

11 May 2015

COUNCIL RESOLUTION 15-02

**Instruction to the Secretariat of the Commission for Environmental Cooperation regarding submission SEM-13-001 (*Tourism Development in the Gulf of California*) in connection with the assertions that Mexico is failing to effectively enforce provisions of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (“Ramsar Convention”); the Convention Concerning the Protection of the World Cultural and Natural Heritage (“World Heritage Convention”); the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*); the Regulations to the LGEEPA Respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental—REIA*); the General Wildlife Act (*Ley General de Vida Silvestre—LGVS*); Official Mexican Standard NOM-022-SEMARNAT-2003 *Specifications for the preservation, sustainable use and restoration of coastal wetlands in mangrove zones* (“NOM-022”); and Official Mexican Standard NOM-059-SEMARNAT-2010 *Environmental protection – Native species of wildlife in Mexico – Risk categories and specifications for inclusions, exclusions or modifications – List of species at risk* (“NOM-059”)**

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

AFFIRMING that the process provided for in Articles 14 and 15 of the NAAEC was established by the Parties of the NAAEC to provide an opportunity for residents of Canada, Mexico, and the United States to present their concerns regarding effective enforcement of environmental law and to bring facts to light regarding those concerns;

RECOGNIZING that the Submissions on Enforcement Matters (SEM) process is designed to promote information-sharing between members of the public and the governments on matters concerning the effective enforcement of environmental law;

CONSIDERING the revised submission, filed on 16 August 2013 by the *Asociación Interamericana para la Defensa del Ambiente* (AIDA), represented by Sandra Moguel, and Earthjustice, represented by Sarah Burt, in representation of various organizations (the “Submitters”), and the response provided by the Government of Mexico on 24 February 2014 (the “Response”);

HAVING REVIEWED the 5 September 2014 Notification by the Secretariat recommending the development of a factual record with respect to certain assertions made by the Submitters;

AWARE that the Response provides information on the enforcement actions taken by Mexico with respect to the assertions made in the Submission;

TAKING INTO ACCOUNT Guideline 10.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, which states that “Council will provide its reason(s) for the [factual record] instructions in writing and they will be posted on the [SEM] public registry”; and

NOTING that Party positions presented in the reasons of the Council members for their votes should not be understood as views held by the entire Council.

HEREBY BY A TWO-THIRDS VOTE DECIDES:

TO INSTRUCT the Secretariat not to prepare a factual record with respect to this submission; and

UNANIMOUSLY DECIDES:

TO DIRECT the Secretariat to post the Council members’ reasons for their votes on the SEM public registry.

On behalf of the Council:

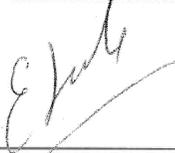


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Louise Métivier

Government of Canada

*In support of the Instruction Not to Prepare a Factual Record*

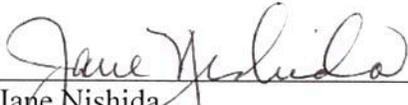


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Enrique Lendo Fuentes

Government of the United Mexican States

*In support of the Instruction Not to Prepare a Factual Record*



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Jane Nishida

Government of the United States of America

*In opposition to the Instruction Not to Prepare a Factual Record*

**Reasons for Council instructions to the Secretariat  
not to prepare a factual record regarding submission  
SEM-13-001 (*Tourism Development in the Gulf of California*)**

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the *North American Agreement on Environmental Cooperation* (NAAEC), the Council of the Commission for Environmental Cooperation (the “Council”) hereby makes public the Council’s reasons for the instructions to the Secretariat in Council Resolution 15-02, by a two-thirds vote (Mexico and Canada), not to prepare a factual record regarding SEM-13-001 (*Tourism Development in the Gulf of California*).

