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**Secretariat of the Commission for Environmental Cooperation**

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

**Submitters:** Center for Biological Diversity  
Greenpeace México  
Mr. Alfonso Aguirre  
Ms. 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 this notification:** 18 January 2007

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

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**I. EXECUTIVE SUMMARY**

In accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”), the Secretariat of the Commission for Environmental Cooperation (CEC) (the “Secretariat”) may examine submissions asserting that a Party to the NAAEC (a “Party”) is failing to effectively enforce its environmental law. Where the Secretariat determines that the requirements of Article 14(1) have been met, it shall decide whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of the response provided by that Party, the Secretariat may notify the Council that it considers the preparation of a factual record to be warranted, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record. The Secretariat dismisses the submission if it finds that the preparation of a factual record is not warranted.

This Notification contains the Secretariat’s analysis in accordance with NAAEC Article 15(1) for submission SEM-05-002 (Coronado Islands), filed with the Secretariat on 3 May 2005. The Submitters listed above assert that Mexico is failing to effectively enforce Articles 79–83 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and principles 1–3 of Article 5 of the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS) by

granting environmental impact approval for the construction and operation, by Chevron Texaco de México S.A. de C.V. (the “Proponent”), of a liquefied natural gas regasification terminal adjacent to the Coronado Islands [“Islas Coronado” in Spanish, shortened from the full “Las Islas de los Santos Coronados”], off the coast of the state of Baja California. The Submitters’ main assertion is that the siting of the terminal, 600 meters from South Coronado Island, should not have been approved because carrying out the project at this site would produce irreversible, unmitigable, non-compensable impacts on various vulnerable species, including Xantus’s murrelet (*Synthliboramphus hypoleucus*), an endangered species.

In a determination dated 2 June 2005, the Secretariat found that the submission did not provide sufficient information to allow the Secretariat to review it pursuant to Article 14(1)(c). The Secretariat notified the Submitters that they had 30 days in which to file a revised submission. On 7 July 2005, the Submitters filed with the Secretariat a revised submission including supplemental information (the “Supplemental Information”). They added allegations concerning the alleged failure to effectively enforce LGEEPA Article 78 as well as LGEEPA Articles 34 and 35 in regard to public participation and other requirements for environmental impact assessment of the project. Taking into account the Supplemental Information, the Secretariat requested a response from Mexico on 30 September 2005.

On 10 January 2006, Mexico responded to the submission, noting that the submission focuses on the content of the environmental impact statement prepared by the Proponent, without taking into account the additional and complementary information submitted by the Proponent or the terms and conditions of the approval issued by the Ministry of the Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*—Semarnat). In addition, pursuant to NAAEC Article 14(3)(a), Mexico notified the Secretariat that the matter is the subject of pending administrative proceedings.

After reviewing the submission in light of Mexico’s response, the Secretariat concludes that, for the purposes of NAAEC Article 14(3)(a), there are no pending judicial or administrative proceedings that require or warrant termination of the submission. It further concludes that central questions remain open in relation to some of the assertions made by the Submitters concerning alleged failures of effective enforcement during the environmental assessment of the project, prior to its approval. In particular, central questions remain open concerning whether there was a comparison of the environmental impacts of various offshore siting alternatives for the terminal; as to any assessments of the environmental impact of the project on the Coronado Islands ecosystem; and as to the assessment of the project’s cumulative and synergistic impacts, pursuant to LGEEPA Article 35. Likewise, information is lacking concerning Semarnat’s consideration and analysis, pursuant to LGEEPA Article 35, of the possibility of denying project approval due to impacts on endangered species.

In regard to the Submitters' assertions concerning failure to effectively enforce the provisions of LGEEPA Article 34 in connection with public participation in the environmental impact assessment for the project, the Secretariat has determined that the preparation of a factual record is warranted in order to compile information on open questions relating to the enforcement of this article prior to approval of the project.

The Secretariat also recommends the preparation of a factual record concerning questions that remain open in relation to Semarnat's enforcement of standards 1–3, 5, and 7 of LGEEPA Article 79 and principles 1–3 of LGVS Article 5 in its consideration, pursuant to LGEEPA Article 35, of the opinions of entities specializing in wildlife as regards the project.

## **II. SUMMARY OF THE SUBMISSION AND SUPPLEMENTAL INFORMATION**

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"), filed the submission with the Secretariat. The Submitters assert that Mexico is failing to effectively enforce provisions of LGEEPA and LGVS<sup>1</sup> by allowing the construction of a liquefied natural gas (LNG) regasification terminal (the "Terminal" or the "Project") adjacent to the Coronado Islands, which are located in the Pacific Ocean off the coast of the state of Baja California, near the United States border.

The Submitters assert that the Terminal would consist of a platform approximately 300 meters long that would serve as a receiving dock for supply ships as well as house LNG storage tanks and a regasification facility that would send natural gas via underwater pipeline to the mainland.<sup>2</sup> The Submitters assert that the main justification provided for building the platform near the Coronado Islands is the breakwater effect of South Coronado Island.<sup>3</sup>

The Submitters assert that the Terminal would be sited near an important breeding colony of Xantus's murrelet (*Synthliboramphus hypoleucus*), a seabird that is listed as endangered in Mexican Official Standard (*Norma Oficial Mexicana*) NOM-059-ECOL-2001.<sup>4</sup> The submission focuses on harm to Xantus's murrelet, but the Submitters assert that the Terminal would also harm other species of the Coronado Islands,<sup>5</sup> in particular endemic terrestrial species and subspecies of animals and plants found nowhere else in

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<sup>1</sup> Submission, p. 1.

<sup>2</sup> *Ibid.*, p. 2.

<sup>3</sup> *Idem.*

<sup>4</sup> Submission, p. 1.

<sup>5</sup> *Ibid.*, p. 4.

the world, several of which are protected under NOM-059-ECOL-2001.<sup>6</sup> They state 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.”<sup>7</sup> In addition, they assert that the Terminal will be sited within a protected natural area, and they refer to a resolution to that effect issued by the Congress of the Union in 2003.<sup>8</sup>

The Submitters assert that the Terminal would impact the Islands’ species on several levels: 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; increased opportunity for spills and discharge of petroleum products; increased potential for rat introduction to the islands; and intake, disinfection, and discharge of 188 million gallons of chlorinated seawater per day.<sup>9</sup>

The Submitters assert that Semarnat approved the Environmental Impact Statement (EIS) for the Project on 15 September 2004.<sup>10</sup> They assert that in approving the Project, Semarnat failed to effectively enforce LGEEPA Articles 78–83<sup>11</sup> and the principles listed in paragraphs 1–3 of LGVS Article 5 which, the Submitters assert, the authorities must observe in making and implementing national wildlife policy.<sup>12</sup>

According to the Submitters, Mexico has failed to effectively enforce various standards and measures listed in LGEEPA Article 79 that must be considered for the preservation and sustainable use of wildlife: 1) preservation of biodiversity and natural species habitat; 2) continuation of the evolutionary processes of species and their genetic resources, including areas designated as representative for ecological systems for protection and research; 3) preservation and development of endemic, threatened, endangered and specially protected species; [...] 5) promotion and establishment of biological stations for rehabilitation and repopulation of wild fauna species, and [...] 7) promoting and carrying out research on wildlife and genetic material with the object of ascertaining its scientific, environmental, economic, and strategic value to the Nation.<sup>13</sup>

The Submitters assert that Mexico is failing to apply the following principles listed in LGVS Article 5 that the authorities must observe in making and implementing national wildlife policy:

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<sup>6</sup> *Ibid.*, p. 2.

<sup>7</sup> *Ibid.*, p. 12.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, pp. 3-7.

<sup>10</sup> *Ibid.*, p. 2.

<sup>11</sup> *Ibid.*, pp. 8–9.

<sup>12</sup> Submission, pp. 9-10.

<sup>13</sup> *Ibid.*, pp. 8-9.

- 1) The conservation of genetic diversity and the protection, restoration, and integrated management of natural habitats as critical factors in the conservation and recovery of wildlife species.
- 2) Preventive measures designed to maintain conditions conducive to the evolution, viability, and continuity of ecosystems, habitats, and populations in their natural environments. In no event may the lack of scientific certainty be used as a justification for postponing the adoption of effective measures for the conservation and integrated management of wildlife and its habitat.
- 3) The application of available scientific, technical, and traditional knowledge as a basis for activities relating to the conservation and sustainable use of wildlife.

