

# City Park Project Factual Record Regarding Submission SEM-19-002

Prepared in accordance with Article 15 of the North American Agreement on Environmental Cooperation

COMMISSION FOR ENVIRONMENTAL COOPERATION

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## **Acronyms, Abbreviations and Definitions**

Amparo Act Enabling legislation in relation to the provisions of Articles 103 and 107 of the Political

Constitution of the United Mexican States

**CEC** Commission for Environmental Cooperation

**CJF** Federal Council of the Judiciary (*Consejo de la Judicatura Federal*)

Conabio National Commission for the Knowledge and Use of Biodiversity (Comisión Nacional para

el Conocimiento y Uso de la Biodiversidad)

**Conagua** National Water Commission (Comisión Nacional del Agua)

CPEUM Political Constitution of the United Mexican States (Constitución Política de los Estados

Unidos Mexicanos)

DGGA Environmental Management Department of the City of León (Dirección General de Gestión

Ambiental del Municipio de León)

**DGMA** General Directorate for the Environment (Dirección General de Medio Ambiente)

**DOF** Diario Oficial de la Federación, Mexico's official gazette

DRA Environmental Regulation Directorate (Dirección de Regulación Ambiental)

**EIA** Environmental Impact Assessment

**EIS** Environmental Impact Statement

IEE-Guanajuato Ecology Institute of the State of Guanajuato (Instituto de Ecología del estado de Guanajuato),

now the Ministry of the Environment and Land-Use Planning of the State of Guanajuato

(Secretaría de Medio Ambiente y Ordenamiento Territorial de Guanajuato)

JPAC Joint Public Advisory Committee

LGEEPA Mexican Environmental Protection Act (Ley General del Equilibrio Ecológico y la Protección

al Ambiente)

**LPPAEG** Environmental Protection and Preservation Act of the State of Guanajuato (Ley para la

Protección y Preservación del Ambiente del estado de Guanajuato)

NAAEC North American Agreement on Environmental Cooperation

NOM Mexican Official Standard (Norma Oficial Mexicana)

**PMDUOET** Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de* 

Desarrollo Urbano y Ordenamiento Ecológico y Territorial)

**REIA** LGEEPA Regulations on Environmental Impact Assessment (Reglamento de la LGEEPA

en materia de Evaluación de Impacto Ambiental)

## **Acronyms, Abbreviations and Definitions** (continued)

REIA- LPPAEG Regulations on Environmental Impact Assessment (Reglamento de la LPPAEG en

**Guanajuato** materia de Evaluación del Impacto Ambiental)

RGA-León Environmental Management Bylaw of the City of León, Guanajuato (Reglamento para la Gestión

Ambiental del Municipio de León, Guanajuato)

RI-Semarnat Internal Regulations of the Ministry of the Environment and Natural Resources (Reglamento

Interior de la Secretaría de Medio Ambiente y Recursos Naturales)

**SEM** Submissions on Enforcement Matters

Semarnat Ministry of the Environment and Natural Resources (Secretaría de Medio Ambiente y

Recursos Naturales)

SMAOT Ministry of the Environment and Land-Use Planning of the State of Guanajuato (Secretaría

de Medio Ambiente y Ordenamiento Territorial)

UCAJ Legal Affairs Coordinating Unit of Semarnat (Unidad Coordinadora de Asuntos Jurídicos

de la Semarnat)

**UGAT** Local Environmental Management Unit (Unidad de Gestión Ambiental Territorial)

#### **Definitions**

**Agreement** North American Agreement on Environmental Cooperation

Congress of the Union The legislative branch of the United Mexican States, made up of the House of Deputies

and the Senate

**Complainant** Developer of the City Park Project, complainant in amparo lawsuit 326/2020

**Council** Council of the Commission for Environmental Cooperation

**EIA procedure** Procedure for the Environmental Impact Assessment

**Guidelines** Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the

North American Agreement on Environmental Cooperation

Mexico United Mexican States

Notification SEM-19-002 (City Park Project) Article 15(1) Notification (10 August 2020)

Party The Government of Mexico

Parties The Governments of Canada, Mexico and the United States

Submission SEM-19-002 (City Park Project) Article 14(1) Submission (16 April 2019)

**Submitter** Acción Colectiva Socioambiental, A.C., authoring organization of Submission SEM-19-002

(City Park Project)

**Resolution** SEM-19-002 (City Park Project) Council Resolution 21-05, instructing the Secretariat to

prepare a factual record (19 November 2021)

**Response** SEM-19-002 (City Park Project) Party Response (25 March 2020)

Secretariat Secretariat of the Commission for Environmental Cooperation

## **Explanatory notes**

Due to the length of some of the Internet addresses cited in this document, and in order to facilitate reading, <a href="https://app.bitly.com/">https://app.bitly.com/</a> was used to abbreviate the URLs. In each case, the functionality of the corresponding link was checked and the date viewed specified.

Maps and other illustrations included in this factual record were produced from available sources and are purely for purposes of illustration.

Unless otherwise indicated, all official documents cited herein are contained in the archive of the Secretariat. Page numbers cited in the Submission and the Response refer to their original Spanish versions.



## 1. Background to the Submission

- 1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement")¹ provide for a process allowing any person or nongovernmental organization residing or established in Canada, Mexico or the United States, to file a submission with the Secretariat of the Commission for Environmental Cooperation (the "CEC Secretariat" or the "Secretariat") asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The CEC Secretariat initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of the concerned Party's response, if any, and in accordance with NAAEC Article 15(1), the Secretariat may notify the Council that the matter warrants the development of a factual record, while providing its reasons for such a recommendation. Where the Secretariat decides that the existence of certain circumstances precludes the preparation of a factual record, it then proceeds no further with the submission.² Where the Council of the CEC so resolves, by a two-thirds vote of its members, the Secretariat shall prepare a factual record, as instructed by the Council.
- 2. On 16 April 2019, the organization *Acción Colectiva Socioambiental*, *A.C.* (hereafter the "Submitter") filed a submission with the Secretariat, in accordance with the provisions of NAAEC Article 14(1).<sup>3</sup> The Submitter asserts that Mexico is failing to effectively enforce its environmental law in relation to the City Park Project, in the City of León, Guanajuato, Mexico. At the time this submission was filed, the City Park Project was under construction.
- 3. The Submitter asserts that Mexico is failing to effectively enforce provisions of General Act on Ecological Balance and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA); the LGEEPA Regulations on Environmental Impact Assessment (Reglamento de la LGEEPA en Materia de Evaluación de Impacto Ambiental—REIA); the General Wildlife Act (Ley General de Vida Silvestre—LGVS); the Internal Regulations of the Ministry of the Environment and Natural Resources (Reglamento Interior de la Secretaría de Medio Ambiente y Recursos Naturales—RI-Semarnat); the Environmental Protection and Preservation Act of the State of Guanajuato (Ley para la Protección y Preservación del Ambiente del estado de Guanajuato—LPPAEG); the LPPAEG Regulations on Environmental Impact Assessment (Reglamento de la LPPAEG en Materia de Evaluación del Impacto Ambiental—REIA-Guanajuato); the Environmental Management Bylaw of the City of León, Guanajuato (Reglamento para la Gestión Ambiental del Municipio de León, Guanajuato—RGA-León or the "Municipal Bylaw"); and Official Mexican Standard NOM-059-SEMARNAT-2010, Environmental protection—Native flora and fauna species of Mexico-Risk categories and specifications for species inclusion, exclusion or amendments—List of species at risk (NOM-059).
- 4. On 5 July 2019, the Secretariat determined that submission SEM-19-002 (*City Park Project*) satisfied the admissibility requirements in NAAEC Article 14(1), as well as the criteria in NAAEC Article 14(2), and it requested a response from the Government of Mexico.<sup>4</sup>
- 5. On 25 March 2020, the Secretariat received Mexico's response in accordance with NAAEC 14(3).<sup>5</sup> Having analyzed the submission in light of said response, the Secretariat determined that submission SEM-19-002 (*City Park Project*) warrants the preparation of a factual record regarding the enforcement of provisions of LGEEPA, LPPAEG and RGA-León.

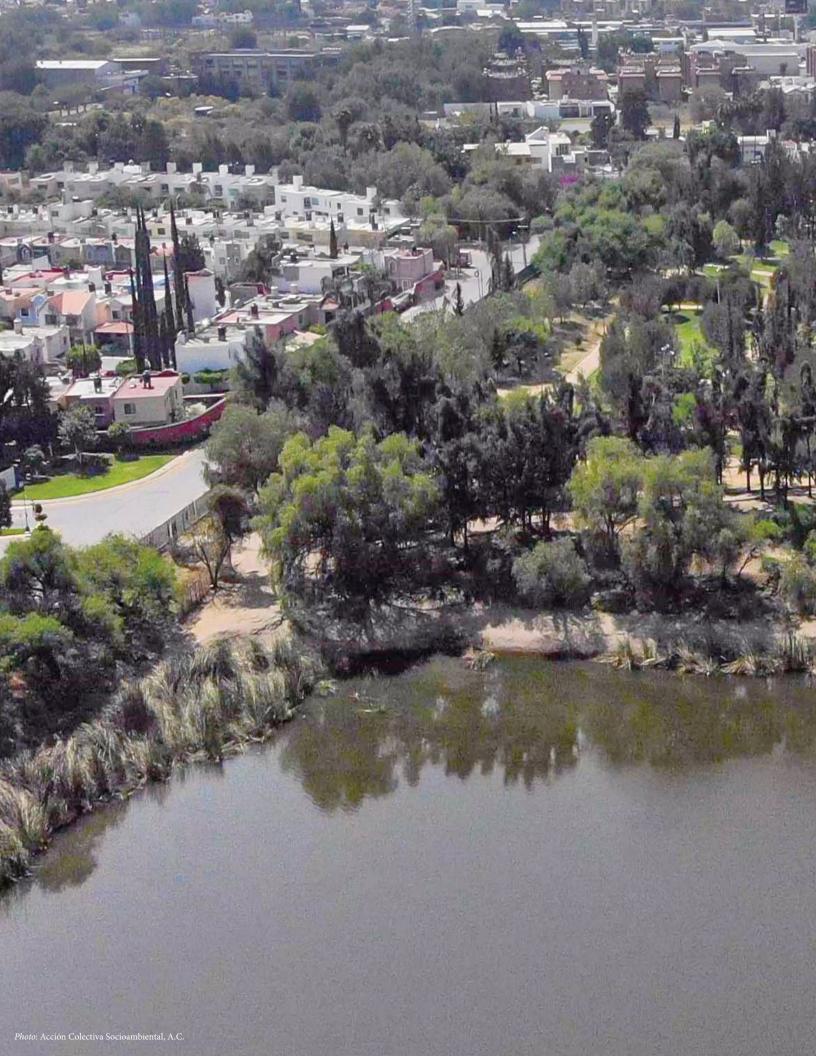
- 6. On 10 August 2020, the Secretariat notified the CEC Council that the submission warranted the preparation of a factual record.<sup>6</sup> The Secretariat found that Mexico's response left key questions unanswered regarding the effective enforcement of provisions of LGEEPA, LPPAEG and RGA-León in relation to the jurisdiction of the municipal authorities over approval of the project's environmental impact, as well as alleged deficiencies in the environmental impact assessment of the City Park Project. In particular, the Secretariat's recommendation focused on the effective enforcement of the following legal provisions:<sup>7</sup>
  - a) LGEEPA Articles 4, 7 paragraph XVI and 8 paragraph XIV, and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 and REIA-Guanajuato Articles 8 and 9), in relation to the assertion that the municipal authorities lacked the jurisdictional authority to assess and approve the City Park Project's environmental impact.
  - b) LPPAEG Article 31 paragraph two and REIA-Guanajuato Articles 19, 20, 21, 25 and 27, in relation to the applicable modality for the City Park Project's environmental impact statement (EIS).
  - c) RGA-León Articles 104, 105 and 120, in relation to the assertions of failures to demand sufficient documentation during the environmental impact assessment (EIA) process and to conduct a public consultation and participation process.
- 7. Following the Secretariat's notification to the Council but before the vote to authorize preparation of a factual record, the project developer filed an *amparo* lawsuit that alleged a violation of the Constitution by various authorities. In particular, this lawsuit contested Mexico's response to the submission and the related consequences of the operation of the SEM process. The CEC and the Submitter were named as interested third parties in this lawsuit.<sup>8</sup>
- 8. On 19 November 2021, the Council issued Resolution 21-05, which instructed the Secretariat to prepare a factual record on the following cited legal provisions in submission SEM-19-002:9
  - a) LGEEPA Articles 4, 7 paragraph XVI and 8 paragraph XIV;
  - b) LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 paragraph II);
  - c) RGA- León Articles 104, 105, and 120.
- 9. In accordance with NAAEC Article 15(5), the Secretariat presented the Council with a draft factual record on submission SEM-19-002 (*City Park Project*) on 30 September 2022, whereupon the Parties had 45 working days to provide their comments on the accuracy of the draft.
- 10. On 9 December 2022, Mexico and the United States provided comments on the accuracy of the draft factual record Canada did not provide comments. Pursuant to NAAEC Article 15(6), the Secretariat incorporated these observations, where appropriate, in the final draft of the factual record, which it submitted to the Council on 17 February 2023 to be voted on, in accordance with NAAEC Article 15(7). The Council authorized the publication of the factual record on XX XXX.

#### 1.1 Regarding the indirect amparo lawsuit 326/2020

- 11. Beyond the scope of submission SEM-19-002 (*City Park Project*), the City Park Project developer presented, before competent jurisdictional authorities, several legal actions against Mexico's response. On 15 July 2020, the developer of the City Park Project (the "Complainant") filed a lawsuit. The case was heard by the Eleventh District Court of the State of Guanajuato. The Complainant alleged that its constitutional rights under Articles 1, 14, 16 and 17 were violated by the NAAEC Article 14(3) response..<sup>10</sup> The CEC was named as an interested third party in this case.
- 12. The Complainant requested the suspension of the effects generated by Mexico's response, essentially the continuation of the process, arguing that the response would be utilized to its detriment in national or international legal proceedings. Also, it argued that given the existence of a pending judicial proceeding the submission should have been terminated in accordance with NAAEC Article 14(3).<sup>11</sup>
- 13. The Eleventh District Court of Guanajuato delivered its judgment on 20 May 2022, in which it dismissed the *amparo* case, thereby denying the Complainant's claim to constitutional protection. The Complainant then appealed the ruling. The appeal will be adjudicated by the Collegial Circuit Court.
- 14. The potential result of the SEM process is the development of a factual record. A factual record is an objective presentation of the facts relevant to assertions raised in a submission, including the responses to those assertions made by the responding Party. The factual record does not make any findings or determinations that a Party is failing to effectively enforce its environmental laws and is not punitive or adversarial.



Acción Colectiva Socioambiental, A.C.



## 2. Scope of the Factual Record

- 15. Pursuant to Council Resolution 21-05 (see Appendix 1), this factual record addresses issues of effective enforcement of the following provisions of environmental law, in relation to the alleged deficiencies in the environmental impact assessment procedure carried out for the City Park Project:
  - LGEEPA Articles 4, 7 paragraph XVI and 8 paragraph XIV, and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 paragraph II), "since it was not shown that the municipality of [León] had jurisdiction to issue an environmental impact approval for the City Park Project" and
  - RGA-León Articles 104, 105 and 120, in relation to assertions made in the submission "since it was not shown that the documents required underRGA-León Article 105 paragraphs VI, VII, X, XI and XII were incorporated into the environmental impact assessment proceeding file [...] Likewise [...]it is not clear whether the Environmental Regulation Branch of the municipality of León (*Dirección de Regulación Ambiental*—DRA) enforced provisions of the RGA-León relating to the right to public consultation and community participation in accordance with Article 120 [of the regulations in question]."<sup>13</sup>
- 16. Appendix 1 contains the complete text of Council Resolution 21-05, along with an explanation of the Council's reasons for authorizing the preparation of a factual record. Appendix 3 contains the texts of the legal provisions examined in this factual record.
- 17. In accordance with NAAEC Article 15(4), the Secretariat took into account all information provided by Mexico, as well as relevant technical, scientific and other information, which is publicly available, submitted by interested persons and organizations or developed by the Secretariat and independent experts.
- 18. Furthermore, the Secretariat conducted a field visit to the project site on 9 May 2022, accompanied by the Submitter, to tour Los Cárcamos Park and the immediate vicinity, observing the construction work, vegetation, and site access. The Secretariat also held a meeting with the General Directorate for the Environmental Management (*Dirección General de Medio Ambiente*—DGMA) of the City of León, during which it answered questions on the scope of the City Park factual record.
- 19. On 10 May 2022, the Secretariat met with the Director of León Metropolitan Park. This meeting included discussion of the Secretariat's questionnaire, as well as a tour of the park to observe the features and amenities of this state natural protected area, such as the El Palote Dam and the park's green areas.

