
Secretariat of the Commission for Environmental Cooperation

**Secretariat Determination in accordance with
Article 14(1) of the North American Agreement on Environmental Cooperation**

Submitters: Center for Biological Diversity
Greenpeace Mexico
Mr. Alfonso Aguirre
Mr. Shaye Wolf
American Bird Conservancy
Los Angeles Audubon Society
Pacific Environment and Resources Center
Wildcoast

Represented by: James Jay Tutchton

Party: United Mexican States

Date of receipt: 3 May 2005

Date of determination: 2 June 2005

Submission no.: **SEM-05-002 (Coronado Islands)**

I. BACKGROUND

On 3 May 2005, Center for Biological Diversity, Greenpeace Mexico, Alfonso Aguirre, Shaye Wolf, American Bird Conservancy, Los Angeles Audubon Society, Pacific Environment and Resources Center, and Wildcoast (the “Submitters”), represented by James Jay Tutchton, filed a submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) pursuant to Article 14 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”). The Submitters assert that Mexico is failing to effectively enforce provisions of its environmental law by allowing the construction of a Liquefied Natural Gas (LNG) Re-gasification Terminal (the “Terminal”) adjacent to the Coronado Islands and a breeding colony of Xantus’s Murrelet, *Synthliboramphus hypoleucus*, a seabird considered at risk (and on the Mexican list of endangered bird species).

The Secretariat has determined that the submission does not meet all the requirements of NAAEC Article 14(1) for the reasons set out below.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico is failing to effectively enforce provisions of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y de Protección al Ambiente—LGEEPA*), the General Wildlife Act (*Ley General de Vida Silvestre—LVS*) and other Mexican environmental laws¹ by allowing the construction of the Terminal adjacent to the Coronado Islands and a breeding colony of Xantus’s Murrelet, a seabird listed as endangered in Mexican official standard NOM-059-ECOL-2001.²

The submission asserts that the government of Mexico has decided to allow construction of the Terminal despite its likely devastating impact on the main breeding area of Xantus’s Murrelet. The submission focuses on harm to Xantus’s Murrelet but asserts that the Terminal would also harm other Coronado Islands species.³

According to the submission, the Coronado Islands harbor the largest known breeding colony of Xantus’s Murrelet. Xantus’s Murrelet is a transborder species that breeds on a small number of islands in southern California and northern Baja California, and forages in the waters of Mexico, the United States and Canada.⁴ Las Islas de los Santos Coronados, commonly known as the Coronado Islands, are an archipelago of four small islands located about eight miles off the coast of Tijuana, Baja California, Mexico.⁵ The submission states that the islands support endemic terrestrial species and subspecies of animals and plants found nowhere else in the world, several of which are protected by NOM-059-ECOL-2001.⁶

The submission states that the Coronado Islands are considered by the National Biodiversity Commission (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad—Conabio*) as an “Important Area for the Conservation of Birds” and a “Priority Maritime Region.”⁷ The submission also makes reference to a resolution by the Congress of the Union to create a protected natural area for the Baja California Pacific islands, including the Coronado Islands.⁸

The submission asserts that the Ministry of the Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales—Semarnat*) authorized the Environmental Impact Assessment (EIA) for the Terminal on 15 September 2004.⁹ As the submission explains, the Terminal would consist of a platform approximately 300

¹ Submission, at 1.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid. at 2.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

meters long that would serve as a receiving dock for the supply ships as well as house the LNG storage tanks and a re-gasification facility that would send natural gas via underwater pipeline to the mainland.¹⁰ The main justification provided for building the platform in proximity to the Coronado Islands is the breakwater effect of Coronado Sur Island.¹¹

The submission explains that the Terminal would impact the Island's species in several ways: light pollution from the terminal and tankers; the potential for a catastrophic explosion; direct disturbance through construction and general operation of the Terminal and the tankers; the increased opportunity for spills and discharge of petroleum products; the increased potential for rat introduction to the islands; and the intake, disinfection, and discharge of 188,000,000 gallons of chlorinated seawater per day.¹²

The submission asserts that the government of Mexico has failed to effectively enforce LGEEPA Articles 78–83 and the principles listed in LVS Article 5 which the authorities must observe in making and implementing national wildlife policy. In regard to LGEEPA Articles 78-83, the submission asserts that Mexico is failing to follow several criteria and measures listed in LGEEPA Article 79 that apply to the management of flora and fauna. The Submitters claim that by approving the Terminal, Mexico is failing 1) to preserve biodiversity and natural species habitat; 2) to continue the evolutionary processes of species and their genetic resources, including areas designated as representative for ecological systems for protection and research; 3) to preserve and develop endemic, threatened, endangered or specially protected species; 4) to strengthen biological reproductive seasons and repopulate wildlife species; and 5) to promote wildlife research to discover its genetic, scientific and economic potential.¹³

