dicha legislación ambiental pueden ser hechos pasados.[14] Aunque los Peticionarios plantean sus aseveraciones en términos de que México "ha incurrido" en omisiones respecto del confinamiento Cytrar, que ya no está operando, las supuestas omisiones en las que la Parte "ha incurrido", sí corresponden a posibles acciones de aplicación que la autoridad competente pudiera llevar a cabo, es decir, a omisiones en que la Parte supuestamente "está incurriendo".

De la información contenida en la petición se desprende que las facultades para imponer sanciones administrativas no habían prescrito al momento de presentarse la petición en febrero de 2001,[15] suponiendo que las presuntas violaciones administrativas sucedieron: hasta noviembre de 1998 cuando parece haber cesado la operación presuntamente ilícita del confinamiento por falta de autorización de impacto ambiental[16]; en 1997 cuando supuestamente se iniciaron los envíos de Alco Pacífico a Cytrar[17]; y entre 1996 y 1997 cuando parece haberse construido la última celda.[18] Por otra parte, en cuanto a la presunta omisión en la aplicación del artículo 415 del CPF, a partir de los hechos descritos en la petición parece que las actuaciones realizadas por las autoridades han interrumpido la prescripción de la acción penal, y por lo tanto, la aseveración sí se refiere a una supuesta omisión en que la Parte "está incurriendo".[19] Por último, dado que al momento de presentarse la petición la Parte no había proporcionado la información solicitada a los Peticionarios, la supuesta omisión en la aplicación del artículo 159 bis 3 de la LGEEPA continuaba en ese momento, y esta aseveración satisface también la consideración temporal del artículo 14(1).

En vista de todo lo anterior, no obstante que el confinamiento se encuentre cerrado y que la petición se refiera a actos consumados, la petición cumple con esta consideración temporal del artículo 14(1). Las

14. Véase en este sentido, e.g., SEM-96-001 (Cozumel), Recomendación conforme al artículo 15(1) (7 de junio de 1997).
15. Véase el artículo 79 de la *Ley Federal de Procedimiento Administrativo*, que dispone que la facultad para imponer sanciones administrativas prescribe en cinco años, contados a partir del día en que se cometió la falta o infracción, si fueren consumadas, o desde que cesó si fuere continua.
16. Véase el anexo 4 de la petición, del que se desprende que la autorización de operación concedida a Cytrar por un año, expiró el 19 de noviembre de 1998.
17. Véase el anexo 39 de la petición.
18. Véase el punto 1.1 de los anexos 3 y 4 de la petición.
19. Véase el anexo 9 de la petición y el artículo 110 del CPF, que dispone que las actuaciones que se practiquen en averiguación del delito interrumpen la prescripción de las acción.

aseveraciones se entienden en el sentido de que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental al no sancionar que la empresa Cytrar, S.A. de C.V. haya operado el confinamiento sin contar con autorización en materia de impacto ambiental, que supuestamente haya construido sus celdas sin observar las especificaciones de la NOM-057, que presuntamente haya recibido para su disposición final residuos peligrosos cuya importación está prohibida y que debieron repatriarse, conforme al artículo 153 de la LGEEPA, y al no proporcionar información en presunta violación al artículo 159 bis 3 de la LGEEPA.

La petición también satisface los seis requisitos listados en el artículo 14(1). La petición se presentó por escrito en español, que es el idioma designado por la Parte mexicana.[20] Los Peticionarios se identificaron como la Academia Sonorense de Derechos Humanos, A.C. y Domingo Gutiérrez Mendívil. La primera es una organización sin vinculación gubernamental y el segundo un particular, vinculado a esa organización, ambos con residencia en Hermosillo, Sonora, México.[21]

La petición contiene información suficiente, que permitió al Secretariado revisarla. La petición incluye información sobre los antecedentes del confinamiento y sobre las acciones de la autoridad ambiental respecto del confinamiento (incluyendo copia de las autorizaciones otorgadas para su operación y de algunas notas sobre los residuos abandonados por la antigua fundidora Alco Pacífico y su traslado a Cytrar). Asimismo, la petición describe y documenta los esfuerzos de los Peticionarios por obtener de la autoridad ambiental mayor información relacionada con el cumplimiento de la legislación ambiental en la operación del confinamiento.[22]

Si bien respecto de algunos puntos tomados por separado la información de apoyo no es concluyente, en conjunto la información proporcionada en la petición es suficiente para que el Secretariado la revise. Los Peticionarios como particulares no gozan de facultades de verificación y pueden estar limitados por razones técnicas y económicas para obtener información de fuentes externas a la autoridad ambiental. Los Peticionarios indican que la autoridad les ha negado mayor información. Afirman

20. Véanse el artículo 14(1)(a) del ACAAN y el apartado 3.2 de las Directrices.
21. Véanse los artículos 14(1)(b) y (f) y 45(1) del ACAAN y los anexos 44 y 45 de la petición.
22. Véase el artículo 14(1)(c) del ACAAN. Posteriormente a la presentación de la petición, otros interesados enviaron al Secretariado información relacionada con el asunto materia de la petición. El Secretariado mantendrá dicha información en el archivo para su consideración en el caso de que se llegue a elaborar un expediente de hechos y hasta ese momento.

que han solicitado que se verifique el cumplimiento de las especificaciones de construcción, y que la autoridad se ha negado a hacerlo.[23] También señalan que se les ha negado información sobre la naturaleza y origen de los residuos depositados en el confinamiento, y sobre el convenio por el que la Profepa y el Juez del Condado de Los Angeles determinaron disponer en Cytrar de los residuos abandonados por Alco Pacífico.[24] Considerando todo lo anterior, se estima que la información proporcionada en la petición es suficiente para satisfacer el requisito conforme al artículo 14(1)(c) del ACAAN.

La petición no parece encaminada a hostigar una industria aunque las presuntas omisiones en la aplicación efectiva de la legislación ambiental se refieren en particular a la empresa Cytrar, S. A. de C.V., que fue la última empresa responsable del confinamiento a que se refiere la petición. La petición parece encaminada, antes bien, a promover la aplicación de la legislación ambiental, porque se centra en la aplicación por la autoridad ambiental de diversas disposiciones sobre disposición final de residuos peligrosos respecto del confinamiento y en la falta de acceso que se ha dado a los Peticionarios a la información ambiental relativa al posible incumplimiento de algunas obligaciones ambientales del confinamiento. No parece que los Peticionarios hayan sido competidores de dicha empresa, ni en el momento en que se presentó la petición, ni cuando dicha empresa estaba aún operando. La petición no es intrascendente, ya que la disposición adecuada de residuos peligrosos es una materia de importancia indiscutible, que representa además un problema reconocido ampliamente en México.[25]

La petición incluye copias de múltiples comunicaciones por escrito enviadas a la autoridad ambiental, mediante las cuales los Peticionarios han comunicado el asunto materia de la petición a las autoridades pertinentes de la Parte mexicana (en particular, al Ministerio Público Federal mediante la denuncia penal de diciembre de 1997, ampliada en diciembre de 1998; y a la Profepa mediante la denuncia popular de marzo de 1998), así como las respuestas que aquéllos recibieron, además de otros

23. La petición señala que, no obstante la negativa de realizar la verificación de las celdas, la autoridad ambiental anunció en julio de 1998 que se realizaría una auditoría ambiental para garantizar que se tomarían las medidas necesarias de prevención, o en su caso de remediación, antes de sellar las celdas del confinamiento. Los Peticionarios consideran que no hay intención de realizar dicha auditoría, ya que la autoridad ambiental anunció en febrero de 2001 que se fijó a la empresa un plazo de 45 días para sellar el confinamiento.
24. Véanse las páginas 6 a 8, y los anexos 20 a 23 de la petición.
25. Véase el artículo 14(1)(d) del ACAAN, el apartado 5.4 de las Directrices. y el anexo 44 de la petición.

documentos que muestran que las autoridades están al tanto de dicho asunto.[26]

Habiendo estimado cumplidos los requisitos del artículo 14(1) respecto de esta petición por las razones arriba expuestas, el Secretariado pasa a la consideración de si la petición amerita solicitar una respuesta a la Parte interesada.

Artículo 14(2) del ACAAN

Para determinar si la petición amerita una respuesta de la Parte, el Secretariado debe guiarse por las consideraciones que establece el artículo 14(2). Dichas consideraciones son las siguientes:

(a) si la petición alega daño a la persona u organización que la presenta;

(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

Para hacer esta determinación, el Secretariado contempló lo siguiente.

Los Peticionarios afirman que "resulta evidente el perjuicio que [...] causa a todos los habitantes de Hermosillo, Sonora, la existencia del confinamiento de residuos peligrosos CYTRAR, que está contaminando el suelo y la atmósfera con desechos tóxicos expuestos al aire libre, y que inminentemente contaminará si es que se contaminaron ya [*sic*] los mantos freáticos que existen en el sitio". De la información incluida en la petición no se desprende certeza sobre la existencia o no de daños relacionados con el confinamiento. Según la autoridad ambiental, ésta negó a Cytrar la renovación de su autorización de operación sin que el confinamiento hubiese alcanzado su capacidad instalada, no por haberse comprobado que existan daños o incumplimiento por parte de la empresa, sino en respuesta a las preocupaciones de la ciudadanía. Ahora

26. Véanse el artículo 14(1)(e) del ACAAN y los anexos 13 a 15, 27 a 32 y 37 a 39 de la petición.

bien, dichas preocupaciones parecen basarse tanto en la proximidad con la ciudad de Hermosillo de una actividad percibida como altamente peligrosa, como en la falta de información que pudiera cambiar dicha percepción. En particular, no parece haber información disponible a la ciudadanía sobre el cumplimiento (por parte de Cytrar y sus antecesoras) de las obligaciones y especificaciones diseñadas para prevenir que el confinamiento de residuos peligrosos cause daños a la salud humana y al medio ambiente, que se invocan en la petición.[27]

Los artículos 1 y 5 del ACAAN plantean, entre otras metas, mejorar la aplicación efectiva de la legislación ambiental, lograr niveles altos de protección del medio ambiente y de cumplimiento de las leyes de las Partes, así como promover la transparencia y la participación pública. La observancia y la aplicación efectiva de la legislación relacionada con la disposición final de residuos peligrosos y el acceso de los interesados a la información relativa a ello, a que se refiere esta petición, están directamente relacionados con dichas metas del ACAAN. El ulterior estudio de los asuntos planteados en esta petición contribuiría a su consecución.

Con relación a los recursos disponibles conforme a la legislación de la Parte a los que se ha acudido, la Petición aborda este punto y muestra que se ha hecho un esfuerzo razonable para acudir a ellos.[28] Los Peticionarios indican que han iniciado diversos procedimientos administrativos y judiciales y proporcionan copia de los siguientes: la denuncia popular del 11 de marzo de 1998; la denuncia penal del 8 de diciembre de 1997, ampliada el 3 de diciembre de 1998, con base en la cual se inició la averiguación previa penal número 56/98/H-11; la queja ante la Comisión Estatal de Derechos Humanos del 2 de mayo de 1987; los juicios de amparo números 85/98 ante el Juez Primero de Distrito del Estado de Sonora, número 386/2000, número 679/99 y número 181/2000 (éste último concluido mediante sentencia en parte favorable al Peticionario), todos ante el Juez Tercero de Distrito del Estado de Sonora.[29]

Finalmente, la Petición no parece basarse exclusivamente en noticias de los medios de comunicación, aunque los Peticionarios sí hacen referencia a algunas noticias de ese tipo.[30]

Considerando en conjunto los factores del artículo 14(2) del ACAAN, el Secretariado determina que esta petición sí amerita solicitar una respuesta de la Parte.

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27. Veánse las páginas 7 a 9 y los anexos 5, 8, 13, 15, 17, 20 a 23, 25, 26, 30, 32, 40 y 41 de la petición.
28. Véanse también los apartados 5.6(c) y 7.5 de las Directrices.
29. Véanse los anexos 5, 8, 12, 13, 15, 17, 27, 31 y 32 la petición.
30. Véanse los anexos 22, 23, 33, 36, 40 y 41 de la petición.

IV. DETERMINACIÓN DEL SECRETARIADO

El Secretariado determina que la Petición SEM-03-006 (Cytrar III), presentada por la Academia Sonorense de Derechos Humanos, A.C., *et. al* cumple con todos los requisitos contenidos en el artículo 14(1) del ACAAN. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que dicha petición amerita solicitar una respuesta a la Parte interesada, en este caso México, y así lo hace a través de esta Determinación.

La Parte podrá proporcionar una respuesta dentro de los 30 días siguientes a la recepción de esta notificación, y en circunstancias excepcionales, dentro de los 60 días siguientes a ella, conforme a lo establecido en el artículo 14(3) del ACAAN. Dado que ya se ha enviado a la Parte interesada una copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Por otra parte, se informa a los Peticionarios que su solicitud para que el Secretariado lleve a cabo un informe conforme al artículo 13 del Acuerdo, sería tomada en consideración una vez concluido el proceso conforme al artículo 14 del mismo.

Sometida respetuosamente a su consideración, el 29 de agosto de 2003.

Secretariado de la Comisión para la Cooperación Ambiental

por: Katia Opalka
Oficial Jurídica
Unidad sobre Peticiones Ciudadanas

cc: Dra. Olga Ojeda , SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres , US-EPA
Sr. Victor Shantora, Director Ejecutivo Interino de la CCA
Lic. Domingo Gutiérrez Mendívil, Academia Sonorense de Derechos Humanos

SEM-04-001

(Hazardous Waste in Arteaga)

SUBMITTERS: FRANCISCO H. GARZA VARA ET AL.