#### 2.1 Environmental law in question

#### 2.1.1 The enforcement context

- 20. We begin with an overview of how powers are assigned in Mexico to enforce the environmental law in question, in accordance with the applicable legal and regulatory framework.
- 21. The distribution of environmental responsibilities is established in the Constitution, which enshrines the legal precepts applicable to the preservation and restoration of ecological balance, environmental protection and the criteria governing the distribution of jurisdictions among the different levels of government. Provisions on environmental jurisdiction are detailed in general laws such as LGEEPA<sup>14</sup> which defines the framework that governs issues of jurisdiction, coordination and concurrent responsibilities between the federal, state and municipal authorities. In this sense, LGEEPA establishes the specific powers of the different levels of government as regards their participation in the environmental impact assessment procedure (EIA procedure).<sup>15</sup>

- 22. Acting through Semarnat, the federal authorities assess and, where appropriate, issue approvals to projects and activities under federal jurisdiction, which are subject to environmental impact assessment, as per the provisions of LGEEPA Article 28.<sup>16</sup> At the state level, the competent environmental authority may assess those projects or activities which do not expressly fall under federal jurisdiction.<sup>17</sup>
- 23. As for the municipal authorities, LGEEPA establishes that they are authorized to participate in the environmental impact assessment of projects or activities under state jurisdiction, provided such projects or activities are carried out within their territorial boundaries.<sup>18</sup>
- 24. In this regard, the Supreme Court has held that "the [m]unicipalities do not have an exclusive and definitive power in the matters of urban settlements and environmental protection, since both are of a concurrent constitutional nature, thus this type of municipal powers must be understood to be subject to the guidelines and formalities set forth in federal and state laws, and never in an exclusive and isolated sphere of the [m]unicipality." <sup>19</sup>
- 25. This issue is addressed in greater detail in section 4.1.2 of this factual record.
- 2.1.2 Legal provisions examined in the factual record
  - 26. The legal provisions examined in the present factual record, pursuant to the instructions of Council resolution 21-05, are part of the body of federal, state and municipal environmental impact statutes and regulations (which, as a whole, constitute the "environmental law in question"). The provisions cited by Council Resolution 21-05 are enclosed in Appendix 3 for consultation purposes.
  - 27. The provisions of LGEEPA establish the following: i) the distribution of jurisdictions among Mexican authorities regarding the preservation and restoration of ecological balance, environmental protection and forestry management (Article 4); ii) the jurisdiction of state governments over the environmental impact assessment of projects or activities not expressly reserved to the federal government (Article 7 paragraph XVI); and iii) the authority of municipal governments to participate in the environmental impact assessment of projects or activities under state jurisdiction (Article 8 paragraph XIV).
  - 28. The provisions of LPPAEG establish: i) the granting of executive authority to the State of Guanajuato to assess the environmental impact of projects or activities not expressly reserved to the federal authorities and issue approvals, where appropriate (Article 6 paragraph XVI); ii) the participation of municipal governments in the environmental impact assessment of projects or activities under state jurisdiction, conducted within their territorial boundaries (Article 7 paragraph XVII); and iii) the power of the Ministry of the Environment and Land-Use Planning of the State of Guanajuato (Secretaria de Medio Ambiente y Ordenamiento Territorial del estado de Guanajuato, formerly known as IEE-Guanajuato) to assess the environmental impact of public or private sector activities not expressly reserved to the federal government and to issue approvals, where appropriate (Article 8 paragraph I). The Secretariat is mindful that, in accordance with Council Resolution 21-05, this latter provision should be considered with reference to the provisions of Article 44 paragraph II, which establish that the municipal authorities shall issue environmental impact approvals when the projects or activities in question correspond to elements established in the municipal ecological management plan or program in force.
  - 29. The provisions of **RGA-León** establish: i) the requirements accompanying an application to submit a construction project or activity for environmental impact assessment (**Article 104**); ii) the documents to be incorporated into an EIA file (**Article 105**); and iii) the municipal authority charged with compiling and publishing a list, which must be periodically updated, of the environmental impact statements submitted for environmental impact assessment (**Article 120**).

## 3. Description of the Project Site

- 30. In the paragraphs below, this factual record will present relevant information about the project site to provide context for the City Park Project EIA procedure cited in Council Resolution 21-05.
- 31. In this context, figure 1 provides a concept map of the relationships between the different topics which must be considered to fully comprehend the City Park Project's environmental impact. On the one hand, one must consider the regulatory framework which regulates human activities to minimize and, as required, offset the project's environmental impacts as well as the actions of the authorities and individuals involved in the project's development. On the other hand, one must consider the environment, which is subject to various physical and chemical influences, both local and regional, which, at the end of the day, impact the biota that is dependent on the environment.
- 32. Taking this concept map as a framework, the following section will focus on describing the region where the project is located by examining certain physical aspects that have a significant influence on the conservation of Los Cárcamos Park and, in particular, its body of water. This section will also focus on describing the biota in this environment.

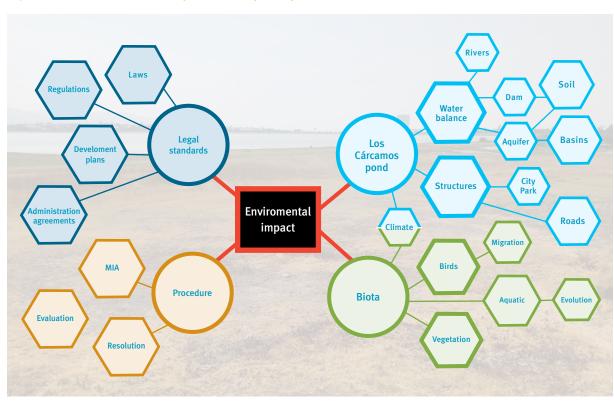


Figure 1. Environmental Impact Concept Map

Source: CEC Secretariat.

#### 3.1 Location of the City Park project

33. The City Park real estate development – also known as "City Center León" –, is located on José María Morelos Boulevard, civic address no. 1555, at the corner of Adolfo López Mateos Boulevard, in the Colonia Granjas del Rosario neighborhood of the City of León, Guanajuato, Mexico. The project includes a number of buildings with a variety of uses, including entertainment, commercial, restaurants, office space, residential and hotels. José María Morelos Boulevard is part of a federal freeway which crosses the León Metropolitan Area from the southwest to the northeast.<sup>20</sup> Figure 2 shows the location of the City Park Project. The map shows that the Granjas del Rosario neighborhood is located in the northern part of the City of León and is bordered to the north by the El Palote Dam and to the south by Los Cárcamos Park. The location of the project, adjacent to Los Cárcamos Park and its body of water, was corroborated with information from the SMAOT that Mexico included in its comments to the draft factual record.<sup>21</sup>



Figure 2. Location of the City Park Project

Source: CEC Secretariat, based on Google Maps.

34. The City of León is one of Guanajuato's principal cities. It is the municipal capital of the municipality of León, as well as the state's principal agglomeration. The municipalities of Silao, San Francisco del Rincón, and Purísima del Rincón are part of the León Metropolitan Area.<sup>22</sup> Figure 3 shows the location of the City of León (dark green) and its metropolitan area (light green) within the State of Guanajuato. The León Metropolitan Area's formation owes more to functional integration factors arising from urban growth and the construction of roads between the principal population centers of the abovementioned municipalities, which generate a constant and reciprocal exchange of people, goods and economic activities, than it does to topographic, meteorological or climate related factors.<sup>23</sup>



Figure 3. The León Metropolitan Area

Source: State of Guanajuato Planning, Statistics and Geography Institute, Government of the State of Guanajuato, Metropolitan program for urban development and territorial ecological planning of the metropolitan area of Leon, Part 1, p. 20 (2018).

35. The State of Guanajuato Planning Act (*Ley de Planeación para el Estado de Guanajuato*) establishes general development planning guidelines.<sup>24</sup> Under the regulations to this Act, the state is divided into four regions and the municipality of León is incorporated into Region III Center,<sup>25</sup> a region distinguished by its economic, social, cultural and environmental characteristics, as well as by development challenges specific to it.<sup>26</sup> See Figure 4 for a map that presents the regions of Guanajuato and their respective economic roles.

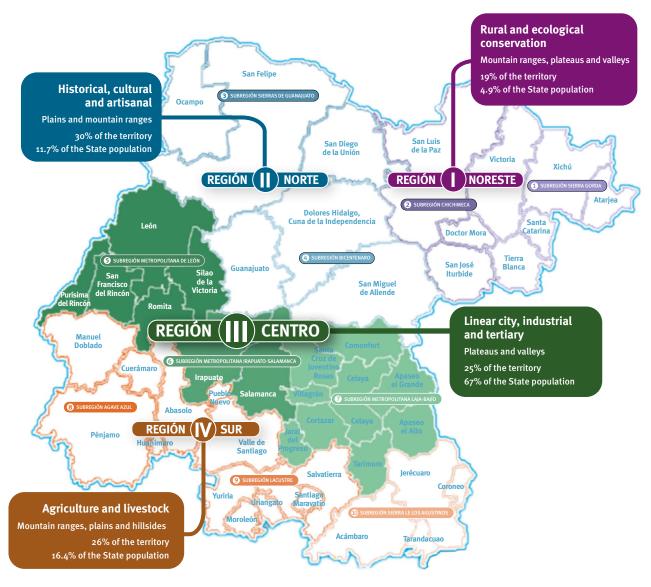


Figure 4. Regions of Guanajuato and Their Economic Roles

Source: Adapted from: Iplaneg, Government of the State of Guanajuato, Programas regionales del estado de Guanajuato Visión 2018 – Síntesis, p. 12 (2015).

#### 3.2 Los Cárcamos Park

- 36. Los Cárcamos Park is approximately 500 meters south of the El Palote dam curtain and is located between two rivers, the Hacienda de Arriba and Los Castillos, which are both part of the same micro-watershed.<sup>27</sup> The park's northern limits are adjacent to the City Park Project. To the south of the El Palote Dam is Metropolitan Park, which was declared a state protected natural area and ecological park in 2000.<sup>28</sup> The information provided by the SMAOT confirms that the City Park Project is adjacent to Los Cárcamos Park.<sup>29</sup>
- 37. The origins of Los Cárcamos Park date back to 1953 when earth was excavated from the location of the present-day park to construct the embankment for the El Palote Dam. More recently, the northern part of the park was used as a landfill until it was ceded to the city.<sup>30</sup> The southern part of the park was donated to the city to obtain approval for the Hacienda del Campestre development, which borders the park on its eastern side. In the northern part of the park, a body of water formed and was stocked with fish.<sup>31</sup>
- 38. The Secretariat found no documents in the historical record supporting the existence of an ecosystem with characteristics corresponding to a wetland.<sup>32</sup> The only documentation that refers to it was a 2019 document from Conagua which affirmed that at one time the body of water in Los Cárcamos Park "could be considered a wetland."<sup>33</sup> This document was the subject of an *amparo* lawsuit filed by the City Park project developer; the final resolution of the *amparo* case annulled Conagua's document.<sup>34</sup>
- 39. Following the excavation of the pit, out of which material was extracted for the El Palote Dam, a stream formed in the sumps area that flowed towards the south where it eventually discharged into the Los Castillos River. This channel is represented in Figure 5 with a dashed line and indicated by a red arrow.
- 40. In a 1971 map (see Figure 6), two bodies of water can be seen in the Los Cárcamos Park area. The channel indicated in Figure 5 is also visible in Figure 6.
- 41. The stream originating in Los Cárcamos Park is also apparent in Figure 7, which shows the park's location on a 1978 map of León. As this stream's riverbed has been occupied by human settlements, it no longer exists.



Photo 1. The Body of Water in the Los Cárcamos Park and the El Palote Dam

Source: from photo archive enclosed with submission SEM-19-002 (City Park Project).



Figure 5. The Hacienda Arriba River and Los Castillos River Micro-basins

Source: Ministry of the Environment and Land-Use Planning (Secretaría de Medio Ambiente y Ordenamiento Territorial), Government of the State of Guanajuato, Geographic, Environmental, Land-Use and Urban Planning Information Subsystem (Subsistema de Información Geográfica, Medio Ambiente, Ordenamiento Territorial y Urbano—SIGAMOT) (2022) <a href="https://mapas.ecologia.guanajuato.gob.mx/sigmaot">https://mapas.ecologia.guanajuato.gob.mx/sigmaot</a>.

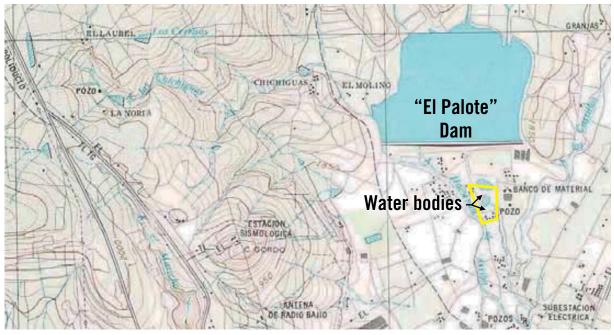


Figure 6. Detail of a Section of the Topographic Map of León in 1971

Source: Bartorila, M. A. et al., Urban Atlas of León - Charts and maps to get to know the city, University La Salle Bajío, p. 7 (2018).

#### 3.3 The El Palote Dam Curtain

- 42. From the El Palote Dam toward the south and even beyond the City of León, the alluvial zone acts more as an aquifer recharge zone than as an upwelling or aquifer discharge zone.<sup>35</sup> The dam curtain bisects the alluvial zone, thereby blocking water from flowing through the alluvial strata.
- 43. Figure 8 shows a cross section of El Palote's dam curtain. As can be seen, waterproof materials were installed 15 meters deep, i.e., deeper than the thickness of the alluvial stratum. As a result, water flow through the alluvial stratum is blocked. Furthermore, in 1958 it was discovered that the floor of the dam is waterproof, which is why no recharging of shallow or deep aquifers has been observed and, at that time, the dam was already in operation to meet the growing demand of the city of León.<sup>36</sup>

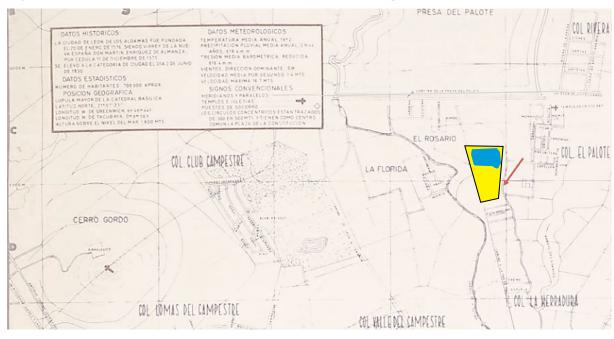


Figure 7. Course of the Stream from Los Cárcamos Park, City of León, 1978

Source: Adapted from: Bartorila, M. A. et al., Urban Atlas of León - Charts and maps to get to know the city, University La Salle Bajio, p. 23 (2018).

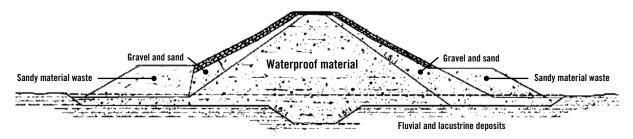


Figure 8. Cross section of the El Palote Dam

Source: Conagua (2011), Basic Engineering and Technical Standards Management, "El Palote Dam Descriptive Report."





 $Source: {\it CEC Secretariat's visit to Metropolitan Park (10 May 2022)}.$ 

- 44. The dam's filtration gallery is 70 m beneath the dam curtain and parallel to its axis. The collector duct, which is 76 cm in diameter and made of galvanized sheeting, was installed 5 m beneath the natural surface and is surrounded by a filter of gravel and sand. The filtration gallery has seven reinforced concrete inspection wells that are 1.22 m in diameter and spaced 270 m apart, which allows for a water filtration rate of 60 to 80 l/s.<sup>37</sup>
- 45. During the Secretariat's visit to the dam, the inspection well at the far eastern end of the filtration gallery was found to contain water 2 to 3 meters from floor level.

#### 3.4 Roadways between the parks

- 46. José María Morelos Boulevard West, also known as the León freeway, runs between the Metropolitan Park and Los Cárcamos Park. Toward the north, and perpendicular to it, is Adolfo López Mateos Boulevard, the principal access to Metropolitan Park. Toward the south, this boulevard is adjacent to Los Cárcamos Park on the west side. In the section between the two parks, the freeway has nine lanes and two medians. The intersection of these two roadways is shown in Figure 9.
- 47. José María Morelos Blvd is comparable to a type ET3 or A3 roadway.<sup>38</sup> Its foundation consists of an embankment with subgrade.<sup>39</sup> Based on the soil mechanics analysis from similar roadways, in the very same City of León (see Table 1), soil compaction on roadways of this type is estimated to be 2 m or less.<sup>40</sup>
- 48. The waterproof material in the middle of the dam curtain was installed to a depth of 15 m, which is much deeper than the foundation of José María Morelos Blvd.



Figure 9. Approach to José María Morelos Blvd (León freeway)

Source: Conagua (2022), GeoVisor from the National Wetlands Inventory (Inventario Nacional de Humedales), base map gallery, <a href="https://sigagis.conagua.gob.mx/">https://sigagis.conagua.gob.mx/</a> humedales/> (viewed 12 April 2022).

Table 1. Embankment, Sub-base and Subgrade Volumes for Roadways in León

| Roadway         |                | Metropolitan<br>Axis O | Metropolitan Axis 1 | Metropolitan Axes 2 and 3 |
|-----------------|----------------|------------------------|---------------------|---------------------------|
| Number of lanes |                | 6                      | 2                   | 2                         |
| Bearing area    | m <sup>2</sup> | 90,447                 | 99,600              | 115,608                   |
| Length          | m              | 4,307                  | 8,300               | 9,634                     |
| Roadbed width   | m              | 21                     | 12                  | 12                        |
| Base volume     | m <sup>3</sup> | 180,894                | 199,200             | 231,216                   |
| Base depth      | m              | 2                      | 2                   | 2                         |

 $Source: Government of the State of Guanajuato, \textit{Cost-Benefit Analysis Le\'on-Silao Metropolitan Axis} \ at \ 47-50 \ (2016).$ 



Photo: Acción Colectiva Socioambiental, A.C.

## 4. Measures Taken by Mexico

#### 4.1 Regarding the City of León's alleged lack of jurisdiction over the EIA procedure

#### 4.1.1 Introduction

- 49. The Submitter argues that the Environmental Management Department of the City of León (*Dirección General de Gestión Ambiental del municipio de León*—DGGA, now known as *Dirección General de Medio Ambiente*—DGMA) "was not the competent authority to hear, evaluate and adjudicate the environmental impact assessment process." The Submitter observes that "the power to conduct such [environmental impact] assessments falls solely to the federal and state governments" and that the city may only participate in the EIA procedure. In addition, the Submitter argues that the environmental impact approval granted to the City Park Project is based solely on legal provisions established in the municipal bylaw and not on provisions in LGEEPA or LPPAEG.
- 50. In its response, Mexico presented its view of the jurisdiction of the municipal authorities in the State of Guanajuato. It noted that the City of León had the power to participate in the EIA process under LPPAEG Article 7 paragraph XVII when it concerns "projects or activities under state authority" that are carried out "within the scope of its territorial jurisdiction." However, it is noted that in the case of the City Park Project, the municipality did not have specific powers to issue an environmental impact approval under LPPAEG Article 44.<sup>44</sup> The response cautions that "the municipality's jurisdiction over the EIA procedure is not unlimited, and applies only to the activities contemplated in the article in question."<sup>45</sup> The response cites RGA-León Article 87, which establishes that the City of León may issue environmental impact approvals in relation to the projects and activities listed in said article, "[w]here they do not require environmental impact approval by the federal or state authorities."<sup>46</sup>
- 51. The City Park Project includes the following components: a shopping center with six movie theaters, storefronts, self-service shops, a 20-storey residential tower with 156 apartments, a 16-storey office tower and a 16-storey five-star hotel. To Verall, the planned work of the City Park Project would cover over 27,449 m. Given the Project's magnitude and numerous components, whether the environmental impact assessment and approval of the project falls to IEE-Guanajuato must be determined.
- 52. Mexico's response indicated that no coordination agreement was identified between the state and the municipality that would allow the municipal authority to discharge responsibilities that belong to IEE-Guanajuato.<sup>49</sup>
- 53. In its notification, the Secretariat found that a factual record could present information on how the León municipal authorities made their determination on their jurisdictional authority to consider, analyze, and issue an environmental impact approval for the City Park project. In addition, the Secretariat deemed that a factual record could yield information on how municipal jurisdiction is determined, so that the public may draw its own conclusions regarding the effective enforcement of LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV, and of LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (in light of the provisions of LPPAEG Article 44, Section II).