**The Secretariat’s Article 15(1) Notification**

In its Article 15(1) Notification issued on 5 September 2014 (the “Article 15(1) Notification”), the Secretariat notified the Council that the development of a factual record was warranted regarding the Submitters’ assertions of an alleged failure to effectively enforce the following provisions in connection with the tourism development projects listed below:

**CIP Playa Espíritu Project**

- (i) Article 36 of the Regulations to the LGEEPA Respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental*—REIA) in relation to the incorporation of better and more detailed technical information in the project’s environmental impact statement;
- (ii) Article 35 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); REIA Articles 13 and 44; and Article 5, section II of the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS), in relation to the assessment of the project’s cumulative effects and its alleged fragmentation;
- (iii) Articles 3.1 and 3.2 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (“Ramsar Convention”) in relation to the conservation, wise use and exploitation of the Marismas Nacionales Ramsar site;

**Entremares Project**

- (i) LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project’s cumulative effects and its alleged fragmentation;
- (ii) Official Mexican Standard NOM-059-SEMARNAT-2010 *Environmental protection – Native species of wildlife in Mexico – Risk categories and specifications for*

*inclusions, exclusions or modifications – List of species at risk (“NOM-059”)* in relation to species listed therein and identified on the project site;

- (iii) Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of the Mogote—Ensenada de La Paz Wetlands Ramsar site;

### **Paraíso del Mar Project**

- (i) LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project’s cumulative effects and its alleged fragmentation;
- (ii) Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of the Mogote—Ensenada de La Paz Wetlands Ramsar site.

### **The Council’s Instruction to the Secretariat**

In Council Resolution 15-02 the Council instructed the Secretariat, by a two-thirds majority (Canada and Mexico), not to prepare a factual record regarding SEM-13-001 (*Tourism Development in the Gulf of California*). Pursuant to Guideline 10.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”), the Council hereby offers its reasons for said instructions.

#### **A. Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of Ramsar sites for the CIP Playa Espiritu, Entremares, and Paraíso del Mar projects**

The Council affirms that where, according to their nature, instruments of international law are not fully implemented into a Party’s domestic law, they do not fit the definition of environmental law pursuant to Article 45(2) of the NAAEC, and thus cannot be considered within the Submission for Enforcement Matters (SEM) process under Articles 14 and 15 of the NAAEC. The Council notes that the Ramsar Convention is such an instrument of international law.

Since the Ramsar Convention Articles 3.1 and 3.2, and related resolutions of the Conference of the Parties that may inform actions in relation to these Articles, do not meet the definition of environmental law in the context of NAAEC Article 45(2)(a), the Council further affirms that these cannot constitute the basis for the development of a factual record.

The Council also notes that in the interests of transparency, Mexico’s Response (the “Response”), at pages 93 to 98, provided information on how the Ramsar Convention articles factored into Mexico’s environmental impact assessment process for the Paraíso del Mar Project. Notwithstanding that the allegations in the Submission are not related to Article 3.2 of the Ramsar Convention, Mexico provided information regarding monitoring activities that have been carried out (see pages 99 to 103).

The Council further notes that paragraphs 65 (regarding the CIP Playa Espiritu project) and 84 (regarding the Entremares project) of the Article 15(1) Notification could be construed as including considerations which did not form part of the Submitter's assertions with respect to the Ramsar Convention. The Council emphasizes that, pursuant to Article 14(1) of the NAAEC and Guideline 5.1 of the Guidelines, a factual record should only be recommended regarding environmental law and assertions raised by submitters in a submission and thus that the Party has had the opportunity to address in its response.

## **B. CIP Playa Espiritu Project**

### **i. REIA Article 36 in relation to the incorporation of better and more detailed technical information in the project's environmental impact statement**

The objective of the SEM process is to provide residents of Canada, Mexico, and the United States with the opportunity to present their concerns regarding the enforcement of environmental laws. Accordingly, the SEM process is designed to promote information-sharing between members of the public and their governments on these matters. This may be accomplished by members of the public asking their governments to provide information and to explain how their environmental law is interpreted and enforced in a specific situation, since each Party is in a unique position to provide insight on the interpretation and application of its environmental laws.

The Council notes that, regarding REIA Article 36, the Party provided information on how said provision is interpreted and enforced, especially in connection with the CIP Playa Espiritu Project (see pages 5-6 of the Response). Furthermore, the Council observes that the diagnostic prepared by the Universidad Nacional Autónoma de México, cited by the Submitters as an example of best available information under REIA Article 36, was taken into account by the Government of Mexico in its environmental impact authorization, as explained in pages 93 and 94 of the Response.

