

**Secretariat of the Commission for Environmental Cooperation**

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

**Submitters:** Fundación Lerma-Chapala-Santiago Pacífico, A.C.  
Sociedad Amigos del Lago de Chapala, A.C.  
Instituto de Derecho Ambiental, A.C.  
Residents of the Community of Juanacatlán, Jalisco  
Comité Pro-Defensa de Arcediano, A.C.  
Amigos de la Barranca, A.C.  
Ciudadanos por el Medio Ambiente, A.C.  
AMCRESP, A.C.  
Red Ciudadana, A.C.

**Party:** United Mexican States

**Date of receipt:** 23 May 2003

**Submission no.:** SEM-03-003 (Lake Chapala II)

**Date of this notification:** 18 May 2005

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**I. EXECUTIVE SUMMARY**

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”), the Secretariat of the Commission for Environmental Cooperation (CEC) (the “Secretariat”) may examine submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the requirements of Article 14(1) have been met, it then decides whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of any response provided by that Party, the Secretariat may notify the Council that it considers the preparation of a factual record to be warranted, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record. The final factual record may be made publicly available upon a two-thirds vote of the Council.

This notification contains the Secretariat’s Article 15(1) analysis of the submission, filed 23 May 2003, which asserts that Mexico is failing to effectively enforce its environmental law in connection with the management of water resources in the Lerma-Chapala-Santiago-Pacífico Watershed (the “watershed”). The Submitters assert that this alleged failure to enforce has caused environmental degradation of the watershed and a water imbalance in Lake Chapala.

On 19 December 2003, the Secretariat determined that the submission meets the requirements of Article 14(1) and, guided by the criteria in Article 14(2), requested a response from Mexico with regard to the Submitters’ assertions concerning the enforcement

of the following legal provisions and matters: Articles 88 paragraphs II and III, 89, and 157 of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*) in regard to the Arcediano Dam project; LGEEPA Articles 88 paragraph I and 133 in regard to citizen complaints filed by residents of Juanacatlán about the level of pollution in the Santiago River; and Articles 4, 7 paragraph IV, and 9 paragraph XIII of the National Waters Act (*Ley de Aguas Nacionales—LAN*) in regard to the negotiation, signing, and implementation of agreements on water use and distribution in the watershed.<sup>1</sup> Mexico filed its response on 31 March 2004. The response explains the responsibilities of and actions taken by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales—Semarnat*) and the National Water Commission (*Comisión Nacional del Agua—CNA*) in relation to the administration, monitoring and protection of the water in the watershed, and responds to assertions in the submission.

The Secretariat has concluded that the response leaves open factual matters central to the submission. Information is lacking regarding the operation of the Watershed Council for the watershed and whether and how its agreements have been given authoritative effect, and on the implementation of Mexico's system for monitoring water quality in the Santiago River and taking appropriate measures in response to monitoring results. Therefore, in accordance with Article 15(1), the Secretariat hereby notifies the Council that, in light of the Party's response, the Secretariat considers the submission to warrant the development of a factual record and hereby provides its reasons.

## II. SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico is failing to effectively enforce its environmental law in relation to the management of water resources in the Lerma-Chapala-Santiago-Pacífico Watershed (Hydrological Region XII),<sup>2</sup> resulting in serious environmental degradation and water imbalance of the watershed as well as the risk that Lake Chapala and the habitat it provides for migratory birds could disappear.<sup>3</sup> They cite as examples the level of pollution of the Santiago River,<sup>4</sup> to which they attribute serious impacts on the health of Juanacatlán residents,<sup>5</sup> as well as the low level of Lake Chapala,<sup>6</sup> which they assert is jeopardizing the habitat of the White Pelican.<sup>7</sup>

According to the Submitters, Mexico is failing to guarantee effective citizen participation in environmental policymaking for the watershed since all the initiatives (described in the submission) in which civil society participated with a view to solving the water quality and quantity problems of the watershed “never went beyond that, beyond good intentions, whose

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<sup>1</sup> See SEM-03-003 (Lake Chapala II), *Article 14(1) & (2) Determination* (19 December 2003), at 6–7.

<sup>2</sup> Submission, at 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 7, 12 and Appendix XXV.

<sup>5</sup> *Ibid.* at 7.

<sup>6</sup> *Ibid.* at 3.

<sup>7</sup> *Ibid.* at 6–7 and Appendix XXIV.

innumerable draft reports are to be found in the archives of the Minister of the Environment as well as the general and regional director of the National Water Commission...”<sup>8</sup>

The Submitters assert that, in the case of the Santiago River, Semarnat is failing to effectively enforce Article 133 of the LGEEPA by failing to conduct ongoing, systematic monitoring of water quality in order to detect the presence of pollutants or excess organic wastes and take the necessary responsive measures.<sup>9</sup> They further allege that Semarnat is failing to apply LGEEPA Article 88 criteria for the sustainable use of water and aquatic ecosystems by permitting the construction of the Arcediano Dam in the Huentitán Gorge on the Santiago River to supply the Guadalajara metropolitan area, despite the level of pollution in the river and despite a 1997 decree by the Guadalajara municipal government prohibiting the construction of the dam.<sup>10</sup> They assert that:

Therefore, the authority is failing to apply these water resource management criteria while the Authority of the National Water Commission and the state of Jalisco (CEAS)<sup>11</sup> are planning to build the Arcediano Dam on the Santiago River without first restoring the functioning ecological stability thereof, alongside an existing environmental policy set forth in the various legal instruments referring to the watershed at issue.<sup>12</sup>

The Submitters maintain that the CNA is delegating decisions on water use and distribution in the area to the Watershed Council (*Consejo de Cuenca*) and hence is failing to effectively enforce the provisions of the LAN which invest the CNA with the authority and responsibility to make the relevant decisions.<sup>13</sup> According to the Submitters, Mexico is preventing the public from assuming shared responsibility for environmental protection by delegating decisions on water use and distribution in the watershed to the Watershed Council, but then taking the position that the Council’s decisions are not subject to challenge by citizens through the appeal for review procedures provided by the LAN.<sup>14</sup> They assert as follows:

Having thus stated our premise, the CNA should assume its authority over water distribution and use in Mexico, which it has to date avoided doing by repeatedly hiding behind the Watershed Council in order to dodge responsibility under the National Waters Act for enforcement of the Act as it affects water use and distribution. Such is the case of the responses given to two petitions filed by the Fundación to ascertain how the authorities were intending to rule on water distribution and the fate of Lake Chapala, as appears from documents dated 26 November 2001, 11 February and 14 November 2002, and 10 January 2003. To these the CNA responded evasively, washing its hands and, where convenient in

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

<sup>9</sup> *Ibid.* at 12.

<sup>10</sup> *Ibid.* at 9.

<sup>11</sup> The CEAS is the Jalisco State Water and Sanitation Commission (*Comision Estatal de Agua y Saneamiento*).

<sup>12</sup> Submission, at 9.

<sup>13</sup> *Ibid.* at 10.

<sup>14</sup> *Ibid.* at 4, 5, 13.

order to dodge responsibility, claiming that the Watershed Council is not the competent authority yet, when an act of authority is requested, stating that the decision was made by the Watershed Council. This is tantamount to a repeated failure to enforce Article 4 of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo—LFPA*), which is supplemental to the National Waters Act...<sup>15</sup>

The Submitters assert that the Council's agreements are null and void, first because they do not respect the priority given by the LAN to domestic water use, and second because they fail to meet the formal requirements for acts of authority set out in LFPA Articles 3–5.<sup>16</sup>

### III. SUMMARY OF THE MEXICO'S RESPONSE

On 31 March 2004, Mexico responded to the submission in a 75-page document plus 150 appendices (including documents in hard copy and on compact disc). The response is divided into four sections, which are summarized below. These four sections address, in turn, preliminary matters challenging the admissibility of the submission, issues regarding the Arcediano Dam, issues regarding contamination of the Santiago River and issues regarding agreements on distribution and use of water.