PARTY: MEXICO

DATE: 27 January 2004

SUMMARY: The Submitters assert that Mexico is failing to effectively enforce its environmental laws by not properly processing their complaint against the companies Ecolimpio de México, SA de CV and Transportes J. Guadalupe Jiménez, SA, and by not penalizing those companies. The Submitters claim that both companies operate in violation of the law, causing serious damage to the environment and their property. Furthermore, they assert that the companies are seriously endangering their health and physical well-being due to the improper management of hazardous waste.

SECRETARIAT DETERMINATIONS:

ART. 14(1) **(20 February 2004)**	Determination that criteria under Article 14(1) have not been met.

Revised Submission

ART. 14(1) **(20 April 2004)**	Determination that criteria under Article 14(1) have not been met.

Revised Submission

ART. 14(1)(2) (30 June 2004)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-04-001** (Residuos Peligrosos en Arteaga)
Peticionaria(os):	Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres
Representados por:	Francisco H. Garza Vara
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	27 de enero de 2004
Fecha de la determinación:	20 de febrero de 2004

I. ANTECEDENTES

Con fecha 23 de enero de 2004, Francisco H. Garza Vara en representación de los Peticionarios presentó al Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo"). La petición hace referencia al "incumplimiento y a la falta de aplicación efectiva de la legislación ambiental de la Ley General del Equilibrio Ecológico y Protección al Ambiente y su reglamento en materia de residuos peligrosos con fundamento en el artículo 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte, así como la omisión e incumplimiento en nuestro país del Acuerdo de Cooperación Ambiental de América del Norte en lo

referente a sus art. 1, art. 6 y art. 7 del referido Acuerdo"[1]. En especifico, aseveran la falta de cumplimiento por parte de la Procuraduría Federal de Protección al Ambiente ("PROFEPA") para dar tramite a la denuncia presentada por los Peticionarios en contra de las empresa Ecolimpio de México, S.A. de C.V., y Transportes J. Guadalupe Jiménez, S.A.; empresas que, según lo que los Peticionarios argumentan, operan en forma irregular causando graves daños al ambiente, a sus propiedades, su salud e integridad física por el inadecuado manejo de residuos peligrosos.

Según el ACAAN, el Secretariado puede examinar las peticiones que cumplan con los requisitos establecidos en su artículo 14(1). El Secretariado ha determinado que esta petición no cumple con los requisitos de dicho artículo y en este documento expone las razones de esta determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran la falta de cumplimiento por parte de la PROFEPA para dar tramite a la denuncia presentada por los mismos en contra de las empresa Ecolimpio de México, S.A. de C.V. ("Ecolimpio") y Transportes J. Guadalupe Jiménez, S.A. ("TGJ").[2] En específico señala que estas empresas, "...operan en forma irregular, causando graves daños ambientales, danos en las propiedades de mis representados, y exponiendo en graves peligro su salud e integridad física, por el inadecuado manejo de residuos peligrosos por parte de Ecolimpio de México, S.A. y la transportación y disposición de residuos peligrosos en lugares no autorizados por la empresa Transportes J. Guadalupe Jiménez, S.A.".[3]

Los Peticionarios aseveran también "... que la dependencia encargada de realizar la inspección no actuó en tiempo y forma y es fecha que no se nos ha mostrado la copia de la referida inspección a la empresa Ecolimpio de México, S.A. y no se realizó ninguna inspección en el terreno donde se vierten residuos peligrosos propiedad de la empresa Transportes J. Guadalupe Jiménez, S.A.".[4]

Los Peticionarios fundan su Petición en "...la falta de aplicación efectiva de la legislación ambiental de la Ley General del Equilibrio Ecológico y Protección al Ambiente y su reglamento en materia de residuos

1. Página 1 de la Petición.
2. Página 2 de la Petición
3. *Ibid*.
4. *Ibid*.

peligrosos con fundamento en el artículo 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte, así como la omisión e incumplimiento en nuestro país del Acuerdo de Cooperación Ambiental de América del Norte en lo referente a sus art. 1, art. 6 y art. 7 del referido Acuerdo".[5]

Adjunto a la Petición, los Peticionarios acompañan 1) fotografías de paredes presuntamente de las casas de los vecinos a la empresa tratadora de residuos peligrosos; (2) fotografías de derrames aparentemente en el interior de la empresa tratadora; (3) copia de artículos de periódico que hacen alusión a que en la empresa Ecolimpio han ocurrido incendios y explosiones; (4) Copia del Permiso de Tratamiento de Residuos Peligrosos expedido por la Secretaría del Medio Ambiente y Recursos Naturales ("SEMARNAT") a favor de Ecolimpio; (5) fotografías aparentemente del interior de la empresa Ecolimpio; (6) fotografías en donde se aprecian lodos; y (7) Copia de una denuncia de hechos presentada por los Peticionarios de fecha 1 de diciembre de 2003.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:

(a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;

(b) identifica claramente a la persona u organización que presenta la petición;

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;

(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;

(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y

5. Página 1 de la Petición

(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.

En esta etapa se requiere entonces, de cierta revisión inicial para verificar que la petición cumple con estos requisitos, si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios.[6] El Secretariado examinó la petición en cuestión con tal perspectiva en mente.

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en los incisos a), b), d), e) y f) del artículo 14(1), por las siguientes razones. La petición se presentó por escrito en español,[7] que es el idioma designado por México. Los Peticionarios se identificaron como Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres, todos representados por el Sr. Francisco H. Garza Vara, con residencia en Saltillo, Coahuila, México, es decir personas que residen en el territorio de la Parte mexicana.[8] La petición es presentada con respecto a la falta de cumplimiento por parte de la PROFEPA para dar tramite a la denuncia presentada por los Peticionarios, por lo mismo parece encaminada a promover la aplicación de la ley y no a hostigar una industria en cumplimiento de lo que establece el inciso d) del artículo 14(1). Con respecto al inciso e) del mismo artículo, éste prevé que la petición señale que el asunto se haya comunicado por escrito a las autoridades pertinentes de la Parte; el Secretariado considera que la Petición si cumple con este requisito al hacer referencia a dicha denuncia interpuesta por los Peticionarios de fecha 1 de diciembre de 2003 de la cual anexaron copia a la Petición y con respecto a la cual los Peticionarios manifiestan no haber tenido respuesta a la fecha de presentación de la Petición.

En distinto sentido, el Secretariado juzga que la petición tampoco satisface el requisito del inciso c) de dicho artículo 14(1) del Acuerdo. Lo anterior, primero, ya que no contiene información suficiente para analizarla; la petición es muy breve, constando de 3 páginas y 7 anexos, y no contiene suficiente información para que el Secretariado pueda revisarla en este proceso.[9] En particular, la petición no expresa claramente la función de cada uno de sus anexos en la argumentación sobre la presunta

6. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme al artículo 14(1) y (2) (8 de septiembre de 1999).
7. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las *Directrices para la presentación de peticiones*.
8. Véanse los artículos (14)(1)(b) y (f) del ACAAN.
9. Véase el artículo (14)(1)(c) del ACAAN.

omisión por parte de México de aplicar de manera efectiva su legislación ambiental en este asunto, lo cual es de especial importancia dado lo breve que es la petición misma. Si bien la petición incluye anexos que presuntamente contienen información sobre el problema planteado por el Peticionario respecto del sitio donde se encuentran localizados residuos peligrosos aparentemente en la empresa llamada Ecolimpio, en la petición misma no es clara la explicación de los anexos.

Además, la petición no contiene información suficiente para determinar si la petición "asevera que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental". Los Peticionarios "aseveran" que México está incurriendo en omisiones en la aplicación efectiva "de la legislación ambiental de la Ley General del Equilibrio Ecológico y Protección al Ambiente y su reglamento en materia de residuos peligrosos". A efecto de calificar para el proceso del artículo 14(1), las disposiciones citadas en una petición deben satisfacer la definición de "legislación ambiental" contenida en el artículo 45(2) del ACAAN[10]. Para ello, los Peticionarios pueden acudir a lo que establece la sección 5.2 de las *Directrices para la presentación de peticiones* (las "Directrices")[11] ya que de la

10. El artículo 45(2) del ACAAN establece:
Para los efectos del Artículo 14(1) y la Quinta Parte:
(a) "**Legislación ambiental**" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:
(i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,
(ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o
(iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.
(b) Para mayor certidumbre, el término "**legislación ambiental**" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.
El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte.
Aun cuando el Secretariado no se rige por el principio de *stare decisis*, en ocasiones anteriores, al examinar otras determinaciones, ha señalado que las disposiciones citadas deben satisfacer la definición de legislación ambiental. Véanse las determinaciones del Secretariado, conforme al artículo 14(1) del ACAAN, para las siguientes peticiones: SEM-98-001/Instituto de Derecho Ambiental et al. (13 de septiembre de 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 de marzo de 1999) y SEM-97-005/Animal Alliance of Canada, et al. (26 de mayo de 1998).

11. La sección 5.2 de las Directrices establece que: "El peticionario deberá identificar la ley o el reglamento aplicable, o su disposición, tal como se define en el artículo 45(2)

lectura de la Petición se aprecia que no son señalados en específico ni el capítulo ni la disposición o disposiciones aplicables de la LGEEPA.

Además, de la misma forma el Peticionario omite explicar porque considera que las presuntas faltas de cumplimiento efectivo de la legislación ambiental por parte del gobierno mexicano son también un incumplimiento del Acuerdo de Cooperación Ambiental de América del Norte en lo referente a sus art. 1, art. 6 y art. 7 del referido Acuerdo, disposiciones las cuales cita el Peticionario.

Dada la redacción y el breve contenido de la Petición, los Peticionarios deben establecer si pretenden denunciar ya sea: la falta de cumplimiento por parte de la PROFEPA de dar el debido trámite al proceso de denuncia popular establecido aparentemente por los Peticionarios; la falta de cumplimiento por parte de la autoridad para detectar y sancionar en su caso a las empresas que se señalan en la Petición; o bien ambas premisas.

IV. DETERMINACIÓN DEL SECRETARIADO

Habiendo revisado esta petición de conformidad con el artículo 14(1) del ACAAN, con base en el análisis expuesto en el capítulo anterior, el Secretariado considera que ésta no cumple con todos los requisitos en él establecidos. Por esto, y en cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica a los Peticionarios la no procedencia de su petición y al mismo tiempo los apercibe de que, de conformidad con el apartado 6.2 de las Directrices, cuentan con 30 días para presentar una petición que cumpla con los criterios del artículo 14(1) del ACAAN.

Secretariado de la Comisión para la Cooperación Ambiental

por: William V. Kennedy
Director Ejecutivo

ccp: Sr. José Manuel Bulás, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. Francisco H. Garza Vara

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de Acuerdo. En el caso de la Ley General del Equilibrio Ecológico y la Protección al Ambiente de México, el Peticionario deberá identificar el capítulo o la disposición aplicable de la Ley.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-04-001** (Residuos peligrosos en Arteaga)
Peticionaria(os):	Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres
Representados por:	Francisco H. Garza Vara
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	16 de marzo de 2004
Fecha de la determinación:	20 de abril de 2004

I. ANTECEDENTES

Con fecha 23 de enero de 2004, Francisco H. Garza Vara en representación de los Peticionarios presentó al Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo"). El 20 de febrero de 2004 el Secretariado notificó a los peticionarios que la petición no cumplía con todos los criterios del artículo 14(1) y que tenían 30 días para presentar una petición revisada. Fue el 16 de marzo del año en curso que el Secretariado recibió la versión revisada de dicha Petición. La petición hace referencia al incumplimiento y a la falta de aplicación efectiva de la Ley General del Equilibrio Ecológico y Protección al Ambiente y su reglamento en materia de residuos peligrosos. En especifico, aseveran la falta

de cumplimiento por parte de la Procuraduría Federal de Protección al Ambiente ("PROFEPA") para dar tramite a la denuncia presentada por los Peticionarios en contra de las empresa Ecolimpio de México, S.A. de C.V., y Transportes J. Guadalupe Jiménez, S.A.; empresas que, según lo que los Peticionarios argumentan, operan en forma irregular causando graves daños al ambiente, a sus propiedades, su salud e integridad física por el inadecuado manejo de residuos peligrosos.

Según el ACAAN, el Secretariado puede examinar las peticiones que cumplan con los requisitos establecidos en su artículo 14(1). El Secretariado ha determinado que la versión revisada de la petición reincide en no cumplir con los requisitos de dicho artículo y en este documento expone las razones de esta determinación.

II. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran la falta de cumplimiento por parte de la PROFEPA para dar tramite a la denuncia presentada el 4 de diciembre de 2003 por los mismos peticionarios en contra de las empresa Ecolimpio de México, S.A. de C.V. ("Ecolimpio") y Transportes J. Guadalupe Jiménez, S.A. ("TGJ"). En específico señala que estas empresas, "...operan en forma irregular, causando graves daños ambientales, danos en las propiedades de mis representados, y exponiendo en graves peligro su salud e integridad física, por el inadecuado manejo de residuos peligrosos por parte de Ecolimpio de México, S.A. y la transportación y disposición de residuos peligrosos en lugares no autorizados por la empresa Transportes J. Guadalupe Jiménez, S.A.".