### **ii. LGEEPA Article 35; REIA Articles 13 and 44; and LGVS Article 5, section II, in relation to the assessment of the project's cumulative effects and its alleged fragmentation**

Regarding LGEEPA Article 35 and REIA Articles 13 and 44, Mexico wishes to emphasize that those provisions do not prohibit a project's environmental impact assessment being conducted in phases, noting that the Party's environmental authorities can only evaluate the environmental impact assessment presented to them. The Council notes that the Party is aware of the possibility of the development of further phases of the project and states that it will evaluate the cumulative effects when appropriate (see page 34 of the Response). As the possible subsequent phases of the CIP Playa Espiritu Project have not been presented for environmental impact assessment, the Council does not find that the development of a factual record is warranted on alleged cumulative environmental impacts regarding phases of the project that do not exist and have not been presented to the Party for evaluation and authorization, as of the date of the Submission. The Council further notes that paragraph 50 of the Article 15(1) Notification underscores a paragraph of the environmental impact authorization that reinforces this idea.

Furthermore, the Council notes that in connection with the project’s cumulative effects on the environment, the Party has provided information, on pages 13 through 16 of its Response, on how it evaluated said impacts pursuant to LGEEPA Article 35 and REIA Articles 13 and 44.

In connection with Article 5, section II, of the LGVS, the Council notes that the Submitters’ allegations in connection therewith relate to the construction of the project’s marina and the manner in which this would allegedly affect the aquifer of the Marismas Nacionales site or its coastline. The Council further notes that Mexico’s Response provided information on how the environmental impact assessment process related to the construction of said marina considered these issues, including those with respect to the water and salinity levels of the aquifer (see pages 13, 14 and 15), alleged effects on water quality (see pages 29 and 30) and variations of water flow due to the construction of the marina (see pages 93 and 94), as follows:

<b>Party Response page</b>	<b>Issue raised in SEM-13-001</b>	<b>Party Response</b>
13, 14, 15	Availability of water infiltrating the aquifer and increases in the water’s salinity levels	<p>The environmental impact authorization provided for measures to inject treated water back into the aquifer for its preservation.</p> <p>Drinking water will be supplied by the Government of the State of Sinaloa, provided that this initial supply will come from the aquifer located at the left bank of the Baluarte River while the Santa María Dam is being built.</p> <p>To address this issue, the environmental impact authorization, in its Condition #7, ordered a monitoring program put in place to follow the behavior of the hydrological flux and the water’s salinity levels.</p>
29, 30	The alleged effects that the construction of the marina will have on water quality due to saline intrusion into the aquifer	The National Water Commission stated that it would analyze and, if appropriate, authorize the project to inject treated water back into the aquifer. As provided in the environmental impact authorization Condition #15, proper authorizations and permits regarding the supply of drinking water for the first phase of the project needed to be secured before the marina could be built.
93, 94	Variations of subterranean water flux due to the	The variations in the hydrological flux in Marismas Nacionales due to the construction of the marina were already estimated by modeling said flux, and

	construction of the marina	will be compensated by injecting treated waters back into the aquifer.
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Furthermore, the Council is concerned that paragraph 47 of the Article 15(1) Notification appears to consider allegations that did not form part of the Submitters’ assertions in connection with this provision. The Council reiterates that, under the NAAEC and the Guidelines, a factual record can only be recommended on assertions made by submitters in a submission.

**C. Entremares Project**

**(i) LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project’s cumulative effects and its alleged fragmentation**

The Council notes that the Response provided information in connection with the Submitters’ assertions regarding the cumulative effects that the Entremares Project would have on the surrounding ecosystems, including mangrove ecosystems, on species that inhabit the area, and on the volume of drinking water available in the region (see Response, pages 16 through 20).