#### A. Preliminary Matters

Mexico requested that the Secretariat keep confidential the portion of its response dealing with the first preliminary matter it raises (Existence of Pending Administrative and Judicial Proceedings).<sup>17</sup> In this section of the response, Mexico refers to two citizen complaint proceedings, one a judicial proceeding and the other a complaint before the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos—CNDH*), which they claim address issues also raised in the submission, and requests that the Secretariat dismiss the submission under Article 14(3)(a) because the proceedings are still pending.

Next, Mexico alleges that the submission should be dismissed due to links between some of the Submitters and the government.<sup>18</sup> Mexico asserts that two Submitters, Manuel Villagómez Rodríguez and Luís Alejandro Rodríguez, are members of the Congress of the state of Jalisco for the Green Party of Mexico (*Partido Verde Ecologista de México*). In its response, Mexico indicates that Manuel Villagómez Rodríguez is President of *Fundación Cuenca Lerma-Lago Chapala-Santiago* as well as [of] *Comité Pro-Defensa de Arcediano*, of which Luís Alejandro Rodríguez is a member.

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<sup>15</sup> *Ibid.* at 10.

<sup>16</sup> *Ibid.* at 10–12.

<sup>17</sup> Response of Mexico, at 1–3.

<sup>18</sup> *Ibid.* at 9–10.

Mexico next asserts that the submission is not aimed at promoting enforcement and therefore does not meet the requirement of NAAEC Article 14(1)(d).<sup>19</sup> Mexico argues that an appendix to the submission containing a call for a “peaceful revolution for an authentic federalism, not the predominance of the state of Guanajuato to the detriment of Jalisco” indicates that the submission is not aimed at promoting the effective enforcement of environmental law but rather to harass an entity that, although not an industry, is equally subject to being negatively affected.<sup>20</sup>

Regarding the criterion of NAAEC Article 14(2)(c), Mexico states that the submission should not go forward because the Submitters did not pursue all the legal remedies available to them under Mexican law. It asserts that pursuant to NAAEC Article 14(2)(c), the Submitters should have pursued all of the remedies available to them.<sup>21</sup> Mexico asserts that the factors listed in NAAEC Article 14(2) are not simple or mere considerations by which the Secretariat should be guided, but rather mandatory requirements.<sup>22</sup>

Mexico also asserts that the citizen complaint (*denuncia popular*) procedure cannot and should not be considered a remedy under Mexican law. It states that this procedure gives rise to a recommendation by the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) which, because it is non-binding, cannot and should not in any way be considered a remedy.<sup>23</sup> Mexico further states that Profepa issues these recommendations in its capacity as a specialized ombudsman on environmental matters and that in this capacity it does not carry out acts of authority.<sup>24</sup>

## **B. Arcediano Dam**

This section of the response addresses the Submitters’ assertion that Mexico is failing to effectively enforce its environmental law in permitting the construction of the Arcediano Dam. Mexico provides clarification regarding the context in which the assertions are made, as well as responding to the assertions regarding the alleged failure to effectively enforce.

### **1. Clarifying details**

The response includes a heading providing details that clarify the context for the assertions in the submission regarding the dam. These are summarized below.

- Mexico alleges that the submission overstates the geographical magnitude of the problem and cites the Lerma-Chapala-Santiago-Pacífico Watershed erroneously because the facts mentioned are concentrated primarily in the areas of Lake Chapala, Arcediano and Juanacatlán, including the part corresponding to the Santiago and

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<sup>19</sup> *Ibid.* at 10.

<sup>20</sup> *Ibid.* at 10–11.

<sup>21</sup> *Ibid.* at 11.

<sup>22</sup> *Ibid.* at 13.

<sup>23</sup> *Ibid.* at 16.

<sup>24</sup> *Ibid.* at 14.

Verde Rivers. This territory comprises only the Lerma-Chapala [portion of the] watershed (Lerma subregion) and not the Santiago and Pacifico subregions, such that the problem is limited to the part of the watershed comprised within the state of Jalisco.<sup>25</sup>

- Mexico asserts that the Arcediano Dam project will not affect water levels in Lake Chapala and, consequently, will not impact migratory species that depend on the lake. Mexico asserts that, to the contrary, the project will contribute to the recuperation of the lake and be beneficial to species dependent on the lake.<sup>26</sup>
- Mexico acknowledges that a Forest Protection Area Decree comprising several hills located in Guadalajara including a section of the Santiago River and the river gorge, was published in the Official Gazette of the Federation (*Diario Oficial de la Federation—DOF*) on 7 December 1934.<sup>27</sup> However, Mexico asserts that this decree does not constitute environmental law as defined by NAAEC Article 45(2)(b) because its purpose is to govern commercial forestry operations. Mexico points to Article 2 of the Decree, which specifies that no commercial forestry operations may be carried out in the protected area unless they obey a “uniform system to guarantee the stability of the biological equilibrium of the forested areas...”<sup>28</sup>
- Mexico states that the assertion that the Arcediano Bridge will be affected is not a matter of environmental law.<sup>29</sup> Nevertheless Mexico states that, in view of the foreseen impacts on the bridge from the operation of the project, necessary measures have been taken to relocate the bridge.<sup>30</sup> Mexico asserts that the CEAS Jalisco entered into an agreement with the National Institute of Anthropology and History (*Instituto Nacional de Antropología e Historia—INAH*) to collaborate on conducting archaeological studies, site tours, and prospecting as well as to preserve historic monuments in the area of the Arcediano Dam.<sup>31</sup>
- Mexico further states that an initiative to decree a protected natural area comprising the Oblatos-Huentitán Gorge was declared null and void.<sup>32</sup>

## 2. Assertions concerning the Arcediano Dam construction project

Mexico states that the criteria for sustainable water use in LGEEPA Article 88 constitute the basis for regulation of all water use and that, consequently, they establish the guidelines for national policy on water and aquatic ecosystems, including the Arcediano Dam project.<sup>33</sup>

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 26-27.

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

<sup>28</sup> *Ibid.* at 27–28.

<sup>29</sup> *Ibid.* at 28.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 29–30.

<sup>33</sup> *Ibid.* at 18–19.

Mexico states that an environmental impact decision (*resolutivo de impacto ambiental*—RIA) issued by the Environmental Impact and Risk Branch (*Direction General de Impacto and Riesgo Ambiental*—DGIRA) of Semarnat in *oficio* (official communication) S.G.P.A.-DGIRA.-DEI.-0672/03 of 27 October 2003, demonstrates that these criteria were taken into account and that CEAS was required to comply with conditions set out in the Environmental Impact Assessment and the RIA.<sup>34</sup> The RIA requires that the sustainable use of water and aquatic ecosystems shall take place in such a manner as not to affect their ecological stability and imposes other criteria and conditions set out in the response:<sup>35</sup>

- The creation of a protected natural area with the status of a state park in the area adjacent to the project;
- The implementation of a program to salvage and transplant certain plant species;
- A ban on marketing, hunting, capturing, and/or trafficking in certain wildlife species in the project area and its area of influence, upstream and downstream of the reservoir;
- The development and implementation of an environmental restoration and/or rehabilitation program to be carried out at the completion of the project;
- The development and implementation of a salvage program for flora specimens found within the reservoir area, particularly for species covered by Mexican Official Standard NOM-059-ECOL-2001;
- The development and implementation of a reforestation program endorsed by a university or academic institution, validated by Semarnat, and filed with Profepa;
- The development and implementation of control measures to prevent the leaching of contaminants into the planned project site. CEAS expressed its commitment to build the Coyula-Leachates Treatment Plant;
- Construction of a collector line from the San Gaspar, Osorio and San Andrés watersheds and the Agua Prieta, Santa María Tequepexpan, El Ahogado (airport), Coyula, Coyula-Leachates and Puente Grande treatment plants, so as to lessen the pollution problems of the Santiago River;
- The filing, for consideration and validation by Semarnat, prior to construction of the dam wall, of alternative technically viable solutions for preventing runoff of leachates from the Matatlán dump and ensuring decreased levels of contamination in the area prior to filling of the reservoir;

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

<sup>35</sup> *Ibid.* at 20-24.

