
Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 14(1) and (2)
of the North American Agreement for Environmental Cooperation**

Submitters: Center for Biological Diversity
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Los Angeles Audubon Society
Pacific Environment and Resources Center
Wildcoast

Represented by: James Jay Tutchton

Party: Mexico

Original submission: 3 May 2005

Revised submission: 11 July 2005

Date of this determination: 30 September 2005

Submission I.D.: SEM-05-002 (Islas Coronado)

I. INTRODUCTION

On 3 May 2005, Center for Biological Diversity, Greenpeace Mexico, Alfonso Aguirre, Shaye Wolf, American Bird Conservancy, Los Angeles Audubon Society, Pacific Environment and Resources Center, and Wildcoast (the “Submitters”), represented by James Jay Tutchton, filed a submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) pursuant to Article 14 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”). The Submitters assert that Mexico is failing to effectively enforce provisions of its environmental law by allowing the construction of a Liquefied Natural Gas (LNG) Re-gasification Terminal (the “Terminal”) adjacent to the Coronado Islands and a breeding colony of Xantus’s Murrelet, *Synthliboramphus hypoleucus*, a seabird considered at risk (and on the Mexican list of endangered bird species).

Specifically, the Submitters assert that Mexico’s approval of the Terminal’s environmental impact assessment constituted a failure to effectively enforce provisions of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y de Protección al Ambiente—LGEEPA*), the General Wildlife Act (*Ley General de Vida Silvestre—LVS*), as well as the National Biodiversity Commission’s (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad—Conabio*) consideration of the Coronado Islands as an “Important Area for the Conservation of Birds” and a “Priority Maritime Region,” and a resolution by the Mexican Congress (*Congreso de la Unión*) mandating the

creation of a protected natural area for the Pacific islands off Baja California, including the Coronado Islands. The Submitters' assertions relate to the environmental impact assessment (EIA) that was approved, the protection of endangered species, and the preservation of biodiversity.

In its determination of 2 June 2005, the Secretariat found that the submission did not provide sufficient information to allow the Secretariat to review it, and therefore failed to satisfy Article 14(1)(c). The Secretariat gave the Submitters 30 days to file a revised submission, and on 11 July 2005, the Submitters filed a revised submission containing additional information.

The Secretariat has determined that the submission now satisfies Article 14(1) and that it warrants a response from Mexico. The reasons for this determination are provided below.

II. SUMMARY OF THE SUBMISSION

A. The Original Submission

The Submitters assert that Mexico is failing to effectively enforce provisions of the LGEEPA), the LVS and other Mexican environmental laws¹ by allowing the construction of the Terminal adjacent to the Coronado Islands and a breeding colony of Xantus's Murrelet, a seabird listed as endangered in Mexican official standard NOM-059-ECOL-2001.²

The submission asserts that the government of Mexico has decided to allow construction of the Terminal despite the devastating impact this would have on the main breeding area of Xantus's Murrelet. The submission focuses on harm to Xantus's Murrelet but asserts that the Terminal would harm other Coronado Islands species as well.³

According to the submission, the Coronado Islands harbor the largest known breeding colony of Xantus's Murrelet. Xantus's Murrelet is a transboundary (migratory) species that breeds on a small number of islands in southern California and northern Baja California, and forages in the waters of Mexico, the United States and Canada.⁴ Las Islas de los Santos Coronados, commonly known as the Coronado Islands, are an archipelago of four small islands located about eight miles off the Pacific coast of Tijuana, Baja California, Mexico.⁵ The submission states that the islands support endemic terrestrial species and subspecies of animals and plants found nowhere else in the world, several of which are protected by NOM-059-ECOL-2001.⁶

The submission states that the Coronado Islands are considered by Conabio as an "Important Area for the Conservation of Birds" and a "Priority Maritime Region."⁷ The submission also

¹ Original Submission at 1.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid. at 2.

⁶ Ibid.