The Submitters also assert that the government of Mexico has failed to effectively enforce its law by approving an insufficient EIS for the Terminal.<sup>14</sup> The Submitters contend that while the EIS does address the effects of noise and turbidity from the construction and operation of the Terminal, tanker activity, oil spills, and release of chlorinated water, it wrongly concludes that these impacts on seabirds, marine mammals, and marine biota in general will not be significant. The Submitters assert that there are contradictions among different sections of the EIS and that one of its chapters is entirely based on an impact analysis of a land-based LNG terminal project and therefore did not contemplate the impact on marine species or island wildlife.<sup>15</sup>

According to the Submitters, in July 2003, the Mexican Federal Congress of the Union mandated that the relevant federal agencies “promote a decree” for (declare) a protected natural area comprising the Coronado Islands. They therefore assert that the EIS for the Terminal was 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.”<sup>16</sup>

On 2 June 2005, the Secretariat issued a determination granting the Submitters a period of 30 days in which to file supplementary information to support their assertions and to identify all the legislative provisions on which the assertions concerning the Project’s EIS are based. The Submitters filed Supplemental Information on 6 July 2005. The Secretariat determined that an annex to the Supplemental Information alleging Semarnat’s failure to effectively enforce LGEEPA Articles 34–35 in regard to the Project provides support for the Submitters’ assertions regarding the alleged insufficiency of the EIS.

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<sup>14</sup> *Ibid.*, p. 11.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 13.

The Submitters assert that Mexico is failing to effectively enforce Article 34, which lists obligations relating to publicity and public consultation for projects subject to the environmental impact assessment procedure, in that (1) the Proponent allegedly published an excerpt from the Project outside the period provided by LGEEPA; (2) Semarnat allegedly did not make available to the public the additional and complementary information filed with Semarnat by the Proponent;<sup>17</sup> and (3) Semarnat allegedly failed to give due consideration to the technical opinions and reports filed by members of the public.<sup>18</sup> The Supplemental Information is accompanied by a U.S. Fish and Wildlife Service document<sup>19</sup> which, the Submitters assert, “discussed the dire threats to the Xantus’s murrelet posed by the Terminal.”<sup>20</sup>

With respect to the assertion that Mexico is failing to effectively enforce LGEEPA Articles 34 and 35, the Submitters incorporate into the submission the arguments contained in an administrative appeal challenging approval of the Terminal, filed by Alfonso Aguirre Muñoz and Grupo de Ecología y Conservación de Islas on 7 October 2004.<sup>21</sup> The appeal contains the following assertions:

1. The Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) of Semarnat did not seriously consider the submission

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<sup>17</sup> Supplemental Information, Appendix 4, p. 8.

<sup>18</sup> *Ibid.*, p. 7.

<sup>19</sup> United States of America, Department of the Interior, Fish and Wildlife Service, 50 CFR Part 17, “Endangered and Threatened Wildlife and Plants: Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions,” *Federal Register*, vol. 70, no. 90, Wednesday, 11 May 2005, Proposed Rules, pp. 24870–24877: “Xantus’s murrelet: [...] Despite actions to address some of the threats to this species, a recent proposal by ChevronTexaco Corporation to build a liquid natural gas (LNG) facility 600 meters offshore Islas Los Coronados in Baja California, Mexico, poses a threat to the survival of the Xantus’s murrelet. The Los Coronados islands support the largest known breeding population of Xantus’s murrelets in the world. The construction and operation of the proposed LNG facility at Islas Los Coronados would increase levels of disturbance to Xantus’s murrelets. Sources of disturbance include: (1) Bright lights at night from the facility and visiting tankers; (2) noise from the facility; (3) noise from helicopters visiting the facility; (4) ingress and egress of tanker vessels; and (5) other vessels transporting personnel and supplies. These factors would have a serious impact on the islands’ population of Xantus’s murrelets, and, taken together, the cumulative disturbance caused by this proposed facility would have substantial negative consequences for the colony. Additionally, there are potential impacts to the Xantus’s murrelet prey base due to increased seawater chlorination resulting from this facility. The ocean waters around Islas Los Coronados are highly productive and very important foraging areas for breeding, migrant, and wintering seabirds such as the Xantus’s murrelet. The loss of large numbers of prey could be detrimental to seabirds that depend on Islas Los Coronados for foraging at various times of year. Degraded water quality around Islas Los Coronados may also result from this project, such as from the seawater chlorination process. A gas spill from the facility or pipeline could have substantial negative effects on the Xantus’s murrelet. Due to the now imminent threats from the proposed LNG facility, we changed the listing priority number for this species from a 5 to a 2.” Notice published pursuant to the *Endangered Species Act*, 16 U.S.C. 1531 *et seq.*

<sup>20</sup> Supplemental Information, Appendix 4, p. 1.

<sup>21</sup> *Ibid.*, Appendix 4 and 5.

presented by Aguirre Muñoz and Grupo de Ecología y Conservación de Islas (the “Appellants”) during the public consultation process for the Project.<sup>22</sup> For example, DGIRA stated that the submission was not dated, when in fact the date appeared on the last page.<sup>23</sup> Furthermore, in response to the assertion that the original EIS contained a project description corresponding to a different, land-based project, DGIRA referenced the second version of the EIS and pointed to the absence of such a description (thereby denying the Appellants’ assertion that the Proponent had earlier submitted – and made public – a different version of the EIS).<sup>24</sup>

2. DGIRA admitted that the EIS submitted by the Proponent was insufficient but claimed that deficiencies in the EIS were remedied in additional and complementary information filed with DGIRA by the Proponent.<sup>25</sup> According to the Appellants, the public was never informed that this information had been filed with DGIRA, and the information was never included in the public file, thereby violating the right of the public to be consulted and to participate in the assessment of the Project.<sup>26</sup>
3. DGIRA refused to consider additional information regarding the risk of an explosion associated with the Project.<sup>27</sup>
4. DGIRA criticized the Appellants for considering the Coronado Islands as a whole, instead of focusing on South Coronado Island.<sup>28</sup> The Appellants maintain that the reason for considering the archipelago as a whole is because ecological processes on the islands are similar and interdependent.<sup>29</sup>
5. DGIRA over-estimated the existing, pre-project degradation of South Coronado Island.<sup>30</sup>
6. It is incongruous that while Congress, with the support of National Protected Natural Areas Commission (*Comisión Nacional de Areas Naturales Protegidas*—Conanp), was working to have the Coronado Islands archipelago declared a protected natural area prior to the Proponent applying for approval of the Project, the federal executive approved the Project despite its grave environmental risks.<sup>31</sup>

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<sup>22</sup> *Ibid.*, Appendix 5, p. 3.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, p. 4.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, pp. 5, 11.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, pp. 5-6, 9-10.

<sup>31</sup> *Ibid.*, pp. 6-7.

7. DGIRA is mistaken in asserting that because the Project does not involve any activities on South Coronado Island, the Project will have no direct effects on species regulated under NOM-059-SEMARNAT-2001.<sup>32</sup> According to the Appellants, an example of a direct effect is death by collision.<sup>33</sup> The Appellants maintain that it is well documented that nocturnal birds travel as far as 100 km away from the islands in search of food, and that such birds are attracted to illuminated structures, which results in deadly collisions.<sup>34</sup>
8. The gravest mistake made by DGIRA in its analysis of the Appellants' objections to the Project is in dismissing offhand their assertions regarding adverse effects associated with Terminal construction and operation because such assertions were not supported by technical or scientific documents.<sup>35</sup> According to the Appellants,

a cursory search would certainly have allowed DGIRA to document the risks noted, instead of denying them out of hand with facile, legalistic arguments, contrary to its own mandate.<sup>36</sup>

They add:

In its decision, DGIRA criticizes the citizens' arguments in favor of a negative decision by invoking the "lack of technical evidence and/or scientific documents." DGIRA proffers this counterargument without making any effort to prove its validity. Thus, one major inconsistency is that **members of DGIRA's own staff made a visit of only two days** in order to "obtain further technical information with which to evaluate and reach a decision on the project." **No serious environmental consultant would say that two days are sufficient to obtain robust information on all aspects that must be considered in evaluating a project such as this one.**[emphasis in original].<sup>37</sup>

They add that their organization was awarded the 2002 Dr. Enrique Beltrán Castillo Nature Conservation Award by Semarnat for its efforts and achievements in nature conservation in Mexico, and that this gives weight to their opinion regarding the Project.<sup>38</sup>

9. The Proponent failed to comply with Article 34 of LGEEPA by publishing a project description in local newspapers two weeks late, and by publishing a project description intended to avoid negative opinions regarding the Project and which downplayed the biological and ecological significance of the archipelago.<sup>39</sup>

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<sup>32</sup> *Ibid.*, p. 7.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, p. 10.