- During site preparation, clearing only those sites that are strictly necessary within the project area; chipping and spreading in appropriate areas compostable plant material resulting from land clearing; and removing all vegetation from land clearing activities in the area of the proposed reservoir.

Mexico states that the intention is to locate the dam on the Santiago River, which already has been altered more than the better-preserved Verde River.<sup>36</sup> It further states that the Arcediano Dam is intended to prevent impacts on aquatic ecosystems and resources associated with Lake Chapala by supplying water to the Guadalajara metropolitan area without taking water from the lake.<sup>37</sup>

Mexico further states that the assertion that Mexico failed to apply criteria for the sustainable use of water and aquatic ecosystems is incorrect, in that those criteria were considered throughout the dam project, beginning with the feasibility analysis of the alternatives for supplying water to the Guadalajara metropolitan area,<sup>38</sup> as prescribed (Mexico maintains) by LGEEPA Article 89.

Mexico states that LGEEPA Article 88 sets out criteria for the sustainable use of water and aquatic ecosystems and that LGEEPA Article 89 sets out the instruments and tools in which they must be applied.<sup>39</sup> However, Mexico asserts that paragraphs IV, V, VI, VII, IX and X of Article 89 do not apply to the Arcediano Dam project. Mexico summarizes how, in its view, the Arcediano Project complies with the remaining paragraphs of Article 89.<sup>40</sup>

### 3. Alleged failure to guarantee civic participation

With respect to the assertion that Mexico is failing to effectively guarantee civic participation in Mexican environmental policy and joint citizen responsibility for environmental protection, Mexico provides information on measures it has taken to conform to the provisions of LGEEPA Article 157.<sup>41</sup> It states that, consistent with Article 157, groups like the Submitters have had at their disposal various public participation events and forums associated with the development of programs and instruments for planning, implementation, and assessment pertaining to environmental impact and natural resources.<sup>42</sup> Mexico explains that these opportunities for public participation have been available in connection with the National Development Plan (*Plan Nacional de Desarrollo—PND*),<sup>43</sup> the National Environment and Natural Resources Program (*Programa Nacional de Medio Ambiente y Recursos Naturales*),<sup>44</sup> the National Water Program (*Programa Nacional Hidráulico*),<sup>45</sup> the

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<sup>36</sup> *Ibid.* at 25.

<sup>37</sup> *Ibid.* at 26–27.

<sup>38</sup> *Ibid.* at 31.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 33–39.

<sup>41</sup> LGEEPA Article 157. “The federal government shall promote the empowerment of society as a participant in the planning, implementation, evaluation and monitoring of environmental and natural resource policy.”

<sup>42</sup> Response of Mexico, at 39.

<sup>43</sup> *Ibid.* at 40–42.

<sup>44</sup> *Ibid.* at 42–43.



Watershed Councils,<sup>46</sup> the Water Advisory Councils (*consejos consultivos del agua*),<sup>47</sup> expert panels,<sup>48</sup> public consultation processes,<sup>49</sup> the regional water plans for 2002–06,<sup>50</sup> the water plan for Region VIII-Lerma Santiago Pacífico,<sup>51</sup> and the public consultation process for the Arcediano Dam project.

With respect to the Arcediano Dam project, Mexico asserts that the government of the state of Jalisco created an interdisciplinary group to analyze alternatives for supplying water to the Guadalajara metropolitan area, as well as a later group following the public meeting and consultation on the environmental impact statement (EIS) for the project.<sup>52</sup> The interdisciplinary group, with assistance from a technical committee, selected the Arcediano and Loma Larga projects from among ten alternatives, after which the CNA and the governor of Jalisco undertook studies that concluded that the Arcediano project was the most viable alternative.

Mexico states that it carried out a public consultation process on the EIS for the Arcediano Dam project, including a public information meeting in which interested citizens participated, pursuant to LGEEPA Article 34 and Article 43 of the Regulation to the LGEEPA respecting Environmental Impact Assessment (RLEIA).<sup>53</sup> The public meeting, in which the developer was asked to explain the technical and environmental aspects of the project, was held 9 September 2003, and five of the nine individuals who signed the submission attended. Mexico also states that pursuant to the third paragraph of Article 34 it responded to five petitions (*solicitudes*) in addition to holding this meeting.<sup>54</sup>

In addition to the public consultations, Mexico states that pursuant to RLEIA Article 24, the DGIRA requested technical opinions on the project from the mayoral offices of Guadalajara, Zapotlanejo, Ixtlahuacán del Río, and Tonalá, Jalisco as well as from the Ministry of Urban Development and the Ministry of the Environment for Sustainable Development of the state of Jalisco.<sup>55</sup>

### **C. Pollution of the Santiago River**

#### **1. Mexico's actions to comply with LGEEPA Article 88**

Mexico rejects the Submitters' allegation that it "failed to apply water resource management criteria... in planning to build a dam ... on the Santiago River without first restoring its

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<sup>45</sup> *Ibid.* at 43–47.

<sup>46</sup> *Ibid.* at 44–45.

<sup>47</sup> *Ibid.* at 45–46.

<sup>48</sup> *Ibid.* at 46.

<sup>49</sup> *Ibid.* at 46–47.

<sup>50</sup> *Ibid.* at 47–48.

<sup>51</sup> *Ibid.* at 48–49.

<sup>52</sup> *Ibid.* at 50–55.

<sup>53</sup> *Ibid.* at 52–3.

<sup>54</sup> *Ibid.* at 55.

<sup>55</sup> *Ibid.* at 53.

ecological stability.”<sup>56</sup> Mexico states that its discussion of the Arcediano Dam project demonstrates that it complied with Article 88 and reiterates that the Santiago River is more suitable for the dam because the Verde River is better preserved.<sup>57</sup>

Mexico states that because the Santiago and Verde rivers are polluted by untreated municipal and industrial wastewater discharges, Semarnat determined that the Arcediano project would be conditioned upon controlling sources of deterioration through collection, channeling, and full treatment of all wastewater from the neighboring localities.<sup>58</sup> It further asserts that the integrated project of the government of the state of Jalisco considers the construction of the dam in parallel with cleanup and complementary use of the watershed. Therefore, plans for six wastewater treatment plants, a watershed collector line, and a leachate treatment plant associated with the Arcediano Dam are to be submitted subsequently for evaluation and environmental impact assessment and decision.<sup>59</sup>

Furthermore, Mexico makes reference to a coordination agreement between the federal executive branch and the Jalisco executive branch. The agreement contemplates the construction (in progress) of three wastewater treatment plants as well as the rehabilitation of the existing plants which, according to reports, all of which was to be completed in 2004.<sup>60</sup>

## 2. Ongoing systematic monitoring of water quality

Mexico states that matters relating to knowledge of water quality are related to the criteria for sustainable use of water and aquatic systems. In this regard, the CNA has, since 1974, operated the National Water Quality Monitoring Network (*Red Nacional de Monitoreo de la Calidad del Agua—RNMCA*) whose strategic objective is to provide an up-to-date, reliable water quality information system for measurement, analysis, and assessment of water quality in water bodies of national interest as well as dissemination of the information generated for wider use.<sup>61</sup> Mexico asserts that water quality information obtained through the RNMCA has satisfied LGEEPA Article 133 and Article 154 of the Regulation to the National Waters Act (*Reglamento de la Ley de Aguas Nacionales—RLAN*) since 1974.