- 54. The Council issued instructions to develop a factual record with respect to submission SEM-19-002 (*City Park Project*). In its resolution, the Council reaffirmed that the purpose of a factual record is to provide an objective presentation of the facts in relation to the assertions set forth in the submission, while also providing a general outline of the history of the environmental enforcement issues raised in the submission, the relevant legal obligations of the Party, and the actions taken by the Party in fulfilling those obligations.<sup>50</sup>
- 55. In its reasoning, the Council explained that:

The Council agrees with the Secretariat's recommendation regarding the preparation of a factual record [...] since it was not demonstrated that the municipality of [León] had the authority to issue an environmental impact authorization for the City Park Project.

In the case at hand, the environmental impact approval issued by the Environmental Management Department (*Dirección General de Gestión Ambiental*) of the municipality of León was based on LPPAEG Article 44 paragraph II, which gives municipalities the power to grant environmental impact approval where the work or activity in question is contemplated within the municipal ecological zoning plan.

The Council found that it has not been demonstrated that the City Park Project is included among the activities contained within the Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de Ecología*, *Desarrollo Urbano y de Ordenamiento Territorial*) of León, Guanajuato.<sup>51</sup>

- 56. LGEEPA Articles 4, 7 paragraph XVI and 8 paragraph XIV; LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII and 8 paragraph I (with reference to Article 44 paragraph II) establish: i) the distribution of jurisdictions between the Mexican authorities with respect to the preservation and restoration of ecological balance, environmental protection and forestry management (Article 4); ii) the jurisdiction of the states over the environmental impact assessment of projects or activities not expressly under federal jurisdiction (Article 7 paragraph XVI); and iii) the power of the municipal governments to participate in the environmental impact assessment of projects or activities under state jurisdiction (Article 8 paragraph XIV).
- 57. Likewise, LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII and 8 paragraph I (with reference to Article 44 paragraph II) establish: i) the executive authority of the State of Guanajuato to assess the environmental impact of projects or activities not expressly under the jurisdiction of federal authorities and to issue approvals, where appropriate (Article 6, paragraph XVI); ii) the participation of the municipal governments in the environmental impact assessment of projects or activities under state jurisdiction, within their respective territorial boundaries (Article 7 paragraph XVII); and iii) the authority of the Ministry of the Environment and Land-Use Planning of the State of Guanajuato (Secretaría de Medio Ambiente y Ordenamiento Territorial (SMAOT) del estado de Guanajuato, formerly IEE-Guanajuato) to assess the environmental impact of public or private sector activities not expressly under federal jurisdiction and to issue approvals, where appropriate (Article 8 paragraph I). The Secretariat is mindful that, in accordance with Council Resolution 21-05, that the preceding provision should be read in light of the provisions of Article 44 paragraph II, which establish that the municipal authority shall issue environmental impact approvals in accordance with the provisions of municipal environmental bylaws.

- 58. On 9 December 2022, Mexico submitted its comments on the draft factual record and requested that comments from the governments of the State of Guanajuato and the City of León be included in the factual record.
- 59. The SMAOT issued the following statement regarding the authority of the municipality:
  - In consideration of this state environmental authority, due to the nature of the "City Center" project [i.e., the "City Park" project], the competent authority to authorize the environmental impact assessment of said project, in accordance with the constitutional and legal framework, is the municipality of León, Guanajuato, through the General Directorate of Environmental Management....<sup>52</sup>
- 60. The SMAOT based its opinion on Article 73: section XXIX-G of the CPEUM; Articles 4 and 8: section XIV of the LGEEPA; Article 44: section II of the LPPAEG, and Article 87: section II, clauses d), e), f), h) i) and o) of the RGA-León.<sup>53</sup>
- 61. The City of Leon stated that the DGGA and the Environmental Regulation Directorate (DRA) of the municipality have the authority to resolve and implement the environmental impact procedures under municipal authority<sup>54</sup> in accordance with Articles 115: section V, paragraph d) of the CPEUM; Article 117: section II, paragraph d) of the Political Constitution for the State of Guanajuato; Article 76: section II, paragraph h) of the Organic Municipal Law for the State of Guanajuato; Articles 4, 5: section X, Articles 7: section XVI, 8: sections I, II, VI, XIV, XVI and XVII, 10 and 35 *bis2* of the LGEEPA; Articles 7: section XXV, 29: second paragraph, 44: sections I, II and V of the LPPAEG, and Articles 153 (now 166) and 156 (now 169) of the Internal Regulations of the Municipal Public Administration of Leon, Guanajuato; Articles 1: section II, 5: section XVI and 87: section II, subsection f), of the RGA-Leon.
- 62. The City of Leon concluded that in the evaluation and authorization of the environmental impact of the City Park Project, it did not contravene any sphere of federal or state jurisdiction, since according to the principle of hierarchy of laws, the municipal authority has the powers necessary to evaluate environmental impacts within municipal jurisdiction.<sup>55</sup>
- 4.1.2 Distribution of jurisdictions in relation to the environment
  - 63. In accordance with the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*—CPEUM), the distribution of jurisdictions between the federal, state, and municipal governments is determined according to the principle of legal reservation: "[t]he powers that are not expressly granted by [the] Constitution to federal officials are understood to be reserved to the states [...], in the areas of their respective competencies." Furthermore, the Constitution provides that with respect to environmental protection and the preservation and restoration of the ecological balance, Congress shall issue general laws establishing the powers and concurrence of the federal, state, and municipal governments within the scope of their respective competencies. 57

- 64. In the Mexican legal system, the exercise of concurrent powers implies that the federal entities and Mexico City, as well as the municipalities and the federal government, may act with respect to the same matter. The so-called concept of concurrent jurisdiction refers to the simultaneous allocation of powers in a given area to the federal government and the state or municipal governments. Moreover, concurrent jurisdiction not only encompasses the notion that the different levels of government are charged with joint responsibilities; it also signifies that they *must* participate in a coordinated manner in the discharge of said responsibilities, as well as incorporate civic participation to achieve their ends. In certain cases, the Constitution provides for concurrent jurisdiction that, in relation to environmental protection and the preservation and restoration of ecological balance, is enacted by CPEUM Articles 73 section XXIX-G and 124.62
- 65. The Congress of the Union is responsible for determining the form and terms for the participation of the spheres of government through a general law. The LGEEPA is a regulatory law of the Constitution, 63 which establishes, in Articles 4, 5, 7, and 8, the order of distribution of powers by which the federation, the states, and the municipalities exercise their powers in matters of preservation and restoration of the ecological balance and environmental protection. 64
- 66. The concurrence of powers between the federal government, the states, and the municipalities, with respect to environmental impact assessment, is found in LGEEPA Articles 5: section X, 7: section XVI, and 8: section XIV. In addition, the LGEEPA establishes the gradual and selective transfer of powers from the federal government to the states in Articles 11 and 12.65
- 67. In this regard, the Supreme Court determined that a "general law" must have "a constitutional mandate that orders the distribution of jurisdiction and that the law issued by the Congress of the Union effectively carries out a distributive exercise, based on the constitutional objective pursued." 66
- 4.1.3 Agreement on coordination and administrative collaboration
  - 68. In its response, Mexico points out that, due to the extension of the complex and the dimensions of the various components of the City Park Project in its first phase, IEE-Guanajuato was the "competent authority to know" about the project's activities with the authority to assess its environmental impact and issue the corresponding environmental impact authorization, in accordance with REIA-Guanajuato Article 10 paragraph XVIII, which states those projects or activities that "by reason of their magnitude generate significant, residual, synergistic or cumulative impacts to the environment and that are not expressly reserved to the federation" <sup>67</sup> require an EIS submitted before the IEE-Guanajuato.
  - 69. Now, under Article 8 of the REIA-Guanajuato, the IEE-Guanajuato is empowered to transfer its authority regarding EIA to municipalities with which it signs coordination agreements. In which case, "the exercise of the authority assumed by the municipalities must comply with the provisions of the [LGEEPA], the [LPPAEG], the [REI-Guanajuato] and other applicable legal provisions." For its part, the municipality of León is authorized under the terms of RGA-León Article 7 to sign such "coordination and administrative collaboration agreements." Pursuant to both provisions, on March 1, 2016, the IEE-Guanajuato and the municipality of León entered into an administrative coordination agreement (Coordination Agreement) on the transfer of environmental responsibilities that enabled the city to assume environmental impact assessment powers vested in IEE-Guanajuato.<sup>68</sup>
  - 70. The purpose of this agreement was to establish the bases, criteria, conditions, and mechanisms that the municipal government must observe and implement to assume the environmental impact assessment powers that were granted to IEE-Guanajuato in LPPAEG Article 8 paragraph I.

- 71. The Coordination Agreement entered into force on 1 March 2016 and terminated on 5 October 2018.<sup>69</sup> It was in force when the City Park Project's environmental impact approval was issued on 15 November 2017.
- 72. In accordance with the Coordination Agreement, IEE-Guanajuato transferred to the City of León the power to assess the environmental impact and risks that may arise from public or private sector projects and activities, which are not under exclusive federal jurisdiction, as well as to issue the appropriate approvals.<sup>70</sup>
- 73. The municipal government undertook to assume the DGGA responsibilities transferred to it through the Coordination Agreement and to enforce state environmental law, as well as certain other instruments under state purview. Among the notable obligations assumed by the City of León were the following:
  - Deliver to IEE-Guanajuato, within the first 10 working days of each month, over the term of the agreement, a report written and signed by the compliance officer, containing a record of the administrative acts issued and the procedures concluded or pending, an account of the activities completed and single copies of the administrative acts issued;
  - Observe the soil uses stipulated in the Municipal Environment, Urban Development and Zoning
    Plan in the administrative acts issued, in accordance with Guanajuato's state and municipal land use
    code and the state planning act;
  - Transfer to IEE-Guanajuato those matters which by their nature and characteristics require its direct intervention and forward the documentation necessary for the issuance of the relevant administrative act(s);
- 74. Under the terms of the Coordination Agreement, IEE-Guanajuato reserved the right to directly exercise, at any time, the environmental powers transferred under the agreement, whether in general or in relation to specific cases.
- 75. The Coordination Agreement was an instrument that sufficed to encompass the powers transferred to the municipal authorities even the environmental impact assessment of projects described in REIA-Guanajuato Article 10 paragraph XVIII and the City Park Project was subject to said provision due to the characteristics and nature of its work.<sup>71</sup>
- 76. In accordance with the powers conferred on the city government through the agreement, the DGGA was authorized to implement the EIA procedure pursuant to state—but not municipal—regulations, in accordance with RGA-León Article 87 paragraph I and the obligations assumed<sup>72</sup> by the city in the agreement.<sup>73</sup>
- 77. The Secretariat found nothing in the documentary record demonstrating that the developer of the City Park Project has gone before the corresponding state authority to determine, in accordance with state regulations, whether its project was subject to environmental impact assessment under state jurisdiction.<sup>74</sup>
- 4.1.4 Municipal environment, urban development and zoning plan of León, Guanajuato
  - 78. In the reasoning supporting Council Resolution 21-05, the CEC Council observed "that it has not been demonstrated that the City Park Project is included among the activities contained within the Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de Ecología, Desarrollo Urbano y de Ordenamiento Territorial*) of León, Guanajuato." ["PMDUOET"]<sup>75</sup>

- 79. LPPAEG Article 44 establishes that "The municipal authority shall issue environmental impact authorizations in the following cases: [...] II. In those cases established by municipal environmental bylaws."
- 80. RGA-León Article 87 paragraph II lists the projects or activities which require an evaluation process and municipal approval of the EIA,<sup>76</sup> such as: hotels, motels or hostels with 20 or more rooms;<sup>77</sup> movie theaters;<sup>78</sup> office buildings or complexes, cafeterias, self-service or department stores;<sup>79</sup> cafeterias, restaurants or unlicensed beverage or food retail outlets, including department or self-service stores, grocery or convenience stores, miscellaneous retail outlets, micro retailers and pet shops.<sup>80</sup>
- 81. The paragraph cited above encompasses "any commercial or services establishment, whether public or private sector, distinct from those mentioned in the preceding subparagraphs, with a total floor space equal to or greater than one thousand six hundred square meters or which requires at least 80 parking spaces" as well as "any other projects or activities located in one of the city's neighborhoods, and which may cause some significant, synergistic or cumulative environmental impacts, in accordance with the corresponding legal provisions." Finally, the provision covers "any other project that includes any of the work or activities mentioned in the preceding subparagraphs." 83
- 82. Although the PMDUOET neither identifies nor lists the City Park Project or proposed projects in the City of León, it identifies the section of José María Morelos Blvd adjacent to the City Park Project as a high intensity services corridor (S3) and classifies the premises of the City Park Project as a medium intensity services area (S2), as may be seen in Figure 10. To the north of this roadway is the Metropolitan Park (ME) and an ecological conservation (CE) zone, surrounded mainly by residential (H) and urban consolidation zones (ZCU). To the south of the roadway, Los Cárcamos Park (PU) is surrounded by medium intensity services areas (S2), including those corresponding to the City Park Project site, and mainly medium density residential uses (H4).<sup>84</sup>
- 83. In the latest version of the PMDUOET, land use zoning remains unchanged with the exception of the ecological reserve that was north of the City Park Project site. It is now considered a ZCU and H1 area of urban consolidation, the same as the area to the southeast of Los Cárcamos Park, which was formerly divided into I2, H7, and PM type land uses.<sup>85</sup>
- 84. Urban consolidation areas, including industrial zones, tend to increase in terms of population density and the land use coefficient of properties located in population centers. This encourages the development of empty spaces, vacant lots and under-utilized plots, as well as the efficient use of public infrastructure, green areas and the existing urban equipment.<sup>86</sup>

## 4.2 Regarding the integration of the environmental impact assessment file and the public consultation procedure with reference to RGA-León Articles 104, 105 and 120

#### 4.2.1 Introduction

85. The Submitter asserts that the authorities of the City of León failed to enforce provisions intended to ensure the proper integration of the environmental impact file. Furthermore, the Submitter points out that the consultation process was not implemented according to the terms established by environmental law. Regarding the first point, and more specifically regarding the documentation required to integrate the corresponding file, as part of the EIA procedure that the municipal authority should have followed, the Secretariat examined two provisions cited by the Submitter: RGA-León Articles 104 and 105.88

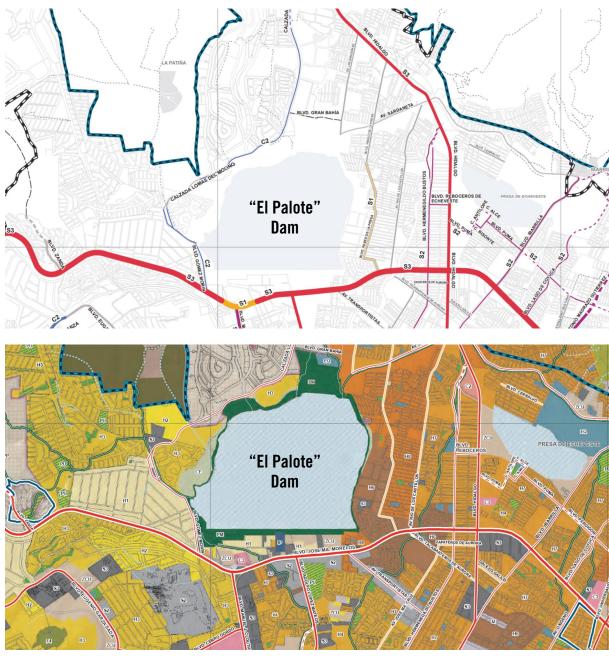


Figure 10. Land uses in the corridors and areas in the vicinity of the City Park Project

Source: Implan (2020), Programa Municipal de Desarrollo Urbano y Ordenamiento Ecológico y Territorial de León, updated on 2020, Instituto Municipal de Planeación, Ayuntamiento de León 2018-2021, at. 227-231, available at: <a href="https://bit.ly/3DLfQsL">https://bit.ly/3DLfQsL</a>> and <a href="https://bit.ly/3LEtD6D>">https://bit.ly/3LEtD6D></a>.