<sup>38</sup> *Ibid.*, p. 7.

<sup>39</sup> *Ibid.*, p. 8.



10. DGIRA refused to consider materials filed by the Appellants if those materials were in English, yet the EIS filed by the Proponent and accepted by DGIRA contained 54 pages of information written in English.<sup>40</sup>

### III. SUMMARY OF MEXICO'S RESPONSE

The Secretariat received Mexico's response to the submission on 10 January 2006. In its response, Mexico asserts that the submission does not take into account the requirements, conditions, and mitigation measures imposed by Mexico when it approved the Project. According to the response, compliance with these requirements, conditions, and measures must be demonstrated by means of an environmental quality control program and will be guaranteed by a bond that the Proponent must post.<sup>41</sup> Mexico presents information on how matters raised in the submission were taken into account by the environmental authority when it approved the Project.<sup>42</sup> According to Mexico's response, the assessments, programs, and restrictions required of the Proponent demonstrate that, in approving the Project, the environmental authorities gave due weight to all of the issues identified by the Submitters.<sup>43</sup>

Mexico further asserts that pursuant to NAAEC Article 14(3)(a), the submission should be given no further consideration in view of pending proceedings, and it requests that the Secretariat keep the files relating to these proceedings confidential.<sup>44</sup>

Mexico asserts that the submission is based exclusively on the Submitters' interpretation of and comments on the EIS, and fails to take into account that the EIS is subject to approval, and that in issuing such approval Semarnat has the power to impose conditions and requirements to avert or minimize the negative environmental impacts of a project.<sup>45</sup> Mexico further states that the approval of the Project was not based solely on the EIS but also on a risk assessment (the "Risk Assessment"), as well as additional information and complementary information provided by the Proponent.<sup>46</sup>

Mexico asserts that several objections to the EIS contained in the submission constitute personal assessments that lack scientific justification.<sup>47</sup> As to the allegation that the Terminal will be located within a protected natural area, Mexico asserts that no such declaration had been made at the time the Project was approved.<sup>48</sup> As regards impacts

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<sup>40</sup> *Ibid.*, p. 10.

<sup>41</sup> Response, pp. 37 *et seq.*

<sup>42</sup> *Ibid.*

<sup>43</sup> See e.g. response, pp. 47, 61.

<sup>44</sup> Response, s. I.1, "Existence of Pending Administrative Proceedings," pp. 4-13.

<sup>45</sup> Response, pp. 37-38.

<sup>46</sup> *Ibid.*, p. 38.

<sup>47</sup> *Ibid.*, p. 40.

<sup>48</sup> *Ibid.*, p. 41.

on nocturnal seabirds caused by artificial light, the response states that the environmental impact approval contains a series of conditions requiring the Proponent to justify the selection of lighting equipment and to select the option with the lowest impact on bird behavior. In addition, Mexico emphasizes that the possibility was left open “to broaden the scope of the decision in regard to the approval to prohibit the Project from operating at night.”<sup>49</sup>

Concerning the risk of a catastrophic explosion, Mexico states that although the study carried out by the Proponent indicates that such an event is very unlikely, Semarnat nonetheless took into account the remote possibility of a catastrophic event and required the Proponent to consider an environmental response plan designed to offset, prevent, or minimize environmental harm to the various species.<sup>50</sup>

Mexico disputes the Submitters’ conclusion that the operation of the Project will likely frighten away seabirds, noting that the EIS states that there will be no loss of seabird habitat and that seabirds will not be affected because they will avoid the affected area.<sup>51</sup> Mexico states that, nevertheless, in order to avert or minimize negative environmental impacts, the Proponent was required to comply with all the measures set out in the EIS, the additional information, and the complementary information, to obtain the Single Environmental License (*Licencia Ambiental Única*), to implement an accident prevention program and an environmental quality control program, and to implement a biodiversity protection and conservation program.<sup>52</sup> Mexico also emphasizes that restrictions were placed on the Project in the environmental impact approval (the “Approval”),<sup>53</sup> including prohibitions on landing or disembarking on any of the Coronado Islands, except in emergencies as provided by the LGEEPA; on flights by helicopters or other aircraft associated with the Project over the Coronado Islands; and on the introduction of exotic species onto the islands.<sup>54</sup> Mexico further notes that other mitigation measures were imposed, including the requirement to comply with World Bank wastewater guidelines and to implement a seawater discharge monitoring program; to select the Terminal site and the gas pipeline route so as to avoid rock outcroppings; to refrain from discharging ballast water into Mexican waters; and to schedule Terminal operations taking into consideration the seasons of highest marine mammal abundance.<sup>55</sup>

As to the risk of an oil spill from the tankers, Mexico asserts that the Submitters failed to consider that the Proponent is required to submit to Semarnat an emergency response

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<sup>49</sup> *Ibid.*, pp. 44–47.

<sup>50</sup> *Ibid.*, pp. 47–52.

<sup>51</sup> *Ibid.*, pp. 52–54.

<sup>52</sup> *Ibid.*, pp. 54–56.

<sup>53</sup> Issued by Semarnat on 1 July 2004 in accordance with document no. S.G.P.A./DGIRA.DEI.1536.04.

<sup>54</sup> Response, p. 56.

<sup>55</sup> *Ibid.*, pp. 57–58.

plan and to comply with all provisions of the various documents filed with Semarnat, as well as to submit to an environmental audit.<sup>56</sup>

Concerning the risk of rat introduction onto the islands, Mexico states that the Submitters provided no evidence that the islands are free of exotic fauna, and notes that the Approval prohibits the introduction of exotic fauna onto the islands.<sup>57</sup>

In regard to chlorinated water discharges into the ocean, Mexico asserts that the EIS provides no support for the Submitters' assertion that the Terminal will discharge 711.6 million liters (188 million gallons) of chlorinated water into the ocean per day. It further asserts that the discharge levels will in fact be lower than World Bank guidelines for residual chlorine concentrations at the point of discharge into the ocean; that under the Approval, the wastewater resulting from hydrostatic testing will have to be neutralized, eliminating the biocide before it is discharged into the ocean; and that follow-up testing of the impact of wastewater on marine biota will be part of the environmental quality control program.<sup>58</sup>

Mexico also addresses the assertions in the submission regarding Mexico's alleged failure to effectively enforce LGEEPA Articles 78–83 and LGVS Article 5. In reference to LGEEPA Article 78, Mexico asserts that as part of the conditions set out in the Approval, the Proponent must devise a biodiversity protection and conservation program for the Coronado Islands.<sup>59</sup> It asserts that LGEEPA Articles 78 Bis and 78 Bis 1, the standards of LGEEPA Articles 79, and LGEEPA Articles 80, 82, and 83 are not applicable in this case,<sup>60</sup> and further states that the submission contains no assertions relating to the enforcement of LGEEPA Articles 80–83.<sup>61</sup> Nevertheless, Mexico underscores that the Approval demonstrates that the Article 79 standards were taken into account. Thus, for example, the Proponent was required to comply with all prevention, control, mitigation, restoration, and compensation measures set out in the EIS, as well as with the terms and conditions of the Approval. In particular, it was required to comply with the restrictions set out in the Approval as well as the obligations relating to the development of an environmental quality control program and a compensation program; the establishment of coordination, induction, and cooperation mechanisms among the competent federal, state, and municipal authorities, academic institutions and community groups having an interest in the environment; as well as the posting of a bond covering compliance with the terms and conditions of the Approval.<sup>62</sup> As to LGVS Article 5, Mexico asserts that, pursuant to the Approval, the

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<sup>56</sup> *Ibid.*, pp. 58–61.

<sup>57</sup> *Ibid.*, pp. 62–64.

<sup>58</sup> *Ibid.*, pp. 64–66.

<sup>59</sup> *Ibid.*, p. 67.

<sup>60</sup> *Ibid.*, p. 68.