⁷ Ibid.

makes reference to a resolution by the Mexican Congress to create a protected natural area for the Baja California Pacific islands, including the Coronado Islands.⁸

The submission asserts that the Ministry of the Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*—Semarnat) approved the Environmental Impact Assessment (EIA) for the Terminal on 15 September 2004.⁹ As the submission explains, the Terminal would consist of a platform approximately 300 meters long that would serve as a receiving dock for the supply ships as well as house the LNG storage tanks and a re-gasification facility that would send natural gas via underwater pipeline to the mainland.¹⁰ The main justification provided for building the platform in proximity to the Coronado Islands is the breakwater effect of the southernmost island of the group.¹¹

The submission explains that the Terminal would cause various impacts on the Islands' species: artificial light pollution coming from the Terminal and tankers; the potential for a catastrophic explosion; direct disturbance through construction and general operation of the Terminal and tankers; the increased opportunity for petroleum spills and discharges; the increased potential for rat introduction to the islands; and the intake, disinfection, and discharge of 188,000,000 gallons of chlorinated seawater per day.¹²

The submission asserts that the government of Mexico has failed to effectively enforce LGEEPA Articles 78–83 as well as the principles listed in LVS Article 5, which the authorities must observe in making and implementing national wildlife policy. In regard to LGEEPA Articles 78–83, the submission asserts that Mexico is failing to follow several criteria and measures listed in LGEEPA Article 79 that apply to the management of flora and fauna. The Submitters claim that by approving the Terminal, Mexico is: 1) failing to preserve biodiversity and natural species habitat; 2) threatening the continuity of the evolutionary processes of species and their genetic resources, including areas designated as representative for ecological systems for protection and research; 3) failing to preserve and develop endemic, threatened, endangered or specially protected species; 4) failing to strengthen biological reproductive seasons and repopulate wildlife species; and 5) failing to promote wildlife research to discover its genetic, scientific and economic potential.¹³

The submission asserts that Mexico is failing to enforce the principles listed in LVS Article 5 by allegedly failing: 1) to conserve genetic diversity and to protect, restore and provide comprehensive management for natural habitats; 2) to implement preventive measures for maintaining the appropriate conditions for the evolution, viability and continuity of ecosystems, habitats and populations in their natural surroundings, and 3) to apply the available scientific, technical and traditional knowledge.¹⁴

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid. at 3.

¹³ Ibid. at 8–9.

¹⁴ Ibid. at 10–11.

The submission further asserts that the government of Mexico has failed to effectively enforce its law by approving an insufficient EIA for the Terminal.¹⁵ The Submitters contend that while the EIA does address the effects of noise and turbidity from the Terminal and tanker activity, oil spills, and the release of chlorinated water, it incorrectly concludes that the effects on seabirds, marine mammals, and marine biota in general will be insignificant. They also contend that the EIA is internally inconsistent and that one of its chapters is based entirely on the analysis of a land-based LNG terminal project that did not discuss impacts to marine species or island wildlife.¹⁶

Finally, the Submitters claim that the Coronado Islands are a protected natural area and that Mexico is failing to effectively enforce its environmental law by approving the Terminal project inside that area. The Submitters assert that in July 2003, the Mexican Congress mandated that the relevant federal agencies promote a decree to create a protected natural area including the Coronado Islands and that Mexico nonetheless approved the EIA for the Terminal in September 2004. The submission states that the EIA for the Terminal project is wrong in stating that “no evidence exists that islas Coronado have been declared a natural protected area nor are they in the process of being declared as such.”¹⁷

B. The Revised Submission

On 11 July 2005, in response to the Secretariat’s determination of 2 June 2005, the Submitters filed a revised submission with attachments.

First, the Submitters attach, and request that the Secretariat consider, a 11 May 2005 document by the United States Fish and Wildlife Service (“USFWS”) titled “Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions.” The Submitters refer to assertions by the USFWS in that document of threats posed by the Terminal to Xantus’s Murrelet.¹⁸

Regarding the environmental law to be reviewed through the submission process, the Submitters again assert, as in the original submission, that Conabio’s consideration of the Coronado Islands’ as an “Important Area for the Conservation of Birds” and a “Priority Maritime Region” and the resolution by the Mexican Congress mandating the creation of a protected natural area for the Coronado Islands fall within the NAAEC’s concept of environmental law.¹⁹ Moreover, they incorporate by reference various attachments to the revised submission in which they augment their assertion of failures of effective enforcement by the Mexican authorities to include LGEEPA Articles 34 and 35.²⁰

¹⁵ Ibid. at 11.