Mexico states that the RNMCA currently operates 912 monitoring sites around the country, including 12 sites on the Santiago River, five of which are located in the state of Jalisco. It states that the information generated by the monitoring network is fundamental to controlling, maintaining, and improving the water quality of an aquatic system with a view to preserving a balance between its uses as a water supply and as a receiving body.<sup>62</sup>

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<sup>56</sup> *Ibid.*, at 55–6.

<sup>57</sup> *Ibid.*, at 57.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, at 57–8.

<sup>60</sup> *Ibid.*, at 58.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, at 59.

It explains that these 912 RNMCA monitoring sites are distributed among the Primary Network, which generates long-range descriptive information on the country's most important bodies of water; the Secondary Network, which provides information to support pollution regulation and control activities; Special Studies, which supports the components of the RNMCA; and the Groundwater Reference Network, which provides geohydrological information.<sup>63</sup> Mexico explains that data from the network are evaluated every year, with the intent to undertake the evaluation every six months and eventually in real time.<sup>64</sup>

### **3. Inspection and surveillance activities**

Mexico states that in addition to ongoing systematic monitoring since 1974, the CNA has inspection and surveillance activities for enforcing the provisions of the LAN and its regulation with respect to wastewater discharges into federal waters.<sup>65</sup> Mexican Official Standard NOM-001-ECOL-1996 regulates discharges directly into national bodies of waters or onto national property and is administered by the CNA, and NOM-002-ECOL-1996 regulates discharges to municipal sewer systems and is administered by municipal governments.<sup>66</sup>

Mexico reports that 439 inspections, covering 34.81 percent of the watershed, were conducted in the state of Jalisco in 2003.<sup>67</sup> During the period 2000–2001, audits were conducted of 25 users of receiving bodies for wastewater discharges that were required to comply with contaminant limits as of 1 January 2000. Of the 25 users visited, only three were in compliance. Therefore, administrative sanction proceedings were instituted against the 22 non-compliant users. Twenty-one of the proceedings are pending, and in one case, the user was ordered to suspend activities.<sup>68</sup>

Mexico states that Profepa conducted a total of 125 inspection and surveillance visits in 1998–2003 to facilities discharging wastewater into the Santiago River. These visits were conducted in order to audit the safety measures imposed during administrative proceedings brought against some of these companies (109) and resulting from complaints (16). The visits were conducted in the municipalities of Zapotlán el Grande, El Salto, Zapotlanejo, Tonalá, Tequila, Ixtlahuacán de los Membrillos, Amatitán and Ocotlán.

### **4. Wastewater treatment infrastructure**

In its response, Mexico states that Jalisco has 73 operating wastewater treatment plants. The response also refers to future actions called for in a coordination agreement between the federal executive branch and the executive branch of the state of Jalisco, whose purpose is to contribute to the cleanup of the Lerma-Chapala and Upper Santiago Watershed. The

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<sup>63</sup> *Ibid.*, at 59–60.

<sup>64</sup> *Ibid.*, at 60.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, at 61–62.

<sup>67</sup> *Ibid.*, at 62.

<sup>68</sup> *Ibid.*, at 62.

agreement provides for the construction of three new wastewater treatment plants, which is now in process. The agreement also provides for the rehabilitation of the existing treatment plants, to be completed in 2004. As a complement, and further to the environmental conditions established in the RIA, CEAS Jalisco is also planning to build two additional treatment plants. Mexico's response refers to a comprehensive cleanup program for the watershed. Ensuing from this is a plan to initiate a complementary cleanup program at an estimated cost of 1.2 billion pesos, in addition to 23 cleanup investment proposals for the Lerma-Chapala-Santiago Watershed slated for the 2004–2005 fiscal year.<sup>69</sup>

#### **D. Water Use and Distribution Agreement for the Lerma-Chapala Watershed**

In this part, Mexico notes that the Secretariat requested a response in relation to the enforcement of LAN Articles 4, 7 paragraph IV, and 9 paragraph XIII with respect to the negotiation, signing, and implementation of agreements on water use and distribution in the watershed. Mexico asserts in its response that water distribution is not a valid subject for a submission because it is not a matter of “environmental law” as defined by NAAEC Article 45(2).<sup>70</sup> Mexico nonetheless presents information concerning this point.

Mexico states that LAN Article 4 defines the federal authorities for water and establishes the division of powers between the President of the Republic and the CNA:

Authority over and management of national waters and their inherent public assets is the responsibility of the federal executive branch, which shall exercise it directly or through the Commission.<sup>71</sup>

Mexico states that the Submitters' assertion to the effect that the CNA has failed to exercise this authority and that it has delegated it to the Lerma-Chapala Watershed Council is incorrect. It asserts that the Watershed Councils are auxiliary units within the CNA that do not exercise authority and that their role is one of consensus-building and coordination. Mexico explains that they are regional organizations covering one or several watersheds that allow the CNA to manage water with the users' participation.<sup>72</sup> Rather than exercising authority themselves, the Watershed Councils assist the CNA in planning, programming, management, control, oversight, and evaluation of its activities. The agreements they sign are binding only insofar as the authorities ratify them.<sup>73</sup>

Mexico further asserts that the RLAN leaves no doubt that the Watershed Councils are empowered to coordinate the following with the CNA: water use priorities and other instruments of water management planning as well as mechanisms and procedures to

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<sup>69</sup> *Ibid.*, at 63.

<sup>70</sup> *Ibid.*, at 64.

<sup>71</sup> LAN Article 4.

<sup>72</sup> Response of Mexico, at 65–6.

<sup>73</sup> *Ibid.*, at 66.

confront extreme or emergency situations, shortages, overexploitation, water pollution, or deterioration of the assets under the custody of the CNA.<sup>74</sup>

Mexico asserts that the CNA is empowered to “guarantee compliance and enforcement of [the LAN], interpret it for administrative purposes, and apply those relevant sanctions and exercise those acts of authority not reserved to the federal executive branch.”<sup>75</sup> It then states that the National Water Program (*Programa Nacional Hidráulico*) for 2001–06 designates the restoration and preservation of water quality as a specific policy for Region VIII Lerma-Santiago-Pacífico. Mexico states that to achieve this, “what is required is to continually inspect compliance with quality standards as well as adequately monitor the various receiving bodies.” Mexico asserts that the CNA is properly enforcing this policy and the legal standard on inspection and surveillance.<sup>76</sup>

In support of this assertion, Mexico states in its response that the Regional Water Program (*Programa Hidráulico Regional*) 2002–2006 for Region VIII Lerma Santiago Pacífico projected an investment for 2003 of 7.2 million pesos to conduct measurement and inspection visits to control water quality in the states of Guanajuato, Jalisco and Querétaro. It further states that during 2001–2003, 2,467 inspection visits were made to users of national waters and national receiving bodies located in the jurisdiction of the Lerma-Santiago-Pacífico Regional Management. Similarly, to address the aquifer overexploitation problems of the Lerma-Chapala Watershed, a total of 568 inspection visits were made in the last quarter of 2003 to agricultural operations located in the states of Jalisco, Michoacán, Guanajuato, Querétaro and Mexico. In this regard, it asserts that the files are being prepared and reviewed with a view to initiating administrative proceedings and applying sanctions ranging to the final closing of these operations.<sup>77</sup>

As to enforcement of NOM-001-SEMARNAT-1996, Mexico states that during the period 2000–2001, audits were conducted of 25 users of wastewater-receiving bodies that were engaged in industrial, commercial, and/or service activities and were required to comply with the maximum contaminant limits set by the standard as of 1 January 2000. From this review it was observed that only three of the users were in compliance as to the quality of the discharges while the remaining 22 exceeded the standards. Therefore, administrative sanction proceedings were instituted and are currently pending.<sup>78</sup>

Mexico further states that in addition to the work of the CNA, Profepa has assisted with inspection and surveillance activities. Through its office in the state of Jalisco during 1998–2003, it conducted a total of 125 inspection and surveillance visits to facilities discharging wastewater into the Santiago River. These visits were conducted as part of the activities of the inspection and surveillance program whose purpose was to audit the safety measures imposed during administrative proceedings brought against some of these companies and as

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*, at 72.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, at 73.