Los Peticionarios fundan su Petición en "...la falta de aplicación efectiva de la legislación ambiental de la Ley General del Equilibrio Ecológico y Protección al Ambiente en sus siguientes artículo: art. 1, fracc. I, III y VII, art. 121, art. 150, art. 151, 164, art. 170, fracc. I y II, art. 180, art. 181, art. 194, respecto al reglamento de residuos peligrosos, denunciamos la falta de aplicación efectiva de los siguientes artículos: art. 15, fracc. II, III, IV; art. 16, fracc. IV; art. 17, fracc. II; art. 18; art. 19, fracc. III; art. 58, fracc. II. Así mismo, denunciamos el incumplimiento en nuestro país del referido acuerdo de cooperación ambiental en sus art. 6, fracc. 1, 2, 3, fracc. A, B, C, D; art. 7 garantías procesales art. 1, fracciones a, b, c, d".[1]

1. Página 2 de la Petición.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> *El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:*
>
> *(a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;*
>
> *(b) identifica claramente a la persona u organización que presenta la petición;*
>
> *(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;*
>
> *(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;*
>
> *(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y*
>
> *(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.*

En esta etapa se requiere entonces, de cierta revisión inicial para verificar que la petición cumple con estos requisitos, si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios.[2] El Secretariado examinó la petición en cuestión con tal perspectiva en mente.

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó que la petición satisface los requisitos establecidos en el inciso a), ya que la petición se presentó por escrito en español, idioma designado por el gobierno de los Estados Unidos Mexicanos;[3] satisface los requisitos del inciso b), ya que los peticionarios se identificaron como Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres, todos

2. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme al artículo 14(1) y (2) (8 de septiembre de 1999).
3. Véanse el artículo 14(1)(a) del ACAAN y la sección 3.2 de las Directrices para la presentación de peticiones (las "Directrices").

representados por el Sr. Francisco H. Garza Vara; y también satisface los requisitos del inciso f), ya que acreditan tener residencia en Saltillo, Coahuila, México, es decir personas que residen en el territorio de la Parte mexicana.[4]

Con respecto al inciso c), el Peticionario ha anexado a la Petición la información que a continuación se detalla.

1. Fotografías de paredes presuntamente de las casas de los vecinos a la empresa tratadora de residuos peligrosos;

2. Copia de escritura pública de propiedad;

3. Fotografías de presuntos derrames de líquidos en el interior de la empresa Ecolimpio de México, S.A. de C.V.;

4. Fotografías de manchas por presunta contaminación de las paredes de casas habitación;

5. Copias de periódicos de la localidad donde narran este evento;

6. Copia de carta folio 1189160-25 de la Coordinación de Atención Ciudadana de la Presidencia de la República de México;

7. Copia de la Carta de Folio 1189160-25 girada por la Coordinación de Atención Ciudadana de la Presidencia de la República de México al Secretario de Medio Ambiente, Sec. Victor Lichtinger;

8. Fotografías de presuntos residuos al descubierto;

9. Fotografías de pisos de tierra;

10. Fotografías de aparentes residuos que presuntamente no cumplen con legislación;

11. Fotografías de fosa y de autorización 5-4-PS-V-01-2001;

12. Fotografías de maquina retroexcavadora mezclando aparentes residuos con tierra;

4. Véanse los artículos (14)(1)(b) y (f) del ACAAN.

13. Fotografías que presuntamente indican sitios donde se mezclan presuntos residuos peligrosos con tierra;

14. Copia de oficio No. SGPA/007/COAH/2004;

15. Fotografías donde se aprecian lodos y camiones de volteo;

16. Copia de oficio PFPA-B00-387 de PROFEPA de fecha 22 de enero de 2004;

17. Copia de escrito dirigido a la PROFEPA relacionado con la denuncia 03/12/145/104;

18. Copia de denuncia de hechos presentada ante la PROFEPA de fecha 4 de diciembre de 2003 y registrada bajo número 03/12/145/104;

19. Copia de Orden de Inspección y verificación expedida por PROFEPA bajo número PFPA-B00-1-0004855;

20. Copia de artículos relacionados de la Ley Federal de Metrología y Normatización;

21. Copia de antecedentes de Norma Oficial NOM-052-1993;

22. Copia de análisis de laboratorio elaborado por Laboratorio Microanálisis, S.A.;

23. Carta de Residuos Industriales Multiquim, S.A. de C.V. dirigida al delegado de PROFEPA en el Estado de Coahuila.

El Secretariado observa que los peticionarios efectivamente han acompañado a la Petición información relacionada a los argumentos que en ella plantea. No obstante, el Secretariado considera que los Peticionarios no han cumplido aún con el requisito del inciso c) del artículo 14.1 del Acuerdo. El Secretariado estima que la información proporcionada no es suficiente ya que si bien la Petición en esta ocasión si incluye información que permite al Secretariado revisar los planteamientos hechos por los peticionarios, por otro lado no deja claro si el motivo por el que la presenta es encaminado a promover la aplicación de la ley y no a hostigar una industria. Lo anterior ya que a través de información pública el Secretariado ha tomado conocimiento de que el Sr. Francisco Garza Vara, representante legal de los peticionarios, es señalado como

propietario de una compañía denominada Garlok Industrial la cual aparenta tener un giro industrial similar al de Ecolimpio.[5] Lo anterior hace considerar al Secretariado que los Peticionarios pudieren encontrarse dentro del supuesto artículo 14.1, sección d) del Acuerdo. El supuesto (a) del punto 5.4 de las Directrices respecto del artículo 14.1, sección d) del Acuerdo señala que el Secretariado considerará si una petición se "centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular; *especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición* [énfasis añadido]". El Secretariado estima que éstas mismas premisas están presentes cuando el representante legal del peticionario pudiera obtener un beneficio económico indebido con la petición al ser un competidor de la entidad en contra de la cual se alega que la Parte no ejerce de forma efectiva su legislación.

La cita del artículo de periódico en el que se hace referencia al representante legal de los peticionarios, aún cuando no fuere concluyente, si indica que el Secretariado requeriría de argumentos adicionales dentro de la Petición que clarifiquen tal situación o bien de información adicional al respecto. Es ante esa falta de claridad y/o de información al respecto que el Secretariado estima que la Petición cumple parcialmente con el inciso c) del artículo 14.1 del Acuerdo.

Con respecto al inciso e) del artículo 14.1, éste prevé que la petición señale que el asunto se haya comunicado por escrito a las autoridades pertinentes de la Parte. El Secretariado ha observado que el Peticionario ha hecho referencia a una denuncia popular que presentó el 4 de diciembre de 2003.

El Secretariado ha notado que en la primera versión de la Petición los peticionarios señalaron con respecto a esta denuncia popular que la

5. "Clausuran a Garlok depósito de residuos... Deberá, además, remediar 20 hectáreas que usó en ejido de Ramos". Periódico PALABRA / México (25 de febrero de 2004).
"El confinamiento Garlok Industrial fue clausurado total y definitivamente por el Instituto Coahuilense de Ecología ante distintas irregularidades en que incurrió, como fueron incendios, desorganización y no tener la posesión del predio... Sergio Avilés de la Garza, director de la dependencia... agregó que se aplicó una multa de 20 mil pesos. El funcionario dijo que antes de abandonar el sitio, el propietario Francisco Garza Vara deberá remediar las 20 hectáreas de que se componía dicho confinamiento. El plazo es de 90 días contados a partir del 11 de febrero, de acuerdo con la Ley General de Protección al Ambiente. Con base en los datos proporcionados por el Instituto, se supo que si Garza Vara no cumple con la obligación de remediar el suelo, se le demandaría por la vía penal ante el Ministerio Público por probables delitos ambientales... La última historia... El Confinamiento de residuos industriales de Garlok Industrial atravesó en las últimas fechas una serie de conflictos 2002..."

autoridad ambiental en México: "...es fecha que no se nos ha mostrado la copia de la referida inspección a la empresa Ecolimpio de México, S.A..."[6] Luego, en la versión revisada de la Petición se afirmó que "... al día 10 de marzo de 2004 y a más de 90 días de presentada la denuncia ante la Procuraduría del Medio Ambiente.... no se han desahogado las pruebas tanto de inspección en el interior de la empresa como en la casa del Sr. Genaro Meléndez...".[7]

El Secretariado ha notado también que de la lectura del resto de la versión revisada de la Petición los peticionarios hacen referencia a un oficio número PFPA-B00 00387 expedido por PROFEPA el 22 de enero de 2004 del que manifiestan que: "... en el referido oficio se hace constar en el punto tercero "toda vez que al desahogar la inspección ocular, tanto en las instalaciones de Ecolimpio de México, S.A. de C.V., como en la casa habitación que ocupan los denunciantes, pueda ser necesario llevar a cabo la toma de muestras o bien se haga necesaria la aplicación de conocimientos especiales...".[8] Luego, en la página 11 de la petición revisada también se hace referencia al oficio PFPA-0004855 expedido por PROFEPA en fecha 8 de diciembre de 2003 que se da como resultado de la presentación de la denuncia popular hecha por los Peticionarios. Estos datos parecen indicar que los peticionarios tenían conocimiento de éstas actuaciones al momento de presentación de esta Petición. El Secretariado hace notar estas posibles contradicciones en la Petición y si bien el Secretariado considera se satisface el requisito establecido por el artículo 14.1, sección e), la Petición indica que el asunto materia de la Petición puede encontrarse todavía en un proceso de inspección y vigilancia en desarrollo.

IV. DETERMINACIÓN DEL SECRETARIADO

Habiendo revisado esta petición de conformidad con el artículo 14(1) del ACAAN, con base en el análisis expuesto en el capítulo anterior, el Secretariado considera que la Petición nuevamente no cumple con todos los requisitos en él establecidos.

Siendo que las razones por las que en esta ocasión se considera la Petición improcedente son distintas de aquellas por las que se desestimó en la primera ocasión, el Secretariado considera procedente aplicar de nuevo lo dispuesto por el apartado 6.2 de las Directrices en el sentido de otorgar a los Peticionarios el plazo de 30 días para presentar una petición que cumpla con los criterios del artículo 14(1) del ACAAN.

6. Página 2 de la Primera Versión de la Petición.
7. Página 8 de la Petición Revisada.
8. Página 9 de la Petición Revisada.

Secretariado de la Comisión para la Cooperación Ambiental

por: Rolando Ibarra R.
Oficial Jurídico de la Unidad sobre Peticiones Ciudadanas

ccp: Lic. José Manuel Bulás, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. William Kennedy, Director Ejecutivo, CCA
Lic. Francisco H. Garza Vara

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-04-001** (Residuos peligrosos en Arteaga)
Peticionaria(os):	Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres
Representados por:	Francisco H. Garza Vara
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	25 de mayo de 2004
Fecha de la determinación:	30 de junio de 2004

I. RESUMEN DE LA PETICIÓN

Los Peticionarios aseveran la falta de cumplimiento por parte de la Procuraduría Federal de Protección al Ambiente ("PROFEPA") para dar tramite a la denuncia presentada el 4 de diciembre de 2003 por los mismos peticionarios en contra de las empresa Ecolimpio de México, S.A. de C.V. ("Ecolimpio") y Transportes J. Guadalupe Jiménez, S.A. ("TGJ"). En específico señala que estas empresas, "...operan en forma irregular, causando graves daños ambientales, danos en las propiedades de mis representados, y exponiendo en graves peligro su salud e integridad física, por el inadecuado manejo de residuos peligrosos por parte de Ecolimpio de México, S.A. y la transportación y disposición de residuos

peligrosos en lugares no autorizados por la empresa Transportes J. Guadalupe Jiménez, S.A.".[1]

Los Peticionarios fundan su Petición en "...la falta de aplicación efectiva de la legislación ambiental de la Ley General del Equilibrio Ecológico y Protección al Ambiente en sus siguientes artículo: art. 1, fracc. I, III y VII, art. 121, art. 150, art. 151, 164, art. 170, fracc. I y II, art. 180, art. 181, art. 194, respecto al reglamento de residuos peligrosos, denunciamos la falta de aplicación efectiva de los siguientes artículos: art. 15, fracc. II, III, IV; art. 16, fracc. IV; art. 17, fracc. II; art. 18; art. 19, fracc. III; art. 58, fracc. II. Así mismo, denunciamos el incumplimiento en nuestro país del referido acuerdo de cooperación ambiental en sus art. 6, fracc. 1, 2, 3, fracc. A, B, C, D; art. 7 garantías procesales art. 1, fracciones a, b, c, d".[2]

II. ANTECEDENTES

A. La Petición

Con fecha 23 de enero de 2004, los Peticionarios presentaron al Secretariado (el "Secretariado") de la Comisión para la Cooperación Ambiental ("CCA") una petición en conformidad con los Artículos 14 y 15 del *Acuerdo de Cooperación Ambiental de América del Norte* ("ACAAN" o "el Acuerdo"). El 20 de febrero de 2004 el Secretariado notificó a los peticionarios que la petición no cumplía con todos los criterios del artículo 14(1) y que tenían 30 días para presentar una petición revisada.

En esta ocasión, el Secretariado baso su determinación en que la petición no cumplió con el requisito del inciso c) del artículo 14(1) del Acuerdo al no proporcionar información suficiente que permitiera al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla. Lo anterior en el sentido de que el contenido de la Petición era muy breve constando de 3 páginas y 7 anexos. Además, el Secretariado noto que la petición no contenía una descripción específica de cuales disposiciones de la Ley General del Equilibrio Ecológico y Protección al Ambiente ("LGEEPA") y su reglamento en materia de residuos peligrosos eran las cuales estaban siendo omitidas de ser aplicadas de forma efectiva.[3] El Secretariado también hizo notar a los Peticionarios

1. Página 2 de la Petición.
2. Página 2 de la Versión Revisada de la Petición
3. Lo anterior dando referencia a los Peticionarios de considerar la sección 5.2 de las Directrices para la presentación de peticiones (las "Directrices") que establece que: "El peticionario deberá identificar la ley o el reglamento aplicable, o su disposición, tal como se define en el artículo 45(2) de Acuerdo. En el caso de la Ley General del

la omisión de explicar porque consideraban que las presuntas faltas de cumplimiento efectivo de la legislación ambiental por parte del gobierno mexicano eran también un incumplimiento del ACAAN en lo referente a sus art. 1, art. 6 y art. 7 del referido Acuerdo, disposiciones las cuales se incluían también en la Petición.