¹⁶ Ibid.

¹⁷ Ibid. at 12.

¹⁸ Revised Submission at 1.

¹⁹ Ibid. at 3.

²⁰ Revised Submission at 4, Revised Submission, Exhibit 4 at 3 and 8.

The Submitters assert that Semarnat, in its decision, in violation of LGEEPA Article 35, i) unjustifiably dismissed the written opinions and technical supporting documentation that had been filed, and ii) did not provide grounds or reasons for its decision.²¹

The Submitters assert that LGEEPA Article 34 establishes the obligation that “the project’s developer shall publish, at its own expense, an excerpt of the projected construction or activity in a wide-circulation newspaper in the federated entity [state or Federal District] in question, within the five days following the filing of the environmental impact assessment with the Ministry.” The Submitters assert that the Terminal project developer’s compliance with this article was deficient in that: a) the information was not published in newspapers within 5 days of the filing of the EIA with Semarnat but 21 days later, and b) the information published in various newspapers could not be construed as an excerpt of the project providing a clear and, most importantly, a complete indication of its impacts. They assert that the newspaper announcements do not mention that the project would be sited very close to the Coronado Islands. The Submitters assert that it can be deduced that the developer intentionally omitted key information to avoid negative opinions’ being formed about the project.²² Additionally, the Submitters assert that Semarnat failed to publicly announce, through any print or electronic medium of communication, that the project developer filed additional information on the project on 17 March 2004 and filed supplementary information on 7 June 2004.²³

In response to certain observations made by the Secretariat in its determination of 2 June 2005, the Submitters attach to the revised submission copies of the EIA for the Terminal project²⁴ and Semarnat’s approval thereof.²⁵ In response to the Secretariat’s observation in its determination that the Submitters must provide copies of any correspondence and other documentation filed with Semarnat or other judicial authorities in connection with the arguments in the submission, the Submitters attach copies of the following to this revised version: i) the observations filed by one of them concerning the Terminal and its EIA; ii) the administrative appeal (*recurso de revisión*) that one of them filed against Semarnat’s approval of the EIA; iii) an *amparo* action filed by one of them before a District Court in connection with the matters raised in the submission; iv) additional correspondence between the Submitter who filed the administrative appeal and Semarnat. In addition, the Submitters provide copies of: i) a Semarnat decision merging the administrative appeal filed by one of the Submitters against the Terminal Project with appeals filed against the project by other persons, and ii) the District Court decision dismissing the *amparo* action filed by one of the Submitters in connection with the matters raised in the submission. The grounds for this decision were that the *amparo* claimant had not met the exhaustion requirement of having filed an action in nullity (*juicio de nulidad*) before filing an *amparo* claim. The Submitters assert that these procedures were terminated or could not be pursued due to their inability to post the P\$65,950,000 bond required by the Mexican authorities.²⁶

²¹ Revised Submission, Exhibit 4 at 3.

²² Revised Submission, Exhibit 4 at 8.

²³ Ibid.

²⁴ Revised Submission, Exhibit 9.

²⁵ Revised Submission, Exhibit 10.

²⁶ Revised Submission at 4.

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission with reference to the criteria in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations, Article 14(1) is not intended to be an insurmountable procedural screening device.²⁷

A. Opening Sentence of Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law....” The Submitters are persons or nongovernmental organizations residing in either Mexico or the United States.

The Secretariat confirms that — despite the information the Submitters present in their revised submission — Conabio’s consideration of the Coronado Islands as an “Important Area for the Conservation of Birds” and a “Priority Maritime Region” and the resolution by the Mexican National Congress to create a protected natural area for the Pacific islands of Baja California, including the Coronado Islands, do not meet the NAAEC Article 45(2) definition of environmental law.