<sup>61</sup> *Ibid.*, p. 77.

<sup>62</sup> *Ibid.*, pp. 70–75.

Proponent must provide a technical and/or scientific justification for the type of lighting or light source to be used in the Project's facilities, and must select the one with the lowest impact on bird behavior.<sup>63</sup>

Finally, Mexico asserts that LGEEPA Articles 34 and 35 were not expressly cited by the Submitters in the submission and that the Submitters did not make any assertions about those articles therein.<sup>64</sup>

#### IV. ANALYSIS

The Secretariat finds that preparation of a factual record is warranted in order to gather further information regarding the assertion that Mexico is failing to effectively enforce its environmental law by approving the Project pursuant to LGEEPA Article 35. In the following sections of this determination, the Secretariat first explains why the provisions of NAAEC Article 14(3)(a) do not require termination of the submission. The Secretariat then presents its reasons for considering that preparation of a factual record is warranted.

##### A. Pending Judicial and Administrative Proceedings

In its response to the submission, Mexico maintains that there are six pending administrative appeals (*recursos de revisión*) challenging the Approval, and that therefore, pursuant to NAAEC Article 14(3)(a), the submission should be dismissed.<sup>65</sup> The Secretariat has determined that these are not pending proceedings for the purposes of NAAEC Article 14(3)(a), for the reasons set out below.

Article 14(3)(a) provides that the Secretariat shall proceed no further with a matter raised in a submission that is also the subject of a pending judicial or administrative proceeding. NAAEC Article 45(3)(a) stipulates that, for the purposes of Article 14(3), "judicial or administrative proceeding" means:

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 approval; 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; [...]

Thus, an administrative proceeding is an administrative action pursued by a Party—not by an appellant—in a timely fashion and in accordance with its law.

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<sup>63</sup> *Ibid.*, p. 85.

<sup>64</sup> *Ibid.*, p. 87.

<sup>65</sup> *Ibid.*, p. 4.

Mexico's response identifies six administrative appeals filed by various persons and organizations (including one of the Submitters) under LGEEPA Article 176 challenging Semarnat's September 2004 decision to approve the Terminal.<sup>66</sup> Five of these appeals were filed in October 2004 and the sixth was filed in May 2005.<sup>67</sup> Because all the appeals deal with the same matter, Semarnat joined them.<sup>68</sup>

Under the LGEEPA, administrative appeals are filed directly with the authority that made the decision at issue; this authority, in turn, must refer the appeal to its hierarchical superior for a final decision.<sup>69</sup> The Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo—LFPA*),<sup>70</sup> whose provisions are suppletive to those of the LGEEPA,<sup>71</sup> provides that the authority must issue its decision within three months.<sup>72</sup> Where three months elapse without a decision, the LFPA deems the appeal to be denied.<sup>73</sup>

In its response to the submission, Mexico stated that, pursuant to LFPA Article 94, the appellant may await an explicit decision or, at any time following the three-month period in which a decision must be issued, challenge the implicit denial of the appeal.<sup>74</sup> According to Mexico, because appellants may yet challenge the implicit upholding of the Approval, the joined proceedings filed in October 2004 and May 2005 are still pending.

Article 14(3)(a) does not require termination of the submission in these circumstances. Mexico asserts that, despite the expiration of the three-month period for resolving the appeals, Semarnat is still considering them.<sup>75</sup> Even if Semarnat is "in the process of issuing an administrative order," the proceeding is no longer timely for the purpose of Article 45(3)(a). As noted above, administrative orders must be issued within three months following the filing of an appeal. Where the authority fails to act, the law fills the legal void by establishing that the appeal is deemed to be denied. For the purposes of the NAAEC, upon expiry of the period prescribed by Mexican law for the authority's action, any subsequent action taken by the Party at the appellant's request,

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, pp. 4–7. Concerning appeals 130/2004, 131/2004, and 132/2004, the response states that they were filed 7 October 2005, but the actual filing date was 7 October 2004.

<sup>68</sup> *Ibid.*, p. 7.

<sup>69</sup> LGEEPA Art. 176.

<sup>70</sup> Published in the *Diario Oficial de la Federación* (DOF, Official Gazette of the Federation) on 4 August 1994.

<sup>71</sup> LFPA Art. 2.

<sup>72</sup> *Ibid.*, Art. 17.

<sup>73</sup> *Ibid.*

<sup>74</sup> Response, p. 8.

<sup>75</sup> Indeed, when Semarnat consolidated the first five appeals in April 2005, the three-month period under LFPA Art. 17 had expired.

even if compliant with Mexican law, is not considered timely. Because it is not a timely action, the proceeding does not fall within the meaning of NAAEC Article 45(3)(a) and therefore cannot be a pending administrative proceeding for the purposes of Article 14(3)(a).

Mexico asserts that in view of the lack of an explicit, as opposed to an implicit, resolution of the administrative appeals, the information gathering process for a factual record would be impaired because information related to the joined appeal must be kept confidential pursuant to the Federal Transparency and Access to Public Governmental Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*).<sup>76</sup> The Secretariat has no information indicating that the appeals are being actively pursued, and notes that Mexico could avoid this concern entirely by making a decision on the appeal, which, if not yet explicitly resolved, has been pending over two years and is legally considered denied.<sup>77</sup> The Secretariat finds that the possibility that information gathering will be impaired is limited, given that more than two years have passed since the first appeals were filed and more than eighteen months have passed since the last was filed.

### **B. Preparation of a Factual Record is Warranted**

Having reviewed the submission in light of Mexico's response, the Secretariat finds that the preparation of a factual record is warranted in relation to the assertions in the submission concerning the approval of the Project. The Secretariat finds that central questions remain open regarding enforcement, by DGIRA, of various requirements of LGEEPA Articles 34 and 35 as they relate to assessing environmental impacts and consulting the public prior to Semarnat making the decision to grant environmental impact approval to the Project at the site selected by the Proponent. As regards the conditions attached to Semarnat's approval of the Project, such information is relevant to clarify aspects of the evaluation carried out by DGIRA, pursuant to Article 35 of LGEEPA, prior to approving the Project.

In regard to LGEEPA Articles 78–83 and LGVS Article 5, the Secretariat finds that the Submitters' allegations in the submission should be considered within the more specific framework provided by the LGEEPA for approval of a project's environmental impacts. Thus, LGEEPA Article 35 provides that for approval of works and activities to which the EIA procedure applies, Semarnat shall submit to the provisions of various legal instruments and "any other applicable legal provisions." On this basis, the Secretariat recommends the development of a factual record in order to compile further information on the consideration given by DGIRA to standards 1–3, 5, and 7 of

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<sup>76</sup> Response, pp. 12–13.

<sup>77</sup> The Secretariat notes that NAAEC Art. 7 provides, *inter alia*, that each Party shall ensure that its administrative proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

LGEEPA Article 79 and principles 1–3 of LGVS Article 5 as it reviewed the technical opinions of entities specializing in wildlife conservation. In the following sections, the Secretariat sets forth its reasons for this determination.

**1. Alleged failure to effectively enforce Article 35 of LGEEPA by accepting an insufficient EIS and not evaluating the possible effects of the Project on the ecosystem of the Coronado Islands**

The Submitters allege the failure of the Proponent and Semarnat to assess, from an environmental perspective, alternative locations for the Project; failure to consider potential Project impacts on the ecosystem of the archipelago as a whole; and failure to consider cumulative and synergistic effects.

**(i) Environmental criteria for assessing alternative locations for the Terminal**

The Submitters claim that the EIS did not consider potential alternatives to the location for the Project, from the perspective of environmental impacts, as required by Article II.3.2.2 (“Sitios o trayectorias alternativas”) of Semarnat’s guide for the preparation of EIS.<sup>78</sup> As evidence for this assertion, they cite the Approval, in which DGIRA states:

Although the information presented in the EIS exhibited some inadequacies as regards the criteria and the justification for the methodologies used in evaluating and identifying the environmental impacts, DGIRA requested additional information from the developer, who rectified these inadequacies as indicated in paragraph XXXVI of this document. [...] It should also be clarified that the developer, in the additional and complementary information, presented alternatives in an effort to justify the siting of the LNG terminal in the vicinity of South Coronado Island as the most viable option in comparison with other sites analyzed by the developer.<sup>79</sup>

The Submitters state that Semarnat never issued a public notice regarding receipt of the additional information and the complimentary information, and never included this information in the public file, as required by paragraph I of Article 26 of the Regulation to the LGEEPA Respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental—REIA*<sup>80</sup>).<sup>81</sup> The Submitters assert:

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<sup>78</sup>*Guía para elaborar la manifestación de impacto ambiental* (Guide to Production of Environmental Impact Statement), regional form for petroleum projects, published by the Environmental Land Use Planning and Impact Division (*Dirección de Ordenamiento Ecológico e Impacto Ambiental*) of the National Institute of Ecology (*Instituto Nacional de Ecología*) of the former Ministry of the Environment, Natural Resources, and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*) (no date) at 6.