The submission asserts that Mexico is failing to enforce the principles listed in LVS Article 5 by allegedly failing 1) to conserve genetic diversity, as well as the protection, restoration and comprehensive management of natural habitats; 2) to implement preventive measures for maintaining the appropriate conditions for the evolution, viability and continuity of ecosystems, habitats and populations in their natural surroundings; and 3) to apply the available scientific, technical and traditional knowledge.¹⁴

The submission also asserts that the government of Mexico has failed to effectively enforce its law by authorizing an insufficient EIA for the Terminal.¹⁵ The submission does not identify the provision of Mexican environmental law to which this assertion relates. The Submitters contend that while the EIA does address the effects of noise and

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid. at 3.

¹³ Ibid. at 8-9.

¹⁴ Ibid. at 10-11.

¹⁵ Ibid. at 11.

turbidity from the Terminal and tanker activity, oil spills, and the release of chlorinated water, it incorrectly concludes that the effects on seabirds, marine mammals, and marine biota in general will be non-significant. They also contend that the EIA is internally inconsistent and that one of its chapters is based entirely on the analysis of a land-based LNG terminal project that did not discuss impacts to marine species or island wildlife.¹⁶

Finally, the Submitters claim that the Coronado Islands are a specially protected natural area and that Mexico is failing to effectively enforce its environmental law by approving the Terminal project inside that area. The Submitters assert that in July 2003, the Mexican Federal Congress mandated that the relevant federal agencies promote a decree to create a natural protected area including the Coronado Islands and that Mexico nonetheless approved the EIA for the Terminal in September 2004. The submission states that the EIA for the Terminal project is wrong in stating that “no evidence exists that islas Coronado have been declared a natural protected area nor are they in the process of being declared as such.”¹⁷

III. ARTICLE 14(1) ANALYSIS OF THE SUBMISSION

Article 14(1) of the Agreement provides that:

The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the 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.*

¹⁶ Ibid.

¹⁷ Ibid. at 12.

As the Secretariat has noted in previous Article 14(1) determinations, Article 14(1) is not intended to be an insurmountable procedural screening device.¹⁸

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 persons or nongovernmental organizations residing in either Mexico or the United States of America. Second, the submission asserts that a Party, México, is failing to effectively enforce LGEEPA Articles 78–83 and certain principles listed in LVS Article 5 which the authorities are required to observe in making and implementing national wildlife policy. These provisions meet the NAAEC Article 45(2) definition of environmental law.¹⁹ Last, the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.

Although the submission meets the criteria in the opening sentence of Article 14(1) with respect to some of its assertions, the Secretariat notes several deficiencies. First, although the submission asserts that the government of Mexico has failed to effectively enforce its environmental law by authorizing an insufficient EIA, the submission only refers to LGEEPA Articles 78–83 and LVS Article 5 and not to any provision of environmental law related to environmental impact assessment. Section 5.2 of the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”) states that submitters must identify the applicable statute or regulation, or provision thereof, and, specifically in the case of the LGEEPA, the applicable chapter or provisions of the Act.²⁰

¹⁸ 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).

¹⁹ NAAEC Article 45(2) defines “environmental law” as follows:

(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 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.

²⁰ See Guidelines, Section 5.2.

Second, the assertion that Mexico is failing to effectively enforce its environmental law by approving the Terminal project inside a specially protected natural area is not grounded in environmental law within the meaning of NAAEC Article 45(2). Neither Conabio's recognition of the Coronado Islands as an "Important Area for the Conservation of Birds" and a "Priority Maritime Region" nor the Congressional resolution calling for the Coronado Islands to be designated a protected natural area meet the definition of environmental law.

The Secretariat has determined that the submission does not meet all of the six requirements listed in Article 14(1)(a)-(f). The Secretariat's reasoning is as follows:

- A. The submission meets the requirement in Article 14(1)(a) that it be in a language designated by the Party in a notification to the Secretariat, in this case English. NAAEC Article 19 stipulates that the official languages of the CEC are Spanish, French, and English. Likewise, Section 3.2 of the SEM Guidelines establishes that "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."²¹ Section 9.1 of the Guidelines provides for translation of a submission and supporting information into the official language(s) of the Party concerned (unless that Party directs otherwise) if and when the Secretariat requests a response from that Party.²²
- B. The submission satisfies Article 14(1)(b), in that the Submitters identified themselves as Center for Biological Diversity, Greenpeace Mexico, Alfonso Aguirre, Shaye Wolf, American Bird Conservancy, Los Angeles Audubon Society, Pacific Environment and Resources Center, and Wildcoast, all represented by James Jay Tutchton.
- C. The submission does not meet the requirement in Article 14(1)(c), in that it fails to provide sufficient information, including any relevant documentary evidence, to allow the Secretariat to review it,

The Submitters assert that the EIA authorized by the government of Mexico was insufficient in that it ignored unnamed provisions of environmental law. Although the Submitters state that they have a copy of the EIA, the submission does not include a copy of it or the decision whereby the government of Mexico approved it. To enable the Secretariat to review the submission, the Submitters must provide this information, along with copies of any other documentary evidence that supports the Submitters' assertions.²³

²¹ Guidelines, Section 3.2.