The Secretariat finds that the other provisions which the Submitters assert that Mexico is failing to effectively enforce — LGEEPA Articles 34, 35, and 78–83 and the principles of LVS Article 5 — are clearly environmental law as defined by NAAEC Article 45(2).²⁸ The

²⁷ See, for example, SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

²⁸ Article 45 of the NAAEC defines “environmental law” as follows:

“2. For purposes of Article 14(1) 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.”

Secretariat also finds that the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself.²⁹

LGEEPA Article 34 sets forth the process to be followed in holding a public consultation on an environmental impact assessment. The Submitters assert that with respect to this article, Semarnat, in its decision, unjustifiably dismissed the written opinions and supporting technical documentation filed by citizens. Furthermore, they assert that the Terminal project developer's LGEEPA Article 34 compliance was deficient in that: a) the information was not published in newspapers within the 5 days following the filing of the EIA with Semarnat but 21 days later, and b) the information published in various newspapers does not constitute an excerpt of the project providing a clear and, most importantly, a complete indication of the impacts of this project, since it does not mention that the project would be located very close to the Coronado Islands. Additionally, the Submitters assert that Semarnat failed to publicly announce, through any print or electronic medium of communication, that the project developer subsequently filed additional and supplementary information on the project.³⁰

LGEEPA Article 35 sets forth the process and criteria that Mexican authorities must follow in determining whether or not to approve an environmental impact assessment. The Submitters assert that Semarnat did not provide grounds or reasons for its decision as prescribed by this article.

The revised submission, with its attachments, clarifies that the assertions on page 11 of the original submission regarding the alleged insufficiency of the EIA constitute a failure to effectively enforce LGEEPA Articles 34 and 35. The Submitters assert that although the EIA does address the effects of noise and turbidity from the Terminal and tanker activities, oil spills, and release of chlorinated water, it incorrectly concludes that the effects on seabirds, marine mammals, and marine biota will be non-significant. They also assert that the EIA is internally inconsistent and one of its chapters is entirely based on an analysis of a LNG terminal project which did not address the impact on marine species or island wildlife.³¹

LGEEPA Articles 78–83 establish Semarnat's obligations with respect to (i) the ecological restoration of areas exhibiting degradation, desertification, or serious ecological instability, and (ii) the declaration of ecological restoration areas. LGEEPA Article 79, specifically cited by the Submitters, lists the criteria that the Mexican authorities must consider for the preservation and sustainable use of wildlife. The submission asserts that Mexico is failing to effectively enforce several of the criteria and measures listed in Article 79 that are applicable to wildlife management. It asserts that by approving the Terminal, Mexico is failing to effectively enforce the criteria and measures to ensure 1) the preservation of biodiversity and

²⁹ This criterion derives from the opening sentence of Article 14(1). The Secretariat has previously determined to consider submissions asserting a failure to effectively enforce or fulfil a clear and specific legal obligation that a Party imposes upon itself. However, with respect to the government enforcement actions contemplated in NAAEC Article 5, the Secretariat has also determined, in its review of previous submissions, to dismiss assertions challenging the language of the provisions enacted by the NAAEC Parties, as opposed to assertions of "failures to effectively enforce" those provisions.

³⁰ Revised Submission, Exhibit 4 at 8.

³¹ Submission at 11.

natural species habitat; 2) the continuity of the evolutionary processes of species and their genetic resources, by designating areas representative of the country's ecological systems for protection and research; 3) the preservation of species considered endemic, threatened, at risk or specially protected; 4) the strengthening of biological reproductive seasons and the repopulation of wildlife species; and 5) the promotion of wildlife research to discover its genetic, scientific and economic potential.³²