B. La Versión Revisada de la Petición

El 16 de marzo del año en curso, el Secretariado recibió una versión revisada de dicha Petición. Esta Versión Revisada de la Petición se estimó cumplía con los incisos (a), (b), (e) y (f) del Artículo 14(1) del ACAAN. Sin embargo el Secretariado estimo que la Petición no cumplía con el inciso (c) del Artículo 14(1) del Acuerdo. En consecuencia, el 20 de abril del año en curso el Secretariado notificó a los Peticionarios que la petición no cumplía con todos los criterios del artículo 14(1) sin embargo, dado que las razones por las que en esa ocasión se consideró la Petición improcedente fueron distintos de aquellos por los que se desestimó en la primera ocasión, se les otorgó nuevamente el plazo de 30 días para presentar una petición que cumpliera con los criterios del artículo 14(1) del ACAAN.

El Secretariado en esta ocasión estimó que la información proporcionada en la Petición no había sido suficiente ya que si bien en esta ocasión si incluyó información que permitía al Secretariado revisar los planteamientos hechos por los Peticionarios, por otro lado no había dejado claro si el motivo por el que fue presentada era encaminado a promover la aplicación de la ley y no a hostigar una industria. Lo anterior ya que a través de información pública el Secretariado tuvo conocimiento de que el Sr. Francisco Garza Vara, representante legal de los peticionarios, es señalado como propietario de una compañía denominada Garlok Industrial la cual aparenta tener un giro industrial similar al de Ecolimpio. Lo anterior hizo considerar al Secretariado que los Peticionarios pudieren encontrarse dentro del supuesto artículo 14.1, sección d) del Acuerdo. El supuesto (a) del punto 5.4 de las Directrices respecto del artículo 14.1, sección d) del Acuerdo señala que el Secretariado considerará si una petición se "centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular; *especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición* [énfasis añadido]".[4]

Equilibrio Ecológico y la Protección al Ambiente de México, el Peticionario deberá identificar el capítulo o la disposición aplicable de la Ley"

4. El Secretariado estimó que éstas mismas premisas están presentes cuando el representante legal del peticionario sea un competidor de la entidad en contra de la cual se alega que la Parte no ejerce de forma efectiva su legislación.

C. La Versión Aclaratoria de la Petición

En esta ocasión, el 25 de mayo del presente, el Secretariado ha recibido una versión aclaratoria de la Petición. En esta versión aclaratoria, el representante legal de los Peticionarios, en un apartado que solicitó sea guardado como confidencial, expuso las razones por las que considera no encontrarse dentro del supuesto artículo 14.1, sección d) del ACAAN, aclarando que el motivo por el que se presentó la Petición es el de promover la aplicación de la ley y no hostigar a una industria, aclarando también que no considera que pueda beneficiarse económicamente con la petición. En otro apartado, los Peticionarios aclararon las observaciones hechas por el Secretariado en cuanto al desarrollo del procedimiento de denuncia popular referido en la Petición. Es en este documento donde se analiza el contenido de esta versión aclaratoria y si con ella la Petición cumple con los requisitos del artículo 14(1) del ACAAN para luego de cumplir con los requisitos del artículo 14(2) de dicho Acuerdo, se amerita la solicitud de una respuesta de la Parte objeto de la presente Petición.

En fecha 27 de mayo del presente, el Secretario emitió y envió una carta al representante legal de los Peticionarios respecto del contenido que solicitó fuera guardado como confidencial. El Secretariado solicitó que se le informara si parte de dicha información hubiera podido ser manejada de forma pública. Lo anterior con la intención de que el Secretariado esté en aptitud de poder hacer uso de ella y exponerla en el análisis que realice para determinar si la Petición cumple con los requisitos del Artículo 14 del ACAAN y en dicho caso continuar con el trámite de la petición. El Secretariado realizo la anterior solicitud en consideración del punto 17.3 de las Directrices para la Presentación de Peticiones Ciudadanas que a la letra señala:

> "*17.3. Tomando en consideración que la información confidencial o privada proporcionada por una Parte, organización sin vinculación gubernamental o persona puede contribuir de manera sustancial a la opinión del Secretariado en cuanto a si se amerita la elaboración de un expediente de hecho, los suministradores de esa información deberían esforzarse proa proporcionar un resumen de esa información o explicación general de por qué esa información se considera como confidencial o privada.*"

No obstante, el Secretariado no recibió respuesta alguna a su solicitud.

III. ANÁLISIS DE LA PETICIÓN, SU VERSIÓN REVISADA Y SU ACLARACIÓN, CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> *El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:*
>
> *(a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;*
>
> *(b) identifica claramente a la persona u organización que presenta la petición;*
>
> *(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;*
>
> *(d) parece encaminada a promover la aplicación de la ley y no a hostigar una industria;*
>
> *(e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y*
>
> *(f) la presenta una persona u organización que reside o está establecida en territorio de una Parte.*

En esta etapa se requiere entonces, de cierta revisión inicial para verificar que la petición cumple con estos requisitos, si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios.[5] El Secretariado examinó la petición en cuestión con tal perspectiva en mente.

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó:

A. Con respecto del inciso (a) del artículo 14(1), que la Petición cumple con el requisito de ser presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado ya que la petición se presentó por escrito en español, idioma designado por el gobierno de los Estados Unidos Mexicanos.

5. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme al artículo 14(1) y (2) (8 de septiembre de 1999).

B. Con respecto del inciso (b) del artículo 14 (1), que la Petición satisface el requisito de identificar claramente a la persona u organización que presenta la petición, ya que los peticionarios se identificaron como Genaro Meléndez Lugo y José Javier, José Genaro, Miguel Ángel, Carlos Ariel, Juan Antonio, Iris Elidia y Cruz Adriana Meléndez Torres, todos representados por el Sr. Francisco H. Garza Vara.

C. Con respecto del inciso (c) del artículo 14 (1), que la Petición cumple el requisito de haber proporcionado información suficiente que permita al Secretariado revisarla y haber incluido las pruebas documentales para sustentarla. Para mayor referencia, véase la sección IV siguiente.

D. Con respecto del inciso (d) del artículo 14 (1), que la Petición cumple el requisito de estar encaminada a promover la aplicación de la ley y no a hostigar una industria. Para mayor referencia, véase la sección IV siguiente.

E. Con respecto del inciso (e) del artículo 14 (1), que la Petición cumple el requisito de señalar que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte. Para mayor referencia, véase la sección IV siguiente.

F. Con respecto del inciso (f) del artículo 14 (1), que la Petición cumple el requisito de ser presentada por una persona u organización que reside o está establecida en territorio de una Parte ya que acreditan tener residencia en Saltillo, Coahuila, México, es decir personas que residen en el territorio de la Parte mexicana.

IV. ANÁLISIS DE LA PETICIÓN

A. Con respecto a los incisos (c) y (d) del artículo 14 (1) del ACAAN

El requisito que establece el inciso (c) del artículo 14(1) del Acuerdo consiste en proporcionar junto con la Petición, información suficiente que permita al Secretariado revisarla y haber incluido las pruebas documentales para sustentarla. El inciso (d) de dicho artículo establece que la Petición debe estar encaminada a promover la aplicación de la ley y no a hostigar una industria. El Secretariado ya había notado que la Versión Revisada de la Petición contenía información adicional que permitía al

Secretariado verificar los argumentos que se plantean en la Petición.[6] También, a diferencia de la versión original de la Petición, en la Versión Revisada se hizo una descripción de las disposiciones que en cada cuerpo legislativo los Peticionarios consideraban no estaban siendo aplicadas de forma efectiva.

No obstante, el Secretariado hizo notar que la información proporcionada continuaba sin ser suficiente ya que no dejaba claro si el motivo por el que la presentaba era encaminado a promover la aplicación de la ley y no a hostigar una industria. Lo anterior ya que el representante legal de los peticionarios, podía estar vinculado con una compañía la cual aparentaba tener un giro industrial similar al de Ecolimpio y por lo mismo pudiere encontrarse dentro del supuesto artículo 14.1, sección d) del Acuerdo y del supuesto (a) del punto 5.4 de las Directrices. El Secretariado estimó que éstas mismas premisas estaban presentes cuando el representante legal del peticionario sea un competidor de la entidad en contra de la cual se alega que la Parte no ejerce de forma efectiva su legislación.

Al respecto y como se señalo antes, el representante legal de los Peticionarios expuso en un escrito que solicitó fuera guardado como confidencial los argumentos por los cuales consideraba no caer dentro de los supuestos descritos en el párrafo anterior. No obstante que el Secretariado no esta en aptitud de exponer en el presente documento su análisis de la información proporcionada por el representante legal por el carácter confidencial de la misma, por no contar el Secretariado, al momento de valoración del presente documento, evidencia alguna en contrario, éste estima que el representante legal no se encuentra dentro del supuesto artículo 14.1, sección d) del Acuerdo y del supuesto (a) del punto 5.4 de las Directrices.

B. Con respecto del inciso (e) del artículo 14 (1) del ACAAN

Con relación al requisito de señalar que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte. Los Peticionarios han hecho referencia a una denuncia popular presentada el 4 de diciembre de 2003. De la información proporcionada por los Peticionarios tal y como se hizo notar en la determinación del 20 de abril de 2004[7] el Secretario hizo notar que aún y cuando se satisface el requisito establecido por el artículo 14.1 sección e) del ACAAN, los Peticionarios también han aportado, al menos hasta

6. Página 4 de la Determinación 14.1 de fecha 20 de abril de 2004.
7. Página 6 de la Determinación 14.1 de fecha 20 de abril de 2004.

cierto punto, documentos emitidos por PROFEPA dando seguimiento a su denuncia popular. Ya que dicha denuncia popular fue presentada relativamente de forma reciente y su trámite podría todavía ser existente, el Secretariado puede no contar con todos los oficios que la Parte haya emitido con respecto a dicho procedimiento..

V. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(2) DEL ACAAN

Una vez que el Secretariado ha determinado que las aserciones de una petición satisfacen los requisitos del artículo 14(1), el Secretariado analiza la petición para determinar si ésta amerita solicitar una respuesta a la Parte. Conforme al artículo 14(2) del ACAAN, son cuatro los criterios que guían la decisión del Secretariado en esta etapa:

> *(a) si la petición alega daño a la persona u organización que la presenta*
>
> *(b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;*
>
> *(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte; y*
>
> *(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.*

En cuanto a los cuatro requisitos listados en el artículo 14(2), el Secretariado determinó:

A. Con respecto a si la Petición alega daño a la persona u organización que la presenta, el Secretariado observa que base de los argumentos que los Peticionarios exponen es precisamente que las operaciones de Ecolimpio están causando un daño en su salud y sus propiedades. Por lo anterior, el Secretariado estima dicho requisito como satisfecho.

B. El Secretariado estima que la Petición efectivamente plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo ya que porqué se refiere a la aplicación efectiva, en el sector del manejo de residuos peligrosos, de la legislación en materia de manejo de residuos peligrosos, contribuyendo a mejorar la observancia y aplicación de las leyes y

reglamentos ambientales (artículo 1(g) del ACAAN); alentar la protección y el mejoramiento del medio ambiente en territorio de la Parte para el bienestar de las generaciones presentes y futuras (artículo 1(a) del ACAAN); y promover políticas y prácticas para prevenir la contaminación (artículo 1(j) del ACAAN).

C. Como se ha expuesto antes, los Peticionarios indican que presentaron una denuncia popular sobre las presuntas violaciones a la legislación ambiental por parte de Ecolimpio. En particular, la petición afirma que se presentaron denuncias populares ante la Profepa el 4 de diciembre de 2003, hecha la aclaración en el último párrafo de la sección IV anterior, el Secretariado estima que los Peticionarios han acudido a los recursos disponibles conforme a la legislación de la Parte (artículo 14(2)(c)).

D. Por lo que se refiere al artículo 14(2)(d), la petición no parece basarse en noticias de los medios de comunicación, sino en el conocimiento directo de los hechos por ocurrir en terrenos propiedad de los Peticionarios.

VI. SOLICITUD DE LOS PETICIONARIOS RESPECTO DEL PROCEDIMIENTO DE CONSULTA Y SOLUCIÓN DE CONTROVERSIAS CONTENIDO EN LOS ARTÍCULOS 22, 23 Y 24 DEL ACAAN

Esta versión aclaratoria de la Petición incluye la solicitud por parte de los Peticionarios de que se tenga por denunciado "*la existencia de una pauta persistente de omisiones en la aplicación efectiva de la legislación ambiental*".[8] Su solicitud especifica consiste en que por conducto del Secretariado se notifique a los Estados Unidos de América de la existencia de una pauta persistente de omisiones en la aplicación efectiva de la legislación ambiental por parte de los Estados Unidos Mexicanos, para que manifieste a lo que su derecho corresponda y de considerarlo conveniente, efectué el procedimiento relacionado con los artículo 22, 23 y 24 del ACAAN.[9]

Al respecto el Secretariado informa a los Peticionarios que su solicitud no encuadra dentro de algún tipo en el procedimiento descrito en los artículos a los que los Peticionarios hacen referencia ni dentro de las funciones que tiene el Secretariado bajo el ACAAN.