<sup>79</sup>Supplemental Information, Appendix 5, p. 4.

<sup>80</sup>Published in the DOF on 30 May 2000.

<sup>81</sup>Supplemental Information, Appendix 5, p. 4.

According to these paragraphs, the additional and complementary information were apparently pivotal elements leading to DGIRA's positive decision. As such, the fact that this information was never announced nor made available to the public constitutes a serious infringement of civil society's right to participate in the project evaluation process. It is absurd that such serious defects in the EIS, such as the fact that the precautionary principle was ignored and that no justification was provided for the siting of the project, were totally rectified in additional and complementary information that was never made public.<sup>82</sup>

The Secretariat reviewed the EIS, the corresponding Risk Assessment,<sup>83</sup> and the additional information provided by the Proponent at Semarnat's request ("Additional Information"), in order to determine how the Proponent decided where to site the Terminal.

The EIS indicates that the Proponent considered the possibility of siting the Terminal on the Baja California coast but opted for an offshore project after analyzing the policies adopted within the framework of the environmental land use planning program for the coastal region.<sup>84</sup> Regarding this program, the EIS states as follows:

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<sup>82</sup> *Ibid.*

<sup>83</sup> See LGEEPA Art. 30: "... In case of activities considered as high-risk under this Act, the statement shall include the corresponding risk assessment."

<sup>84</sup> "In accordance with Article 37 of the Baja California State Urban Development Act (*Ley de Desarrollo Urbano del Estado de Baja California—LDUEBC*), the Regional Urban, Tourism, and Ecological Development Program for the Tijuana-Rosarito-Ensenada Coastal Corridor (*Programa Regional de Desarrollo Urbano, Turístico y Ecológico del Corredor Costero Tijuana-Rosarito-Ensenada—Cocotren*) is considered a regional program. Prepared by the Ministry of Human Settlements and Public Works (*Secretaría de Asentamientos Humanos y Obras Públicas*) and pursuant to LDUEBC Article 38, this program is subject to the provisions of the State Development Plan. Cocotren is concerned with tourism and environmental issues common to the coastal corridor of these three cities and is a policy instrument for municipal planning. Cocotren is a legal instrument that represents an update of the program created in 1995 (Cocotren).

The purpose of Cocotren is to coordinate land use planning within and among the municipalities with a view to achieving consistent urban development, thereby contributing to regional development. Cocotren is a guideline to be followed when planning takes place. The spirit of these legal provisions is that of ensuring uniform policymaking within the state of Baja California.

Cocotren also has an interregional function. The Tijuana-Ensenada corridor may be considered a part of the San Francisco-Los Angeles-San Diego urban belt, and these are highly urbanized, industrialized areas. This corridor is part and parcel of a set of economic and demographic interrelations situated on both sides of the border. The international context has defined the economic activities of the communities constituting Cocotren. International trade across the Tijuana-San Diego border continues to increase with the passage of time (Cocotren).

Cocotren acknowledges that the potential uses of the corridor are activities in the tourism industry and related economic sectors such as trade, services, the film industry, arts and crafts, tourist transportation,



Cocotren is an extremely important land use planning instrument providing for consistent urban development among the municipalities of Tijuana, Playas de Rosarito, and Ensenada. In addition, during the decision-making process for the Project, the requirements and impacts with respect to Cocotren were assessed to determine the best site for the Project.<sup>85</sup>

In the Risk Assessment, the Proponent states as follows:

State officials, local officials, and the local community expressed concerns about the impact of a land-based regasification facility. The idea of siting a regasification facility anywhere on the Baja California coast is being challenged by the local community.<sup>86</sup>

According to the Additional Information, in selecting an offshore site, the Proponent's two main considerations appear to have been safety and gas transportation distance to the mainland, in that order.<sup>87</sup> Thus, the siting of the Terminal to the leeward side of South Coronado Island makes it possible to take advantage of the island's breakwater effect, while the distance to the coastal interconnection system (17 km) is not too great.<sup>88</sup> As to the distance between the Terminal and the island (600 m), it was determined in such a way as to maximize the wind protection provided by the island while simultaneously maintaining the safety radius required by international standards and the Electricity Regulatory Commission (*Comisión Reguladora de Electricidad*).<sup>89</sup>

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dining, and sports activities. Due to the great ecological value of the region, the corridor is considered an ideal location for such activities.

Cocotren divides the territory into twenty-eight Environmental Management Units (*Unidades de Gestión Ambiental*—UGA). These UGA are determined with reference to the urban, tourism, environmental, and physical characteristics of the region. Figure 3.2 shows the Cocotren area, comprising Tijuana, Playas de Rosarito, and Ensenada.

CT de México conducted a feasibility study and various in-depth studies on Cocotren and assessed its policies. As a result of these assessments and in order to minimize the possible adverse impacts on the environment and the population, CT de México saw fit to execute the Project offshore as a better alternative.” EIS, pp. 3–15, 3–16.

<sup>85</sup> EIS, pp. 3–50.

<sup>86</sup> Risk Assessment, pp. 2–19.

<sup>87</sup> Additional Information, s. 7.0, “Environmental Prognosis,” p. 8 (March 2004): “A very specific site was identified that would meet the seismicity and other safety requirements. If the site were located closer to the coast in order to reduce the distance and cost of the underwater gas pipeline, other factors would pose a risk, such as the protection provided by the northern portion of South Coronado Island, the distance from existing faults, and the safe ingress and egress of LNG tankers. Issues such as these were considered in determining the location of the safest site.”

<sup>88</sup> See Additional Information, s. 7.0, “Environmental Prognosis,” subsection 7.b (March 2004).

<sup>89</sup> See Risk Assessment, s. 2.5, “Siting Criteria,” pp. 2–20. Nevertheless, in the Additional Information, the Proponent notes that “in the event of a catastrophic scenario, the affected area could also include a portion of Coronado Island.” See Additional Information, subsection 9.b.7, “Restoration Activities” (March 2004).

In this regard, in the EIS chapter on mitigation measures, the Proponent explains as follows:

The result of impact identification and assessment was that the Baja California Offshore LNG Terminal Project (the Project) in general will have impacts considered non-significant due to the mitigation measures incorporated into the Project's design. The mitigation procedures and measures included from the planning and design stage onward for the construction, operation, and maintenance stages of the Facility have led to the generation of impacts considered non-significant during the execution of the Project. These measures are presented below.

The main mitigation measure that was considered in order to minimize the environmental and socioeconomic impacts on the region was to build the Project offshore. It was considered that by building and operating a Regasification Facility in the Territorial Waters off the coast of Baja California:

- It does not conflict with land use considerations in the Regional Urban, Tourism, and Ecological Development Program for the Tijuana-Rosarito-Ensenada Coastal Corridor [*Programa Regional de Desarrollo Urbano, Turístico y Ecológico del Corredor Costero Tijuana-Rosarito-Ensenada—Cocotren*], which is of great importance for the residents of Baja California;
- It does not require construction of a breakwater for safe unloading of liquefied natural gas (LNG) tankers. The area required for a breakwater is larger than the area occupied by the Facility offshore;
- It does not require the construction of a pier, which could change the existing conditions on the coast;
- Regarding safety conditions, the Project will not be sited within industrial or residential areas;
- It does not interfere with existing port activities and will not create new ports on the Baja California coast.<sup>90</sup>

The foregoing passage indicates that the Proponent's opinion was that siting the Project offshore constituted the main mitigation measure for the environmental and socioeconomic impacts of the Project.

According to the Submitters:

[...] this reduces an ecosystem of great ecological value to the economic value of a breakwater, as if the island consisted of mere inert rock and were not an active ecosystem bursting with life.<sup>91</sup>

Semarnat states the following in the Project Approval:

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<sup>90</sup> EIS, p. 6–1.