- 86. Concerning the second point, the Submitter also asserts that, in accordance with RGA-León Article 120, the DGGA should have made publicly known information on the City Park Project by publishing the list of environmental impact statements submitted for assessment, along with the corresponding project summaries, in a large circulation periodical.<sup>89</sup> The Secretariat also considered this provision.
- 87. On the other hand, the project file lacked the following information in accordance with the provisions of RGA-León Article 105 paragraphs VI, VII, X, XI, and XII:<sup>90</sup>
  - minutes of the public information meeting, as well as any comments and observations that may have been made:
  - changes made to the project, if any;
  - documentation of any guarantees given;
  - the following notices: commencement of the site preparation phase and completion of the construction phase; and
  - reports submitted by the technical services provider in charge of preparing the EIS.
- 88. Moreover, during the environmental impact assessment procedure, the authorities must inform the public of projects that may cause ecological imbalance or exceed the limits and conditions established in the applicable law. Likewise, the list of environmental impact requests must be published by means that allow interested parties to participate in the evaluation process.<sup>91</sup>
- 89. Following Mexico's response, the Secretariat recommended the preparation of a factual record on the alleged failure of the environmental authorities of the City of León, Guanajuato to effectively enforce RGA-León Articles 104, 105 and 120 in relation to the EIA procedure related to the City Park Project.<sup>92</sup>
- 90. The Council concurred with the Secretariat's recommendation on the preparation of a factual record regarding the enforcement of RGA-León Articles 104, 105, and 120 in view of the fact that it has not been demonstrated that the documents required, under Article 105 paragraphs VI, VII, X, XI and XII, were incorporated into the EIA procedure file. Also, since this would make it possible to clarify "compliance with the provisions set forth in [said ordinance] regarding both the right to public consultation and community participation."
- 91. RGA-León Articles 104, 105 and 120 establish, respectively: i) the accompanying requirements when submitting a work or activity for environmental impact assessment (Article 104); ii) the documents required when integrating an environmental impact assessment file (Article 105); and iii) the municipal authority charged with integrating and publishing a list, which must be periodically updated, of the environmental impact statements submitted for environmental impact assessment (Article 120).
- 92. It should be noted that, in its instructions to the Secretariat on the preparation of the factual record, the Council excluded Articles 31: second paragraph of the LPPAEG and 19, 20, 21, 25 and 27 of the REIA-Guanajuato (related to the modality of the environmental impact statement of the project) that the Secretariat had recommended to consider, as explained in the reasoning accompanying Council Resolution 21-05, "the resolution of approval of the EIA does refer to the modality [applied] (in accordance with Article 31 of the LPPAEG)" and also given that, "although Articles 19, 20 and 21 of the REIA-Guanajuato regulate the subcategories A, B or C applicable to the general modality [assigned to the City Park project], there is no legal obligation to indicate or determine in the [AIA] the subcategory corresponding to the work or activity in question," in addition to the fact that the modalities regulated by Articles 25 and 27 of the same regulation are not applicable in the case of the City Park project. 95

#### 4.2.2 Actions prior to the EIA procedure

- 93. In practice, when undertaking a construction project or activity, a screening study is done to determine whether an environmental impact study is necessary. Subsequently —or concurrently— a scoping study is done to identify the specific issues and impacts to be addressed by the environmental impact study. In general, there are two different approaches to determining whether an environmental impact study is required:
  - a. an approach that categorizes the need based on project types or sizes; and b. a preliminary study.
- 94. In the first approach, one identifies exclusions, i.e., categories exempted from the EIA process. With the second approach, a preliminary study is done. Then, depending on the findings, the authority either proceeds with an environmental impact study or argues that it is unnecessary.<sup>96</sup>
- 95. In the matter at hand, the project developer asked Conagua to confirm whether the body of water in Los Cárcamos Park constituted a national asset under federal jurisdiction. The object of this information request was to determine whether environmental impact assessment of the City Park Project was under federal jurisdiction, at least in relation to the waterbody, which was ultimately ruled out.
- 96. In this regard, Conagua explained that it has not found documentation that proves that the Los Cárcamos Park lands are federal property and stated that it "considers that [such lands] are not assets under the responsibility of this [agency]." <sup>97</sup>
- 97. The body of water in Los Cárcamos Park is neither located in a protected natural area or a protected wetland, nor is it listed under *The Ramsar Convention on Wetlands of International Importance*, *Especially as Waterfowl Habitat*, (the "Ramsar Convention").
- 98. In contrast with Metropolitan Park, where the El Palote Dam is located, the body of water in Los Cárcamos Park is not identified as a wetland in the official information sources consulted by the Secretariat. As attests its absence in Figure 11, which is taken from Conagua's National Wetlands Inventory (*Inventario Nacional de Humedales*).98



Figure 11. Wetlands in the Project's Vicinity Registered in the National Wetlands Inventory

 $Source: GeoVisor\ of\ National\ Wetlands\ Inventory< https://bit.ly/3AhyB5c>.$ 

- 99. On 31 March 2017, the project developer filed a modality assignment application with the DGGA, in relation to the City Park Project's EIA. The applicant observed that he held a land use permit for high intensity commercial and services uses, as well as for free density residential use. 99 The applicant also informed the DGGA that the project site was adjacent to Los Cárcamos Park and enclosed project maps and drawings.
- 100. On 12 April 2017, the DGGA assigned a "general" modality to the EIS for the City Park project.100
- 101. In its modality assignment decision, the municipal authority did not cite the Coordination Agreement between the City and IEE-Guanajuato. <sup>101</sup> Moreover, it made no mention of the Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de Desarrollo Urbano y de Ordenamiento Ecológico y Territorial de León*—PMDUOET) <sup>102</sup> nor of the corresponding Local Environmental Management Unit (*Unidad de Gestión Ambiental Territorial*—UGAT), as determined by the project's location.
- 102. At the time of formulating the request for environmental impact assessment of the City Park project, it was foreseeable that the project would have—due to its nature, location, dimensions, extent, and characteristics—environmental impacts that could go beyond the site's boundaries. <sup>103</sup> Therefore, the modality that could be assigned was the "General Modality B," since the environmental impacts that the project would generate could be severe and synergistic, affecting the natural flow of groundwater, a decrease in the aquifer recharge, the movement of wildlife, the loss of habitat and refuge for smaller wildlife, the relocation of wildlife and the loss of landscape continuity. <sup>104</sup>
- 4.2.3 Environmental impact assessment procedure: the applicable requirements
  - 103. As previously mentioned, for projects under the jurisdiction of the City of León for the environmental impact assessment procedure are subject to RGA-León Articles 104, 105, and 120. RGA-León also establishes that an environmental impact approval must be obtained prior to any construction permit for buildings requiring construction activities. 105
  - 104. On 16 August 2017, the developer filed an environmental impact approval application (including annexes) with the DGGA. In the course of its environmental impact assessment, the DGGA determined that the following documents were submitted in accordance with RGA-León Article 104<sup>106</sup>:
    - a. Certified proof of ownership or possession of the premises via notarized deed number 67095 of 9 February 2016, executed in the presence of notary public number 102 of the Federal District (Article 104 paragraph I);
    - b. DGDU land use permit for the project site, folio number 217 (Article 104 paragraph II);
    - c. Electronic copy of the EIS, in the applicable modality (Article 104 paragraph III);
    - d. The project summary, in accordance with RGA Article 121, and a digital copy thereof (Article 104 paragraph IV), as of August 2017:
      - i. Complete set of floor plans, including for the entire site, the underground levels, the ground floor, levels 1 to 4, a typical floor, the roofs, general elevations, residential areas, hotel and office buildings, and general and partial cross-sections
      - ii. Installation drawings for the sanitation, rainwater management and hydraulics systems
      - iii. Location sketches
    - e. Single copies of permits, licenses, approvals, and concessions obtained in the past (Article 104 paragraph IV), including:

- i. Proof of feasibility, in compliance with the Municipal Environment, Urban Development and Zoning Plan of the City of León;
- ii. Road section permit no. 23-20143 from the Sub-divisions and Urban Structure Department (*Dirección de fraccionamientos y estructura urbana*)
- iii. Irrevocable management trust agreement
- iv. Notarial deeds certifying the relevant powers of attorney.
- v. Feasibility of the drinking water services and sewage system of the City of León.
- vi. Document no. BOO.910.04.1/000565, issued by the Guanajuato Local Office, Technical Division (*Dirección Local Guanajuato, Subdirección Técnica*), in Celaya, Guanajuato, and dated 16 December 2016, which contains information corroborating that the land in Los Cárcamos Park is not a national asset under Conagua jurisdiction.
- 105. Regarding the preparation of the EIS file no. MIA-MG-506-2017, as prescribed under RGA-León Article 105, the Secretariat observed that this file consisted of the following documents:

Table 2. Documents to Include in the EIA Process

| Land use permit  | Deadline extension for decision on the environmental impact assessment                            |
|--|---|
| Feasibility documentation  | Technical annexes   |
| Public consultation  | Field and laboratory studies  |
| Assignment of modality   | Geotechnical model  |
| Authenticated copies of documents  | Foundations analysis  |
| Legal documents related to the property                                    | Various maps and plans  |
| Tree management  | Technical studies   |
| Project manager  | Bioclimatic criteria  |
| Project plans  | Soil mechanics  |
| Payment of fees  | Foundations and seismicity  |
| Conagua document on the legal status of the land in Los Cárcamos Park      | Comprehensive study on the conservation of Los Cárcamos Park                                      |
| Public summary of the project  | Bird study  |
| EIS for the "City Park" project, phase 1                                   | Priority Species Management plan for 4 species listed in NOM-059-SEMARNAT-2010                    |
| Field inspection minutes   | Geohydrological study   |
| Complementary information  | Decision No. D.U. 22-6671 regarding file MIA-MG-506-2017 on general modality environmental impact |
| Technical opinions (Public Works<br>Department, León College of Engineers) |   |

- 106. After an exhaustive review of DGGA's files, the Secretariat could not identify the following documents in the file no. MIA-MG-506-2017, the environmental impact assessment procedure file, that were required under RGA- León Article 105:
  - 1) The minutes of the public information meeting, where applicable, as well as whatever comments and observations, in writing, may have been made by meeting attendees;
  - 2) The changes made to the project, if any;
  - 3) Documentation of any guarantees given;
  - 4) The notices of commencement of the site preparation phase and completion of the construction phase; and
  - 5) The reports submitted by both the holder of the approval and the supervisor of environmental technical services.<sup>107</sup>
- 107. Regarding information on any changes to the project, various documents were identified which refer to project modification notices, as well as the DGGA's corresponding approvals. These notices concerned the expansion of the switchyards<sup>108</sup> and updating the environmental impact approval following adjustments to the internal arrangement of floor space and an increase in the number of levels and private units within the authorized area.<sup>109</sup>
- 108. Regarding information on the contracting of instruments to guarantee compliance with the conditions stipulated in the approval of the project's EIS, established in accordance with RGA-León Articles 130: section II and 131,<sup>110</sup> the City Park Project environmental approval does not include compliance guarantees.
- 109. Relevant documentation was identified regarding the notices on commencement of the site preparation. On 8 February and 11 April 2018, the developer of the City Park Project informed the DGGA of its intention to begin transplanting the existing trees on José María Morelos Blvd and requested the DGGA's approval. This prior notification indicated the developer's intention to proceed with developing the project and connections with the storm drainage system. This notification constituted, in effect, a notice of commencement of the site preparation phase. The DGGA issued its approval on 16 April 2018.<sup>111</sup>
- 110. Regarding the reports submitted by the holder of the approval or by the supervisor of environmental technical services, several compliance reports were identified, concerning the conditions stipulated in the approval. Examples include the reports on flora which examined the possible impacts on vegetation in Los Cárcamos Park, 112 the reports on the habitat conservation status of four priority species, 113 the Los Cárcamos Park water level monitoring reports, 114 as well as various documents submitted by the environmental supervisor of the City Park Project on compliance with the conditions posed in the environmental approval.
- 111. Returning to the EIA procedure, after receiving a request for the assignment of an EIS modality for a project to be carried out in the vicinity, with possible serious environmental repercussions, the municipal authority of León usually publishes "in the galleries" (i.e., on the walls of the DGGA's offices), a notice informing the public of the project in question. Subsequently, once the corresponding EIS has been submitted, the DGGA adds it to its public list of environmental impact statements it has received, and which are subject to evaluation.
- 112. In the case of City Park, on 7 April 2017, one week after receiving the request for assignment of modality of the corresponding EIS, the DGGA published an official notice addressed to the general public, dated April 5, on the walls of its offices, by which it notified the existence of the project and made public the related information in compliance with RGA-León Articles 118: paragraph IV, 122, and 123. Specifically,

- it published an extract of the project with the purpose of issuing "the proposals and considerations of a technical nature formulated by the interested parties" within the framework of an informative public meeting. The Secretariat found no information confirming whether the public consultation did in fact take place and whether the DGGA obtained any opinions or information requests on the EIS within the deadlines established by the law.
- 113. After receiving the EIS that the City Park Project developer submitted, dated 16 August 2017, the DGGA included this document in its public list of environmental impact statements received for its assessment, as may be seen in Figure 14.
- 114. Now, in relation to the minutes of the public information meeting, the list of environmental impact approval applications must be published in media outlets so that interested parties may participate in the project evaluation process.<sup>116</sup>
- 115. The importance of promoting and guaranteeing public participation in the EIA procedure through public meetings or consultations, and compliance with relevant municipal provisions has been highlighted. 117 In this regard, the RGA-León provides for the possibility of holding a public information meeting in the case of any project that may have a serious environmental impact (i.e., that causes or may cause a significant alteration of environmental conditions). 118 Article 123 of the municipal regulations establishes that this type of meeting may be held at the request of: "whoever has a legitimate interest, under the LGEEPA, [provided they request it] in writing and within five working days following the publication of the project in the list [of environmental impact manifestations] referred to in [Article 120]." Further:

Figure 12. The RGA-León 120 Article Weekly List Published in the Galleries

| ALD. | MOD   | CONTROL | NOMBRE DE PROVECTO   | CALLE                        | NUMERO | COLONIA                       | PROMOVENTE                                    | FECHA DE RECE    |
|------|-------|---------|--|------------------------------|--------|-------------------------------|---|------------------|
|      | 11100 |         | ADECUACION DE LA RUTA DEL PEATON SAN JUAN DE   | IGNACIO ALTAMIRANO - VICENTE |        |                               |   | THE STATE        |
| 499  | MG    | 22-6662 | DIOS   | GUERRERO                     |        | CENTRO                        | OBRA PUBLICA                                  | 14/08/201        |
| 500  | ME    | 22-6664 | UBV VILLAS DE SAN JUAN II SEC. 2.0   | VILIAS DE SAN JUAN           |        | VILLAS DE SAN JUAN            | INSTITUTO MUNICIPAL DE<br>VIVIENDA DE LEON    | 14/08/201        |
| 501  | CA    | 22-6665 | PAVIMENTACION  | MELANCOLIA                   |        | SAN PEDRO DE LOS<br>HERNANDEZ | DERA PUBLICA                                  | 14/08/201        |
| 502  | CA    | 22-6666 | BODEGA   | SAN JUAN BOSCO               | 3146   |                               | VIANEY MENDOZA PEREZ                          | 15/08/201        |
| 508  | CA    | 22-6667 | BODEGA   | INDUSTRIAL JEREZ             | 401-1  | FRACCIONES DE SANTA<br>JULIA  | VICTORIANO TELLEZ MOEDAN                      | 15/08/201        |
| 504  | CA    | 22-6669 | TALLER MECANICO Y AUTOLAVADO   | LA LUZ                       | 1714   | LA LUZ                        |   | 15/08/201        |
| 506  |       | 12.6630 | LOCALES COMERCIALES Y CASA MARITACION  | BALCON DE LAS ABEIAS         | 125    | BALLOOMES DE LA JOYA          | RITA MRAMILIO                                 | 15/08/201        |
| 506  | MG    | 22-6671 | HOTEL, HABITACIONAL, COMERCIAL Y SERVICIOS   | JOSE MA. MORELOS             | 1555   | GRANIAS EL ROSARIO            | CIBANCO S.A. LB.M.<br>FIDEICOM SO MRP LEON    | 16/08/201        |
|      |       |         | INSTITUTE OF THE PROPERTY OF T |                              |        | DOMEST DET                    |   | THE RESIDENCE IN |
| 507  | CA    | 22-6672 | AL PUBLICO   | UNIVERSIDAD                  | 702    | REFUGIO                       | LIBRADO PADILLA PADILLA                       | 16/08/201        |
| 508  | CA    | 22-6673 | TRES DEPARTAMENTOS   | MURALISTA ASIATICO           | 201    | REAL DE LOS MURALES           |   | 17/08/2013       |
| 509  | MG    | 22-6674 | BODEGA DE ABARROTES Y LICORES  | BLVD. AEROPUERTO             | 2910   | SAN CARLOS                    | DESARROLLO INMOBILIARIO<br>MERZA S.A. DE C.V. | 17/08/201        |
| 510  | CA    | 22-6675 | LOCAL COMERCIAL PARA FENTA   | BOSQUES BRASILEÑOS           | 201    | PRADERA                       | IOSEFINA AVILA JUAREZ                         | 17/08/201        |
| 511  | CA    | 22-6676 | LOCAL COMERCIAL PARA PENTA CON BODESA  | MARIANO ESCOBEDO             | 4708   | JARDINES DE JEREZ             | JORGE FEDERICO VILLALOBOS<br>OÑATE            | 17/08/201        |
| 512  | CA    | 22-6679 | LOCAL Y ALMACEN  | JOSE MA. CRUZ                | 618    | REAL DEL BOSQUE II            | FEDERICO GONZALEZ<br>ALVAREZ                  | 17/08/2017       |
| 513  | CA    | 22-6680 | 3 CASAS HABITACION   | PRIVANZA                     | 116    | PRIVANZA                      | INMOBILIARIA TESTONI S.A.<br>DE C.V.          | 17/08/201        |
| 514  | CA    | 22-6681 | ALMACEN, DISTRIBUCION Y VENTA DE ABARROTES   | AMATEA                       | 102    | LA JOYA                       | LUIS FEUPE SANCHEZ                            | 17/08/201        |
| 515  | CA    | 22-6682 | BODEGA DE ARTICULOS PERSONALES Y UN<br>DEPARTAMENTO  | GUATEMALA                    | 605    | OBREGON                       | SALVADOR AGUILERA<br>MARTIN DEL CAMPO         | 18/06/201        |
| 516  | CA    | 22 6683 | FABRICA DE QUIMICOS Y POLJURETANO PARA LA<br>INCUSTRIA DEL CALZADO   | SIGMA                        | 7.00   | INDUSTRIAL DELTA              | DESARROLIO Y ACABADOS<br>EN POLURETANO        | 18/08/201        |
| 517  | CA    | 22-6684 | TRES LOCALES EN RENTA  | PASEO DE LA FRAGUA           | 625    | PASEOS DE LA FRAGUA           | PATRICIA ARROYO VAZQUEZ                       | 18/08/201        |

Source: Extract of the City Park Project for public consultation (August 2017), included in the annexes to submission SEM-19-002 (City Park Project).