8. Página 3 de la Versión Aclaratoria de la Petición.
9. Página 4 de la Versión Aclaratoria de la Petición.

VII. DETERMINACIÓN DEL SECRETARIADO

Después de analizar la petición, su versión revisada, su versión aclaratoria y los anexos a estos tres documentos, el Secretariado determina que la petición cumple con los requisitos contenidos en el artículo 14(1) del ACAAN. Asimismo, tomando en consideración los criterios establecidos en el artículo 14(2), el Secretariado determina que la petición amerita solicitar una respuesta de la Parte.

Por lo anterior, el Secretariado solicita una respuesta del gobierno de México con respecto a la petición, dentro de un plazo de 30 días, conforme a lo establecido en el artículo 14(3) del Acuerdo. Dado que ya se ha enviado a la Parte interesada una copia de la petición y de los anexos respectivos, no se acompañan a esta Determinación.

Secretariado de la Comisión para la Cooperación Ambiental

por: Rolando Ibarra R.
Oficial Jurídico
Unidad sobre Peticiones Ciudadanas

ccp: Ing. José Manuel Bulás, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. William Kennedy, Director Ejecutivo, CCA
Peticionarios

SEM-04-002

(Environmental Pollution in Hermosillo)

SUBMITTERS:	ACADEMIA SONORENSE DE DERECHOS HUMANOS, A.C., AND DOMINGO GUTIÉRREZ MENDÍVIL
PARTY:	MEXICO
DATE:	14 July 2004
SUMMARY:	The Submitters assert that Mexico is failing to effectively enforce various provisions of Mexican environmental law regarding the prevention, monitoring, oversight and control of air pollution in Hermosillo, Sonora.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (30 August 2004)	Determination that criteria under Article 14(1) have not been met.

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Número de petición:	**SEM-04-002** (Contaminación Ambiental en Hermosillo)
Peticionaria(os):	Academia Sonorense de Derechos Humanos, A.C. y Lic. Domingo Gutiérrez Mendívil (los "peticionarios")
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	14 de julio de 2004
Fecha de la determinación:	30 de agosto de 2004

I. ANTECEDENTES

El 14 de julio de 2004, los Peticionarios antes señalados presentaron ante el Secretariado (el "Secretariado") de la Comisión para la Cooperación Ambiental (la "Comisión") una petición ciudadana de conformidad con el artículo 14 del Acuerdo de Cooperación Ambiental de América del Norte (el "ACAAN" o el "Acuerdo"). Los peticionarios aseveran que México ha incurrido en omisiones en la aplicación efectiva de su legislación ambiental en relación con el control de la contaminación atmosférica en la ciudad de Hermosillo, Sonora;[1] que las autoridades señaladas como responsables han omitido aplicar de manera efectiva prácticamente todas las disposiciones jurídicas en materia de prevención y control de la contaminación del aire en el Municipio de Hermosillo, Sonora.[2] Afirman que resulta evidente el perjuicio que causa a todos los habitantes de Hermosillo, Sonora, la circunstancia de que

1. Página 5 de la Petición.
2. Página 13 de la Petición.

prácticamente no se esté realizando acción alguna para la prevención y control de la contaminación de la atmósfera.[3]

Según el ACAAN, el Secretariado puede examinar las peticiones que cumplan con los requisitos establecidos en su artículo 14(1). El Secretariado ha determinado que esta petición no cumple con los requisitos de dicho artículo y en este documento expone las razones de esta determinación.

II. RESUMEN DE LA PETICIÓN

Los peticionarios fundan su Petición en la omisión por México en la aplicación efectiva del artículo 4to. de la Constitución de los Estados Unidos Mexicanos; de los artículos 5, fracciones II, V, XVIII y XIX, 7, fracciones III, XII y XIII, 8, fracciones III, XI, XII y XV, 10, y 112 fracciones II y IV, de la Ley General del Equilibrio Ecológico y la Protección al Ambiente; de los artículos 3, fracción VII, 4, fracción III, 13, 16, y 41, del Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Prevención y Control de la Contaminación de la Atmósfera; de los artículos 13, apartado A, fracción I, y apartado B, Fracción VI, Y 20 Fracción VII, de la Ley General de Salud; de los artículos 73, 75, 85, apartado B, fracción I, 138 y 139 de la Ley del Equilibrio Ecológico y la Protección al Ambiente para el Estado de Sonora; de los Artículos 15, Fracción VI, y 18, Fracción VI, de la Ley de Salud para el Estado de Sonora; del artículo 9, fracción II, de la Ley de Protección Civil para el Estado de Sonora; y de las Normas Oficiales Mexicanas ("NOM") NOM-020-SSA1-1993, NOM-021-SSA1-1993, NOM-022-SSA1-1993, NOM-023-SSA1-1993, NOM-024-SSA1-1993, NOM-025-SSA1-1993, NOM-026-SSA1-1993, NOM-048-SSA1-1993, NOM-040-SEMARNAT-2002 (antes NOM-040-ECOL-2002; NOM-CCAT-002-ECOL/1993), NOM-043-SEMARNAT-1993 (antes NOM-043-ECOL-1993; NOM-CCAT-006-ECOL/1993), NOM 085-SEMARNAT-1994, NOM-121-SEMARNAT-1997 (antes NOM-121-ECOL-1997), NOM-041-SEMARNAT-1999 (antes NOM-041-ECOL-1999; NOM-CCAT-003-ECOL/1993), NOM-042-SEMARNAT-1999 (antes NOM-042-ECOL-1999; NOM-CCAT-004-ECOL/1993), NOM-044-SEMARNAT-1993 (antes NOM-044-ECOL-1993, NOM-CCAT-007-ECOL/1993), NOM-045-SEMARNAT-1996 (antes NOM-045-ECOL-1996; NOM-CCAT-008-ECOL/1993), NOM-048-SEMARNAT-1993 (antes NOM-048-ECOL-1993; NOM-CCAT-012-ECOL/1993) Y NOM-050-SEMARNAT-1993 (antes NOM-050-ECOL-1993; NOM-CCAT-014-ECOL/1993).[4]

3. *Ibid*.
4. Página 1 y 2 de la Petición.

Los peticionarios señalan a las siguientes como autoridades responsables por las omisiones aseveradas: La Secretaría de Medio Ambiente y Recursos Naturales (Semarnat); la Procuraduría Federal de Protección al Ambiente (Profepa); la Secretaría de Salud del Gobierno Federal (Salud); el Poder Ejecutivo del Gobierno del Estado de Sonora y las Secretarías de Infraestructura Urbana y Ecología y de Salud; el Ayuntamiento de Hermosillo, Sonora ("Ayuntamiento"); Comisión Estatal de Derechos Humanos de Sonora, Comisión Nacional de Derechos Humanos, Juzgado Segundo de Distrito en el Estado de Sonora y Tercer Tribunal Colegiado del Quinto Circuito.[5]

Los peticionarios enumeraron los argumentos por los que considera que la Parte Mexicana ha incurrido en omisiones en la aplicación efectiva su legislación ambiental.

A. Consideran que PROFEPA y SALUD han omitido: vigilar el cumplimiento de las NOMs sobre control de la contaminación atmosférica en el Estado de Sonora y, en particular, en el municipio de Hermosillo. Además, la segunda de aquéllas aseveran ha omitido establecer y mantener actualizado un Sistema Nacional de Información de la Calidad del Aire que registre los datos relativos a la ciudad de Hermosillo, aparte de que tampoco ha vigilado el cumplimiento de la NOM-048-SSA1-1993, ya que presuntamente jamás ha realizado evaluación alguna sobre el impacto que está teniendo en la población de Hermosillo el confinamiento de residuos peligrosos Cytrar.[6]

B. Exponen que el Poder *Ejecutivo del Gobierno del Estado de Sonora* y las *Secretarías de Infraestructura Urbana y Ecología, y de Salud del propio Gobierno del Estado* han omitido: a) llevar a cabo las acciones de prevención y el control de la contaminación del aire en bienes y zonas de jurisdicción estatal; b) definir en el Plan Estatal de Desarrollo Urbano las zonas en que sea permitida la instalación de industrias contaminantes; c) vigilar y hacer cumplir en la esfera de su competencia las NOMS sobre control de la contaminación atmosférica; d) expedir las normas técnicas ecológicas sobre la materia; e) establecer y operar o, en su caso, autorizar el establecimiento y operación de centros de verificación, para los vehículos automotores destinados al servicio publico de transporte concesionado por el Estado, con arreglo a las normas técnicas ecológicas que no existen; f) expedir los reglamentos, las circulares y las

5. Página 4 y 5 de la Petición.
6. Página 6 de la Petición.

demás disposiciones de observancia general que resulten necesarias para proveer, en su esfera administrativa, a la exacta observancia de la Ley Ambiental del Estado, entre otros, el relativo a la prevención y control de la contaminación de la atmósfera, también ha dejado de actualizar el plan estatal de ecología; g) proponer los planes para la verificación, seguimiento y control de los valores establecidos en las NOMs NOM-020-SSA1-1993 a la NOM-026-SSA1-1993.[7]

C. El *Ayuntamiento de Hermosillo, Sonora* ha omitido: a) llevar a cabo las acciones de prevención y el control de la contaminación del aire en bienes y zonas de jurisdicción municipal; b) definir en el Programa Municipal de Desarrollo Urbano las zonas en que sea permitida la instalación de industrias contaminantes; c) vigilar y hacer cumplir en la esfera de su competencia las NOMs sobre control de la contaminación atmosférica; d) establecer programas de verificación vehicular obligatoria, así como establecer y operar o, en su caso, autorizar el establecimiento y operación de centros de verificación vehicular obligatoria, con arreglo a las normas técnicas ecológicas (que no existen); e) integrar la Comisión Municipal de Ecología prevista en el artículo 138 de la Ley local de la materia; f) expedir los reglamentos, las circulares y las demás disposiciones de observancia general que resulten necesarias para proveer, en su esfera administrativa, a la exacta observancia de la Ley Ambiental del Estado, entre otros, el reglamento sobre prevención y control de la contaminación de la atmósfera; el reglamento municipal de ecología, el programa municipal de protección al ambiente, programa de respuesta contingencias ambientales y un programa de administración de la calidad del aire; g) reducir o controlar las emisiones de contaminantes a la atmósfera, sean de fuentes artificiales o naturales, fijas o móviles para asegurar una calidad del aire satisfactoria para el bienestar de la población y el equilibrio ecológico.[8]

D. Los peticionarios argumentan que como consecuencia de que presuntamente no se está realizando el monitoreo de la calidad del aire de Hermosillo, la *Secretaría de Salud del Gobierno del Estado de Sonora* se ha abstenido de formular estudios epidemiológicos en los que se determine cuál es la gravedad del efecto negativo que está teniendo la contaminación atmosférica en la salud de los pobladores de la mencionada ciudad.[9]

7. Página 6 de la Petición.
8. Página 7 de la Petición.
9. Página 9 de la Petición.

E. Los peticionarios aseveran que el monitoreo de la calidad del aire en Hermosillo es una actividad obligatoria para el *Ayuntamiento* de dicho municipio, según lo ordenado por el artículo 8o., fracciones III y XII de la Ley General del Equilibrio Ecológico y la Protección al Ambiente.

F. En el mismo sentido, las NOM-CCAM-001-ECOL/1993 a la NOM-CCAM-005-ECOL/1993 (denominación original), así como las NOM-CCAT-001-ECOL/1993 a la NOM-CCAT-014-ECOL/1993 (denominación original), responsabilizan de su cumplimiento a la *PROFEPA*, al *Gobierno del Estado* y al *Ayuntamiento*, mismas instancias que los Peticionarios aseveran nada han hecho para acatar las referidas disposiciones.[10]

G. Aseveran que la *Comisión Estatal de Derechos Humanos de Sonora, la Comisión Nacional de Derechos Humanos, el Juzgado Segundo de Distrito en el Estado de Sonora y el Tercer Tribunal Colegiado del Quinto Circuito* han omitido aplicar en forma correcta las disposiciones jurídicas ambientales en sus resoluciones. Los Peticionarios dan una descripción incluida en la petición de los procesos seguidos ante dichas instancias.[11]

H. Los peticionarios aseveran que no existe un Plan Estatal de Medio Ambiente actualizado, que el Ayuntamiento de Hermosillo no ha expedido un Reglamento de Ecología, ni se dispone de un Programa de Administración de la Calidad del Aire, ni de un Programa de Respuesta a Contingencias Ambientales.[12]

I. Los peticionarios también incluyen en la petición que: "El artículo 13 del ACAAN faculta al Secretariado para preparar un informe de evaluación del caso CONTAMINACIÓN ATMOSFÉRICA EN HERMOSILLO, como un asunto relacionado con las funciones de cooperación del Acuerdo.[13]"

10. *Ibid*.
11. Véanse páginas 10, 11 y 12 de la Petición.
12. Páginas 7 y 8 de la Petición.
13. Página 13 de la Petición.

III. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(1) DEL ACAAN

El artículo 14(1) del Acuerdo establece que:

> *El Secretariado podrá examinar peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental, si el Secretariado juzga que la petición:*
>
> *a. se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;*
>
> *b. identifica claramente a la persona u organización que presenta la petición;*
>
> *c. proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla;*
>
> *d. parece encaminada a promover la aplicación de la ley y no a hostigar una industria;*
>
> *e. señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte; y*
>
> *f. la presenta una persona u organización que reside o está establecida en territorio de una Parte.*

En esta etapa se requiere entonces, de cierta revisión inicial para verificar que la petición cumple con estos requisitos, si bien el artículo 14(1) no pretende colocar una gran carga para los peticionarios.[14] El Secretariado examinó la petición en cuestión con tal perspectiva en mente.