²² See Guidelines, Section 9.1. This submission is not the first one concerning Mexico's enforcement of its environmental law to be filed in English; see SEM-98-007 (Metales y Derivados).

²³ Although section 3.3. of the SEM Guidelines states that submissions should not exceed 15 pages, that guideline does not restrict the amount of supporting documentation that may accompany a submission.

In addition, the Submitters appended to the submission a statement by Alfonso Aguirre Muñoz asserting that various remedies have been pursued in relation to the assertions in the submission.²⁴ The Secretariat is unable to review the submission without copies of the correspondence and other documentation which they claim they filed with Semarnat and certain judicial authorities in connection with the arguments in the submission. These proceedings are discussed below, in connection with Article 14(1)(e). To enable the Secretariat to proceed with the submission, the Submitters must provide these documents along with any other correspondence they have had with any relevant authority in relation to the arguments in the submission and the authority's responses. The Submitters should also provide information on the pursuit of remedies under Mexican law, if any, relating to their assertions, and on the status of any pending proceedings that relate to the subject matter of the submission.²⁵

- D. The submission meets the requirement in Article 14(1)(d) that it be aimed at promoting enforcement rather than at harassing industry. The submission is focused on alleged acts or omissions by the Mexican authorities and not on compliance by any particular company. The Submitters are not competitors who could benefit economically from the submission and it does not raise any frivolous matters.²⁶
- E. The submission satisfies Article 14(1)(e), in that it indicates that the matter has been communicated in writing to the relevant authorities of the Party and also indicates that there was a response from those authorities. Furthermore, it refers to the pursuit of certain remedies.²⁷

Appendix A of the submission refers to a June 2004 document submitted to Semarnat by Grupo de Ecología y Conservación de Islas (GECI) requesting that the authority deny authorization for construction of the Terminal. According to the submission, Semarnat issued the authorization on 15 September 2004. Subsequently, between 15 September and October 2004 (although the submission does not specify a date), the submission asserts that an appeal for review was filed and that Semarnat “agreed the review request had merit and thereby enabled an immediate stop order on the project and review of the permit by a federal judge.”²⁸ However, the submission asserts that in order to continue the review process, it was determined that the applicants had to post a bond in an amount of US \$6 million. The submission also asserts that in November 2004, GECI applied with a federal judge

²⁴ Submission, at 13.

²⁵ SEM Guidelines, Section 5.5: “The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities.”

²⁶ SEM Guidelines, Section 5.4.

²⁷ Submission, at 13.

²⁸ Submission, Appendix A, at 3.

for an injunction to permit a review without the bond and that this proceeding is pending.²⁹

Appendix B, the 24 April 2005 declaration of the General Director of GECI, also refers to the pursuit of certain remedies before federal judges to request a suspension order, without specifying whether these are the same or have any relationship to the proceedings mentioned in Appendix A of the submission.³⁰ The GECI General Director asserts that he requested preliminary injunctions against the Terminal project from two federal judges, both of whom declared themselves not competent for the case.³¹ He also indicates that review of the EIA by a Semarnat undersecretary is still in process.

As noted above in connection with Article 14(1)(c), the Submitters omitted the documents and correspondence relating to the proceedings described in these appendices.

- F. The submission satisfies Article 14(1)(f), in that it was filed by a person or organization residing or established in the territory of a Party. The Submitters indicate that they reside in either Mexico or the United States.

IV. DETERMINATION

For the foregoing reasons, the Secretariat has determined that although submission SEM-05-002 (Coronado Islands) meets some of the requirements of Article 14(1), it does not meet all of them, in particular Articles 14(1)(c). Pursuant to Sections 6.1 and 6.2 of the SEM Guidelines, the Secretariat hereby notifies the Submitters that it will terminate the Article 14 process with respect to this submission, unless the Submitters 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.

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Rolando Ibarra R.
Legal Officer
Submissions on Enforcement Matters Unit

²⁹ Ibid.

³⁰ Submission, Appendix B, at 2–3.

³¹ Ibid.

Coronado Islands –
Article 14(1) Determination

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