- II. In the event that the request [to hold a public meeting] is granted, within five business days following the filing thereof, the DGGA must notify the applicant that [it] must publish, at its own expense and within five business days following [the] notification, [a] summons to the public information meeting, in some written means of communication with circulation in the municipality, specifying the day, time and place within the municipal area where it will take place.<sup>120</sup>
- 116. As stated previously, no information was found indicating that a public consultation meeting had been held in relation to the City Park project.
- 4.2.4 Environmental impact approval of the City Park Project
  - 117. On 15 November 2017 the DGGA granted an environmental impact approval to the City Park Project. <sup>121</sup>
    This approval was based on LGEEPA Article 8 paragraphs IV, VI and XII. These provisions establish the jurisdiction of municipal governments over the enforcement of legal provisions on the prevention and control of environmental effects caused by solid and industrial waste, <sup>122</sup> pollution from fixed sources that function as commercial or services establishments <sup>123</sup> and monitoring of compliance with Official Mexican Standards. <sup>124</sup>
  - 118. The DGGA also based its approval on Article 8 paragraph XI of the Code of Procedure and Administrative Justice for the state and municipalities of Guanajuato (*Código de Procedimiento y Justicia Administrativa para el estado y los municipios de Guanajuato*), which establishes the power to issue express approvals for applications. <sup>125</sup> In its approval, the DGGA also cited provisions from state law, namely LPPAEG Articles 7 and 44 paragraph II, which establish the powers of municipal governments in relation to environmental issues. <sup>126</sup> Moreover, said provisions identify the projects and activities subject to environmental impact approval by the municipal authorities of Guanajuato, <sup>127</sup> such as projects and activities identified in municipal environmental bylaws. <sup>128</sup>
  - 119. In sum, the DGGA approval indicated that City Park Project would be located in PMDUOET Local Environmental Management Unit (UGAT) 13 (from 2015), 129 with a mainly "urban" function and a strategic objective to "consolidate urban development compatible with the environment, avoiding urban expansion and the degradation of areas of natural value with environmental services. 130 The DGGA, however, did not clarify whether it foresaw the project's compatibility with the modalities, restriction and application conditions based on the environmental criteria and land use planning defined for UGAT 13 and the neighboring Metropolitan Park, in accordance with the strategic objective of UGAT 13.
  - 120. Finally, in its environmental impact approval, the DGGA cited RGA-León Article 5 paragraph XVI, which concern its authority to assess the environmental impact of projects and activities under municipal jurisdiction, in accordance with LGEEPA and the LPPAEG, their regulations, and other legal provisions or collaboration agreements. However, the DGGA did not cite the provisions from the Coordination Agreement signed between IEE-Guanajuato and the León City Council in 2016 (see section 4.1.3), an instrument which could serve as a basis for the DGGA's involvement.
  - 121. The information presented in the processing of submission SEM-19-002 should be considered in relation to IEE-Guanajuato's jurisdiction to address all those projects or activities which, due to their magnitude, generate significant, residual, synergistic or cumulative environmental impacts and are not expressly reserved to the federal government.<sup>132</sup>

# 5. Ongoing Commitment to Transparency

- 122. Factual records provide detailed information regarding the assertions of the public on failures to effectively enforce environmental law in North America, information which may be helpful to the Submitters, the Parties to the NAAEC and other sectors of society with an interest in the matters examined. This factual record does not present conclusions regarding the alleged failures in effective enforcement of environmental law, which—according the Submitter—were committed by Mexico. Nor does it present conclusions regarding the effectiveness of the Party's enforcement measures.
- 123. In accordance with NAAEC Article 15(3), this factual record has been prepared "without prejudice to any further steps that may be taken" in relation to submission SEM19-002 (*City Park Project*).
- 124. In 2014, the CEC Council issued instructions to the effect that the Parties to the NAAEC would provide updates on actions taken in connection with submissions concluded in the past year (including those for which a factual record was prepared).<sup>133</sup>
  - This year, we implemented a new reporting approach for submissions on enforcement matters (SEM) as part of our continued commitment to transparency and to the SEM modernization process. Following a proposal by the Joint Public Advisory Committee, each country provided an update on actions taken in connection with submissions concluded in the past year.
- 125. With the goal of facilitating any follow-up actions, which the public or the competent authorities in Mexico may wish to carry out, this factual record provides relevant information on the matters raised in the submission and authorized as issues warranting examination in this factual record in Council Resolution 21-05.



: Acción Colectiva Socioambiental, A.C

#### **Endnotes**

- North American Agreement on Environmental Cooperation, published in Mexico's official gazette, Diario Oficial de la Federación (DOF) on 21 December 1993.
- 2. For detailed information on the various stages of the submissions on enforcement matters process, as well as on the Secretariat's determinations and factual records, please consult the CEC website <a href="http://www.cec.org/submissions-on-enforcement/">http://www.cec.org/submissions-on-enforcement/</a>>.
- 3. SEM-19-002 (City Park Project), NAAEC Article 14(1) Submission (16 April 2019) <a href="https://bit.ly/3BHntOr">https://bit.ly/3BHntOr</a> [Submission].
- 4. SEM-19-002 (City Park Project), NAAEC Article 14(1)(2) Determination (5 July 2019) <a href="https://bit.ly/3rkNbUh">https://bit.ly/3rkNbUh</a> [Determination 14(1)(2)].
- 5. SEM-19-002 (City Park Project), Mexico's Article 14(3) Response (25 March 2020) <a href="https://bit.ly/3DS5Zl0">https://bit.ly/3DS5Zl0</a> [Response].
- 6. SEM-19-002 (City Park Project), NAAEC Article 15(1) Notification (10 August 2020) <a href="https://bit.ly/3DLCph9">https://bit.ly/3DLCph9</a> [Notification].
- 7. Id., §60.
- 8. "Agreements by file", Federal Judiciary Council <www.dgej.cjf.gob.mx>.
- 9. SEM-19-002 (City Park Project), Council Resolution 21-05 (19 November 2021) <a href="https://bit.ly/3DOaKvP">https://bit.ly/3DOaKvP</a> [Council Resolution].
- 10. Federal Judicial Council (Consejo de la Judicatura Federal—CJF) "Agreements by case" <www.dgej.cjf.gob.mx>.
- 11 Id
- 12. Reasons for Council instructions Regarding Submission SEM-19-002 (City Park Project) <a href="https://bit.ly/3dGJdlC">https://bit.ly/3dGJdlC</a> [Council Explanation] at 2.
- 13. Id
- Mexican Environmental Protection Act (Ley General del Equilibrio Ecológico y la Protección al Ambiental—LGEEPA), published in DOF on 28 January 1988.
- 15. LGEEPA, Chapter 2 "Distribution of Jurisdictions and Coordination."
- 16. Id., Article 5 paragraph X.
- 17. Id., Article 7 paragraph XVI.
- 18. Id., Article 8 paragraph XIV.
- 19. Thesis [J.]: P./J. 38/2011 (9th.), Mexican Federal Judicial Weekly and Gazette, Book I, October 2011, Volume 1, p. 288, reg. digital 160856.
- 20. Government of the State of Guanajuato, *Metropolitan Program for Urban Development and Territorial Ecological Planning of the Metropolitan Area of León, Part 2* at 17, Figure III-3 Road infrastructure in the León Metropolitan Area (2018) <a href="https://bit.ly/3C4ZhHd">https://bit.ly/3C4ZhHd</a>>.
- 21. SEM-19-002 (*City Park Project*) Mexico's Comments on the Draft Factual Record (9 December 2022), Annex: Ministry of the Environment and Land-Use Planning of the State of Guanajuato (*Secretaría de Medio Ambiente y Ordenamiento Territorial*), Document No. SMAOT-1109/2022, p. 4 (2 November 2022).
- 22. Government of the State of Guanajuato), Agreement for the León Metropolitan Zone Constitution, *Periódico Oficial del Gobierno del Estado de Guanajuato*, part 3 at 37-47 (23 May 2008) <a href="https://bit.ly/3QBZXYR">https://bit.ly/3QBZXYR</a> (viewed 25 March 2022).
- 23. Id. at 37.
- 24. State of Guanajuato Planning Act (*Instituto de Planeación, Estadística y Geografía*—Iplaneg), Chapter IV, *Periódico Oficial del Gobierno del estado de Guanajuato* (7 June 2013) <a href="https://bit.ly/3PgneyG">https://bit.ly/3PgneyG</a>>
- 25. Article 14, State of Guanajuato Planning Act Regulations, *Periódico Oficial del Gobierno del estado de Guanajuato* (17 August 2012) <a href="https://bit.ly/3BF9ys5">https://bit.ly/3BF9ys5</a>.
- 26. Iplaneg, Regional Programs of the State of Guanajuato. Vision 2018 Summary at 34 (2012) <a href="https://bit.ly/3p9sd9I">https://bit.ly/3p9sd9I</a> (viewed 22 March 2022).
- 27. A micro-watershed is defined as a smaller hydrographic unit whose boundaries may or may not correspond to administrative limits (e.g., a lot or municipality) and in which surface runoff flows into a common discharge point. See: Semarnat, Watersheds. Fundamentals and perspectives for their management and administration at 8-12 (2013).
- 28. Governmental Decree no. 174, Periódico Oficial del Gobierno del estado de Guanajuato (2000 19 September 2000 <a href="https://bit.ly/3CQhUQ3">https://bit.ly/3CQhUQ3</a>.
- 29. SEM-19-002 (*City Park Project*) Mexico's Comments on the Draft Factual Record (9 December 2022), Annex: Ministry of the Environment and Land-Use Planning of the State of Guanajuato (*Secretaría de Medio Ambiente y Ordenamiento Territorial*), Document No. SMAOT-1109/2022, p. 4 (2 November 2022).
- Neighborhood Association of Los Cárcamos Park, León, Guanajuato, draft bill on the rehabilitation of Los Cárcamos Park, Section 2 Background (1994).
- 31. Id
- 32. National Waters Act (*Ley de Aguas Nacionales*—LAN), Article 3 paragraph XXX:

  Transition zones between aquatic and terrestrial systems where temporary or permanent flooding occurs, whether subject to tidal influence or not, such as swamps, bogs and marshes, which are fringed by permanent or seasonal hydrophilic vegetation; areas where soil is predominantly water-saturated; and coastal areas or areas with permanently wet soil due to natural groundwater discharges;

- 33. National Water Commission (*Comisión Nacional del Agua*—CNA), document no. B00.7.05.670, Water Quality Management, Technical Subdirectorate General (19 August 2019).
- 34. Amparo Lawsuit No. 790/2019, filed before the Eleventh District Court in Guanajuato.
- 35. N. Hernández Laloth, "Conceptual model of the hydrodynamic functioning of the aquifer system of the Valle de León, Guanajuato," Thesis. Faculty of Engineering, UNAM at 89 (1991) <a href="https://bit.ly/3dTU63z">https://bit.ly/3dTU63z</a>>.
- 36. Léon Drinking Water and Sewage System (Sistema de Agua Potable y Alcantarillado de Léon—SAPAL) (2009), "The water in León An encounter with the future" at 47 <a href="https://bit.ly/3cu7IBH">https://bit.ly/3cu7IBH</a>>.
- 37. Conagua, 2011, Basic Engineering and Technical Standards Management, "El Palote Dam Descriptive Report," ID 1354 Municipality of León Guanajuato at 4.
- 38. Ministry of Communications and Transportation (Secretaría de Comunicaciones y Transportes—SCT) (2018), Geometric road design manual at 186. See also: A. C. Cuevas, and M. Cadengo (2020), Notes, no. 188, Mexican Transport Institute, "Official Classification of Highways in Mexico" <a href="https://bit.ly/3zNoFPj">https://bit.ly/3zNoFPj</a>.
- 39. SCT (2018), Geometric road design manual at 242.
- 40. Government of the State of Guanajuato (2016), León-Silao Metropolitan Axis Cost-Benefit Analysis at 47-50.
- 41. Submission at 4.
- 42. Id. at 5.
- 43. Id.
- 44. Compare Response at 14.
- 45. Id. at 15.
- 46. Id.
- 47. Id. at 21.
- 48. Id. at 24.
- 49. Id. at 25-26.
- 50. Council Resolution at 2.
- 51. Reason for Council Instructions at 2.
- 52. SEM-19-002 (*City Park Project*) Mexico's Comments on the Draft Factual Record (9 December 2022), Annex: Ministry of the Environment and Land-Use Planning of the State of Guanajuato (*Secretaría de Medio Ambiente y Ordenamiento Territorial*), Document No. SMAOT-1109/2022, p. 4 (2 November 2022).
- 53. *Id.* at p. 13.
- 54. Municipality of León, Document No. SHA/2044/2022 (7 November 2022), pp. 1-2.
- 55. Id
- 56. CPEUM, Article 124.
- 57. Id. at Article 73 paragraph XXIX-G.
- 58. Compare Thesis [J.]: P./J. 142/2001, Mexican Federal Judicial Weekly and Gazette, Volume XV, January 2002, p. 1042 reg. digital 187982.
- 59. José Barragán Barragán, "Concurrence of powers in environmental matters between the federation and the states," in: Lourdes Hernández Meza and María del Carmen Carmona Lara (coords.), Selected Topics in Environmental Law, National Autonomous University of Mexico (UNAM) and Federal Attorney's Office for Environmental Protection (Profepa), p. 3 (2006).
- 60. Marisol Anglés Hernández, Montserrat Rovalo Otero and Mariana Tejado Gallegos, Mexican Environmental Law Manual, Institute of Legal Research, National Autonomous University of Mexico, p. 40 (2021).
- 61. Lourdes Hernández Meza and Carmona Lara María del Carmen, supra at 3.
- 62. CPEUM, Article 73 paragraph XXIX-G. Compare Thesis [J.]: P./J. 142/2001, Mexican Federal Judicial Weekly and Gazette, Volume XV, January 2002, p. 1042 reg. digital 187982.
- 63. LGEEPA, Article 1:
  - This Act develops and enacts the provisions of the Political Constitution of the United Mexican States which bear on the preservation and restoration of ecological balance, as well as environmental protection on national territory and in areas where the nation exercises its sovereignty and jurisdiction...
- 64. *Compare* José Ma. Serna de la Garza (coord.) (2022) "Mexican Environmental Federalism," Current Perspectives of Mexican Federalism: Laws, Public Policies and Social Context, Institute of Legal Research, National Autonomous University of Mexico, Mexico, p. 341.
- 65. Julio Trujillo Segura (2011). The principle of environmental concurrence in Mexico, Institute of Legal Research, National Autonomous University of Mexico, Mexico, p. 16.

- 66. Supreme Court of Justice of the Nation, en banc, action of unconstitutionality 15/2017 and its consolidated actions 16/2017, 18/2017 and 19/2017, published in the Official Gazette of the Federation (DOF), second section, § 207 (25 April 2019).
- 67. REIA-Guanajuato, Article 10 paragraph XVIII.
- 68. State and Municipality of León Ecology Institute (*Instituto de Ecología del estado y Municipio de León*) (2016), Administrative Coordination Agreement for the Transfer of Environmental Powers [Coordination Agreement]. *See also* SMAOT, oficio núm. IEE/DAJ/DIAMIR/TRANSFERENCIA DE ATRIBUCIONES/LEÓN/063/2016, Secretaría de Medio Ambiente y Ordenamiento Territorial del estado de Guanajuato (1 March 2016).
- 69. Coordination Agreement, clause six.
- 70. LPPAEG Article 27 determines the projects and activities that require prior authorization in environmental matters by the Secretary of Environment and Territorial Planning of the state (formerly IEE-Guanajuato).
- 71. Compare Response at 24.
- 72. Coordination Agreement, clause one.
- 73. RGA-León, Article 87, on the projects or activities that require authorization of municipal environmental impact assessment:
  - Article 87: They require prior authorization from the DGGA [...].
  - I. [Any projects or activities] referred to in the corresponding agreements or accords, whose evaluation must be subject to the applicable federal or state legal provisions, which being reserved to the federation or the state of Guanajuato are decentralized in favor of the municipality.
- 74. REIA-Guanajuato Article 33 establishes that, prior to undertaking a construction project or activity, the party responsible for the project or activity shall request that IEE-Guanajuato determine whether an environmental impact assessment is required, and if so, it shall submit an environmental risk study.
- 75. Reason for Council Instructions at 2.
- 76. RGA-León, Article 87 paragraph II.
- 77. Id., Article 87 paragraph II, subparagraph D.
- 78. Id., Article 87 paragraph II, subparagraph E.
- 79. Id., Article 87 paragraph II, subparagraph F.
- 80. Id., Article 87 paragraph II, subparagraph H.
- 81. Id., Article 87 paragraph II, subparagraph L.
- 82. Id., Article 87 paragraph II, subparagraph N.
- 83. Id., Article 87 paragraph II, subparagraph O.
- 84. Municipal Planning Institute, *Land use and ecological planning for the Municipality of León*, León Municipal Government 2006-2009 at 219 and 231 <a href="https://bit.ly/3BO0loz">https://bit.ly/3BO0loz</a>>.
- 85. IMP, Presidencia Municipal de León, Guanajuato, Municipal Environment, Urban Development, and Zoning Plan (PMDUOET), Zoning of uses and functions plan of the City of de León, full version at 225, (February 2020).
- 86. Id. at 218
- 87. SEM-19-002 (City Park Project), NAAEC Article 15(1) Notification at § 46.
- 88. Id.
- 89. Id. at §48.
- 90. Id. at 47.
- 91. Compare Response at 36.
- 92. Notification at §52.
- 93. Council Explanation at 2.
- 94. Id.
- 95. Id.
- 96. L. W. Canter, Environmental Impact Assessment Manual, McGraw-Hill, Interamericana de España, S. A. U. 2nd edition at 24- 26 (1998).
- 97. CNA, document no. BOO.910.04.1/000565 (16 December 2016).
- 98. CNA, GeoVisor del Inventario Nacional de Humedales, mapa base de imágenes (2022) <a href="https://sigagis.conagua.gob.mx/humedales/">https://sigagis.conagua.gob.mx/humedales/</a> (viewed 12 April 2022).
- 99. Application letter, Mexico Retail Properties (31 March 2017).
- 100. DGGA, document no. DGGA-DRA-310-2017 (12 April 2017).
- 101. Coordination Agreement, Ministry of the Environment and Land-Use Planning of the State of Guanajuato, document no. IEE/DAJ/ DIAMIR/TRANSFERENCIA DE ATRIBUCIONES/LEÓN/063/2016 (1 March 2016).

- 102. Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de Desarrollo Urbano y de Ordenamiento Ecológico y Territorial de León*—PMDUOET), Official Journal of the Government of the State of Guanajuato (PO), year CII, tome CLIII, no. 166, part 4 (16 October 2015) <a href="https://bit.ly/3xXAfr7">https://bit.ly/3xXAfr7</a>>.
- 103. Compare Response at 32.
- 104. REI-Guanajuato Article 20 stipulates that the evaluation of the environmental impact statement, modality "General B" will proceed when dealing with projects or activities for which, "due to their nature, location, dimensions, extent and characteristics," environmental impacts are expected to affect "beyond the site's boundaries." See Response at 32.
- 105. RGA-León, Article 88
- 106. DGGA, Environmental Approval No. D.U. 22-6671 regarding file MIA-MG-506-2017, Directorate General of Environmental Management of the Municipality of León, Guanajuato (15 November 2017).
- 107. Response at 35
- 108. DGGA, document no. DGGA-DRA-153-2018, General Directorate of Environmental Management of the Municipality of León, Guanajuato (2018).
- 109. DGGA, document no. DGGA-DRA-587-2019 General Directorate of Environmental Management of the Municipality of León, Guanajuato (25 November 2019).
- 110. RGA-León Article 131 establishes that if a project is authorized "conditionally on the establishment of additional prevention, mitigation and compensation measures, the DGGA must indicate the terms, conditions, limitations and requirements that must be observed in the execution of the work or activity in question, as well as the consequences of non-compliance."
- 111. DGGA, document no. DGGA/458/18 General Directorate of Environmental Management of the Municipality of León, Guanajuato (16 April 2018).
- 112. Environment Consulting Group, Monthly vegetation monitoring of Los Cárcamos Park (2019).
- 113. Environment Consulting Group, Description of the habitat conservation status of four priority bird species *Anas platyrhynchos diazi*, *Zenaida asiatica*, *Z. macroura*. and *Amazona autumnalis* in the Bajío Guanajuato (2019).
- 114. Jores Top Topography y Work Management, Water Level Monitoring Report, Los Cárcamos Park (2019).
- 115. DGGA, Oficio DGGA-DRA-290-2017: "Public consultation," Directorate General of Environmental Management of the municipality of León, Guanajuato (April 5, 2017).
- 116. Response at 36.
- 117. Id. at 37.
- 118. RGA-León Article 123.
- 119. Id. at paragraph I.
- 120. Id. at paragraph II.
- 121. DGGA, Environmental Approval No. D.U. 22-6671 regarding file MIA-MG-506-2017, Directorate General of Environmental Management of the Municipality of León, Guanajuato (15 November 2017).
- 122. LGEEPA, Article 8 paragraph IV.
- 123. Id. at paragraph VI.
- 124. Id. at paragraph XII.
- 125. Code of Procedure and Administrative Justice for the state and municipalities of Guanajuato, Article 8 paragraph XI.
- 126. LPPAEG, Article 7.
- 127. Id., Article 44.
- 128. Id., Article 44 paragraph II.
- 129. PMDUOET, Municipal Program for Urban Development and Ecological and Territorial Planning of León (2015) <a href="https://bit.ly/3xXAfr7">https://bit.ly/3xXAfr7</a>.
- 130. Project of the Municipal Program for Urban Development and Ecological and Territorial Planning of León, Gto., annex 2: «Guidelines for Environmental Land Management Unit» (19 June 2015) <a href="https://bit.ly/3ClDwD1">https://bit.ly/3ClDwD1</a>>.
- 131. RGA-León, Article 5 paragraph XVI.
- 132. Compare Response at 24.
- 133. CEC, CEC Ministerial Statement 2014, Twenty-first Regular Session of the CEC Council, Yellowknife, Northwest Territories, Canada (17 July 2014) <a href="https://bit.ly/3nRp6m9">https://bit.ly/3nRp6m9</a>>.