<sup>91</sup> Supplemental Information, Appendix 7, p. 18.

This site was selected, among other reasons, for the breakwater effect provided by the presence of South Coronado Island, which obviates the need for additional infrastructure such as breakwaters, groins or piers that would increase the environmental impacts.<sup>92</sup>

In the Additional Information, the Proponent states that it carried out a conceptual screening study to investigate alternative solutions and sites for the facility.<sup>93</sup> Also, in June 2004, the Proponent filed complementary information with Semarnat.<sup>94</sup> The Secretariat did not obtain a copy of this filing,<sup>95</sup> which forms part of the information on which Semarnat based its evaluation of the Project.

The Secretariat has reviewed the submission in light of Mexico's response and has determined that preparation of a factual record is warranted in order to compile additional information – including information referenced above - that is missing for a consideration of environmental criteria used to assess alternative offshore project locations, as prescribed by the REIA and the corresponding guide published by Semarnat.<sup>96</sup>

The foregoing takes on further importance when one considers that the Proponent, in the Additional Information, put forward the following arguments in favor of the approval of the site that it was promoting for the Project:

It is common knowledge for the majority of the residents of Baja California and the governmental authorities that there is a special interest on the part of foreign gas companies in building an LNG regasification facility in this area. If Chevron Texaco de México (CT de México) does not carry out this regasification facility Project off the coast of Baja California, there would exist at least three other parties interested in developing their own project under very different arrangements. The other projects contemplate a land-based facility that would meet with greater difficulties in combining marine and coastal components. These difficulties translate into environmental impact and societal opposition. The residents of Baja California are involved in decision-making processes and are quite active on social and environmental matters;

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<sup>92</sup> Approval, p. 66.

<sup>93</sup> Additional Information, s. 7.0, "Environmental Prognosis," p. 10 (March 2004).

<sup>94</sup> See p. 14 of the Approval: "XLV. That on 7 June 2004, DGIRA received an unnumbered document dated 2 June 2004 whereby the Proponent submitted complementary information further to the additional information submitted in the unnumbered document of 16 March 2004."

<sup>95</sup> Request for information of 1 May 2006, pursuant to NAAEC Article 21(1)(b): electronic mail from Katia Opalka, Legal Officer, CEC Secretariat, to Lic. Margarita Palafox, International Affairs Coordinating Unit (*Unidad Coordinadora de Asuntos Internacionales*—UCAI) of Semarnat. On 30 May 2006, the UCAI sent the Secretariat s. 2 of the Additional Information which, as it happens, is entitled "Complementary Information"; however, it did not respond to the Secretariat's request, reiterated on 30 May 2006, for a copy of the complementary information submitted by the Proponent to DGIRA in June 2004.

<sup>96</sup> See REIA Art. 13 paras. II and VII and s. II.3.2.2 of the *Guía para elaborar la manifestación de impacto ambiental* (Guide to Production of Environmental Impact Statement), regional form for petroleum projects, published by the Environmental Land Use Planning and Impact Division (*Dirección de Ordenamiento Ecológico e Impacto Ambiental*) of the National Institute of Ecology (*Instituto Nacional de Ecología*) of the former Ministry of the Environment, Natural Resources, and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*) (no date).

as such, the majority of them oppose the development of coastal facilities, primarily due to the incompatibility of such facilities with the land use and zoning designations. Nevertheless, there is a great need to develop a regasification project in Baja California and it is highly probable that one of the many interested parties will develop its project.

If CT de México is unsuccessful in developing the Project, the residents of Baja California will be facing a coastal regasification facility with its concomitant environmental and social impacts. But if the Baja California Offshore LNG Terminal Project is built, the residents of Baja California will have greater assurance, since the Facility will be located 16 km off the coast and the environmental impacts are considered non-significant. As a result, the overall residual impact would be greater if another company had the opportunity to develop its project.<sup>97</sup>

In summary, developing a factual record would allow the Secretariat to compile additional information on the environmental assessment of the various offshore siting options for the Project that is required for a consideration of Semarnat's enforcement of LGEEPA Article 35 in approving the Project.

### **(ii) Scope of the Environmental Assessment**

The Submitters assert that in regard to the scope of the environmental assessment of the Project, DGIRA failed to effectively enforce LGEEPA Article 35 by accepting an incomplete EIS from the Proponent<sup>98</sup> and by evaluating the potential environmental impacts of the Project only in regard to the planned Terminal site and a part of South Coronado Island, without considering the entire archipelago.<sup>99</sup>

LGEEPA Article 35 provides that in order to obtain environmental impact approval, an applicant must file an EIS with Semarnat. The EIS must contain, at the very least, a description of the possible impacts on any ecosystem that may be affected by the work or activity in question, considering the sum total of the components making up the ecosystem.<sup>100</sup> In addition, LGEEPA Article 35 stipulates:

In like manner, for the approval referred to in this Article, the Ministry shall assess the possible effects of such works or activities on the ecosystem(s) involved, considering the sum total of the components making up the ecosystem and not merely the resources that would potentially be subject to use or impact.

In the EIS and the Additional Information, the Proponent concludes that the environmental impact of construction and operation of the Terminal will be non-significant because fish and birds will avoid the Terminal area.<sup>101</sup> Regarding this

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<sup>97</sup> Additional Information, s. 7.0, "Environmental Prognosis," p. 2 (March 2004).

<sup>98</sup> Submission, p. 12.

<sup>99</sup> See submission, pp. 12–13 and pp. 5 and 11 of Appendix 5 of the Supplementary Information.

<sup>100</sup> LGEEPA Art. 30.

<sup>101</sup> See e.g. Additional Information, s. 4.0, "Impacts on Marine Mammals," p. 8 (March 2004): "The activities described above have the potential to impact listed species. However, given that marine mammals possess the natural instinct to avoid areas that could disturb their activities and that CT de México will

conclusion, the Submitters assert: “The EIA utterly fails to consider the significance of the predicted avoidance behavior in the context of the breeding colonies.”<sup>102</sup> According to the Submitters, the ecosystem that will be affected by the Project comprises all four of the Coronado Islands and the waters surrounding those islands.<sup>103</sup>

In the submission, the Submitters allege that DGIRA failed to effectively enforce LGEEPA Article 35 in holding that the Project would have no direct impact on species governed by NOM-059-ECOL-2001 because none of the Project’s component works or activities would be executed on South Coronado Island.<sup>104</sup> The Submitters identify, as an example of a direct impact, the possibility of nocturnal seabird mortality due to collisions.<sup>105</sup> According to the Submitters, nocturnal seabirds nesting on the Coronado Islands range more than 100 km from the islands in search of food.<sup>106</sup> The Submitters also claim that there will be impacts on Xantus’s murrelet, due to predation, if any event were to occur related to the construction or operation of the Terminal that causes adults to abandon their nests.<sup>107</sup>

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ensure that prevention and control measures are implemented, these impacts are considered to be non-significant.” Additional Information, s. 5.0, “Environmental Impact Analysis,” p. 7 (March 2004): “The adverse biological effects of cooled water discharge will be local. It is anticipated that most of the mobile species will move far away from the cooled water column. Therefore, minimal adverse effects on protected, controlled, or other marine species are expected.” Additional Information, s. 5.0, “Environmental Impact Analysis,” p. 22 (March 2004): “Thus, it is expected that marine mammals will avoid the area surrounding the facility during its operation due to increased ship traffic, reduced visibility, desertion of the area by prey species, and increased noise. This will reduce the numbers of marine mammals and birds in the vicinity of the Facility, meaning that a smaller number of species could be affected by a fuel or oil spill.” Additional Information, s. 5.0, “Environmental Impact Analysis,” p. 24 (March 2004): “In the event of a fire or explosion, the accident would be circumscribed and controlled by means of the above-mentioned safety and fire protection equipment and measures. Since the Facility is sited approximately 600 meters from South Coronado Island, it is not expected that this type of accident would have a direct impact on the island and its wildlife. The indirect impacts such as smoke could reach and affect the island and its natural resources; however, these effects would only be short-term in nature. Concerning marine mammals and birds, only those present within or near the radius of impact at the time of the accident would be affected. It is expected that marine mammals will avoid the area surrounding the Facility during its operation due to increased ship traffic, reduced visibility, desertion of the area by prey species, and increased noise. For these reasons, a reduction in the number of marine mammals and birds inhabiting the area surrounding the Facility during the operation of the Project is expected. This implies a smaller number of species that could be affected by a fire or explosion at the Facility. Furthermore, the main effects of a fire or explosion would be felt on the surface of the water. This decreases the impact on marine mammals and biota in the vicinity of the Facility at the time of the accident. Therefore, the potential impacts resulting from a fire or explosion are considered non-significant.”