Regarding paragraph 69 of the Article 15(1) Notification, which notes that the Environmental Impact Statement of the Entremares project does not consider the potential cumulative impacts of the project’s works and activities with other ongoing activities in El Mogote (i.e., the Paraíso del Mar project), the Council notes that the Environmental Impact Authorization for the Paraíso del Mar project, which was issued on March 9, 2004, was the subject of various legal challenges and finally declared null and void on January 14, 2013. The new and current Environmental Impact Authorization was not issued until May 13, 2013. Thus, the Environmental Impact Authorization for the Entremares Project, issued on November 25, 2009, could not have taken into account the alleged cumulative effects of an authorization that was being challenged in the courts and under which no activities or works were being performed. Furthermore, the Council notes that the Article 14(2) Determination did not include REIA Article 13, section V, as warranting a response from Mexico.

In connection with the “alleged fragmentation” of the project, it does not appear that this assertion was made by the Submitters in their Submission regarding the Entremares Project nor developed in the Article 15(1) Notification. The Council reiterates that, under the NAAEC and the Guidelines, a factual record can only be recommended on assertions made by submitters in a submission.

**(ii) NOM-059 in relation to species listed therein and identified on the project site**

The Council notes that the Submission alleges that this project could affect some species protected by NOM-059, that the environmental impact statement presented by the project’s developers does not evaluate a technical opinion issued by the environmental policy directorate of Mexico’s Ministry of the Environment and Natural Resources, and that the project was authorized without regard to the alleged risks posed to said species by it. The Council also notes that in its Response, Mexico provided information on how it took into account both the

protection of species listed under NOM-059 and the opinion of its environmental policy directorate (see Response, pages 77 through 80).

The Council further notes that paragraphs 78 and 79 of the Article 15(1) Notification could be construed as including considerations that did not form part of the Submitters' assertions in their Submission, reiterating that under the NAAEC, a factual record can only be recommended on assertions made by submitters in a submission.

**D. Paraíso del Mar Project**

**(i) LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project's cumulative effects and its alleged fragmentation**

The Council notes that in its Response (see pages 21 through 24 and especially page 23), the Party provided information, in connection with the Submitters' allegations, on how its environmental impact authorization took into account and evaluated the state of the regional ecosystem; made specific reference to other tourism developments in the area, as well as other anthropogenic activities and settlements; ordered mitigation measures for the Paraíso del Mar Project; and determined that, because of its characteristics, the project's environmental impacts were limited to the lot in which it was being developed.

In connection with the alleged fragmentation of the project referred to in paragraph 92 of the Article 15(1) Notification, it does not appear that this assertion was made by the Submitters in their Submission regarding the Paraíso del Mar Project. The Council reiterates that, under the NAAEC, a factual record can only be recommended based on assertions made by submitters in a submission.

**Statement of the Government of the United States of America Concerning the Reasons for its Vote on SEM-13-001 (*Tourism in the Gulf of California*)**

The United States does not think a factual record should be prepared on the assertions made in SEM-13-001 that Mexico is failing to effectively enforce its environmental law with regard to the Ramsar Convention. The Secretariat's analysis seems to indicate that the Ramsar Convention may be part of the supreme law of Mexico under Mexico's Constitution, but does not fully explain how Articles 3.1 and 3.2 of the Ramsar Convention have been integrated into Mexico's law such they could constitute a "statute or regulation of a Party, or provision thereof," as defined by Article 45(2) of the NAAEC.

The United States also is of the view that a factual record should not be prepared concerning the assertions in the submission that Mexico is failing to effectively enforce Article 36 of the REIA. In this instance, the United States did not find the Article 15(1) Notification to be persuasive in light of the points made by Mexico in its Response.

On the remaining issues raised in the submission in relation to which the Secretariat's Article 15(1) Notification recommends that a factual record be developed, the United States is in favor of the preparation of a factual record. The United States wishes to emphasize that its decision in favor of the preparation of a factual record on these remaining issues is based on a long-standing U.S. policy which favors the preparation of factual records by the CEC Secretariat as an important means of increasing public participation, transparency and openness on issues related to enforcement of environmental law in the United States, Canada and Mexico. This longstanding U.S. policy is reflected in Executive Order 12915 of May 13, 1994, which requires the United States, to the greatest extent practicable, to vote in favor of a factual record being prepared whenever such preparation is recommended by the CEC Secretariat. The United States wishes to stress that its position in favor of certain issues being included in a factual record does not reflect any judgment on the part of the United States as to whether Mexico is failing to effectively enforce its environmental law.