<sup>78</sup> *Ibid.*, at 74.

a result of complaints. Mexico stated that the information on these proceedings is “reserved” and that it cannot provide information until these proceedings have concluded.

#### IV. ANALYSIS

This notification corresponds to the stage of the process contemplated in NAAEC Articles 14(3) and 15(1). On 19 December 2003, the Secretariat determined that the submission meets all the requirements of Article 14(1)(a)–(f). Guided by the criteria of Article 14(2), the Secretariat then requested a response from Mexico with respect to the Submitters’ assertions concerning the enforcement of various legal provisions in regard to the Arcediano Dam project; citizen complaints filed by residents of Juanacatlán about the level of pollution in the Santiago River; and the negotiation, signing, and implementation of agreements on water use and distribution in the watershed. Mexico’s response was received on 31 March 2004. In accordance with Article 15(1), the Secretariat hereby provides the reasons why it considers the submission to warrant the development of a factual record.

##### A. Preliminary Matters

In the first part of its response, Mexico makes several assertions questioning the validity of the submission and argues that it should be dismissed. The Secretariat concludes that these assertions do not provide reasons for not recommending a factual record at the Article 15(1) stage of the process.

1. *Submitters’ government ties.* Mexico asserts in its response that certain members of some of the associations among the group of Submitters have ties to the government and that, accordingly, the Secretariat should proceed no further with the submission.<sup>79</sup> However, all of the the Submitters identified in the submission are civic associations, whose legal personhood is distinct from that of their members. Further, the individuals whose connection to the submission Mexico finds objectionable are currently members of the Congress of the state of Jalisco, LVII Legislature, but did not hold that position when the submission was filed. For all of these reasons, the current positions in government of some members of some of the submitting groups do not provide a reason for dismissing the submission at this stage.
2. *Whether the submission is aimed at promoting the effective enforcement of environmental law.* Mexico asserts that the submission is not aimed at promoting the effective enforcement of environmental law because one appendix of the submission contains “a call to a peaceful revolution for an authentic federalism, not the predominance of the state of Guanajuato to the detriment of Jalisco.” Mexico argues that this is evidence of an intent to harass an entity and hence, pursuant to NAAEC Article 14(1)(d), the submission should be dismissed. However, the Secretariat

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<sup>79</sup> NAAEC Article 14 establishes that the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law.

previously found in its Determination of 19 December 2003, that the submission as a whole does meet the requirement that it be aimed at promoting the effective enforcement of environmental law and not at harassing industry, in that it clearly focuses on alleged failures on the part of the authorities of Mexico.<sup>80</sup> The Secretariat concludes that the statements in an Appendix to which Mexico refers do not provide a reason why the development of a factual record should not be recommended.

3. *Legal remedies available to the Submitters under the Party's law.* Mexico asserts that the Submitters should have pursued all remedies that it was reasonably possible for them to pursue under Mexican law, such as the administrative appeal for review (*recurso de revisión*) provided by the LFPA (via the appeal for review provided by the LGEEPA), the action in nullity (*juicio de nulidad*) provided by the Federal Fiscal Code (*Código Fiscal de la Federación*) or, as applicable, the amparo action (*juicio de amparo*) provided by the Amparo Act (*Ley de Amparo*).<sup>81</sup>

Article 14(3)(b)(ii) states that the Party, in its response, “shall advise the Secretariat... whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.” In its response, Mexico asserts that the administrative appeal for review, the action in nullity, and the amparo action are private remedies that are reasonably possible to exercise. However, it does not provide an explanation of why this would be applicable to each of the assertions made in the submission. For example, in regard to the assertion as to the nature of the authority possessed or not possessed by the Watershed Councils, the Submitters attest to having pursued the administrative appeal for review remedy mentioned by Mexico in its response, but without success. Section 7.5(b) of the Guidelines acknowledges the possibility that obstacles to the pursuit of such remedies may exist in some cases. As well, in its determination of 19 December 2003, the Secretariat noted that one of the Submitters attested to having having taken reasonable actions to pursue the private remedies available by filing a citizen complaint with Profepa addressing issues similar to those raised in the submission.<sup>82</sup> The Secretariat has considered numerous submissions in which citizen complaints were the sole remedy pursued, including several for which the Council authorized the development of factual records. In view of the actions taken by the Submitters and others with regard to the watershed and Lake Chapala and described in the submission,<sup>83</sup> the possible availability of other remedies does not provide reasonable grounds not to recommend a factual record.

5. *Water use and distribution comprised within the NAAEC's concept of environmental law.* Mexico asserts that the submission's assertions on water use and distribution are not admissible in this process because regulation of water use is not comprised

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<sup>80</sup> SEM-03-003 (Lake Chapala II), *Article 14(1) & (2) Determination* (19 December 2003), at 8.

<sup>81</sup> Response of Mexico, at 11.

<sup>82</sup> *Ibid.* at 9.

<sup>83</sup> Submission, at 4–7, 10, 13–14.

within the concept of environmental law as defined by NAAEC Article 45(2).<sup>84</sup> The Secretariat previously determined that the submission meets the requirements of Article 14(1), including the requirement that the matter asserted pertain to enforcement of *environmental law*.<sup>85</sup> The Secretariat determined that insofar as the principal purpose of those provisions of the LAN is environmental protection and they impose obligations upon governmental authorities, the Submitters' assertions regarding them could be reviewed under Article 14.<sup>86</sup> Although related to water use and distribution, the Submitters' assertions focus on their contention that the use and condition of the water in the watershed are causing harm to the environment and public health and are therefore appropriate for consideration in this process.<sup>87</sup>

### **B. Article 14(3)(a) Considerations**

Mexico requests that based on Article 14(3)(a),<sup>88</sup> the Secretariat dismiss the submission due to the existence of pending judicial or administrative proceedings. It makes reference to the existence of a citizen complaint procedure, a lawsuit, and a complaint before the CNDH, all pending. It requests that this information be kept confidential and reserved under NAAEC Articles 39 (1) and (2),<sup>89</sup> Article 14 paragraph IV of the Federal Law on Transparency and

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<sup>84</sup> Article 45: Definitions

"2. For purposes of Article 14(l) and Part Five:

- (a) "environmental law" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
  - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
  - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
  - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas
 in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part."

<sup>85</sup> SEM-03-003 (Lake Chapala II), *Article 14(1) & (2) Determination* (19 December 2003).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> NAAEC Article 14(3)(a) provides that a Party from which a response to a submission is requested "shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request, whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."

<sup>89</sup> Article 39(1) and (2) state that: 1. Nothing in this Agreement shall be construed to require a Party to make available or allow access to information:

- (a) the disclosure of which would impede its environmental law enforcement; or
- (b) that is protected from disclosure by its law governing business or proprietary information, personal privacy or the confidentiality of governmental decision making.