# **APPENDIX 1**

# Council Resolution 21-05

DISTRIBUTION: General C/C.01/21/RES/05?final ORIGINAL: English

19 November 2021

#### **COUNCIL RESOLUTION: 21-05**

Instructions to the Secretariat of the Commission for Environmental Cooperation regarding submission SEM-19-002 (City Park Project), which asserts that the environmental authorities of the municipality of León, Guanajuato, failed to effectively enforce various provisions of the General Ecological Equilibrium and Environmental Protection Act (Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA), its environmental impact regulation (REIA), the Internal Regulation of the Ministry of Environment and Natural Resources (Secretaría de Medio Ambiente y Recursos Naturales), the Guanajuato State Environmental Protection and Preservation Act (Ley para la Protección y Preservación del Ambiente del Estado de Guanajuato—LPPAEG), the Environmental Impact Assessment Regulation to the LPPAEG (REIA-Guanajuato), the Environmental Management Bylaw of the municipality of León, Guanajuato (Reglamento para la Gestión Ambiental—RGA-León), and Mexican Official Standard NOM-059-SEMARNAT-2001 regarding approval of the "City Park" project, located in the municipality of León, Guanajuato.

#### 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;

NOTING that the United States-Mexico-Canada Trade Agreement (USMCA) entered into force on 1 July 2020 and now governs the submissions on enforcement matters process;

FURTHER NOTING that the Environmental Cooperation Agreement (ECA) among the Governments of Canada, the United Mexican States, and the United States of America entered into force on 1 July 2020 and superseded the NAAEC on that date;

RECOGNIZING that Article 2(4) of the ECA provides that any submission made pursuant to the NAAEC and not concluded as of entry into force of the ECA shall continue in accordance with the procedures established under Articles 14 and 15 of the NAAEC, unless the Council decides otherwise;

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;

ACKNOWLEDGING that factual records are an important way to increase public participation, transparency, and openness on issues related to the enforcement of environmental law in the Canada, Mexico and United States;

HAVING CONSIDERED the Submission SEM-19-002 filed on 16 April 2019 by "Acción Colectiva Socioambiental, A.C"., as well as the response provided by the Government of Mexico on 25 March 2020 (the "Response");

HAVING REVIEWED the 10 August 2020 Notification of the Secretariat recommending the development of a factual record with respect to the effective enforcement of LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV; LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 and REIA-Guanajuato Articles 8 and 9); LPPAEG Article 31 second paragraph; REIA-Guanajuato Articles 19, 20, 21, 25, and 27, and RGA-León Articles 104, 105, and 120;

AWARE that Mexico's response to the Secretariat's determination concluded that a factual record should be prepared with respect to the effective enforcement of LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 and REIA-Guanajuato Articles 8 and 9), in relation to the alleged lack of jurisdiction of the environmental authorities over environmental impact assessment and approval for the City Park Project, as well as RGA-León Articles 104, 105, and 120 with respect to the alleged failures to enforce the environmental law in relation to the documentation required during the EIA process and in relation to the public consultation and participation process; and

REAFFIRMING that the purpose of a factual record is to provide an objective presentation of the facts relevant to the assertion set forth in a submission and will generally outline the history of the environmental enforcement issue raised in the submission, the relevant legal obligation of the Party, and the actions of the Party in fulfilling those obligations;

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* in relation to the preparation of a factual record, which states that "The Council will provide its reason(s) for the instructions in writing and they will be posted on the [SEM] public registry;"

#### HEREBY UNANIMOUSLY DECIDES:

TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15(4) of the NAAEC, and consistent with Section 10.4 of the Guidelines, on the following provisions:

- LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV;
- LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (with reference to LPPAEG Article 44 paragraph II),
- and RGA-León Articles 104, 105, and 120 in relation to the assertions made in the submission;

TO DIRECT the Secretariat to post the Council's reasons for its vote on the SEM public registry;

TO DIRECT the Secretariat to conclude the preparation of the draft factual record, as provided in Section 19.5 of the Guidelines, and present it to the Council in accordance with Article 15(5) of the NAAEC; and

TO FURTHER DIRECT the Secretariat to provide the Council with its overall work plan for gathering the relevant facts; to keep the Council informed of any future changes or adjustments to such plan; and to promptly communicate with the Council in connection with any clarification required with respect to the scope of the factual record hereby authorized.

| APPROVED BY THE COUNCIL:                   |  |  |  |  |
|--|--|--|--|--|
|  |  |  |  |  |
| Catherine Stewart                          |  |  |  |  |
| Government of Canada                       |  |  |  |  |
|  |  |  |  |  |
| Miguel Ángel Zerón                         |  |  |  |  |
| Government of the United Mexican States    |  |  |  |  |
|  |  |  |  |  |
| <br>Jane Nishida                           |  |  |  |  |
| Government of the United States of America |  |  |  |  |

#### **Reasons for Council Instructions**

## Regarding Submission SEM-19-002 (City Park Project)

Consistent with its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation (CEC) responsible for overseeing the processing of Submissions on Enforcement Matters (SEMs) predating 1 July 2020 in accordance with the procedures established under North American Agreement on Environmental Cooperation (NAAEC), the Council of the CEC hereby makes public its reasons to instruct the Secretariat to prepare a factual record in relation to submission SEM-19-002 (*City Park Project*).

## 1. Secretariat's NAAEC Article 15(1) notification

In its NAAEC Article 15(1) notification of 10 August 2020, the Secretariat notified the Council that the preparation of a factual record is warranted in relation to the Submitter's assertions concerning the following alleged enforcement failures:

- Articles 4, 7 paragraph XVI, and 8 paragraph XIV of the General Ecological Equilibrium and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente* LGEEPA) and Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I of the Guanajuato State Environmental Protection and Preservation Act (*Ley para la Protección y Preservación del Ambiente del Estado de Guanajuato*—LPPAEG) regarding the jurisdiction of municipal authorities over the environmental impact assessment and approval for the City Park Project.
- LPPAEG Article 31, second paragraph and Articles 19, 20, 21, 25, and 27 of the Environmental Impact Assessment Regulation to the LPPAEG (REIA-Guanajuato), regarding the EIS modality applicable to the City Park Project.
- Articles 104, 105, and 120 of the Environmental Management Bylaw of the municipality of León,
   Guanajuato (Reglamento para la Gestión Ambiental—RGA-León), regarding EIA documentation and public consultation and participation requirements.

#### 2. Council's instructions to the Secretariat

In the attached Council Resolution 21-03, the Council instructed the Secretariat to develop a factual record for the following aspects of the submission:

- a) the assertions concerning the municipal authorities' lack of jurisdiction over environmental impact assessment and approval for the City Park Project, and
- b) the assertions concerning the insufficiency of the documentation required during the EIA process and the failure to implement the public consultation and participation process.

## 3. Explanation of the Council's reasons

A. The Council agrees with the Secretariat's recommendation regarding the preparation of a factual record under LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (with reference to the provisions of LPPAEG Article 44 paragraph II), since it was not shown that the municipality of [León] had jurisdiction to issue an environmental impact approval for the City Park Project.

In the case at hand, the environmental impact approval issued by the Environmental Management Department (*Dirección General de Gestión Ambiental*) of the municipality of León was based on LPPAEG Article 44 paragraph II, which gives municipalities the power to grant environmental impact approval where the work or activity in question is contemplated within the municipal ecological zoning plan.

The Council found that it has not been demonstrated that the City Park Project is included among the activities contained within the Municipal Environment, Urban Development, and Zoning Plan (*Programa Municipal de Ecología, Desarrollo Urbano y de Ordenamiento Territorial*) of León, Guanajuato.

- **B.** The Council also agrees with the Secretariat's recommendation to prepare a factual record with respect to RGA-León Articles 104 and 105 since it was not shown that the documents required under RGA-León Article 105, paragraphs VI, VII, X, XI, and XII, were incorporated into the environmental impact assessment proceeding file.
  - Likewise, the Council agrees with the Secretariat that it is not clear whether the Environmental Regulation Branch of the municipality of León (*Dirección de Regulación Ambiental*—DRA) enforced provisions of the RGA-León relating to the right to public consultation and community participation. Under Article 120, the EIS for the City Park Project should have been listed among the projects received by the DRA for assessment.
- C. In its NAAEC Article 15(1) notification to Council, the Secretariat recommended the preparation of a factual record regarding the enforcement of LPPAEG Article 31, second paragraph, and REIA-Guanajuato Articles 19, 20, 21, 25, and 27. These provisions are implicated in the submitter's assertion that the modality in which the City Park EIS was submitted does not correspond to the anticipated environmental impacts of the project.

In its response, the Secretariat of Environment and Natural Resources (SEMARNAT) explained that LPPAEG Article 31 solely establishes the obligation to specify the modality under which the environmental impact statement is to be prepared – general, intermediate, or specific. Article 31 does not specify which modalities must apply to which projects. Here, the decision approving the environmental impact statement does reference the modality corresponding to the project: that is, the general modality.

Moreover, while REIA-Guanajuato Articles 19, 20, and 21 govern the subcategories—A, B, or C—applicable to the general modality, there is no legal requirement to indicate or determine in the environmental impact approval that the work or activity was carried out under any of these subcategories.

With regard to REIA-Guanajuato Articles 25 and 27, which govern the intermediate and specific modalities to which LPPAEG Article 31 refers, the Council determined that these modalities apply only where there is a possibility of impact on a sub-watershed, or where the work or activity is to be carried out on a site catalogued as a "protection or conservation" site under the Municipal Environment, Urban Development, and Zoning Plan of León, Guanajuato. Therefore, these modalities do not apply to the case at hand.

D. The Council agrees with the Secretariat that a factual record is not warranted regarding the effective enforcement of Article 9, paragraph XIII of the General Wildlife Act (Ley General de Vida Silvestre), Article 32 paragraph VI of the Internal Regulation of SEMARNAT, or NOM-059-SEMARNAT-2010, since the Management Plan for Four Priority Species (Programa de Manejo para Cuatro Especies Prioritarias) referenced in the submission was not an administrative act requiring approval by the Wildlife Branch (Dirección General de Vida Silvestre) of SEMARNAT.



# **APPENDIX 2**

# Submission SEM-19-002 (City Park Project)

A14/SEM/19-002/01/SUB DISTRIBUTION: General ORIGINAL: Spanish

[UNOFFICIAL TRANSLATION]

#### **Collective Action**

SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION ON THE EFFECTIVE ENFORCMENT OF ENVIRONMENTAL LAW CONCERNING THE "CITY CENTER PROJECT" IN THE CITY OF LEÓN, GUANAJUATO, MEXICO

#### **SUBMITTER:**

ACCIÓN COLECTIVA SOCIOAMBIENTAL, A.C.

**ACCIÓN COLECTIVA SOCIOAMBIENTAL, A.C.**, is a civil association, duly incorporated under Mexican law by notarial act N° 7,795 of 6 September 2013, executed in the presence of Jesús César Santos del Muro Amador, Notary Public N° 15 of León, Guanajuato, and registered under Folio N° V20\*4852 of the Public Register of the same city.

Under its statutes, the mission of ACCIÓN COLECTIVA SOCIOAMBIENTAL, A.C. is "the comprehensive defense of fundamental human rights in accordance with the highest national and international protection standards; as a non-profit organization, acting in strict adherence with the law, the association may promote and organize any actions which benefit individuals and/or communities in terms of ensuring access to the full enjoyment of their rights. Moreover, the Association shall work to defend the environment by seeking to ensure that non-human nature, which is intrinsically deserving of protection, is acknowledged and endowed with a status that is socially, legally and politically relevant."

## Charter

Acción Colectiva Socioambiental, A.C. is a member of: Plataforma #SalvemosElHumedalLosCarcamos

Contact: Carlos Gustavo Lozano Guerrero

Tel.: [Confidential]
Address: [Confidential]
Email: [Confidential]

# THE FACTS PROMPTING OUR SUBMISSION:

We declare under oath that the facts underlying our submission are as detailed below:

For a summary of the Project and background information from 2016, please consult ANNEX 1.

FACTS (which occurred in 2017): "City Park Project - Phase One"

Hereafter, in the interests of brevity, the following terms and abbreviations will be used:

| AUTHORITIES and STAKEHOLDERS (in alphabetical order)   | ACRONYM or ABBREVIATION |
|--|-------------------------|
| Colegio de Ingenieros Civiles de León A.C  | (College of Engineers)  |
| Project Management Department of the DGOP of the City of León<br>(Dirección de Gerenciamiento de Proyectos de la DGOP del Municipio de León)       | DGP                     |
| Environmental Regulation Department of the City of León<br>(Dirección de Regulación Ambiental del Municipio de León)                               | DRA                     |
| General Directorate for Environmental Management of the City of León<br>(Dirección General de Gestión Ambiental del Municipio de León)             | DGGA                    |
| General Directorate for Public Works of the City of León<br>(Dirección General de Obra Pública del Municipio de León)                              | DGOP                    |
| The Project known as "City Park - Primera Etapa"   | (the Project)           |
| "MRP CKD", S. de R.L. de C.V.   Fideicomiso MRP LEÓN CIB/2467  | (the Developer)         |
| Institute for Access to Public Information for the State of Guanajuato (Instituto de Acceso a la Información Pública para el Estado de Guanajuato) | IACIP Guanajuato        |
| Ecology Institute of the State of Guanajuato<br>(Instituto de Ecología del Estado de Guanajuato)   | IEE                     |
| General Scope Environmental Impact Statement of the "City Park Project – Phase One" (MIA-MG-506-2017)  | MIA-MG-506-2017         |
| Federal Attorney for Environmental Protection<br>(Procuraduría Federal de Protección al Ambiente)  | Profepa                 |
| Environmental ruling on the Project<br>(Resolución Ambiental de El Proyecto)   | (the Ruling)            |
| Ministry of the Environment and Natural Resources (Secretaría de Medio Ambiente y Recursos Naturales)  | Semarnat                |
| Court of Administrative Justice of the state of Guanajuato (Tribunal de Justicia Administrativa del Estado de Guanajuato)                          | TJA Guanajuato          |
| Open Government Unit of the City of León<br>(Unidad de Transparencia del Municipio de León)  | UTM León                |

#### THE ENVIRONMENTAL IMPACT ASSESSMENT FILE: A TIMELINE 1

### Submission of the Environmental Impact Statement for the Project and initiation of the assessment process:

- On 31 March 2017, the Developer filed an application with the DGGA requesting the designation of the scope applicable to the Project's Environmental Impact Statement (EIS).
- On 7 April 2017, the DRA published, on its office platforms, file number DGGA-DRA-290-2017 on "Public Consultations" to bring the Project to the public's attention.
- On 12 April 2017, the DRA issued file number DGGA-DRA-310-2017 to inform the Developer that the
  latter must file a "General Scope" Environmental Impact Statement. Receipt of this file was acknowledged
  on 24 April 2017.
- On 16 August 2017, the Developer submitted a "General Scope" EIS, including annexes, with the DGGA
  to obtain the Project's environmental authorization. This EIS was registered under file control number
  MIA-MG-506-2017.
- According to a reply from UTM León, contained in file number UT/0646/2019 of 11 March 2019, the DGGA states that on 18 August 2017, the DRA published on its office platforms the Listado Semanal (Weekly List) of the environmental impact statements received for the purposes of further assessment, in addition to the Project Summary Extract.
- On 30 August 2017, DGGA personnel conducted a field visit at the site of the Project, to inspect
  the conditions there and verify the accuracy of the information contained in the documents filed by
  the Developer.

#### Suspension and renewal of the environmental impact assessment process:

- On 31 August 2017, the DGGA, issued file number DGGA/988/17, in which it ordered the suspension of the procedure, by means of an information injunction communicated to the Developer, which stated that, "inasmuch as the application filed does not contain sufficient information to determine, know or verify the potential environmental impacts of the work or activity." Receipt of this file was acknowledged on 7 September 2017.
- On 28 September 2017, the Developer submitted the information requested by the DGGA in file number DGGA/988/17 in order to further pursue the assessment process.

## The requesting of Expert Opinions on the Soil Mechanics Study:

- On 10 October 2017, the DRA requested an expert opinion from the DGOP on the Soil Mechanics Study, via file number DGGA-DRA-670-2017. Receipt of this file was acknowledged on 13 October 2017.
- On 10 October 2017, the DRA requested an expert opinion from the IEE on the Soil Mechanics Study, via file number DGGA-DRA-672-2017. Receipt of this file was acknowledged on 11 October 2017.
- On 20 October 2017, the DRA requested an expert opinion from the College of Engineers on the Soil
  Mechanics Study, via file number DGGA-DRA-694-2017. Receipt of this file was acknowledged on the
  same day.

# Extension of the deadline for completing the environmental impact assessment process:

- On 13 October 2017, the DGGA determined, via file number DGGA-1146-17, in favor of an extension of
  the deadline for assessing MIA-MG-506-2017, the EIS filed by the Developer. Receipt of this determination
  was acknowledged on 25 October 2017.
- 1. The information contained in this section comes from the Ruling and from the replies to various access to information requests filed with UTM León.