Para que el Secretariado pueda examinar si la petición cumple con los criterios establecidos en los incisos a) al f) del artículo 14(1) del Acuerdo, la petición debe satisfacer el requisito umbral del artículo 14(1) consistente en ser presentada por cualquier persona u organización sin vinculación gubernamental y que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. Esto lo hace, en el sentido de que la presentan una organización sin vinculación gubernamental y una persona física las cuales aseveran que

14. Véanse en este sentido, e.g., SEM-97-005 (Biodiversidad), Determinación conforme al artículo 14(1) (26 de mayo de 1998) y SEM-98-003 (Grandes Lagos), Determinación conforme al artículo 14(1) y (2) (8 de septiembre de 1999).

una Parte, México, está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental.[15]

En cuanto a los seis requisitos listados en el artículo 14(1), el Secretariado determinó:

A. Con respecto del inciso (a) del artículo 14(1), que la Petición cumple con el requisito de ser presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado ya que la petición se presentó por escrito en español, idioma designado por el gobierno de los Estados Unidos Mexicanos.

B. Con respecto del inciso (b) del artículo 14 (1), que la Petición satisface el requisito de identificar claramente a la persona u organización que presenta la petición, ya que los peticionarios se identificaron como Academia Sonorense de Derechos Humanos, A.C. y el Lic. Domingo Gutiérrez Mendívil.

C. Con respecto del inciso (c) del artículo 14 (1), que la Petición no cumple el requisito de haber proporcionado información suficiente que permita revisarla ni de haber incluido las pruebas documentales que la sustenten. Para mayor referencia, véase la sección IV siguiente.

D. Con respecto del inciso (d) del artículo 14 (1), el Secretariado considera que la petición no parece estar encaminada a hostigar a una industria, sino a promover la aplicación de la legislación ambiental

15. El Secretariado nota como en el texto de la Petición al momento de señalar a cada una de las autoridades que se señalan como responsables de la omisión en la aplicación efectiva de la legislación ambiental mexicana los peticionarios utilizan el vocablo "han omitido". En casos anteriores se ha señalado como la expresión "está incurriendo" en el artículo 14(1) impone una consideración temporal respecto de las aseveraciones de una petición y el Secretariado ya ha considerado que se satisface si la Parte correspondiente puede tomar medidas de aplicación de su legislación ambiental respecto de los asuntos materia de la petición y está omitiendo hacerlo, si bien los hechos a los que sea aplicable dicha legislación ambiental pueden ser hechos pasados. Por esto, si bien los peticionarios plantean sus aseveraciones en términos de que México "ha omitido" en cumplir con las disposiciones a las que hace referencia en la Petición, si esas supuestas acciones que la Parte ha omitido corresponden a posibles acciones de aplicación que la autoridad competente pudiera llevar a cabo, entonces se consideran omisiones en que la Parte supuestamente "está incurriendo". (Veasé SEM-01-001 (Cytrar II) Determinación del Secretariado en conformidad con los artículos 14(1) y (2) (24 de abril de 2001) y también en este sentido, SEM-97-004 (Canadian Env. Defence Fund), Determinación conforme al artículo 14(1) (27 de agosto de 1997) y SEM-96-001 (Cozumel), Recomendación conforme al artículo 15(1) (7 de junio de 1997).

en México. Esto en virtud de que la petición está esencialmente referida a omisiones de diversas autoridades en México y no al cumplimiento de una empresa en particular. La petición tampoco plantea una cuestión intrascendente.[16]

E. Con respecto del inciso (e) del artículo 14 (1), dada la falta de información suficientes que permitan revisar la Petición conforme al requisito del inciso (c) del artículo 14 (1), al Secretariado no le es posible en este momento determinar si la Petición cumple con el requisito de señalar que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte. Para mayor referencia, véase la sección IV siguiente.

F. Con respecto del inciso (f) del artículo 14 (1), que la Petición cumple el requisito de ser presentada por una persona u organización que reside o está establecida en territorio de una Parte ya que acreditan tener residencia en la ciudad de Hermosillo, Sonora, México, es decir personas que residen en el territorio de la Parte mexicana.

IV. ASPECTOS DE FONDO EN EL ANÁLISIS DE LA PETICIÓN

A. ASPECTOS DE LEGISLACIÓN AMBIENTAL Y AUTORIDADES PERTINENTES.

El Secretariado estima necesario realizar las siguientes precisiones en cuanto al alcance de la Petición con respecto a (i) ciertas disposiciones ambientales que los peticionarios señalan como aplicables al caso objeto de la petición y (ii) las autoridades que los peticionarios señalaron como responsables de la omisión en la aplicación efectiva de la legislación ambiental.

A.1. DISPOSICIONES DE LEGISLACIÓN AMBIENTAL OBJETO DE LA PETICIÓN.

En casos anteriores, para determinar si una petición se refería a una omisión en la aplicación efectiva de la ley, el Secretariado examinaba si

16. Véase también el apartado 5.4 de las Directrices, que señala que el Secretariado, al determinar si la petición está encaminada a promover la aplicación efectiva de la legislación ambiental y no a hostigar a una industria, tomará en cuenta: (i) "si la petición se centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular; especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición"; y (ii) "si la petición parece intrascendente".

los peticionarios aseveraban una omisión en el cumplimiento de una obligación legal específica.[17] La sección II de esta determinación ha hecho referencia a las disposiciones legislativas identificadas por los Peticionarios y el Anexo I a esta determinación ha hecho un listado de dichas disposiciones legislativas de una forma más detallada.

El Secretariado nota sin embargo que la petición no contiene una relación sucinta de los hechos o bien brinda información suficiente que explique la aseveración por la que los peticionarios consideran que las autoridades no han aplicado de forma efectiva cada una de las NOMs y de las demás disposiciones que se listan.[18]

A.2. AUTORIDADES PERTINENTES PARA LA APLICACIÓN DE LEYES AMBIENTALES.

Las autoridades que los peticionarios han señalado como responsables de la falta de aplicación efectiva de la legislación ambiental son: Semarnat; Profepa; Salud; el Poder Ejecutivo del Gobierno del Estado de Sonora y las Secretarías de Infraestructura Urbana y Ecología y de Salud; el Ayuntamiento de Hermosillo; y la Comisión Estatal de Derechos Humanos de Sonora, la Comisión Nacional de Derechos Humanos, el Juzgado Segundo de Distrito en el Estado de Sonora y el Tercer Tribunal Colegiado del Quinto Circuito.[19]

El Secretariado estima que para efectos de esta Petición la Comisión Estatal de Derechos Humanos de Sonora y la Comisión Nacional de Derechos Humanos no pueden ser objeto del presente proceso ya que no son parte de los organismos de gobierno encargados, de acuerdo con la legislación de la Parte, de la aplicación de la ley ambiental en cuestión.[20] Además, el Secretariado opina que el proceso relativo a los artículos 14 y 15 del ACAAN no se enfoca a una revisión de las acciones como se presentan en la petición, del Juzgado Segundo de Distrito en el Estado de Sonora o el Tercer Tribunal Colegiado del Quinto Circuito.

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17. Véase SEM-98-003 (Grandes Lagos), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999) en la página 7.
18. Lo anterior tal y como lo recomienda la directriz 5.3 de las Directrices para la presentación de peticiones relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del ACAAN (las "Directrices"):
    "5.3 La Petición deberá contener una relación sucinta de los hechos en que se funde dicha aseveración y deberá proporcionar información suficiente que permita al Secretariado examinarla, incluidas las pruebas documentales que puedan sustenta la Petición."
19. Página 4 y 5 de la Petición.
20. Apartado 5.5 de las Directrices: "... Las autoridades pertinentes son los organismos del gobierno encargados, de acuerdo con la legislación de la Parte, de la aplicación de la ley ambiental en cuestión."

B. CON RESPECTO AL REQUISITO EN EL INCISO (C) Y (E) DEL ARTÍCULO 14 (1) DEL ACAAN.

En cuanto a los requisitos establecidos en los incisos (c) y (e) del Artículo 14 (1) del ACAAN, el Secretariado determinó que la información y documentos proporcionados por los Peticionarios no son suficientes para permitir al Secretariado analizar algunas de las aseveraciones hechas en la petición.

En el Anexo II a esta determinación se hace referencia a los documentos que se acompañaron a la petición misma. Brevemente, entre los anexos se encuentran copias de: un oficio emitido por *Semarnat*; un escrito de los Peticionarios dirigido al *Ayuntamiento*, Copia de un acta de sesión del cabildo del Ayuntamiento, comunicaciones y documentos parte del expediente de los procesos llevados ante las comisiones de derechos humanos y los juzgados y tribunales a los que hicieron referencia los Peticionarios, copia de un reporte "Concentración de partículas en Aire Ambiente para la ciudad de Hermosillo, Sonora, México", copia de la escritura pública donde consta la constitución de la Asociación Civil "Academia Sonorense de Derechos Humanos, A.C. y copia de credencial para votar del Sr. Domingo Gutiérrez Mendívil. Además, se adjuntan fotografías y notas de prensa.

No obstante, el Secretariado estima que la petición no proporciona información suficiente para acreditar que el asunto haya sido efectivamente comunicado por escrito a las autoridades pertinentes en México tal y como lo señala el inciso (e) del artículo 14 (1) . Lo anterior dado que:

(i) Con respecto a SEMARNAT, los Peticionarios ofrecen un oficio que fue emitido por esta autoridad hace 5 años. Para determinar que el asunto materia de esta petición fue debidamente comunicado a esta autoridad, el Secretariado considera necesario contar con la copia del escrito que los Peticionarios presumiblemente hayan presentado a dicha autoridad y que pudo haber motivado tal oficio expedido por SEMARNAT.

(ii) Con respecto al Ayuntamiento, los peticionarios ofrecen prueba de la comunicación que al Ayuntamiento presentaron, lo anterior a pesar de haber sido esta de hace más de 5 años.

(iii) Con respecto a la respuesta del Ayuntamiento a la comunicación referida en el inciso anterior, los peticionarios ofrecen copia del Acta de Sesión del Cabildo del Ayuntamiento de fecha 25 de febrero de 1999 y que también adjuntaron los Peticionarios. El Secretariado nota que entre otras cosas la información que fue solicitada por los Peticiona-

rios fue autorizada a ser proveída según consta en el acta instruyendo para tal efecto el Ayuntamiento a su Dirección General de Servicios Públicos Municipales (siendo la expedición de las copias de esa información a costa de los Peticionarios).

(iv) Al margen de estos escritos a los que se ha hecho referencia en los sub incisos anteriores (emitidos por SEMARNAT, los Peticionarios hacia el Ayuntamiento, y el Ayuntamiento mismo) no se encontró información alguna de que el asunto haya sido comunicado al resto de las autoridades a las que los Peticionarios hicieron referencia en la Petición.[21]

No habiendo mostrado las comunicaciones hacia estas otras autoridades y dada la observación que el Secretariado hizo, basado en el punto 5.3 de las Directrices, al no contener la Petición una relación sucinta de los hechos o bien brindar información suficiente que pueda explicar la aseveración por la que los peticionarios consideran que las autoridades no han aplicado de forma efectiva cada una de las NOMs y de las demás disposiciones que se listan, hace necesario que también los Peticionarios expliquen la razón por la que estas autoridades han omitido aplicar de forma efectiva la legislación ambiental a la que los peticionarios hicieron referencia.

Por las razones que antes se señalan en cuanto a que la información que proporciona la Petición no hace posible determinar si el asunto materia de la Petición ha sido efectivamente comunicado a las autoridades que los Peticionarios señalaron con excepción del Ayuntamiento, son los elementos por los que se considera como no satisfechos los incisos (c) y (e) del artículo 14(1) del ACAAN. Lo anterior, además de la precisión que hace el Secretariado con base a las Directrices en cuanto a que la Petición no contiene una relación sucinta de los hechos o bien brinda información suficiente que pueda explicar la aseveración por la que los peticionarios consideran que las autoridades no han aplicado de forma efectiva cada una de las NOMs y de las demás disposiciones que se listan.[22]

V. DETERMINACIÓN DEL SECRETARIADO

Habiendo revisado esta petición de conformidad con el artículo 14(1) del ACAAN, con base en el análisis expuesto en el capítulo III y IV

21. Con respecto a la Comisión Estatal de Derechos Humanos de Sonora, la Comisión Nacional de Derechos Humanos, el Juzgado Segundo de Distrito en el Estado de Sonora y el Tercer Tribunal Colegiado del Quinto Circuito, véase sección A.2 de la presente determinación.
22. Con base en la directriz 5.3 de las Directrices antes citada.

anterior, el Secretariado considera que ésta no cumple con los requisitos en los incisos (c) y (e) del artículo 14 (1) del ACAAN. En especifico al no haber proporcionado información que compruebe que el asunto materia de la petición haya sido comunicado a las autoridades que los peticionarios señalaron como responsables de las omisiones en la aplicación efectiva de la legislación ambiental en México. Además, el Secretariado hace la precisión de que la petición no considera el punto 5.3 de las Directrices al no brinda la información suficiente para determinar la forma especifica en que ha sido omitida la aplicación efectiva de las disposiciones citadas por los peticionarios.