2. If a Party provides confidential or proprietary information to another Party, the Council, the Secretariat or



Access to Public Governmental Information (*Ley Federal de Transparencia y Acceso a la Informacion Publica Gubernamental*),<sup>90</sup> and Article 159 bis 4 section II of LGEEPA.<sup>91</sup> Guideline 17.2 of the SEM Guidelines acknowledges that “confidential or proprietary information provided by a Party . . . may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted” and encourages a Party providing confidential information “to furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary.” In the absence of any further explanation of Mexico’s reasons for considering this information confidential or private, the Secretariat cannot provide a full explanation of its reasons, summarized below, that in the Secretariat’s view they do not require dismissal of the submission.

In NAAEC Article 45(3)(a), “judicial or administrative proceeding” is defined for the purposes of Article 14(3) as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order..<sup>92</sup>

In previous determinations, the Secretariat has read Article 14(3)(a) as indicating the Parties’ intent “to foreclose a review of enforcement matters actively being pursued by any Party.”<sup>93</sup> Moreover, it determined that “in view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.”<sup>94</sup> Accordingly, the Secretariat established that “to apply this exceptional condition for terminating a submission, the Secretariat must ascertain that there is a ‘pending judicial or administrative proceeding’ and that the matter raised in the submission is the subject matter involved in such proceeding. Also, there must be a reasonable expectation that the ‘pending judicial or administrative proceeding’ invoked by the Party will address and potentially resolve the matters raised in the submission.”<sup>95</sup>

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the Joint Public Advisory Committee, the recipient shall treat the information on the same basis as the Party providing the information.

<sup>90</sup> Article 14 paragraph IV provides that... It will also be deemed as reserved information:...IV. The judicial files or administrative procedures being handled as trials as long as they had not been resolved.

<sup>91</sup> Article 159 bis 4 section II provides that... The authorities referred to in the previous articles will deny access of information when:... II. Such information relates to issues that are subject matter of a pending judicial procedure or inspection and surveillance.

<sup>92</sup> NAAEC Article 45(3)(a).

<sup>93</sup> See SEM-97-001 (BC Hydro), Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (27 April 1998).

<sup>94</sup> SEM-01-001 (Cytrar II) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001).

<sup>95</sup> See SEM-01-001 (Cytrar II) Article 15(1) Notification to Council that Development of a Factual Record is Warranted (29 July 2002).

In submission Oldman River I (SEM-96-003), the Secretariat determined that the concepts “judicial or administrative proceeding” and “pursued by the Party” contained in NAAEC Article 45(3)(a) should be construed as meaning those judicial or administrative proceedings initiated by a Party to the Agreement.

In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.<sup>96</sup>

In sum, for an action to constitute a judicial or administrative proceeding, it must be pursued: (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party’s law and must (iv) belong to one of the categories set forth in Article 45(3). As regards the requirement of proceeding in a timely fashion, it is relevant to consider whether the action is pursued in accordance with time limits established by law and without undue delay.

Because the proceedings to which Mexico refers in its response were not initiated by the relevant authorities in that country, they do not meet the NAAEC Article 45(3)(a) definition of an administrative proceeding. Nevertheless, in previous determinations the Secretariat has considered, in determining whether to recommend a factual record, whether a factual record would risk duplicating or interfering with pending proceedings that do not meet the definition in Article 45(3)(a).<sup>97</sup>

In regard to whether a factual record could duplicate or interfere with the pending proceedings to which Mexico refers, the Secretariat finds that the matters raised in those proceedings do not encompass all of the matters raised in the submission or, more importantly, deal with the matters for which the development of a factual record is recommended. Furthermore, because the procedural stage in which reports submitted by the authorities involved in these proceedings has already ended, the Secretariat is satisfied that a factual record would not run the risk of duplicating or interfering with those proceedings. Therefore, the Secretariat concludes that the pending proceedings to which Mexico refers do not preclude further consideration of the submission.

### **C. The Submission Warrants the Development of a Factual Record**

The submission alleges the failure to effectively enforce various provisions of Mexican environmental law related to water management, protection, preservation, use, and quality in the watershed, allegedly resulting in serious environmental deterioration and water imbalance of the watershed as well as the risk that Lake Chapala and the habitat it provides for migratory birds will disappear.

All the assertions in the submission relate to one another and revolve around this premise.

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<sup>96</sup> See SEM-96-003 (Oldman River I), Determination pursuant to Articles 14 & 15 (2 April 1997).

<sup>97</sup> *Ibid.* See also SEM-00-004 (BC Logging), Article 15(1) Notification (15 March 2000)..

The assertions concerning the Watershed Council refer to the alleged failure to allow affected members of the public to challenge Watershed Council decisions that are allegedly given authoritative effect but never formally adopted by the CNA; the assertions of failures of effective environmental law enforcement in regard to ongoing systematic water quality monitoring in the watershed center on the alleged failure to systematically monitor quality and respond to water quality problems with appropriate pollution control measures; and the assertions relating to the Arcediano Dam project center on an alleged failure to restore ecological stability and sustainably manage the water resources of the Santiago River on which the Dam is to be built.

The information in Mexico's response explaining the actions it has taken to protect the environmental integrity of the watershed leaves open central questions regarding its enforcement of the relevant environmental law. The development of a factual record on these open questions would provide information allowing for an analysis of whether Mexico is effectively enforcing its environmental law in connection with the management, protection, preservation, use, and quality of water in the watershed so as to prevent the alleged environmental deterioration and water imbalance of the watershed and of Lake Chapala.

### **1. Assertions regarding Watershed Council**

The Submitters assert that in the case of the Lerma-Chapala and Santiago-Pacífico Watershed there exists an "absence of authority" that impedes appeals of Watershed Council decisions to administrative tribunals. After reviewing the response, the Secretariat views this assertion as primarily grounded in an asserted failure to effectively enforce the federal obligation under LAN Article 4 to exercise authority over water management. The Secretariat also understands the submission as asserting that Mexico has denied them effective public participation in regard to the activities of the Watershed Council, and consequently has failed to effectively enforce Articles 157 of the LGEEPA. The Secretariat finds that Mexico's response leaves open central questions regarding these assertions.

LAN Article 4 defines the federal authorities for water and establishes the division of powers between the President of the Republic and the CNA:

Authority over and management of national waters and their inherent public assets is the responsibility of the federal executive branch, which shall exercise it directly or acting by the Commission.

In its response, Mexico states that Watershed Councils are auxiliary units within the CNA with both government and user representation that do not exercise authority, but rather assist the CNA in planning, programming, management, control, oversight, and evaluation of activities. The agreements they sign are binding only insofar as the authorities ratify them. Mexico explains that the RLAN provides that the Watershed Councils are empowered to coordinate with the CNA water use priorities and other instruments of water management planning, as well as mechanisms and procedures to confront extreme or emergency

situations, shortages, overexploitation, water pollution, or deterioration of the assets under the custody of the CNA.<sup>98</sup> Although Mexico provides a clear explanation as to the role of the Watershed Councils and the reasons why decisions of the Watershed Councils are unappealable unless adopted by the CNA, Mexico's response omits certain important factual information whose presentation in a factual record is warranted.

In regard to enforcement of the LAN, the federal executive branch is empowered to promote user participation in management of water services without ceding its ultimate authority over water management.<sup>99</sup> To promote user participation, the LAN provides for the implementation of the Watershed Councils, whose activities include the following:

- Formulating and implementing programs and activities to improve water management, development of water infrastructure and corresponding services, and preservation of watershed resources.<sup>100</sup>
- Coordinating with users any temporary limitations on existing rights that may be necessary to confront situations of emergency, extreme shortage, overexploitation, or reserve.<sup>101</sup>
- Coordinating water use priorities and other instruments of water management planning as well as mechanisms and procedures to confront extreme or emergency situations, shortages, overexploitation, water pollution, or deterioration of the assets under the custody of the CNA.<sup>102</sup>

Each Watershed Council session is concluded by means of an agreement signed by its members. A Watershed Council's decisions can cover matters with respect to which the exercise of powers is invested exclusively in the federal executive branch by the Political Constitution of the United Mexican States and the relevant regulatory laws. However, Mexico's response makes clear that although the Watershed Councils are forums allowing for water user participation, they have not been delegated powers of the federal government and their creation does not entail a curtailment of these powers. Further, the rules governing the membership of Watershed Councils ensure that the federal government maintains control over the agreements made by a Watershed Council, and user representation on a Council is subject to government accreditation.<sup>103</sup>

The Submitters' assertions regarding the Watershed Council of interest here raise questions regarding their right to effective public participation in connection with Watershed Council activities and regarding whether or not the Council's agreements constitute acts of authority.