<sup>102</sup> Submission, p. 11.

<sup>103</sup> *Ibid.*, pp. 2, 11.

<sup>104</sup> Supplementary Information, Appendix 5, p. 7.

<sup>105</sup> Submission, p. 4.

<sup>106</sup> Supplementary Information, Appendix 5, p. 7.

<sup>107</sup> See submission, p. 7.

In the Approval, DGIRA explains that because the Terminal will not be sited on one of the Coronado Islands, but rather at a distance of 600 meters from South Coronado Island, the Project probably will not have direct impacts on the populations of species listed in NOM-059-ECOL-2001 that are found on South Coronado Island.<sup>108</sup> Mexico adds that is important to consider that the ecosystem on this island is not in its original condition.<sup>109</sup>

Regarding the condition of South Coronado Island, in the Approval, DGIRA makes the following observation, concerning the opinion expressed by the Baja California State Environment Department, to the effect that the Project would be sited in an area of great scenic and ecological value:

[...] although bibliographically speaking the Coronado Islands archipelago has been considered to be an area of great scenic and ecological value, it should be noted that South Coronado Island does not exhibit pristine environmental conditions. These assertions are based on the fact that during a site visit conducted by DGIRA technical personnel, the vegetation on the eastern shore of South Coronado Island was observed to have been altered and signs of domestic fauna (dogs and donkey scat) were also observed.<sup>110</sup>

In its response to the submission, Mexico notes that the Proponent concluded, in the EIS, as regards potential impacts on seabirds: “There will be no loss of habitat as a result of the construction or operation of the Facility; therefore, there will be no significant impact on bird habitat. *Result: Non-Significant.*”<sup>111</sup> On this issue, Mexico states in its response to the submission: “It cannot be concluded from the foregoing, as the Submitters wrongly assert, that seabirds will be frightened away, because it is specified that there will be no loss of seabird habitat, so that what the Submitters assert is incorrect.” In its response, Mexico states further:

[...] it is clear from the foregoing considerations that the project will not have the impact of eradicating Xantus’s murrelet, a species which, moreover, ranges from Canada to Mexico and, as the Submitters themselves assert, is found on Benito Island and the rest of the Coronado Islands, while on South Coronado Island there is no evidence of there being extinctive processes underway [emphasis in original].<sup>112</sup>

In its response to the submission, Mexico explains that in granting environmental impact approval to the Project, it made approval conditional on the Proponent’s implementing a biodiversity protection and conservation program for the area whereunder, among other things, the Proponent would conduct studies of the potential impacts on bird populations and identify measures to mitigate the negative impacts.<sup>113</sup>

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<sup>108</sup> Approval, p. 13.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, p. 47.

<sup>111</sup> Response, p. 53.

<sup>112</sup> *Ibid.*, p. 77.

<sup>113</sup> *Ibid.*, p. 55.

After reviewing the submission in light of Mexico's response, the Secretariat has determined that central questions remain open regarding Semarnat's enforcement of LGEEPA Article 35 in regard to the requirement, in that article, for an assessment of a project's effects on the ecosystem and its components. Developing a factual record would allow the Secretariat to gather missing, relevant, information, including as regards how Semarnat took into account the provision of LGEEPA Article 35 which provides for a denial of project approval if the Project will affect threatened or endangered species.<sup>114</sup>

### **(iii) Cumulative and Synergistic Impact Assessment**

The Submitters assert that, contrary to the REIA,<sup>115</sup> there was no assessment of the Project's cumulative environmental impacts on the regional environmental system.<sup>116</sup> The REIA defines cumulative environmental impact as "the effect on the environment arising from the incremental impacts of individual actions resulting from interaction with others that took place in the past or are occurring in the present."<sup>117</sup> It defines synergistic environmental impact as "that which occurs where the combined effect of the simultaneous presence of various actions produces a greater environmental impact than the sum of the individual impacts taken separately."<sup>118</sup>

In the documentation filed by the Submitters and by Mexico in its response to the submission, the Secretariat found no information on any assessment of the possible cumulative and synergistic environmental impacts, on the Coronado Islands, of Terminal construction and operation; that is, the impact on the ecosystem resulting from the addition of this new source of impacts to the existing ones, and the impact arising from the combined effects of the Project itself, each of which represents an environmental impact (loss of marine habitat, light, noise, turbidity, chlorine, ship

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<sup>114</sup> LGEEPA Art. 35 provides, in part: Once the environmental impact statement has been evaluated, the Secretariat will issue the corresponding resolution, duly supported and providing reasons, in which it may: [...] III. Deny the requested authorization, when: a) There is a contravention of what is established in this Act, its regulations, the Official Mexican Norms and other applicable provisions; b) The work or activity in question may result in one or more species being listed as threatened or endangered or may affect any such species; or c) False information has been submitted by the proponents, with respect to the environmental impact of the work or activity in question.

<sup>115</sup> REIA Art. 13, Paras. II, III and V.

<sup>116</sup> Supplementary Information, Appendix 6, p. 20.

<sup>117</sup> REIA Art. 3, Para. VII.

<sup>118</sup> *Ibid.*, Para. VIII.

traffic, etc.).<sup>119</sup> It should be noted that the Approval requires the study of such impacts in order to determine mitigation measures.<sup>120</sup> However, the REIA requires that the results of such studies be available, in EISs, before DGIRA makes the decision to approve a project.<sup>121</sup>

The factual record preparation process would allow the Secretariat to gather information regarding open questions on how the legally established conditions for the assessment of the synergistic and cumulative environmental impacts of a project were complied with before the Project was approved.

## **2. Alleged failure to effectively enforce LGEEPA Article 34 as regards public notice and consultation requirements**

The Submitters assert that Semarnat failed to effectively enforce LGEEPA Article 34 by not sanctioning the Proponent when it published an excerpt of the Project in local newspapers two weeks late,<sup>122</sup> and by accepting a project description from which key information, required by the REIA, was missing, such as an indication of the proximity of the proposed Terminal to South Coronado Island;<sup>123</sup> by denying that the Proponent initially filed an EIS that contained a description corresponding to a different, land-based project;<sup>124</sup> by failing to give public notice that the Additional Information and complementary information had been added to the file and failing to make this information available to the public;<sup>125</sup> and by failing to give due consideration to the concerns raised by members of the public.<sup>126</sup> In the Approval, DGIRA denies the Submitters' allegation that there was an initial EIS containing a project description for a different, land-based LNG project, and that the original EIS was replaced without notice.<sup>127</sup> The Approval states that LGEEPA Article 34 and REIA Articles 40, 41 and

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<sup>119</sup> See REIA Art. 3, Para. VIII: "Synergistic environmental impact: That which occurs where the combined effect of the simultaneous presence of various actions presents a greater environmental impact than the sum of the individual impacts taken separately."

<sup>120</sup> Approval, pp. 97-99.

<sup>121</sup> REIA Art. 13, Para. V.

<sup>122</sup> Supplementary Information, Appendix 4, p. 8. See also Supplementary Information, Appendix 5, p. 11. Art. 34 I requires proponents to publish a project description in a local newspaper within five days of filing a request for an environmental impact authorization with Semarnat. In the case of the Project, Semarnat received the request on 9 October 2003 (see Approval, p. 1), while the project description was published in local newspapers on 31 October 2003 (see Approval, p. 9).

<sup>123</sup> *Ibid.* Art. 41 I of the REIA requires that the project description include, at least, "c) indication of the site where the work or activity is to be carried out, indicating the State or Municipality and making reference to the existing ecosystems and their condition at the time the study is performed, and d) indication of the principal environmental impacts that may be caused by the work or activity and any proposed mitigation or restoration measures."

<sup>124</sup> Submission, p. 13; Supplementary Information, Appendix 4, p. 3.

<sup>125</sup> Supplementary Information, Appendix 4, p. 8, and Appendix 5, p. 11.

<sup>126</sup> *Ibid.*, Appendix 4, p. 10.

<sup>127</sup> Approval, p. 23.