LVS Article 5 sets forth the principles the authorities must observe — in addition to those listed in LGEEPA Article 15 — in making and conducting national wildlife policy. It also provides that the objective of national wildlife and habitat policy is the conservation of wildlife and habitat through protection and the enforcement of optimal levels of sustainable use, with a view to simultaneously maintaining and promoting the restoration of wildlife and habitat diversity and integrity, on the one hand, and improving the well-being of the country's population, on the other. The submission asserts that Mexico is failing to effectively enforce the principles listed in this article by failing to consider the following: (1) conserving genetic diversity as well as the protection, restoration and comprehensive management of natural habitat; (2) carrying out preventive measures to maintain the appropriate conditions for the evolutionary viability and continuity of ecosystems, habitats and populations in their natural surroundings; and 3) applying available scientific, technical and traditional knowledge.³³

The Secretariat has determined that the Submitters' assertions regarding the alleged failures to effectively enforce these provisions, whose primary purpose is the protection of the environment and which invest the authorities with a specific power or impose an obligation on them, may be reviewed according to the criteria in Article 14(1) of the NAAEC.³⁴

B. Article 14(1) Requirements

Article 14(1) sets out six specific requirements relevant to the Secretariat's consideration of submissions. The Secretariat must determine whether a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

³² Ibid. at 8–9.

³³ Ibid. at 10–11.

³⁴ See, for example, SEM-03-003 (Lake Chapala II), Determination pursuant to Article 14(1) and (2) (19 December 2003).

In its determination of 2 June 2005, the Secretariat found that the submission meets the requirements of Article 14(1)(a), (b), (d), (e), and (f).³⁵ However, the Secretariat further determined that the submission did not provide sufficient information to allow the Secretariat to review it, and therefore failed to satisfy Article 14(1)(c).

With the revised submission and attachments and the additional information that the Submitters have now provided, the submission meets all the Article 14(1) requirements. Specifically, it meets the criterion of Article 14(1)(c) because it now provides supporting documentation that allows the Secretariat to review it.

The Submitters provide a copy of the relevant EIA, which they assert that Mexico approved even though the EIA did not contain sufficient information or account for the environmental law provisions identified in the submission. The Submitters also provide a copy of the Semarnat decision approving the EIA as well as copies of correspondence and other documents filed with Semarnat and certain judicial authorities in connection with the arguments in the submission. This reaffirms that the submission meets the NAAEC Article 14(1)(e) requirement because it indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates that a response was obtained from the Party. In addition, the Submitters provide copies of documents relating to certain remedies pursued by one of the Submitters.

The original submission also provides information regarding the assertions made in the submission concerning the impact that the Terminal would have on the main breeding area of Xantus's Murrelet, a species listed as endangered in Mexican official standard NOM-059-ECOL-2001. Exhibit A of the submission consists of a document produced by Alfonso Aguirre and Bradford Keitt containing a detailed investigation of the characteristics of the Coronado Islands and the possible effects of the Terminal on the Islands and Xantus's Murrelet. This document appears to be based on a considerable bibliography. Moreover, the USFWS document filed by the Submitters states that in spite of this agency's activities to address threats to Xantus's Murrelet, the Terminal project is a threat to the survival of this species, since the Coronado Islands are its largest-known breeding area. This document explains how the construction and operation of the Terminal would increase the levels of disturbance to Xantus's Murrelet. The USFWS document concludes that the Terminal project is an imminent risk.³⁶ Furthermore, Exhibits I, II and II of the revised submission are pertinent to the Submitters' assertions in that they provide information about the reasons why the Coronado Islands are candidates to be established as a protected natural area.³⁷

C. Article 14(2)

If the Secretariat finds that the submission meets the requirements of Article 14(1), it reviews the submission to determine whether it warrants requesting a response from the Party. Under

³⁵ SEM-05-002 (Coronado Islands), Determination pursuant to Article 14(1) (2 June 2005).

³⁶ Department of the Interior, Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates or Proposed for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions," *Federal Register* 70, no. 90 (11 May 2005), 24876–7.

³⁷ Exhibits 2 and 3 of the Revised Submission.

NAAEC Article 14(2), four criteria guide the Secretariat in deciding whether to request a response; namely, whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in the process would advance the goals of the Agreement;
- (c) private remedies available under the Party's law have been pursued, and
- (d) the submission is drawn exclusively from mass media reports.