Por lo anterior, y en cumplimiento de lo dispuesto por el apartado 6.1 de las Directrices, este Secretariado notifica a los Peticionarios la no procedencia de su petición y al mismo tiempo los apercibe de que, de conformidad con el apartado 6.2 de las Directrices, cuentan con 30 días para presentar una petición que cumpla con los criterios del artículo 14(1) del ACAAN y las observaciones hechas con base en las Directrices.[23]

Secretariado de la Comisión para la Cooperación Ambiental

por: Rolando Ibarra R.
Oficial Jurídico
Unidad sobre Peticiones Ciudadanas

ccp: Mtro. José Manuel Bulás, SEMARNAT
Sra. Norine Smith, Environment Canada
Sra. Judith E. Ayres, US-EPA
Sr. William Kennedy, Director Ejecutivo CCA
Lic. Domingo Gutiérrez M., Academia Sonorense de Derechos Humanos, A.C.

23. "6.1 Cuando el Secretariado determine que una petición no cumple con los criterios establecidos en el artículo 14(1) del Acuerdo, así como con cualquier otro requisito establecido en estas directrices –a excepción de los errores menores de forma contemplados en el apartado 3.10 de estas directrices–, notificará a la brevedad al Peticionario las razones por las cuales ha determinado no examinar la petición.
6.2 Luego de la recepción de tal notificación del Secretariado, el Peticionario tendrá 30 días para presentar al Secretariado una petición que cumpla con los criterios establecidos en el artículo 14(1) del Acuerdo y con los requisitos establecidos en estas directrices."

ANEXO I

LISTA DE LEGISLACIÓN AMBIENTAL A LA QUE SE HACE REFERENCIA EN LA PETICIÓN

DE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS MEXICANOS

ARTÍCULO 4o.- El varón y la mujer son iguales ante la ley. Esta protegerá la organización y el desarrollo de la familia.

Toda persona tiene derecho a decidir de manera libre, responsable e informada sobre el número y el espaciamiento de sus hijos.

Toda persona tiene derecho a la protección de la salud. La Ley definirá las bases y modalidades para el acceso a los servicios de salud y establecerá la concurrencia de la Federación y las entidades federativas en materia de salubridad general, conforme a lo que dispone la fracción XVI del artículo 73 de esta Constitución.

Toda persona tiene derecho a un medio ambiente adecuado para su desarrollo y bienestar.

Toda familia tiene derecho a disfrutar de vivienda digna y decorosa. La Ley establecerá los instrumentos y apoyos necesarios a fin de alcanzar tal objetivo.

Los niños y las niñas tienen derecho a la satisfacción de sus necesidades de alimentación, salud, educación y sano esparcimiento para su desarrollo integral.

Los ascendientes, tutores y custodios tienen el deber de preservar estos derechos. El Estado proveerá lo necesario para propiciar el respeto a la dignidad de la niñez y el ejercicio pleno de sus derechos.

El Estado otorgará facilidades a los particulares para que se coadyuven al cumplimiento de los derechos de la niñez.

DE LA LEY GENERAL DEL EQUILIBRIO ECOLÓGICO Y LA PROTECCIÓN AL AMBIENTE

ARTICULO 5o.- Son facultades de la Federación:

...

II. La aplicación de los instrumentos de la política ambiental previstos en esta Ley, en los términos en ella establecidos, así como la regulación de las acciones para la preservación y restauración del equilibrio ecológico y la protección al ambiente que se realicen en bienes y zonas de jurisdicción federal;

...

V. La expedición de las normas oficiales mexicanas y la vigilancia de su cumplimiento en las materias previstas en esta Ley;

...

XVIII. La emisión de recomendaciones a autoridades Federales, Estatales y Municipales, con el propósito de promover el cumplimiento de la legislación ambiental;

XIX. La vigilancia y promoción, en el ámbito de su competencia, del cumplimiento de esta Ley y los demás ordenamientos que de ella se deriven;...

ARTICULO 7o.- Corresponden a los Estados, de conformidad con lo dispuesto en esta Ley y las leyes locales en la materia, las siguientes facultades:

...

III. La prevención y control de la contaminación atmosférica generada por fuentes fijas que funcionen como establecimientos industriales, así como por fuentes móviles, que conforme a lo establecido en esta Ley no sean de competencia Federal;

...

XII. La participación en emergencias y contingencias ambientales, conforme a las políticas y programas de protección civil que al efecto se establezcan;

XIII. La vigilancia del cumplimiento de las normas oficiales mexicanas expedidas por la Federación, en las materias y supuestos a que se refieren las fracciones III, VI y VII de este artículo;...

ARTICULO 8o.- Corresponden a los Municipios, de conformidad con lo dispuesto en esta Ley y las leyes locales en la materia, las siguientes facultades:

...

III. La aplicación de las disposiciones jurídicas en materia de prevención y control de la contaminación atmosférica generada por fuentes fijas que funcionen como establecimientos mercantiles o de servicios, así como de emisiones de contaminantes a la atmósfera provenientes de fuentes móviles que no sean consideradas de jurisdicción federal, con la participación que de acuerdo con la legislación estatal corresponda al gobierno del estado;

...

XI. La participación en emergencias y contingencias ambientales conforme a las políticas y programas de protección civil que al efecto se establezcan;

XII. La vigilancia del cumplimiento de las normas oficiales mexicanas expedidas por la Federación, en las materias y supuestos a que se refieren las fracciones III, IV, VI y VII de este artículo;

...

XV. La formulación, ejecución y evaluación del programa municipal de protección al ambiente,...

ARTÍCULO 10.- Los Congresos de los Estados, con arreglo a sus respectivas Constituciones y la Asamblea Legislativa del Distrito Federal, expedirán las disposiciones legales que sean necesarias para regular las materias de su competencia previstas en esta Ley. Los ayuntamientos, por su parte, dictarán los bandos de policía y buen gobierno, los reglamentos, circulares y disposiciones administrativas que correspondan, para que en sus respectivas circunscripciones, se cumplan las previsiones del presente ordenamiento.

En el ejercicio de sus atribuciones, los Estados, el Distrito Federal y los Municipios, observarán las disposiciones de esta Ley y las que de ella se deriven.

ARTICULO 112.- En materia de prevención y control de la contaminación atmosférica, los gobiernos de los Estados, del Distrito Federal y de

los Municipios, de conformidad con la distribución de atribuciones establecida en los artículos 7o., 8o. y 9o. de esta Ley, así como con la legislación local en la materia:

...

II. Aplicarán los criterios generales para la protección a la atmósfera en los planes de desarrollo urbano de su competencia, definiendo las zonas en que sea permitida la instalación de industrias contaminantes;

...

IV. Integrarán y mantendrán actualizado el inventario de fuentes de contaminación;...

DEL REGLAMENTO DE LA LEY GENERAL DEL EQUILIBRIO ECOLÓGICO Y LA PROTECCIÓN AL AMBIENTE EN MATERIA DE PREVENCIÓN Y CONTROL DE LA CONTAMINACIÓN DE LA ATMÓSFERA

ARTICULO 3o.- Son asuntos de competencia federal, por tener alcance general en la nación o ser de interés de la Federación, en materia de prevención y control de la contaminación de la atmósfera, los que señala el artículo 5o. de la Ley y en especial los siguientes:

...

VII. La protección de la atmósfera en zonas o en casos de fuentes emisoras de jurisdicción federal.

ARTICULO 4o.- Compete a las entidades federativas y municipios, en el ámbito de sus circunscripciones territoriales y conforme a la distribución de atribuciones que se establezcan en las leyes locales, los asuntos señalados en el artículo 6o. de la Ley y en especial:

...

III. La prevención y el control de la contaminación de la atmósfera generada en zonas o por fuentes emisoras de jurisdicción estatal o municipal;...

ARTICULO 13.- Para la protección a la atmósfera se considerarán los siguientes criterios:

I. La calidad del aire debe ser satisfactoria en todos los asentamientos humanos y las regiones del país, y

II. Las emisiones de contaminantes a la atmósfera, sean de fuentes artificiales o naturales, fijas o móviles, deben ser reducidas o controladas, para asegurar una calidad del aire satisfactoria para el bienestar de la población y el equilibrio ecológico.

ARTICULO 16.- Las emisiones de olores, gases, así como de partículas sólidas y líquidas a la atmósfera que se generen por fuentes fijas, no deberán exceder los niveles máximos permisibles de emisión e inmisión, por contaminantes y por fuentes de contaminación que se establezcan en las normas técnicas ecológicas que para tal efecto expida la Secretaría en coordinación con la Secretaría de Salud, con base en la determinación de los valores de concentración máxima permisible para el ser humano de contaminantes en el ambiente que esta última determina.

Asimismo, y tomando en cuenta la diversidad de tecnologías que presentan las fuentes, podrán establecerse en la norma técnica ecológica diferentes valores al determinar los niveles máximos permisibles de emisión o inmisión, para un mismo contaminante o para una misma fuente, según se trate de:

I. Fuentes existentes;

II. Nuevas fuentes, y

III. Fuentes localizadas en zonas críticas.

La Secretaría en coordinación con la Secretaría de Salud, y previos los estudios correspondientes, determinará en la norma técnica ecológica respectiva, las zonas que deben considerarse críticas.

ARTICULO 41.- La Secretaría establecerá y mantendrá actualizado un sistema nacional de información de la calidad del aire.

Este sistema se integrará con los datos que resulten de:

I. El monitoreo atmosférico que lleven a cabo las autoridades competentes en el Distrito Federal, así como en los Estados y municipios, y

II. Los inventarios de las fuentes de comunicación de jurisdicción, federal y local, así como de sus emisiones.

DE LA LEY GENERAL DE SALUD

ARTÍCULO 13.- La competencia entre la Federación y las entidades federativas en materia de salubridad general quedará distribuida conforme a lo siguiente:

A. Corresponde al Ejecutivo Federal, por conducto de la Secretaría de Salud:

I. Dictar las normas oficiales mexicanas a que quedará sujeta la prestación, en todo el territorio nacional, de servicios de salud en las materias de salubridad general y verificar su cumplimiento;

...

B. Corresponde a los gobiernos de las entidades federativas, en materia de salubridad general, como autoridades locales y dentro de sus respectivas jurisdicciones territoriales:

...

VI. Vigilar, en la esfera de su competencia, el cumplimiento de esta Ley y demás disposiciones aplicables,

...

ARTÍCULO 20

Las estructuras administrativas a que se refiere el segundo párrafo del Artículo 19 de esta Ley, se ajustarán a las siguientes bases;

...

VII. Promoverán y vigilarán la aplicación de principios, normas oficiales mexicanas y procedimientos uniformes;...

DE LA LEY DEL EQUILIBRIO ECOLÓGICO Y LA PROTECCIÓN AL AMBIENTE PARA EL ESTADO DE SONORA

ARTICULO 73.- En materia de contaminación atmosférica, el Estado y los Ayuntamientos, en los ámbitos de sus respectivas competencias:

I. Llevarán a cabo las acciones de prevención y el control de la contaminación del aire en bienes y zonas de jurisdicción estatal o municipal;

II. Aplicarán los criterios generales para la protección a la atmósfera, en las declaratorias de usos, destinos, reservas y provisiones, definiendo las zonas en que sea permitida la instalación de industrias contaminantes;

III. Convendrán con quienes realicen actividades contaminantes y, en su caso, les requerirán la instalación de equipos de control de emisiones cuando se trate de actividades de jurisdicción local, y promoverán ante la Secretaría de Desarrollo Urbano y Ecología dicha instalación, en los casos de jurisdicción federal;

IV. Integrarán y mantendrán actualizado el inventario de fuentes fijas de contaminación y evaluarán el impacto ambiental en los casos de jurisdicción local previstos en el artículo 31 de la Ley General;

V. Establecerán y operarán sistemas de verificación de emisiones de vehículos automotores en circulación;

VI. Establecerán y operarán, con el apoyo técnico, en caso, de la Secretaría de Desarrollo Urbano y Ecología, sistemas de monitoreo de la calidad del aire. Dichos sistemas deberán contar con dictamen técnico previo de dicha Secretaría. Esta promoverá, mediante acuerdos de coordinación, la incorporación de los reportes locales de monitoreo a la información nacional;

VII. Establecerán requisitos y procedimientos para regular las emisiones de contaminantes de vehículos automotores, excepto los destinados al transporte público federal, y las medidas de tránsito y, en su caso, la suspensión de circulación, en casos graves de contaminación;

VIII. Tomarán las medidas preventivas necesarias para evitar contingencias ambientales por contaminación atmosférica;

IX. Elaborarán los informes sobre el estado del medio ambiente en la Entidad o Municipio correspondiente, que convengan con la Secretaría de Desarrollo Urbano y Ecología, a través de los acuerdos de coordinación que se celebren; y

X. Ejercerán las demás facultades que les confieren las disposiciones legales y reglamentarias aplicables.

...

ARTICULO 75.- No podrán emitirse contaminantes a la atmósfera, que ocasionen o puedan ocasionar desequilibrios ecológicos o daños al ambiente. En todas las emisiones a la atmósfera deberán ser observadas las previsiones de esta Ley y de las disposiciones reglamentarias que de ella emanen, así como las normas técnicas ecológicas expedidas por la Secretaria de Desarrollo Urbano y Ecología.

...

ARTICULO 85.- En relación con las emisiones de contaminantes de vehículos automotores, excepto los destinados al transporte público federal, corresponderá:

...

B) A los Ayuntamientos, dentro de sus circunscripciones territoriales:

I. Establecer programas de verificación vehicular obligatoria;

...

ARTICULO 138.- En cada Municipio, se integrará una Comisión Municipal de Ecología, la que será presidida por el Presidente Municipal y como Secretario Técnico fungirá la persona que éste designe. Dicha Comisión tendrá, en el ámbito de su competencia, las atribuciones señaladas en el artículo 135 de esta Ley y sesionará en los términos del Reglamento respectivo.