43 set out the formalities governing the public consultation process and that “during the period and with the formalities prescribed by the aforementioned Act and its Regulation for that purpose, no call for public consultation by Mexican citizens or foreign nationals was received.”<sup>128</sup>

It is evident from the excerpt of the Additional Information reproduced in Section 1(i), above, that avoidance of the public consultation processes prescribed by Cocotren was an important factor considered by the Proponent in deciding to site the Project offshore. LGEEPA Article 34 is the only applicable legal provision offering citizens an opportunity to be consulted about the Project and its siting by the Proponent.

In addition, the Secretariat has received no response from Mexico in relation to the allegations in the submission based on LGEEPA Article 34. For these reasons, and because the Secretariat has not obtained a copy of the complementary information filed by the Proponent in June 2004, the Secretariat finds that preparation of a factual record is warranted in order to compile additional, relevant information that is missing for a consideration of the Submitters’ assertion that Mexico failed to effectively enforce LGEEPA Article 34 during the environmental impact assessment for the Project.

### **3. Alleged Failure to effectively enforce Standards 1–3, 5, and 7 of LGEEPA Article 79 and Principles 1–3 of LGVS Article 5 in Approving the Project**

Article 35 of LGEEPA provides, in part:

For the authorization of the works and activities contemplated in Article 28, the Ministry will be subject to the provisions of the aforementioned regulations,<sup>129</sup> as well as to the urban development programs, environmental land use plans, protected natural area declarations, and other applicable legal provisions.

The Submitters assert that in approving the Project, Mexico failed to effectively enforce standards 1–3, 5, and 7 of LGEEPA Article 79 for preservation and sustainable use of wildlife, as well as principles 1–3 of LGVS Article 5.<sup>130</sup> In its response to the submission, Mexico asserts that these provisions do not apply in regard to the decision to approve the Project because, according to Mexico, it was not a matter of approving the use of wildlife. Nevertheless, Mexico asserts that the terms and conditions of the Approval show that Mexico did take into account these standards and principles in granting environmental impact approval for the Project.<sup>131</sup>

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<sup>128</sup> Approval, p. 14.

<sup>129</sup> The LGEEPA, its regulation, and the applicable Mexican Official Standards.

<sup>130</sup> Submission, pp. 8–12; Supplementary Information, pp. 2–3.

<sup>131</sup> Response, pp. 66–86.

REIA Article 24 provides that, as part of the environmental impact assessment procedure, Semarnat may solicit the technical opinion of any department or entity of the Federal Public Administration, as required, given the nature of the work or activity in question. In the case of the Project, DGIRA solicited the technical opinion of agencies specializing in wildlife, among others. However, additional information is required regarding how DGIRA took account of the above-mentioned standards and principles in analyzing the opinions and comments that it received from these entities. Thus, as discussed below, questions remain open as to how DGIRA gave consideration to the opinions that it solicited and obtained from other entities during its assessment of the Project's possible environmental impacts, in light of the standards and principles of LGEEPA Article 79 and LGVS Article 5 cited by the Submitters, in accordance with LGEEPA Article 35.

The Approval indicates that various entities with highly specialized knowledge of the Coronado Islands ecosystem or protected species had concerns about the Project's potential environmental impacts. For example, after reviewing the EIS, the Wildlife Branch (*Dirección General de Vida Silvestre*—DGVS) under Semarnat's Deputy Minister for Environmental Protection concluded as follows:

[...] Therefore, this Branch **has no objection** to the construction of the Terminal and the gas pipeline for the "Baja California Offshore LNG Terminal" project, provided that there is consultation with the Conanp to ensure that there is no plan to create a protected natural area encompassing the construction site, in which case I would consider the construction of the project to be unviable [emphasis in original].<sup>132</sup>

Thus, the Wildlife Branch stated that it objected to the approval of the Project if there was a plan to create a protected natural area in that area. Yet in approving the Project, DGIRA did not comment on this part of the DGVS's opinion, but stated:

The foregoing opinion of the Wildlife Branch is conclusive as to recognition of the viability of the **project**, although it does recommend specialized supervision of the environmental programs and the taking of precautionary measures during various stages of operation of the **project** [emphasis in original]. The full scope of this opinion was considered by DGIRA in assessing and determining the **project's** viability.<sup>133</sup>

Conanp sent Semarnat the following comments:

In this regard, I hereby inform you that based on the information provided in the Environmental Impact Statement for the project's siting (geographical coordinates and locator map), it was determined that the project is located outside of any relevant Protected Natural Area of the Federation.

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<sup>132</sup> Approval, p. 55.

<sup>133</sup> *Ibid.*

Therefore, and considering that Article 145 Paragraph IV of the Internal Regulation of Semarnat (published in the DOF [Official Gazette of the Federation] on 21 January 2003) invests this National Commission with the power to issue opinions on projects undergoing the environmental impact assessment procedure where these are located within Protected Natural Areas, the decision on this project is at the discretion of the Branch under your responsibility.

Notwithstanding the foregoing, I hereby inform you that due to the current and historical importance of the site as a seabird nesting site, the existence of a great diversity of fish and invertebrates in the waters around the Coronado Islands, and the existence of endemic species, this area is currently under consideration for declaration as a Protected Natural Area. The corresponding Technical Assessment is currently under production by this National Commission. A locator map of the proposed area and the project is attached hereto.<sup>134</sup>

The information in the last cited paragraph above is closely linked to the application of standards 1, 2, 3 and 5 of LGEEPA Article 79 as well as principles 1–3 of LGVS Article 5.

Concerning the role of the opinions solicited during the environmental impact assessment procedure, DGIRA states as follows in the Approval:

It is important to stress that the purpose of the opinions solicited by DGIRA is to identify specific aspects of the EISs that could violate applicable environmental provisions under the jurisdiction of other authorities, all with the goal of complying with the provisions of the last paragraph of LGEEPA Article 35, which requires DGIRA to make decisions as regards only the environmental aspects of works and activities associated with a project.<sup>135</sup>

Based on the information received from Conanp, Semarnat declared the following:

In the opinion submitted to DGIRA by Conanp, there is clear evidence that the projected site is not located within any federal Protected Natural Area. Therefore, this authority is not required to consider provisions concerning such protected spaces in its decision on the project. While Conanp mentions that the Coronado Islands archipelago is currently being studied for declaration as a Protected Natural Area, this proposal does not yet have any legal validity. Therefore, in its decision, DGIRA has no valid basis on which to consider such a proposal as a factor that could limit the viability of the project.<sup>136</sup>

The Secretariat notes that the Approval contains a number of conditions that are based on the future existence of a protected natural area encompassing the Coronado Islands.<sup>137</sup>

The Secretariat has reviewed the submission in light of Mexico's response, and has determined that central questions remain open regarding DGIRA's consideration of opinions it sought from agencies specializing in wildlife as part of its evaluation of the

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<sup>134</sup> *Ibid.*, p. 54.

<sup>135</sup> *Ibid.*, p. 48.

<sup>136</sup> *Ibid.*

<sup>137</sup> See e.g. Approval, p. 74.

Project pursuant to LGEEPA Article 35. Developing a factual record would provide an opportunity to gather relevant information that is missing for a consideration of DGIRA's enforcement of standards 1, 2, 3 and 5 of LGEEPA Article 79 as well as principles 1-3 of LGVS Article 5 in considering such opinions.

## **V. RECOMMENDATION**

For the reasons set out above, the Secretariat considers that the submission, in light of Mexico's response, warrants development of a factual record and hereby so informs the Council.

The submission and Mexico's response leave open central questions as to whether Mexico effectively enforced LGEEPA Articles 34 and 35 in the environmental impact assessment for the Project prior to its approval. Important questions also remain open regarding Mexico's enforcement of standards 1-3, 5, and 7 of LGEEPA Article 79 and principles 1-3 of LGVS Article 5 in the consideration given to the opinions of entities specializing in wildlife.

Therefore, in accordance with Article 15(1), and for the reasons set forth in this notification, the Secretariat hereby informs the Council of its determination that the preparation of a factual record for this submission would help to advance the goals of the NAAEC.

Respectfully submitted for your consideration this 18<sup>th</sup> day of January, 2007.

### **Secretariat of the Commission for Environmental Cooperation**

*(original signed)*  
per: Geoffrey Garver  
Director  
Submissions on Enforcement Matters Unit