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<sup>98</sup> *Ibid.*

<sup>99</sup> LAN Article 5.

<sup>100</sup> LAN 1992 Article 13, first paragraph.

<sup>101</sup> LAN Article 13.

<sup>102</sup> RLAN Article 16 paragraph IV.

<sup>103</sup> LAN Article 15; RLAN Article 21: "The rules of organization and operation of the Watershed Councils shall define the *requirements for accreditation of water user organizations* and the manner in which they may participate in the Councils."

First, the Submitters' contend that their participation in Watershed Council sessions is a mere formality, while Mexico's response asserts that civic participation in water management for the watershed is guaranteed through the Watershed Councils and other mechanisms and instruments. The submission also points to an allegedly contradictory set of criteria used by Mexican authorities in regard to the pursuit of remedies by the Submitters in regard to activities of the Watershed Councils. The Submitters claim their appeals regarding Watershed Council decisions were dismissed due to the Watershed Council's lack of authority; yet, the Submitters assert that when they subsequently sought relief from the CNA regarding these matters, the CNA merely referred to agreements made by the Watershed Councils and indicated that the Watershed Councils were the proper forum for seeking relief.

Because Watershed Councils' responsibilities include formulating and implementing programs and activities for better water management, including temporary suspension of water use rights, reduction in the water levels of a reservoir, or implementation of programs to preserve watershed resources, their agreements, if implemented, can affect the rights of individuals or alter the allotment of resources.<sup>104</sup> The Submitters assert therefore that the content of these agreements, if given binding and mandatory effect, should be appealable to the administrative tribunal. Mexico's response does not resolve the Submitters' concerns in this regard. Indeed, Mexico does not mention the specific cases discussed in the submission: i.e, challenges to Watershed Council decisions submitted on 26 November 2001, 11 February 2002, 14 November 2002 and 10 January 2003.<sup>105</sup> Detailed factual information regarding these cases, including whether and how the Watershed Council agreements involved were implemented or given binding effect, is warranted in order to address the Submitters' assertion that those cases constituted a failure to effectively enforce Article 4 of the LAN. In part, this would involve an examination of the assertion that the authorities effectively avoid application of provisions of the LFPA, which according to the Submitters supplements the LAN.

Detailed factual information is also warranted in regard to the ability of groups such as the Submitters to participate effectively in the activities of the Watershed Council and its subsidiary Follow-up and Evaluation Group as required by LGEEPA Article 157, with reference not only to what avenues for participation are available, but also to the Submitters' and others' actual experience in attempting to make use of those channels of participation. Although Mexico's response provides a detailed explanation of the many avenues available to groups like the Submitters, it provides little detail regarding actual practice in terms of how this participation is taken into account in the implementation of policy or water distribution agreements, for example by Watershed Councils. This information will permit an objective consideration of the Submitters' claim that policies developed with their participation that give high priority to domestic water use and ecosystem protection and restoration in the watershed are not seriously considered or followed, particularly at the Watershed Council, where critical decisions are made.

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<sup>104</sup> LAN Article 13 and RLAN Article 16 paragraph IV.

<sup>105</sup> Submission, at 10.

A factual record would help to clarify the actual functions of the Watershed Councils, whether or not their agreements (with a focus on the cases the Submitters highlight) have been implemented or given binding effect in regard to the management and protection of water, and the manner in which their membership and operation satisfies requirements concerning public participation. A study of these issues would advance the following goals of the NAAEC: 1) strengthening cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices; 2) enhancing compliance with, and enforcement of, environmental laws and regulations; and 3) promoting transparency and public participation in the development of environmental laws, regulations and policies.<sup>106</sup>

## **2. Assertions regarding pollution of the Santiago River**

In regard to pollution of the Santiago River, the submission focuses on an asserted failure to effectively enforce LGEEPA Article 133 in regard to ongoing systematic monitoring of water quality in the watershed, with reference to complaints of residents of Juanacatlán regarding the impacts of pollution of the Santiago River on their health. Article 133 reads:

The Ministry, with the participation of the Ministry of Health as applicable in accordance with other legal provisions, shall conduct ongoing systematic monitoring of water quality to detect the presence of pollutants or excess organic wastes and take appropriate measures. In the case of waters under local jurisdiction, action shall be coordinated with the authorities of the states, the Federal District, and the municipalities.

In explaining its enforcement of this monitoring obligation, Mexico describes the RNMCA, the performance of inspections, and the institution of administrative proceedings against alleged violators (some of which Mexico stated were pending), as well as future investment plans for water treatment infrastructure in the watershed.

Mexico asserts that enforcement of LGEEPA Article 133 has been ongoing since the inception in 1974 of the RNMCA, whose purpose is to provide an up-to-date, reliable water quality information system for bodies of water of national interest, allowing for measurement, analysis, and evaluation of water quality as well as dissemination of the information generated. Mexico's response indicates that the information generated by this monitoring network is fundamental to the detection of water pollution and the management of the water resource, in particular the planning of activities designed to control, maintain, and improve water quality with a view to preserving a balance between uses of the water resources both as a water supply and as a receiving body.<sup>107</sup>

The response indicates that inspections and administrative proceedings were undertaken pursuant to NOM-001-ECOL-1996, which has graduated compliance schedules that call for increasingly strict requirements over the ten-year period from 2000 to 2010, and that

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<sup>106</sup> NAAEC Article 1(f)-(h).

<sup>107</sup> Response of Mexico, at 59–60

additional inspections were undertaken to verify compliance with measures imposed during the course of administrative proceedings, or as a result of complaints. Mexico also notes that the state of Jalisco has 73 operating wastewater treatment plants and that the signing of the coordination agreement between the federal government and the Jalisco state government, which envisages the construction of three new wastewater treatment plants along with the rehabilitation of the existing treatment plants, will significantly contribute to the cleanup of the Lerma-Chapala and Upper Santiago watershed. Mexico states that CEAS Jalisco also has plans to build two additional treatment plants and to improve the sewer system. In addition, within the context of a comprehensive treatment program for the Lerma-Chapala-Santiago watershed, it will initiate a complementary treatment program, to which may be added the submission of 23 investment proposals relating to the watershed for fiscal 2004–2005.

The heart of the Submitters' assertion is that despite Mexico's efforts, the quality of the water in the watershed, and in particular in the Santiago River, remains deteriorated and is worsening.<sup>108</sup> Notwithstanding the considerable information it provides, Mexico's response does not provide information on the past or present quality of water in the watershed, in terms of levels of organic wastes and other pollutants, that shows how its monitoring activities, inspections and administrative proceedings contribute to the effective control, maintenance, and improvement of water quality in the watershed. Article 133 of LGEEPA calls not only for the monitoring of pollutants or excess organic wastes but also the application of the measures necessary for effective cleanup and treatment. Mexico's response does not indicate in a comprehensive and systematic way how the inspections, administrative proceedings and plans for new or improved water treatment systems constitute cleanup and treatment measures that respond to information gathered through the RNMCA.