ARTÍCULO 139.- El Gobernador del Estado y los Ayuntamientos expedirán los reglamentos, las circulares y las demás disposiciones de observancia general que resulten necesarias para proveer, en su esfera administrativa, a la exacta observancia de este ordenamiento.

DE LA LEY DE SALUD PARA EL ESTADO DE SONORA

ARTICULO 15.- En materia de salubridad general, corresponde al Poder Ejecutivo del Estado, por conducto de la Secretaría:

...

VI.- Vigilar y hacer cumplir en la esfera de su competencia, la Ley General de Salud, la presente ley y demás disposiciones legales aplicables;

...

ARTICULO 18. – Compete a los Ayuntamientos:

...

VI.- Las demás que sean necesarias para hacer efectivas las atribuciones anteriores y las que se deriven de la ley.

DE LA LEY DE PROTECCIÓN CIVIL PARA EL ESTADO DE SONORA

ARTICULO 9o.- El Consejo tendrá las siguientes atribuciones:

...

II.- Aprobar el Programa Estatal de Protección Civil y los programas especiales que de él se deriven, evaluando su aplicación y cumplimiento por lo menos una vez en el año, promoviendo la participación de la sociedad, en general en la elaboración de tales programas;...

LISTADO DE NORMAS OFICIALES MEXICANAS A LAS QUE SE HACE REFERENCIA EN LA PETICIÓN

NOM-020-SSA1-1993
Salud ambiental. Criterio para evaluar el valor límite permisible para la concentración de ozono (O_3)de la calidad del aire ambiente. Criterio para evaluar la calidad del aire

NOM-021-SSA1-1993
Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto al monóxido de carbono (CO). Valor permisible para la concentración de monóxido de carbono (CO) en el aire ambiente como medida de protección a la salud de la población

NOM-022-SSA1-1993
Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto al bióxido de azufre (SO_2). Valor normado para la concentración de bióxido de azufre (SO_2) en el aire ambiente como medida de protección a la salud de la población

NOM-023-SSA1-1993
Salud Ambiental. Criterios para evaluar la calidad del aire ambiente con

respecto al bióxido de nitrógeno (NO_2). Valor normado para la concentración de bióxido de nitrógeno (NO_2) en el aire ambiente como medida de protección a la salud de la población

NOM-024-SSA1-1993
Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto a partículas suspendidas totales (PST). Valor permisible para la concentración de partículas suspendidas totales (PST) en el aire ambiente como medida de protección a la salud de la población

NOM-025-SSA1-1993
Salud Ambiental. Criterio para evaluar la calidad del aire ambiente con respecto a partículas menores de 10 micras (PM 10). Valor permisible para la concentración de partículas menores de 10 micras (PM10) en el aire ambiente como medida de protección a la salud de la población

NOM-026-SSA1-1993
Salud Ambiental. Criterios para evaluar la calidad del aire ambiente con respecto al plomo (Pb). Valor normado para la concentración de plomo (Pb) en el aire ambiente como medida de protección a la salud de la población

NOM-048-SSA1-1993
Que establece el método normalizado para la evaluación de riesgos a la salud como consecuencia de agentes ambientales

NOM-040-SEMARNAT-2002
Que establece los niveles máximos permisibles de emisión a la atmósfera de partículas sólidas, así como los requisitos de control de emisiones fugitivas, provenientes de las fuentes fijas dedicadas a la fabricación de cemento.

NOM-043-SEMARNAT-1993
Que establece los niveles máximos permisibles de emisión a la atmósfera de partículas sólidas provenientes de fuentes fijas.

NOM 085-SEMARNAT-1994
Contaminación atmosférica-fuentes fijas-para fuentes fijas que utilizan combustibles fósiles sólidos, líquidos o gaseosos o cualquiera de sus combinaciones

NOM-121-SEMARNAT-1997
Que establece los límites máximos permisibles de emisión a la atmósfera de compuestos orgánicos volátiles (COVs) provenientes de las operacio-

nes de recubrimiento de carrocerías nuevas en planta de automóviles, unidades de uso múltiple, de pasajeros y utilitarios; carga y camiones ligeros, así como el método para calcular sus emisiones.

NOM-041-SEMARNAT-1999
Que establece los límites máximos permisibles de emisión de gases contaminantes provenientes del escape de los vehículos automotores en circulación que usan gasolina como combustible.

NOM-042-SEMARNAT-1999
Que establece los límites máximos permisibles de emisión de hidrocarburos no quemados, monóxido de carbono, óxidos de nitrógeno y partículas suspendidas provenientes del escape de vehículos automotores nuevos en planta, así como de hidrocarburos evaporativos provenientes del sistema de combustible que usan gasolina, gas licuado de petróleo, gas natural y diesel de los mismos, con peso bruto vehicular que no exceda los 3,856 kilogramos.

NOM-044-SEMARNAT-1993
Que establece los niveles máximos permisibles de emisión de hidrocarburos, monóxido de carbono, óxidos de nitrógeno, partículas suspendidas totales y opacidad de humo provenientes del escape de motores nuevos que usan diesel como combustible y que se utilizarán para la propulsión de vehículos automotores con peso bruto vehicular mayor de 3857 kg.

NOM-045-SEMARNAT-1996
Que establece los niveles máximos permisibles de opacidad del humo proveniente del escape de vehículos automotores en circulación que usan diesel o mezclas que incluyan diesel como combustible.

NOM-048-SEMARNAT-1993
Que establece los niveles máximos permisibles de emisión de hidrocarburos, monóxido de carbono y humo, provenientes del escape de las motocicletas en circulación que utilizan gasolina o mezcla de gasolina-aceite como combustible.

NOM-050-SEMARNAT-1993
Que establece los niveles máximos permisibles de emisión de gases contaminantes provenientes del escape de los vehículos automotores en circulación que usan gas licuado de petróleo, gas natural u otros combustibles alternos como combustible.

ANEXO II

Lista de información adicional adjunta a la Petición.

1. Copia del oficio número DS-UAJ-095/99, del 26 de febrero de 1999, suscrito por el entonces Delegado en Sonora de la Secretaría de Medio Ambiente, Recursos Naturales y Pesca, Juan Carlos Ruiz Rubio.

2. Copia del escrito de fecha 3 de diciembre de 1998 dirigido al Ayuntamiento y Presidente Municipal de Hermosillo.

3. Copia del acta de la sesión del Ayuntamiento de Hermosillo, celebrada el 25 de febrero de 1999, que contiene respuesta al escrito mencionado con anterioridad.

4. Copia del expediente número CEDH/I/22/1/197/1999, relativo a la queja interpuesta el 29 de abril de 1999 ante la Comisión Estatal de Derechos Humanos de Sonora, en contra del Ayuntamiento de Hermosillo.

5. Copia del oficio número 16614, de fecha 04 de junio de 1999, derivado del expediente CNDH/121/99/SON/I00159.000, a través del cual el Coordinador General de Presidencia de la Comisión Nacional de Derechos Humanos, licenciado Adolfo Hernández Figueroa, comunicó el desechamiento del Recurso de Impugnación interpuesto en contra del acuerdo de no admisión de la instancia en el asunto descrito en el punto anterior. (Este documento se encuentra integrado a la copia del expediente CEDH/I/22/1/197/1999).

6. Copia de la demanda relativa al juicio de amparo indirecto número 620/1999, del índice del Juzgado Segundo de Distrito en el Estado de Sonora, promovido el 12 de julio de 1999 en contra, entre otras autoridades, del Ayuntamiento de Hermosillo y del Coordinador General de Presidencia de la Comisión Nacional de Derechos Humanos.

7. Copia de la sentencia que se terminó de engrosar el 13 de diciembre de 1999, dictada en el referido amparo indirecto número 620/1999.

8. Copia de la sentencia emitida el 31 de enero de 2001 por el Tercer Tribunal Colegiado del Quinto Circuito, en el toca número 223/

2000, relativo al recurso de revisión interpuesto en contra de la resolución constitucional pronunciada en el amparo indirecto número 620/1999.

9. Copia del expediente número CEDH/II/22/1/210/1999, relativo a la queja interpuesta el 6 de mayo de 1999 ante la Comisión Estatal de Derechos Humanos de Sonora, en contra del Ayuntamiento de Hermosillo.

10. Copia del Reporte *Concentración de partículas en Aire Ambiente para la ciudad de Hermosillo, Sonora, México, durante el período 1990-1995*, emitido por la Subdelegación de Medio Ambiente en el Estado de Sonora de la Secretaría de Medio Ambiente, Recursos Naturales y Pesca, Agosto de 1996. (Este documento se encuentra integrado a la copia del expediente CEDH/II/22/1/210/1999).

11. Copia de la escritura pública número 181, de fecha 19 de agosto de 1991, pasada ante la fe de la Notaria Pública número 46 de Hermosillo, Sonora, relativa a la constitución de la Academia Sonorense de Derechos Humanos, A.C., con la que acredito mi carácter de representante legal del citado organismo no gubernamental.

12. Copia de la credencial para votar con folio número 045328578, expedida por el Instituto Federal Electoral, con la que se acredita que el suscrito tiene su residencia en la ciudad de Hermosillo, Sonora.

13. NOTAS DE PRENSA: 1996, Octubre 5, *Urge frenar contaminación* (El Imparcial, 1A); 1997, Marzo, 4: *Sofoca humo a hermosillo.* (El Imparcial, 1A); 11: *Contaminación por polvo. Problema vigente en Hermosillo.* (El Imparcial, 1D); 1998, Diciembre 4: *Piden resultados de monitoreo.* (El Imparcial, 8B); 5: *No monitorean el polvo*. (Cambio, 2A); 8: *Monitorear ¿para qué? si ya se sabe que hay polvo: J. Valencia.* (Cambio, 5A); 10: *Registra Hermosillo espesa capa de humo. Provocan quemas bruma.* (El Imparcial, 1B); 11: *Polvo, humo y bajas temperaturas provocan efecto de inversión térmica.* (Cambio, 4A); 11: *Fallecen por neumonía tres personas más. Aumentan muertes por frío.* (El Imparcial, 1B); 1999, Enero: *Respiramos la muerte. Contaminación del aire en Hermosillo.* (Expresión Ciudadana); Julio 15: *Alertan a nogalenses / Detectan compuesto que causa cáncer.* (El Imparcial, 1E); Diciembre 9: *Humo encerrado* (El Imparcial, 1A); *Afecta inversión térmica / El frío y el polvo provocan este problema.* (El Imparcial, 1B); 2000 Diciembre 13: *Alertan contra el polvo*. (El Independiente); 14: *Pequeñas cantidades de*

partículas, suficientes para elevar la tasa de muertes, revela estudio. (La Crónica de Hoy); 21: *Pide cuidarse por inversiones.* (El Imparcial); 2001 Febrero 4: *Polvo somos y... ¡Polvo respiramos!* (El Imparcial); Noviembre 24: *Registró Hermosillo ayer fenómeno de inversión térmica.* (Cambio, 14A); 2002 Enero 8: *En el mundo mueren 500 mil personas al año por la contaminación del aire: estudio del PNUMA.* (La Jornada, 35); 14: *Causa la contaminación en la ZMVM 35 mil muertes prematuras al año.* (La Jornada, 39); Noviembre 4: *Hace Ayuntamiento monitoreo del aire.* (El Imparcial, 2B); 18: *Para los niños. Hay riesgo en el norte.* (El Imparcial, 3B); Diciembre 12: *Tiempo de contaminación.* (El Imparcial, 4B); 2003 Octubre 27: *Cubre a Hermosillo densa nube de polvo.* (Cambio, 1A); *Amanece con calima.* (El Imparcial, 1B); *"Desaparece" Hermosillo.* (El Imparcial, 1A); Noviembre 14: *Partículas suspendidas, causa de males crónicos.* (El Imparcial, 15A); 20: *Sacarán la vuelta al polvo.* (Cambio, 1B); Diciembre 15: *Afectan partículas la calidad del aire.* (El Imparcial, 1B).

14. FOTOGRAFÍAS: 1997, Marzo 4: sin pié. (El Imparcial, 1A). sin pié. (El Imparcial, 1A); 1998, Diciembre 10: *Como en el DF.* (El Imparcial 1A); *Una espesa capa de polvo...* (El Independiente, 1A); 2001, Octubre 9: *Llega contaminación.* (El Imparcial, 1B); Noviembre 6: *Gris amanecer.* (El Imparcial, 1A); 24: *Paisaje londinense.* (El Imparcial, 1A); 2002, Enero 18: *¿Contaminación?* (El Imparcial, 2B); Febrero 1: *Quema dañina.* (El Imparcial, 1A); *En medio de la contaminación...* (El Imparcial, 2B); Noviembre 2: *Baja temperatura.* (El Imparcial, 2B); 20: *Una nube de polvo y "smog" cubre...* (Cambio, 1A); *Mal ambiente.* (El Imparcial, 2B); 28: *Capa gruesa.* (El Imparcial, 5B): Diciembre 15: *Se contamina Hermosillo.* (Cambio, 1A); 2003, Octubre 27: *Cubre a Hermosillo densa nube de polvo.* (Cambio, 1A); Noviembre 25: *Contaminación urbana.* (El Imparcial, 1B); Diciembre 15: *Hay que pavimentar.* (El Imparcial, 1B); fecha desconocida: *Hermosillo registró ayer...* (El Imparcial); 2004, Febrero 28: *Contaminación en la capital.* (El Imparcial, 4A); Octubre 27: *Amanece con calima.* (El Imparcial, 1B); *"Desaparece" Hermosillo.* (El Imparcial, 1A); Noviembre 20: *Sacarán la vuelta al polvo.* (Cambio, 1B); Diciembre 15: *Afectan partículas la calidad del aire.* (El Imparcial, 1B).