#### Receipt of expert opinions on the soil mechanics study:

- On 14 November 2017, the DGGA took receipt of the College of Engineers' expert opinion.
- On 22 November 2017, the DGGA took receipt of the expert opinion of the DGP (a DGOP affiliated agency).
- The **IEE** did not provide an expert opinion.

## Environmental authorization of the "City Park" project (MIA-MG-506-2017):

On 15 November 2017, the DGGA issued the Ruling that conditionally authorized the Project.
 The Developer was notified of this decision on 24 November 2017.

For a summary of the **FACTS that occurred in 2018**, please consult **ANNEX 2**. For a summary of the **FACTS that occurred in 2019**, please consult **ANNEX 3**.

## FAILURES IN THE EFFECTIVE ENFORCEMENT OF ENVIRONMENTAL LAW

To adequately establish the **Project's** omissions and violations in relation to the applicable environmental law, a few preliminary remarks are in order.

In accordance with the provisions of Articles 1 and 133 of the Political Constitution of the United Mexican States, the International Treaties to which the Mexican state is a Party form part of the **CONSTITUTIONAL EDIFICE** governing the validity of laws and acts of authority in the Mexican Republic, which fact implies that organs of public administration must interpret and jointly enforce the human rights included in the Constitution and International Treaties as, under our legal order, both sets of rights constitute a unitary bloc.

Accordingly, the **General Act on Ecological Equilibrium and Environmental Protection** (la *Ley General del Equilibrio Ecológico y la Protección del Ambiente*—LGEEPA) regulates the provisions of the Constitution bearing on environmental protection and the preservation and restoration of ecological balance, which have as their object the fostering of sustainable development and laying the foundations for guaranteeing, amongst other rights, the right of every person to live in an appropriate environment for his/her development, health and wellbeing. Non-compliance with the provisions of this law, as well as with the environmental policy instruments which it regulates, in and of itself, harms the environment, natural resources, wildlife and public health, thereby affecting the right to a healthy environment enshrined in Article 4 of the Constitution.

Among the environmental policy instruments provided for under LGEEPA is the Environmental Impact Assessment, which it defines under Article 28 as the process utilized by the authorities to establish the conditions that shall govern the execution of works and activities, which may cause ecological imbalances or exceed the limits and conditions stipulated in applicable provisions on environmental protection and the preservation and restoration of ecosystems, in order to avert or minimize their negative effects on the environment.

From this perspective, an *Environmental Impact Assessment* is not merely paperwork that must be completed as a requirement prior to undertaking works or activities that may cause environmental damage. An *Environmental Impact Assessment* is, above all, a *process* designed—if fully implemented—to ensure that we citizens may be certain that the execution of a given project or activity will not undermine our constitutionally protected right to a healthy environment.

For reasons we shall now explain, the environmental ruling on the *City Park Project – Phase One* is illegal and its execution could damage the environment, natural resources and wildlife, insofar as: (1) the **DGGA** was not the competent authority to understand, evaluate, and adjudicate the environmental impact assessment process; (2) the scope of the environmental impact assessment designated by the **DRA** is not commensurate with the potential environmental impact of the project's works and activities; (3) the **DRA** took actions outside statutory procedures; and (4) the **DGGA** did not comply with due process in its due diligence of the environmental impact assessment process.

#### CONCERNING THE PRESIDING AUTHORITY'S JURISDICTION

The environmental ruling on the *City Park Project – Phase One* is illegal insofar as the **General Directorate for Environmental Management of the City of León (DGGA)** was not the competent authority to understand, evaluate, and adjudicate the environmental impact assessment process.

Although Article 1 Section II of the **Municipal Regulation** states that its provisions "have as their object fostering the City's sustainable development through the regulation of the procedures governing the environmental impact assessment of works or activities under municipal jurisdiction..." and Article 5 Section XVI of the same regulation attributes to the **DGGA** the power to "assess the environmental impact of works and activities under the City's jurisdiction," it's important to point out that the distribution of jurisdictions regarding which authorities are to understand, evaluate and adjudicate environmental impact assessment processes must respect the rules established in **LGEEPA** Articles 4, 5, 7 and 8. Moreover, the provisions of the **LGEEPA** are ratified by Articles 6, 7 and 8 of the Environmental Protection and Preservation Act of the state of Guanajuato (*Ley para la Protección y Preservación del Ambiente del Estado de Guanajuato*—**LPPAEG**).

As the **LGEEPA** and the **LPPAEG** both clearly state, cities and municipal governments may *participate* in the environmental impact assessment of works or activities under state jurisdiction, but the power to conduct such assessments falls solely to the federal and state governments.

However, as is evident when one reads file number DGGA-DRA-310-2017, issued by the DRA on 12 April 2017, the municipal authority did not follow the rules on the distribution of jurisdictions in determining the competent authority to understand, evaluate and adjudicate the environmental impact assessment process of a project or activity to be located—in the present case—in the municipal territory of León, Guanajuato. In effect, the DRA itself assumed a jurisdiction that does not belong to it. Moreover, in so doing, it also failed to comply with its obligation to cite the legal precepts, grounds and objectives underlying its determination.

The legal provisions cited by the **Director of the DRA**, to underpin file number **DGGA-DRA-310-2017**, concern the *application requirements*, the *annexes*, the *works or activities which require a municipal environmental impact authorization*, the *contents of the environmental impact statement* and the *environmental impact statement modalities*, all of which are detailed in the **Municipal Regulation**.

Furthermore, file number **DGGA-DRA-310-2017** offers no explanation regarding the reasoning behind the **Director of the DRA**'s conclusion that **the Developer** must file **the Project**'s EIS with the DRA and not, for example, with the **IEE** or **Semarnat**'s **DGIRA**, as stipulated by the provisions of the **LGEEPA** and the **LPPAEG**.

## REGARDING THE PRESIDING AUTHORITY'S ACTIONS BEYOND STATUTORY PROCEDURES

The environmental ruling on the *City Park Project – Phase One* is illegal insofar as the **Environmental Regulation Department of the City of León (DRA)** took actions beyond statutory procedures.

In accordance with Municipal Regulation Article 104, the environmental impact assessment process formally begins when an application is filed with the authority. The present case is no exception. However, although FINDING II of the Ruling notes that the Developer filed its application with the DGGA for an environmental impact assessment of the Project on 16 August 2017, it was on 7 April 2017 that the DRA published on its office platforms file number DGGA-DRA-290-2017 on "Public Consultations" to inform the public of a project that it would only receive for its assessment 131 days later.

In light of its relevance, we have provided below a transcription of file **DGGA-DRA-290-2017** and underlined irregularities therein and/or shared impressions on its content:

Subject: Public Consultation

Project: "CITY PARK - PHASE ONE"

#### TO THE GENERAL PUBLIC

In the City of León, Guanajuato, on the 5th day of the month of April 2017:

Regarding a matter of public information and pursuant to the provisions of Articles 118 Section IV, 122 and 123 of the Environmental Management Regulation of the City of León, Guanajuato, in light of the potential for a significant alteration of environmental conditions occasioned by or that may be occasioned by the preparations for and construction of the project known as "City Park – Phase One"

[...], information has been publicly released via a project summary extract to facilitate the organization of a public information meeting, under the auspices of the designated Commission, to inform citizens and, as the case may be, gain their approval.

Consequently, the project known as "City Park - Phase One" is being made Public Knowledge:

[...], so that the interested parties may issue proposals and formulate considerations of a technical character; [...]. The present file was published on the platforms of the offices the Environmental Regulation Department, in public view, on 7 April 2017, for all relevant legal purposes.

First of all, an important clarification is in order: the **Municipal Regulation** does not, in any of its articles, provide for *Public Consultations* on projects filed with the **DGGA** for assessment purposes.

Be that as it may, although the **DRA** file states that on **7 April 2017** *information was made public by means of a project summary extract*, in fact, neither the **DGGA** nor the **DRA** had firsthand knowledge of **the Project** and/ or the **Project Summary Extract** until an application for an environmental impact assessment was filed, an event which only occurred on **16 August 2017**, i.e., 131 days after this **DRA** file was published.

On the same lines, in its reply to **UTM León**, contained in file number **UT/0646/2019** of **11 March 2019**, the **DGGA** confirms that the **DRA** published file number **DGGA-DRA-290-2017** on **7 April 2017**. However, it also indicated that the information annexed to said file was the information submitted by **the Developer** in its request that a **scope be assigned** to its EIS; in the event, said information consisted of a *land use permit* (Annex 1), *legal documents* (Annex 2), *the project plan* (Annex 3) and a *Conagua file* (Annex 4) and not the *project summary extract*, as indicated by the **DRA** in file number **DGGA-DRA-290-2017**.

Similarly, in its reply to **UTM León**, the **DGGA** contradicts the **DRA**, in that whereas the latter indicates in file number **DGGA-DRA-290-2017** that it is publishing the *project summary extract* due to *the possibility that the preparation and construction of the project known as "City Park – Phase One" occasions or may occasion a significant alteration of environmental conditions, the DGGA states that the project does not affect the environment and that, furthermore, the <i>project summary extract* was published on **18 August 2017** and not on **7 April 2017**, as stated in the **DRA** file.

#### **DGGA** said as follows:

On 7 April 2017, in a general manner, and under no formal obligation on the part of the Environmental Regulation Department, file number DGGA-DRA-290-2017 was published to inform the public of the project known as "City Park"; annexed to said file was information presented by the project Developer for the purpose of requesting that a scope be assigned to said project. Included among the documents enclosed with the Developer's application were a land-use permit and a project works plan, which, upon review, led to the determination that the project does not affect the environment; [...].

It's worth noting that on 16 August 2017, the environmental impact statement was filed for the project in question and, as a consequence, in compliance with the provisions of Article 120 of the Regulation on Environmental Management in the City of León, Guanajuato, on 18 August 2017, the weekly listing of environmental impact statements received for future assessment was published on the platforms of the offices of the Environmental Regulation Department, an agency affiliated with the General Directorate for Environmental Management, [...].

On the same day, 18 August 2017, the project summary extract was published, along with the listing mentioned in the preceding paragraph [...].

It's important to emphasize that the **DRA**'s file number **DGGA-DRA-290-2017** is based on Article 118 Section IV of the **Municipal Regulation** which refers to works or activities that may provoke a *significant alteration* of environmental conditions which occasion or may occasion the destruction, isolation or fragmentation of ecosystems, affect the structure or function thereof, or modify their development trends. In addition, the **DRA** bases this file on **Municipal Regulation** Articles 122 and 123, which refer, respectively, to the publication of the list stipulated in Article 121 and to public information meetings, but not to a **Public Consultation**.

#### REGARDING THE SCOPE ASSIGNED TO THE ENVIRONMENTAL IMPACT STATEMENT

The environmental ruling on the *City Park Project – Phase One* is illegal insofar as the scope assigned to the environmental impact statement by the Environmental Regulation Department of the City of León (DRA) is not commensurate with the potential environmental impact of the project's works and activities.

The final paragraph of **LGEEPA** Article 30 stipulates that "... the modalities pertaining to environmental impact statements and risk studies shall be established by the Regulation to this Law." In this respect, Article 10 of the **Regulation to the LGEEPA on Environmental Impact Assessment** states that environmental impact statements shall be filed under the following modalities: I. Regional, or II. Particular.

Article 11.- The regional scope applies to environmental impact statements in the following cases: [...]

IV. Proposed projects in sites where, due to the interaction with different regional environmental subsystems, cumulative, synergistic, or residual impacts are foreseeable, which may result in destruction, isolation or fragmentation of ecosystems.

*In other cases, the applicant shall file an environmental impact statement of particular scope.* 

**LPPAEG** Article 31 stipulates that the scope of the environmental impact statement for a given project or activity may be *general*, *intermediate*, *or specific*, in the terms of the Regulation.

The **Regulation to the LPPAEG on Environmental Impact Assessment** states that environmental impact statements shall be filed under the following modalities: *General A, B, or C, Intermediate* or *Specific*.

Articles 19, 20, 21, 25 and 27 of the **Regulation to the LPPAEG on Environmental Impact Assessment** specifies the conditions governing which scope – *General A, B, or C, Intermediate* or *Specific* – shall apply to a given environmental impact statement.

In the present case, in reply to the **Developer**'s request for **assigning a scope** to **the Project**'s Environmental Impact Statement, the **DRA** issued file number **DGGA-DRA-310-2017** of **12 April 2017**, in which it informed **the Developer** that it must file an **EIS** of "**General Scope**".

With the foregoing in mind, based on a reading of the documents in the Project's file, especially the Environmental Impact Statement, the Comprehensive Study on the Conservation of Los Cárcamos Park, the Bird Study and the Program for Managing 4 Priority Species listed in NOM-059-SEMARNAT-2010, but also based on its location—adjacent to Los Cárcamos Park wetlands—and its dimensions, characteristics, scope and complexity, it is clear that the City Park Project – Phase One will generate cumulative, synergistic and residual impacts, which may occasion ecosystems destruction, isolation or fragmentation.

It's important to point out that the very same DRA, which despite its determination that the Developer must file a "General Scope" Environmental Impact Statement, acknowledges in file number DGGA-DRA-290- 2017 of 7 April 2017 that the Project could provoke significant alteration of environmental conditions which would cause or may cause the destruction, isolation or fragmentation of ecosystems, affect the structure or function thereof, or modify their development trends in the terms of Municipal Regulation Article 118 Section IV.

Due to its location—adjacent to Los Cárcamos Park wetlands—and the risks posed by its dimensions, characteristics, scope and complexity, as well as the fact that the "General Scope" is the least stringent level specified in all applicable legislation and is only found in the Municipal Regulation, in our view, a scope at this is not commensurate with the works or activities required for a project such as *City Park – Phase One*.

In accordance with the principle of *hierarchical subordination*, a regulation is absolutely subordinate to a law and may not modify or a limit a law. In light of this principle, the **Municipal Regulation** cannot create mechanisms inconsistent with those contemplated by the **LGEEPA**, the **Regulation to the LGEEPA on Environmental Impact Assessment**, the **LPPAEG** or the **Regulation to the LPPAEG on Environmental Impact Assessment**. The fact is the "**General Scope**" status assigned to **the Project**'s Environmental Impact Statement only exists in the municipal regulation and entails fewer requirements than a scope at any other level in all other applicable legislation.

In this regard, one could cite as a supporting argument the jurisprudential thesis rendered by the Supreme Court of Mexico in the case: "FACULTAD REGLAMENTARIA. SUS LÍMITES."

#### **REGARDING DUE PROCESS**

The environmental ruling on the *City Park Project – Phase One* is illegal insofar as the **DGGA** and the **DRA**, both of which are City of León agencies, failed to adhere to due process formalities in their due diligence of the environmental impact assessment process, as a result of which damages to the environment, natural resources and wildlife may ensue.

In this section, we will address various issues demonstrating the municipal authority's failure to adhere to due process, as provided for in the applicable environmental law:

#### The Right of Access to Information and Participation

The **DGGA** and the **DGA** did not guarantee the right of the citizens of León to receive timely and adequate information during the environmental impact assessment process. As a consequence, they were unable to participate and/or intervene in **the Project**'s assessment.

Whereas, **Municipal Regulation** Articles 104 to 119 specify the rules governing the conduct of the environmental impact assessment process for works and activities under municipal jurisdiction, Articles 120 to 123 prescribe the instructions and mechanisms governing how the **DGGA** must publicize information on the projects awaiting its assessment. In accordance with said provisions, when the **DGGA** receives an application for the *environmental impact assessment* of a project or activity under its jurisdiction it must include it in the *listing* of environmental impact statements received for its assessment, as well as publish the corresponding *project summary extract*.

That said, under **Municipal Regulation** Article 5, the **DGGA** has the power to assess the environmental impact of works and activities under municipal jurisdiction and issue rulings accordingly, provided that such assessments are conducted in accordance with the provisions of the *LGEEPA*, the *LPPAEG*, this Regulation, other related legal provisions and conventions or whatever cooperation and coordination agreements may be signed.

It is the case that in its reply to **UTM León**, contained in file number **UT/0646/2019** of **11 March 2019**, the **DGGA** stated that on **18 August 2017**, the **DRA** published the *listing* and the *project summary extract* on its office platforms:

It's worth noting that on 16 August 2017, the environmental impact statement scope for the project in question was admitted and, as a consequence, in compliance with the provisions of Article 120 of the Regulation on Environmental Management in the City of León, Guanajuato, on 18 August 2017, the weekly listing of environmental impact statements received for future assessment was published on the platforms of the offices of the Environmental Regulation Department, an agency affiliated with the General Directorate for Environmental Management, [...].

On the same day, 18 August 2017, the project summary extract was published along with the listing mentioned in the preceding paragraph [...].

It is important to remember that the object of publishing information on a project or activity is not only to guarantee the right to information but also to ensure that interested parties may emerge to express their views on projects subject to assessment. Although the **Municipal Regulation** states that the **DGGA** *must compile* and publish a list and make available to any interested party the project summary extract corresponding to a given project or activity, it is also true that this provision does not indicate where such information must be published. Consequently, pursuant to Article 5 of the **Municipal Regulation**, the DGGA should have complied with the provisions stipulated in **LGEEPA** Article 34 Section I.

Although in its reply to **UTM León**, contained in file number **UT/0646/2019** of **11 March 2019**, it is noted that the **DGGA** did comply with the obligation to publish the *listing* and *project summary extract*, this was not done, however, in a newspaper with a wide circulation in the state of Guanajuato. The fact that both the *list* and the *project summary extract* were published in the **DRA**'s office platforms does not rectify the issue in question, namely that the hierarchically superior **LGEEPA** requires publication in a newspaper, i.e., a medium with a wider circulation, obviously, than the **DRA**'s office platforms.

In support of the foregoing, it should be noted that the **Supreme Court of Mexico** has ruled on this matter:

In a Constitutional case

Case: 89/2010

Court: First Chamber of the Supreme Court of Mexico

And in a Protection Review case

Case: 956/2015

Court: First Chamber of the Supreme Court of Mexico

In the absence of the *project summary extract*'s publication in a newspaper with a wide circulation, the citizens of the City of León were not given the opportunity to request a *public information meeting* on **the Project** or to participate in the environmental impact assessment process.

### Regarding the species included in NOM-059-SEMARNAT-2010

As part of its environmental impact assessment application for **the Project**, **the Developer** appended a series of documents with the *Environmental Impact Statement*, including *Estudio Integral para la Conservación del Parque Los Cárcamos*, *León*, *Gto* (Comprehensive Study on the Conservation of Los Cárcamos Park, hereafter "the Comprehensive Study") and a *Estudio de Aves*² (hereafter, "the Bird Study").