Because Mexico's response provides insufficient information to indicate that the monitoring and other actions Mexico describes are effective vis-à-vis the full extent of the obligations set out in LGEEPA Article 133, a factual record is warranted to present detailed factual information of this nature for the period following the coming into force of the NAAEC in 1994. The factual record would present a comprehensive set of facts regarding implementation of Article 133 in connection with the Santiago River, including a description of how Mexico applies related provisions contained in the RISEMARNAT that detail the process for developing measures that respond to anomalies detected during water quality monitoring.<sup>109</sup> Consistent with NAAEC Article 14(3)(a), information would not be gathered regarding the details of pending administrative proceedings relevant to the Submitters' assertions pertaining to LGEEPA Article 133.

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<sup>108</sup> Submission, at 7.

<sup>109</sup> The RISEMARNAT states that the CNA shall issue guidelines on, organize, direct, carry out, and publicize the monitoring of the quality of national waters, and keep water availability and use inventories up to date. RISEMARNAT Article 51 paragraph IV. It also spells out the CNA's responsibilities in compiling and analyzing basic water quality information and keeping it up to date to assist with the determination of cleanup activities as well as policies and strategies for control of water quality. *See* RISEMARNAT Article 83 paragraph VI, Article 84 paragraph VI, Article 85 paragraphs II, VII, VIII and IX.

The reasoning in support of developing a factual record for those assertions is similar to the reasoning in support of the Secretariat's recommendation for preparation of the factual record for the SEM-97-002 (Rio Magdalena) submission, in which similar assertions regarding enforcement of Article 133 and related provisions were addressed.<sup>110</sup> As with the Rio Magdalena submission, the Submitters' claim that the water quality in the Santiago River is seriously degraded and worsening, despite the activities and plans that Mexico describes in the response, underscores the Secretariat's view that a factual record is warranted. Further study of these issues would advance the goals of the NAAEC in terms of 1) fostering the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations, and 2) enhancing compliance with, and enforcement of, environmental laws and regulations.<sup>111</sup>

### **3. Assertions regarding the Arcediano Dam project**

The submission asserts that Mexican authorities are failing to enforce mandatory water management criteria by planning to build the Arcediano Dam on the Santiago River without first restoring the ecological stability of the river. According to the submission, this alleged failure constitutes a failure to effectively enforce LGEEPA Articles 88 paragraphs II and III and 89. The Submitters further assert that Mexico is failing to effectively enforce LGEEPA Article 157, which provides that "the federal government shall promote the empowerment of society as a participant in the planning, implementation, evaluation and monitoring of environmental and natural resource policy."

LGEEPA Article 88 paragraphs II and III provide that to promote the rational use and development of water and aquatic ecosystems, the following criteria shall be considered: 1) the sustainable use of natural resources, including aquatic ecosystems, shall be undertaken in a manner that does not affect their natural equilibrium, and 2) to maintain the integrity and equilibrium of natural elements involved in the hydrologic cycle, consideration shall be given to the protection of soils, woodlands and wilderness areas; to the maintenance of the basic flow in watercourses; and to the recharge capacity of aquifers. LGEEPA Article 89 states that the criteria in Article 88 shall be considered in connection with various activities, including the formulation of the National Water Program; the issuance of concessions, permits and in general all types of authorizations for the use of natural resources or the realization of activities that affect or may affect the hydrologic cycle; the issuance of authorizations for the diversion, extraction or drawing of national waters; and policies and programs for the protection of endemic aquatic species, threatened species, species in danger of extinction or specially protected species.

Mexico asserts that the criteria in LGEEPA Article 88 for the sustainable use of water and aquatic ecosystems were considered along with the provisions of LGEEPA Article 89 throughout the dam project, beginning with the feasibility analysis of the alternatives for supplying water to the Guadalajara metropolitan area. It explains how the National Water

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<sup>110</sup> SEM-97-002 (Rio Magdalena), *Article 15(1) Notification to Council that Development of Factual Record is Warranted* (5 February 2002).

<sup>111</sup> NAAEC Article 1(a) and (g).



Program (*Programa Nacional Hidráulico*) and the PND encompass an integrated view of the natural resources of the Lerma-Chapala-Santiago-Pacífico region that plans for the maintenance and restoration of ecosystem integrity, protection of human health and sustainable development. Mexico asserts that even though the concession for the Arcediano Dam project had not yet been issued, the CNA seeks to ensure that water resources are used sustainably and in an integrated manner by providing technical assistance to the CEAS Jalisco. This includes CEAS Jalisco's plans to clean up the Santiago River in conjunction with constructing the Arcediano Dam. Mexico further states that when authorizations to divert or extract national waters are issued in connection with the dam project, they will account for those cleanup intentions and will be designed to take advantage of existing flows for the construction of a storage reservoir designed to conduct water to the Guadalajara metropolitan area. Mexico also states that the RIA made the dam project conditional on the taking of measures to protect any species that may be threatened, endangered, or subject to special protection. As well, Mexico acknowledges in its response that the intention is to locate the dam on the Santiago River because it is already more degraded than the Verde River.<sup>112</sup>

Mexico also provides information in its response on measures it has taken to conform to LGEEPA Article 157. Mexico explains how public participation has taken place through the following channels, at a minimum: the National Development Plan, public opinion meetings, the National Environment and Natural Resources Program, the National Water Program, the Watershed Councils, the Water Advisory Councils, expert panels, public consultation processes, the regional water plans for 2002–2006, the water plan for Region VIII-Lerma Santiago Pacífico, and the public consultation process for the Arcediano Dam project through the creation (by the government of the state of Jalisco) of an interdisciplinary group to analyze alternatives for supplying water to the Guadalajara metropolitan area and a later group subsequent to the public meeting and consultation on the EIS.

On reviewing the submission in light of the response, the Secretariat views the assertions regarding the Arcediano Dam as extensions of the assertions regarding the Watershed Council and the pollution of the Santiago River. The focus of the Submitters' assertion is that the Arcediano Dam project will not ensure the equilibrium of the aquatic ecosystem. Both the Submitters and Mexico appear to acknowledge that the dam project by itself will not address problems related to pollution of the Santiago River. Mexico explains that those problems will be addressed through future actions and through conditions and criteria imposed in connection with approval of the dam. The Submitters' concerns regarding public participation relate not only to participation in connection with the dam project, but more generally to the manner in which the concerns of groups like the Submitters are accounted for not only in the adoption of plans and policies, but most importantly in their implementation. Accordingly, the Secretariat concludes that matters regarding whether the Arcediano Dam will restore equilibrium of the Santiago River aquatic system should be incorporated, as appropriate, in a factual record addressing the Submitters' assertions regarding the Watershed Council and pollution of the Santiago River.

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<sup>112</sup> Response of Mexico, at 57.

## V. RECOMMENDATION

For the foregoing reasons, the Secretariat has determined that, in light of Mexico's response, the submission warrants the development of a factual record and so notifies the Council by means of this notification.

Mexico's response leaves open central questions regarding the assertion that Mexico is failing to effectively enforce its environmental law in connection with 1) the operation of the Watershed Council for the watershed and whether and how its agreements have been given authoritative effect and 2) the implementation of Mexico's system for monitoring water quality in the Santiago River and taking appropriate measures in response to monitoring results. Although the submission refers to the entire Lerma-Santiago-Pacífico Watershed, it focuses on the areas of the watershed that include Lake Chapala, Arcediano, Juanacatlán, the Santiago River and the Verde River, and therefore the factual record would focus primarily on those areas of the watershed, including consideration of the Arcediano Dam project as appropriate, along with general information regarding the entire watershed as necessary and relevant.

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

Respectfully submitted for your consideration on this 18<sup>th</sup> day of May 2005.

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

Per: William V. Kennedy  
Executive Director