

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION for Preparation of a Factual Record Submission SEM-00-006 (Tarahumara) September 2003

I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows residents in North America to inform the Secretariat, in a submission, that any member country (hereinafter, a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, after which the Council may instruct the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide additional information. The Secretariat also may consider any information that is publicly available; provided by the JPAC, the Submitters or other interested persons or nongovernmental organizations; or developed by the Secretariat or independent experts.

On 22 April 2003, the Council decided unanimously to instruct the Secretariat to develop a factual record regarding submission SEM-00-006 (Tarahumara). By means of this document, the Secretariat seeks information relevant to matters to be addressed in the factual record for submission SEM-00-006 (Tarahumara). The following sections provide background on the submission and describe the type of information sought.

II. The Tarahumara submission

On 9 June 2000, the Comisión de Solidaridad y Defensa de los Derechos Humanos A.C. (“the Submitter”) filed a submission with the Secretariat asserting that Mexico is failing to effectively enforce its environmental law by denying access to environmental justice to indigenous communities of the Sierra Tarahumara in the state of Chihuahua, Mexico. In particular, it asserts a failure to effectively enforce environmental law with respect to the

citizen complaint process, the prosecution of alleged environmental crimes and other alleged violations with respect to forest resources and the environment in the Sierra Tarahumara.

III. Assertions with respect to which the Secretariat recommended the preparation of a factual record

On 6 November 2001, the Secretariat determined that some of submission's assertions warranted requesting a response from the Party. After reviewing the Party's response, on 29 August 2002 the Secretariat notified the Council that it recommended the preparation of a factual record with respect to some of the assertions that it had considered warranted a response from the Party. To simplify the analysis of the submission in light of the Party's response, the assertions were grouped into three headings.¹ These headings are reproduced below, along with the Secretariat's respective recommendations in light of the Party's response.

1. Alleged failure to effectively enforce the citizen complaint procedure (Articles 189, 190 to 193 and 199 of the General Law of Ecological Balance and Environmental Protection (Ley General de Equilibrio Ecológico y de Protección al Ambiente—LGEEPA)

The Submitter asserts in headings A, F, R, S y T of the submission that Mexico is failing to effectively enforce its environmental law by failing to duly process 30 citizen complaints on illegal harvesting in and destruction of the Sierra Tarahumara forest. These citizen complaints were filed between February 1998 and March 2000 by different groups: the Community of San Ignacio de Arareco; the Communal Farm (*Ejido*) Communities of Ciénega de Guacayvo, San Diego de Alcalá and El Consuelo; the Rarámuri and Tepehuán indigenous communities; and the *Coalición Rural/Rural Coalition*. Most of the citizen complaints refer to activities or facts that the complainants regard as a threat to the Sierra Tarahumara ecosystem and the subsistence and patrimony of the local cultures. [...]

In summary, although Mexico's response is highly detailed, the appendices to the response do not allow for the conclusion that the relevant authority has taken the enforcement steps set forth in the LGEEPA with respect to most of the specific cases raised in the submission. In the resolutions and rulings attached to the response, we find that the authority enforced the environmental law properly in regard to only two of the 33 complaints under the notification.² In all the other cases, the authority omitted one or more concrete actions involved in the procedure or carried them out outside the period set forth in the law (by a few days in approximately half the cases, and by around one month

¹ A complaint may fall under more than one section (*i.e.*, that of 12 October 1998 submitted by Tepehuán de las Fresas community, which the Submitter indicated as an instance of noncompliance in points A.2, F.3, I.3 and O.1). The same applies to inspections.

² See Annex 15 of the submission and Annex I of the Party's response. Complaints filed by Ricardo Chaparro Julián (Tepehuán de las Fresas indigenous community) on 12 October 1998 and by the Rocoroyvo communal farm on 18 February 2000.

in the others). The fact that these citizen complaints were not processed within the required period is especially relevant, given the other alleged failures to effectively enforce the citizen complaint process in the cases mentioned in the submission.

The Mexican legal system allows only those persons with a recognized legal interest to undertake a judicial proceeding against persons who, in contravention of the applicable rules, causes damage to the environment or natural resources. The citizen complaint procedure is the only means that any interested party has to put the State's environmental protection machinery into motion. Therefore, the effective enforcement of the citizen complaint procedure is fundamental to further and promote citizen participation in environmental protection. In addition, the Mexican legal system stresses the importance of ensuring the right of indigenous communities to protect their environment and natural resources.³ The matters raised in the submission with respect to the effective enforcement of the citizen complaint procedure as a mechanism enabling indigenous communities and other communities in the Sierra Tarahumara to participate in the environmental protection of the area warrant development and documentation in a factual record. The Secretariat considers that the preparation of a factual record on the effective enforcement of Articles 189, 190 to 193 and 199 of the LGEEPA, with respect to the citizen complaints in question, is warranted.