The Secretariat, guided by the Article 14(2) criteria, has determined that the submission merits requesting a response from the Party, in this case Mexico. Specifically, the Secretariat's determination is as follows:

- a) As to whether the submission alleges harm to the person or organization making the submission, the Secretariat observes that the basis of the assertions and information provided by the Submitters is precisely that Mexico authorized the construction of the Terminal in spite of the devastating impact this would have on the main breeding area of Xantus's Murrelet, a transboundary (migratory) species listed as endangered in NOM-059-ECOL-2001. The Secretariat therefore finds that the submission meets this criterion.³⁸
- b) The Secretariat finds that further study of the matters raised in the submission would advance the goals of the NAAEC, specifically NAAEC Article 1 sections (a), (d), (f), (g) and (j), since it refers to fostering the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; supporting the environmental goals and objectives of the NAFTA; strengthening cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices; enhancing compliance with, and enforcement of, environmental laws and regulations; and promoting pollution prevention policies and practices.
- c) With respect to whether private remedies available under the Party's law have been pursued, as described above, the Submitters indicate that one of them has filed an administrative appeal against the decision approving the EIA for the Terminal. They further indicate that one of them filed an *amparo* claim before a District Court with respect to the matters raised in the submission. Regarding the status of these proceedings, the Submitters assert that they have either been terminated or could not

³⁸ In Submission SEM-96-001 (Cozumel), Recommendation to Council for the Development of a Factual Record (7 June 1996) the Secretariat found that “[i]n considering harm... while the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.”

be pursued due to the Submitters' inability to post the bond required by the Mexican authorities.³⁹

The Secretariat observes, in regard to the District Court's dismissal of the *amparo* claim filed by one of the Submitters with respect to the matters raised in the submission, that the grounds for this decision were that the *amparo* claimant had not met the exhaustion requirement of having filed an action in nullity (*juicio de nulidad*) before filing an *amparo* claim. The Secretariat notes that neither the NAAEC Article 14(2)(c) criterion nor Guideline 7.5⁴⁰ require the Submitters to exhaust all remedies available under the Party's law. Guideline 7.5 directs the Secretariat to consider whether "reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases." The Secretariat finds that reasonable actions have been taken by the Submitters to pursue remedies available under the Party's law.

Additionally, the Submitters filed a copy of a Semarnat decision of 11 April 2005 that merges the administrative appeal filed by one of the Submitters against the Terminal Project with appeals filed against the project by other persons. Considering the periods of time established by Mexican administrative law for resolution of such proceedings, the Secretariat finds that requesting a response from Mexico poses little or no risk of duplicating or interfering with the merged appeal proceeding.⁴¹

- d) With respect to Article 14(2)(d), the submission is not based exclusively on mass media reports but on the Submitters' direct knowledge of the facts.

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-05-002 (Islas Coronado) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the criteria of Article 14(2). Accordingly, the Secretariat, subject to the provisions of NAAEC Article 14(3), hereby requests a response from the Government of

³⁹ Revised Submission at 4.

⁴⁰ Guideline 7.5:

In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:

(a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and

(b) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.

⁴¹ Moreover, in its Article 15(1) notification to Council that Submission SEM-02-004 (El Boludo Project) warranted development of a factual record, the Secretariat noted that "where an administrative proceeding lapses due to the expiry of the period in which the authority must issue a decision, it ceases to be pending and ceases to be an 'administrative action pursued by the Party *in a timely fashion and in accordance with its law*' (emphasis added) for the purposes of the NAAEC."

Coronado Islands–
Article 14(1) and (2) Determination

A14/SEM/05-002/28/14(1)(2)
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Mexico. Copies of the submission, the revised submission and their attachments were previously forwarded to the Party under separate cover. Attached hereto are Spanish translations of the submission, the revised submission and their attachments, which were filed in English.

Secretariat of the Commission for Environmental Cooperation

(original signed)
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