According to the Comprehensive Study, **Los Cárcamos Ecological Park** is: an ecological area of 11 ha, located in the northern part of the city, a few meters from the Metropolitan Park, where the El Palote dam is found. [...] it consists mostly of hills covered with pasture in excellent condition, [...], and also includes a path for corridors [...]. Furthermore, it has a lake that is a destination for different types of birds, such as Canada geese, wild ducks, cormorants, coots, etc. There is also a greenhouse in the park, which accommodates very diverse types of plants, such as palm trees, smoketree spurges, arabia plants, etc. (page 11 | The Comprehensive Study).

Regarding characterization of aquatic wildlife in the area, as the Comprehensive Study puts it "our characterization consists of two types: birds and fishes. The former are described below ..." (page 51 | The Comprehensive Study):

The species of water birds described below include ones with potential for habitat mobility between the two reservoirs analyzed in the ecological system under study.

It is important to note that Los Cárcamos Park offers an alternative feeding site for this type of bird (see page 51 | The Comprehensive Study).

Figure 31. Specimen of Egretta thula (snowy egret) (page 51 | The Comprehensive Study).

Figure 32. Specimen of Ardea alba (great egret) (page 51 | The Comprehensive Study).

Figure 33. Specimen of Megaceryle alcyon (belted kingfisher) (page 52 | The Comprehensive Study). [...]

In fact, any of the migratory species present in the El Palote reservoir,<sup>3</sup> may also fly to the reservoir in Los Cárcamos Park (page 54 | The Comprehensive Study).

<sup>2.</sup> The Bird Study was carried out in the month of May 2017. Due to the time of the year when observations were made, it wasn't possible to register all of the types of migratory birds that visit the wetlands in Los Cárcamos Park or the El Palote Reservoir.

<sup>3.</sup> According to its webpage, the Metropolitan Ecological Park of León is a 337 ha Protected Natural Area. The reservoir per se accounts for 85% of its surface area, making it a highly attractive habitat for flora and fauna, including pelicans, Canada geese, wild ducks, herons, gulls, cormorants, ibexes and over 204 species of migratory and resident birds. For further information, please consult: <a href="http://ito.mx/Lk8">http://ito.mx/Lk8</a> i>.

In addition, according to the Comprehensive Study, the site "constitutes an 'ecosystemic island,' within the El Palote-Los Cárcamos Park complex, consistent with the concept of 'archipelago reserves'<sup>4</sup>, developed by Gonzalo Halffter (2004), with wetlands characteristics, thorn forest banks and anthropogenically introduced vegetation (pepper trees, beefwoods, etc.), in ecotone with the urban planning of the City of León, Gto" (page 62 | The Comprehensive Study).

In addition, the Estudio Integral para la Conservación del Parque Los Cárcamos, establishes that:

As the water in the El Palote reservoir [...] is filtered through the entire reservoir curtain and its support structure, this generates internal pressure known as suppression. The resulting effect is a vertical flow which gives rise to small bodies of water. In the case of the study area, such flows were observed in the body of water located in Los Cárcamos Park.

Moreover, the permeability of the layer subjacent to the clayey area presents conditions favorable to the presence of such groundwater flows, [...] (pp. 76-77 | Estudio Integral).

Finally, in its conclusions, the Comprehensive Study determined that:

The results of the physical and chemical analysis of reservoir water show that the reservoir may be considered an eutrophic body of water. Consequently, human actions which engender the entry of organic material should be avoided.

...

... Los Cárcamos Park is a habitat typical of the water runoff areas found in the Laja River's upper basin and, only a deeper and fuller analysis of fauna, in time and space, could adequately produce evidence for wildlife indexing purposes. Based on the precautionary principle, this habitat should be preserved with utmost care, even though the space occupied by the body of water in Los Cárcamos Park may be of anthropogenic origin.

[...] there definitely exists an ecosystem in equilibrium as an "ecosystemic island" in an urban area, in contrast, for instance, with the small lake ecosystems and tributary streams of the Sierra de Lobos.

According to estimates, the insertion of infrastructure at a depth no greater than 11 meters would not influence the natural flow existing between El Palote reservoir and the body of water in Los Cárcamos Park, provided the following recommendation is accepted:

As a preventive measure, consistent with findings of the Soil Mechanics Study, an anti-capillarity structure should be inserted to surround the underground foundations of the planned infrastructure; this measure could condition the natural flow established between bodies of water during the stages of construction entailing earthmoving and the construction of foundations and containment walls, however [...]. As a preventive measure, the installation of piezometric level monitoring wells is recommended [...], in effect, during excavations, the presence of water mirrors impeding normal operations is not a rare occurrence. It is recommended that this piezometric monitoring network be operational and maintained for the duration of the planned infrastructure's useful life [...].

Ecologically, the site presents stable environmental conditions; however, it is important to take into account the site's ecological value and the corresponding proposed mitigation measures. (pp. 77-79 | The Comprehensive Study).

<sup>4. &</sup>quot;Reservas archipiélago: Un nuevo tipo de área protegida" (pp. 281-282): <a href="http://ito.mx/Lkc8">http://ito.mx/Lkc8</a>

Along the same lines, the bird flights survey in The Bird Study indicates that:

Records on the abundance of each species focused on two issues: 1) [...] flights between Los Cárcamos Park and Metropolitan Park; and 2) bird-flight altitudes. Of the 291 recorded flights, 69% were recorded in the corridor between Los Cárcamos Park and the Metropolitan Park [...].

Regarding the species which flew between both parks, the majority [...]. All species of waterfowl (ducks and herons) flew between both parks (page 13 | The Bird Study).

The Bird Study also proposes a series of Measures to mitigate impacts generated by the operation of the City Park complex:

Mitigation of the effects of incidental bird mortality from collisions with tower type structures

- Reduction of the three factors that produce bird collisions against windows: transparency, reflection and light.

[...] (pp. 19-20 | The Bird Study).

Moreover, according to the *Plan Maestro del Parque Metropolitano de León* (León Metropolitan Park Master Plan), El Palote Reservoir is a natural waterbird reserve. Consequently, it recommends that wetlands be established and maintained. As the document explains:

3.1.24 El Palote Reservoir and the Metropolitan Park

El Palote Reservoir [...] is a natural reservoir of waterbirds, migratory birds and land birds (including some species listed under some category of special protection in NOM-059-ECOL-2010), and [...].

The following are proposals [...] recommended for consideration in the reservoir Master Plan:

3.1.24.1 Sediment control

[...]

3.1.24.2 Creation and maintenance of habitats and corridors.

[...]. To improve conditions in the aquatic habitats and wooded areas in Metropolitan Park, the following strategies are proposed:

*Short-term strategy:* 

1. [...]

2. Confection of artificial wetlands to serve as wildlife habitat [...]. The establishing of different types of wetlands (surface flow and vertical flow) is recommended. [...]. Likewise, consideration should be given to integrating the wetlands already present on the site (pp. 215-216 | Master Plan).

Along the same lines, "Table 92. Risk Categories" from the León Metropolitan Park Master Plan (page 311 | Master Plan) compiles a list of the species of migratory and resident waterbirds found in the León Metropolitan Ecological Park and which, according to the Comprehensive Study on the Conservation of Los Cárcamos Park, may also fly to the basin in Los Cárcamos Park (page 54 | The Comprehensive Study).

The following are among the migratory and/or aquatic bird species known to fly to Los Cárcamos Park and represent just a few of the species listed in **NOM-059-SEMARNAT-2010**:

| Common Name      | Scientific Name                   | NOM-059-SEMARNAT-2010         |
|------------------|-----------------------------------|-------------------------------|
| Northern pintail | Anas acuta                        | Priority for conservation     |
| American widgeon | Anas americana (Mareca americana) | Priority for conservation     |
| Blue-winged teal | Anas discors (Spatula discors)    | Priority for conservation     |
| Lesser scaup     | Aythya affinis                    | Priority for conservation     |
| Osprey           | Pandion haliaetus                 | Priority for conservation     |
| Great blue heron | Ardea herodias                    | Subject to special protection |

More generally, the Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR Convention)—to which Mexico is a State Party—establishes under Article 1.2, that "waterfowl are birds ecologically dependent on wetlands" and, under Article 4, that "Each Contracting Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening."

In respect thereof, as part of its application, **the Developer** appended to the Environmental Impact Statement for the *City Park Project – Phase One* a document entitled *Programa de Manejo para 4 Especies Prioritarias y en la NOM-059-SEMARNAT-2010* (Management Program for 4 Priority Species Listed in NOM-059-SEMARNAT-2010).

Out of all of the resident or migratory water birds that may be found in Los Cárcamos Park, only the following species are included in this Management Program:

| Common Name       | Scientific Name          | NOM-059-SEMARNAT-2010     |
|-------------------|--------------------------|---------------------------|
| Mexican duck      | Anas platyrhynchos diazi | Threatened                |
| White-winged dove | Zenaida asiatica         | Priority for conservation |
| Mourning dove     | Zenaida macroura         | Priority for conservation |
| Red-lored amazon  | Amazona autumnalis       | Priority for conservation |

At all events, the Developer did not obtain an authorization from SEMARNAT's General Directorate for Wildlife for its *Management Program for 4 Priority Species listed in NOM-059-SEMARNAT-2010*, an official standard referenced in Article 9 Section XIII of the General Wildlife Act (*Ley General de Vida Silvestre*— LGVS) and Article 32 Section VI of the Internal Regulation of the Ministry of the Environment and Natural Resources (*Reglamento Interior de la Secretaría de Medio Ambiente y Recursos Naturales*).

In conclusion, as attests a comprehensive examination of the documents appended to **the Developer**'s application, as well as the *León Metropolitan Park Master Plan*, it is possible to establish that, regardless of the perimeter classified as a protected natural area, the two parks should be considered as forming a single unit in respect of the wildlife that inhabits or visits it, a unit which the *City Park Project – Phase One* would fragment, were it to be constructed.

## **ENVIRONMENTAL LAW AT ISSUE**

| LAWS   STANDARDS   REGULATIONS   | ACRONYMS                        |
|--|---------------------------------|
| 1. Convention on Wetlands of International Importance especially as Waterfowl Habitat  | Ramsar Convention               |
| 2. General Ecological Balance and Environmental Protection Act (24/01/2017)  | LGEEPA                          |
| 3. Regulation to LGEEPA on Environmental Impact Assessment   | RLGEEPA                         |
| 4. General Wildlife Act  | LGVS                            |
| 5. NOM-059-SEMARNAT-2010   | NOM-059                         |
| 6. Internal Regulation of the Ministry of the Environment and Natural Resources  | Semarnat Internal<br>Regulation |
| 7. Environmental Protection and Preservation Act of the state of Guanajuato (29/12/2015)   | LPPAEG                          |
| 8. Regulation to the LPPAEG on Environmental Impact Assessment (15/06/2012)  | RLPPAEG                         |
| 9. Regulation for the Environmental Management of the City of León, Guanajuato (Reglamento del Patronato del Parque Ecológico Metropolitano de León, Gto.) | Municipal<br>Regulation         |
| 10. Regulation of the Metropolitan Ecological Park Trust   | Park Regulation                 |
| 11. León Metropolitan Park Master Plan   | Master Plan                     |

For access to all environmental law, click HERE: Legislación Ambiental

## RAISE THIS ISSUE WITH THE GOVERNMENT

## MEETING WITH FEDERAL AND MUNICIPAL AUTHORITIES

On **21 February 2019**, members of **Plataforma #SalvemosElHumedalLosCarcamos** had the opportunity to meet with officials from **Semarnat**, **Profepa** and the **DGGA**.

#### Meeting minutes

#### PROPOSAL WITH POINT OF AGREEMENT IN THE SENATE OF MEXICO

On **19 February 2019**, Senator Antares Guadalupe Vázquez Alatorre raised a motion with point of agreement exhorting various authorities to undertake actions to halt the irreversible environmental damages impacting the wetlands in the Los Cárcamos Ecological Park, located in León, Guanajuato. The competent Commission issued its opinion on the proposal, which was then approved by the full Senate.

## **Proposal with Point of Agreement**

## Opinion of the Environment, Natural Resources and Climate Change Commission

Publication of the opinion on 4 April 2019 in:

Gaceta del Senado Nº LXIV/1SPO-116

# LEGAL REMEDIES PURSUED<sup>5</sup>

Type of remedy: Nullity action Plaintiff: C. Juan García Hurtado

**Date:** 4 June 2018

File N°: 861/4a Courtroom/18

Current status: Dismissal due to plaintiff withdrawal

N.B. Information was gained by means of this remedy. In the ensuing admission agreement THE

**DEFINITIVE SUSPENSION** demanded by the plaintiff was **CONCEDED**. However, this agreement lapsed

due to the plaintiff's withdrawal.

PROCURADURÍA FEDERAL DE PROTECCIÓN AL AMBIENTE (PROFEPA)

**Type of remedy: Civil complaint** (2 complaints) **Plaintiff:** C. Pablo Roberto García Gómez Sivertson

**Date:** 12 and 19 February 2019 **File N°:** PFPA/18.7/2C.28.2/00021-19 **Folio N°** 1103625 and 1103627

Current status: Pending

N.B. The actor is a member of Red Alebrije network which, in turn, is a member of Plataforma

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DIRECCIÓN GENERAL DE GESTIÓN AMBIENTAL DEL MUNICIPIO DE LEÓN

Type of remedy: Administrative complaint Plaintiff: Acción Colectiva Socioambiental, A.C.

Date: 1 April 2019 Folio N° 747

Current status: Pending

N.B. Acción Colectiva Socioambiental is a member of Plataforma #SalvemosElHumedalLosCarcamos

PROCURADURÍA FEDERAL DE PROTECCIÓN AL AMBIENTE (PROFEPA)

Type of remedy: Civil complaint

Plaintiff: Acción Colectiva Socioambiental, A.C.

Date: 9 April 2019

File N°: none in the absence of notification

Current status: Pending

N.B. Acción Colectiva Socioambiental, A.C. is a member of Plataforma #SalvemosElHumedalLosCarcamos

For access to all legal remedies pursued, click HERE: Recursos Legales

# All Documents pertaining to the Submission

<sup>5.</sup> The five legal remedies mentioned hereafter appear in chronological order.



# **APPENDIX 3**

# **Environmental Law in Question**

#### **Environmental Law in Question**

SEM-19-002 (City Park Project)

## • General Ecological Balance and Environmental Protection Act

**Article 4.** The federal government, state governments, municipal governments and Mexico City's boroughs shall exercise their powers in the preservation and restoration of ecological balance and environmental protection, in accordance with the allocation of jurisdictions provided for in this Act and other legal instruments.

The General Sustainable Forestry Development Act shall determine the allocation of powers regarding regulation of the sustainable use, protection and preservation of forest resources and land.

**Article 7.** Under the provisions of this Act and the relevant local laws, the following powers fall to the state governments:

[...]

**XVI.-** The environmental impact assessment of works or activities not expressly allocated to the federal government under this Act and, as required, the issuance of appropriate authorizations, in accordance with the provisions of Article 35 bis 2 of this Act;

[...]

**Article 8.** Under the provisions of this Act and the relevant local laws, the following powers fall to the municipal governments:

[...]

**XIV.-** Participation in the environmental impact assessment of works or activities under state jurisdiction, when these are executed within their territorial boundaries;

[...]

### • Environmental Protection and Preservation Act of the State of Guanajuato

Article 6. The State Executive is vested with the power:

[...]

**XVI.**-To assess the environmental impact of works or activities not expressly under the jurisdiction of the federal government and, as required, to issue appropriate authorizations;

[...]

**Article 7.** The municipal governments are vested with the power:

[...]

**XVII.** To participate in the environmental impact assessment of works or activities under state jurisdiction, when these are executed within their territorial boundaries, in accordance with the provisions of this Act and the Regulation thereto;

[...]

**Article 8.** In addition to those allocated to it under the State of Guanajuato's Executive Branch Organization Act, the Ministry of the Environment and Land-use Planning shall have the following powers:

I. To assess whatever environmental impact may arise from the execution of public or private works or activities not under federal jurisdiction, and to issue the appropriate ruling;

[...]

Interpretation in light of the provisions of LPPAEG Article 44, section II:

Article 44. The municipal authority shall issue environmental impact authorizations in the following cases:

[...]

II. The cases provided for under municipal environmental ordinances;

[...]

#### • Environmental Management Regulation of the City of León, Guanajuato

**Article 104.** For the environmental impact assessment of any works or activity referred to in this Chapter, the applicant shall, prior to the commencement of the intended works or activity, submit the request in question to the DGGA, accompanied by the following:

- **I.** the documentation proving the ownership or possession of the property that is the intended site of the works or activity;
- II. the land use permit for the property that is the intended site of the works or activity, issued by the competent municipal authority;
- III. the environmental impact statement, filed in the appropriate modality, including a digital copy of same;
- IV. the project summary excerpt referred to in Article 121 of this Regulation, including a digital copy of same; and
- **V.** single copies of the permits, licenses, authorizations and concessions previously obtained, if any, to carry out the works or activity.

**Article 105.** The file for an environmental impact assessment shall include the following:

- I. the application, including all annexes thereto;
- II. the environmental impact statement, including all annexes thereto;
- III. the complementary information requirements, as well as the clarifications, additional details or corrections to the contents of the environmental impact statement, and other information, provided by the applicant;

- IV. the minutes of the technical inspections conducted, if any;
- V. the requirements in terms of technical reports or opinions and the responses provided;
- VI. the minutes of the public information meeting, where applicable, as well as the written comments and observations, if any, made by participants in said meeting;
- VII. the amendments to the project, if any;
- VIII. the technical opinion, signed by the public official responsible for writing it;
- IX. the administrative procedure's final ruling;
- **X.** proof of the guarantees given;
- **XI.** the notices of commencement of the site preparation phase and termination of the construction phase, respectively;
- **XII.** the reports submitted by both the signatory of the administrative ruling and the lead provider of environmental technical services; and
- XIII. any other documentation filed with the DGGA, which may be directly related to the project.

**Article 120**. The DGGA shall compile and publish a listing of the environmental impact statements that it receives for its assessment in the terms of this Regulation. Said listing shall contain at least the following elements:

- **I.** the file number assigned by the DGGA;
- II. the filing date of the application;
- III. the name of the project or identification of its principal elements;
- IV. the modality of the environmental impact statement filed; and
- **V.** the location of the proposed works or activity.

This listing shall be updated weekly to include the environmental impact statements received in the preceding week, as well as to withdraw those for which the administrative procedures have terminated, in the terms of this Chapter.





**Commission for Environmental Cooperation** 

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