2. *Alleged failure to effectively enforce the provisions on the investigation and prosecution of probable environmental crimes (Articles 416, 418 and 419 of the Federal Penal Code (Código Penal Federal—CPF) and Articles 169 and 202 of the LGEEPA)*

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

The submission states that the environmental authority was notified, through citizen complaints, of facts that possibly constituted environmental crimes. It asserts that the authority also performed at least 15 inspections in which it identified probable

³ Political Constitution of the United Mexican States *Constitución Política de los Estados Unidos Mexicanos*), Article 2. [...] A. This Constitution recognizes and guarantees the right of indigenous peoples and communities to free determination, and consequently the autonomy to:
[...] V. Conserve and improve the habitat and preserve the integrity of their lands, pursuant to this Constitution.
[...] VIII. Fully accede to the jurisdiction of the State. To guarantee this right, in all suits and proceedings to which they are party individually or collectively, their customs and cultural specifics must be taken into account, respecting the precepts of this Constitution [...]

LGEEPA, Article 15. For the formulation and furtherance of environmental policy and the issuance of Mexican official standards and all other instruments set forth in this Law regarding the preservation and restoration of the ecological balance and environmental protection, the Federal Executive shall observe the following principles:

[...] XIII. To guarantee the right of communities, including indigenous peoples, to protect, preserve, use and sustainably exploit natural resources and to safeguard and use biodiversity, as determined in this Law and other applicable provisions; [...]

environmental crimes. The submission asserts that Mexico is failing to effectively enforce its environmental law in two ways: by failing to exercise the powers it possesses to undertake investigations or notify the Federal Public Prosecutor (*Ministerio Público Federal*) of facts consistent with such crimes pursuant to Articles 169 and 202 of the LGEEPA, and by not applying Articles 416, 418 and 419 of the CPF, which define and penalize criminal conduct that harms the environment, to the alleged criminal actions.⁴ [...]

To summarize, Mexico's response does not show that the environmental authority and Federal Public Prosecutor have effectively enforced the environmental law regarding the investigation and prosecution of probable environmental crimes. This submission warrants the development of a factual record that will document the process by which the environmental authority determined whether the facts in question of which it learned were likely to constitute environmental crimes, as well as the rulings by which it determined whether it would inform the Federal Public Prosecutor of such facts, in accordance with Articles 169 and 202 of the LGEEPA. The preparation of a factual record is also warranted to generate information as to whether Mexico is effectively enforcing Articles 416, 418 and 419 of the CPF with respect to these facts, which according to the submission likely constitute a crime.

3. *Alleged failure to effectively enforce the provisions on judicial review (Article 176 of the LGEEPA)*

⁴ CPF Article 416. A penalty of from three months to six years of imprisonment and from one thousand to twenty thousand days' fine shall be imposed upon anyone who, without any required authorization or in contravention of the provisions of law, regulation or Mexican official standards:

I.- Discharges, deposits or spills, or so authorizes or orders, wastewater, chemical or biochemical liquids, waste or pollutants into the soil, seawater, rivers, basins, waterways and all other water deposits or currents under federal jurisdiction, that cause or may cause harm to public health, natural resources, flora, fauna, basin water quality, or the ecosystems.

In the case of water to be delivered en bloc to population centers, the penalty may increase by up to three more years [...]

CPF Article 418.- A person who, without having the authorization required pursuant to the Forestry Law (*Ley Forestal*), upsets or destroys the natural vegetation, cuts, pulls or fells trees, uses forestry resources or changes land use, shall be subject to a penalty of from three months to six years of imprisonment and a fine in the equivalent of one hundred to twenty thousand days' fine. [...] The same penalty shall apply to anyone who intentionally causes forest or natural vegetation fires that damage natural resources, flora, fauna or the ecosystems.

CPF Article 419.- Anyone who transports, deals in, collects or transforms timber resources in amounts greater than four cubic meters or the equivalent thereof, for which the use has not been authorized pursuant to the Forestry Law, shall be subject to a penalty of from three months to six years of imprisonment and from one hundred to twenty thousand days' fine, except in cases of the use of forestry resources for household use pursuant to the provisions of the Forestry Law.

The relevant paragraph of Article 169 of the LGEEPA provides: "In the applicable cases, the federal authority shall notify the Public Prosecutor of the undertaking of acts or omissions learned in the exercise of its powers, that may constitute one or more crimes."

LGEEPA Article 202.- The Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), in the scope of its attributions, is empowered to undertake the applicable actions before the competent judicial authorities, when it learns of acts, facts or omissions that constitute violations of the administrative or criminal laws.

Headings C and D of the submission contain assertions regarding the due processing of applications for judicial review (*recursos de revisión*) filed with respect to the citizen complaints in question. [...]

With respect to the Party's alleged failure to effectively enforce its environmental law in regard to the admission or nonadmission of applications for judicial review, raised under heading C of the submission, Mexico's response indicates that the applications were granted and shows the corresponding rulings. Furthermore, regarding the Party's alleged failure to issue a definitive ruling with respect to the application for judicial review referenced in heading D of the submission, Mexico's response shows that the aforesaid applications were resolved, attaching the corresponding rulings.⁵ Therefore, the Secretariat considers that the submission's allegations regarding the applications for judicial review filed in connection with the citizen complaints do not warrant the development of a factual record.

IV. Request for information

The Secretariat of the CEC requests information relevant to the facts concerning:

- i) the cases mentioned in headings A, F, G, H, I, K, M, N, O, P, R, S and T of the submission.
- ii) Mexico's enforcement of the citizen complaint procedure (Articles 189, 190 to 193 and 199 of the LGEEPA) in the cases mentioned in headings A, F, R, S and T of the submission, and Mexico's enforcement of the provisions on the investigation and prosecution of probable environmental crimes (Articles 416, 418 and 419 of the CPF and Articles 169 and 202 of the LGEEPA) in the cases mentioned in headings G, H, I, K, M, N, O and P of the submission.
- iii) the effectiveness of Mexico's enforcement of these provisions in the above-mentioned cases.

V. Examples of relevant information

1. Information on the processing of the cases mentioned in the submission with respect to which the Secretariat recommended a factual record;
2. General background information regarding the forest industry in the Sierra Tarahumara, including for example:
 - a) Statistics on annual revenues of the forestry sector in the Sierra Tarahumara since 1998;

⁵ See pages 8 and 9 of the Party's response, as well as Annexes VI and VII thereof.

- b) Information on the geographic range of forestry activities in the Sierra Tarahumara since 1998;
 - c) Information with respect to the composition of the forest industry in the Sierra Tarahumara since 1998, including the principal businesses, percentage of small businesses, and number and size of indigenous businesses;
3. Detailed information with respect to the financial and human resources allotted to enforcement of the LGEEPA in the Sierra Tarahumara since 1998;
 4. Information on the inspection and audit program for forestry activities in the Sierra Tarahumara since 1998, to verify compliance with the environmental laws, including statistics on the number of inspections and audits per year per region, rates of compliance, and actions cases of noncompliance;
 5. Information on the financial and human resources allotted to handle citizen complaints in the Sierra Tarahumara since 1998;
 6. Information on any Profepa plan or program to better handle citizen complaints filed by the indigenous communities of the Sierra Tarahumara, financial and human resources allotted to undertake such plan or program, and the results thereof since 1998;
 7. Information on Profepa procedures to forward citizen complaints to the competent authorities (when it is not the competent authority) and to ensure that such authorities follow through on the matters under complaint;
 8. Information with respect to Profepa's procedures to notify the Federal Public Prosecutor of facts constituting environmental crimes in the Sierra Tarahumara, and information on any program of assistance or cooperation between the Public Prosecutor and Profepa with respect to alleged crimes in the context of forestry in the Sierra Tarahumara.

VI. Additional background information

The submission, Mexico's response, the Secretariat's determinations, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files in the Citizen Submissions on Enforcement Matters section of the CEC web site at <http://www.cec.org>. These documents may also be requested from the Secretariat.

VII. Where to send information

Relevant information for the development of the factual record may be sent to the Secretariat **until 30 November 2003**, to either of the following addresses:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393, rue St-Jacques Ouest,
bureau 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

CCA / Mexico Liaison Office
Atención: Unidad sobre Peticiones
Ciudadanas (UPC)
Progreso núm. 3
Viveros de Coyoacán
México, D.F. 04110
México
Tel. (52-55) 5659-5021

For any questions, please send an e-mail to the attention of Katia Opalka, at info@ccemtl.org.