

## **Secretariat of the Commission for Environmental Cooperation**

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

<b>Submitters:</b>	Academia Sonorense de Derechos Humanos and Domingo Gutiérrez Mendívil
<b>Party:</b>	United Mexican States
<b>Date of receipt:</b>	30 August 2005
<b>Date of this notification:</b>	4 April 2007
<b>Submission no.:</b>	<b>SEM-05-003 (Environmental Pollution in Hermosillo II)</b>

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#### **I. EXECUTIVE SUMMARY**

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) create a mechanism for individuals to file submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) initially reviews such submissions with reference to the requirements of NAAEC Article 14(1). If the Secretariat finds that a submission meets these requirements, it proceeds to consider, in accordance with Article 14(2), whether the submission merits a response from the concerned Party. In light of the Party’s response, the Secretariat may notify Council that it considers the preparation of a factual record to be warranted, providing its reasons in accordance with Article 15(1). The Secretariat dismisses the submission if it finds that the preparation of a factual record is not warranted.

On 30 August 2005, Academia Sonorense de Derechos Humanos and Lic. Domingo Gutiérrez Mendívil (the “Submitters”) filed with the Secretariat a submission on enforcement matters pursuant to NAAEC Article 14. The Submitters assert that “Mexico is failing to effectively enforce its environmental law in relation to air pollution control in the city of Hermosillo, Sonora.”<sup>1</sup> They assert that the authorities identified in the submission are not taking the actions necessary to prevent and control environmental pollution in Hermosillo, Sonora, in violation of the legal provisions cited in the submission, and that they “have failed to effectively enforce practically all legal provisions governing air pollution prevention and control.”<sup>2</sup>

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<sup>1</sup> Submission, p. 5.

<sup>2</sup> Ibid., p. 15.

On 9 November 2005, the Secretariat determined that the submission met the requirements of Article 14(1) and found that, pursuant to the criteria of Article 14(2), the submission warranted requesting a response from Mexico in relation to these assertions.<sup>3</sup>

On 16 February 2006, Mexico filed its response in accordance with NAAEC Article 14(3). Mexico contends that its enactment of laws, standards, and programs regarding the matters addressed in the submission constitutes a reasonable exercise of its discretion and states that it focuses its enforcement on higher-priority environmental matters. For these reasons, Mexico contends that the Submitters' assertions should not be considered failures to effectively enforce Mexico's environmental law in the sense of NAAEC Article 45(1).<sup>4</sup> Mexico describes air pollution-related actions taken by the federal, state and local governments, including street paving;<sup>5</sup> inspection of establishments under federal jurisdiction; recording and control, by means of the Annual Operating Report (*Cédula de Operación Anual*—COA), of emissions from fixed sources under federal jurisdiction; operating licenses and the Single Environmental License (*Licencia Ambiental Única*);<sup>6</sup> inspection and enforcement actions;<sup>7</sup> and institutional coordination programs.<sup>8</sup> Mexico's response begins with a section asserting that the submission was improperly admitted by the Secretariat.

After reviewing the submission in the light of Mexico's response, the Secretariat concludes that the response leaves open central questions with respect to the effective enforcement of air pollution laws in the city of Hermosillo. In particular, the response leaves open certain issues relating to programs that have not been implemented, despite specific timetables mandated in the applicable standards, and recommendations contained in air pollution reports.

## II. BACKGROUND

On 14 July 2004, the Submitters filed submission SEM-04-002 (Environmental Pollution in Hermosillo), an earlier version of the submission subject to this notification. The Secretariat dismissed that submission for failure to meet the requirements of NAAEC Article 14(1)(c) and (e). On 28 September 2004, the Submitters filed a revised submission; the Secretariat, pursuant to Article 14(2), determined, on 9 November 2004, that the revised submission did not merit requesting a response from Mexico and gave the Submitters an opportunity to provide additional information on their pursuit of remedies. The Secretariat received complementary information from the Submitters on 9 December 2004, and determined, on 27 January 2005, pursuant to Article 14(2), that a response should not be requested from Mexico, noting that a related proceeding was pending in Mexico.

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<sup>3</sup> SEM-05-003 (Environmental Pollution in Hermosillo II), Article 14(1) and (2) Determination (9 November 2005), p. 14.

<sup>4</sup> Party Response, pp. 31-3.

<sup>5</sup> *Ibid.*, p. 45.

<sup>6</sup> *Ibid.*, pp. 40-7.

<sup>7</sup> *Ibid.*, pp. 43, 45, 47-8.

<sup>8</sup> *Ibid.*, p. 45.

### III. SUMMARY OF THE SUBMISSION

In submission SEM-05-003 (Environmental Pollution in Hermosillo II), the Submitters assert that Mexico is failing to effectively enforce its environmental law in relation to air pollution prevention and control in the city of Hermosillo, Sonora. The Submitters state that the authorities of the three levels of government—federal, state and municipal—have failed to effectively enforce provisions<sup>9</sup> of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), the Regulation to the LGEEPA Respecting Air Pollution Prevention and Control (*Reglamento de la LGEEPA en Materia de Prevención y Control de la Contaminación de la Atmósfera*—RPCCA), the federal General Health Act (*Ley General de Salud*), the Sonora State Ecological Balance and Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente para el estado de Sonora*—LEES), the Sonora State Health Act (*Ley de Salud para el estado de Sonora*), the Sonora State Emergency Preparedness Act (*Ley de Protección Civil para el estado de Sonora*), and various Mexican Official Standards (*Normas Oficiales Mexicanas*—NOM) applicable to air pollution. The Submitters cite failures to effectively enforce the environmental law by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat), the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), the federal Ministry of Health (*Secretaría de Salud*), the Sonora State Executive Branch, the Sonora State Ministry of Urban Infrastructure and Environment, the Sonora State Ministry of Health, and the municipality of Hermosillo.<sup>10</sup>

The Submitters base their submission on the alleged failure by the federal, state, and municipal governments to oversee, promote, and recommend compliance of the legal framework governing air pollution in the city of Hermosillo. The Submitters assert that Semarnat has failed to “enforce the NOMs relating to air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo.”<sup>11</sup> They further allege the absence of or failure to update environmental contingency, environmental quality, and air pollution control, monitoring, and information programs, as well as the lack of a mandatory vehicle inspection program.<sup>12</sup> The Submitters state that the lack of plans and programs for air emission control<sup>13</sup> constitutes a

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<sup>9</sup> The Secretariat concluded the following provisions fall within the meaning of “environmental law” as defined in NAAEC Article 45(2)(a): LGEEPA Articles 5, paragraphs II, V, XVIII, and XIX; 7, paragraphs III, XII, and XIII; 8, paragraphs III, XI, XII, and XV; 10, and 112, paragraphs II and IV; RPCCA Articles 3, paragraph VII; 4, paragraph III; 13, 16, and 41; LEES Articles 73, 75, 85, paragraph B, subparagraph I, 138, and 139; NOM-020-SSA1-1993, NOM-021-SSA1-1993, NOM-022-SSA1-1993, NOM-023-SSA1-1993, NOM-024-SSA1-1993, NOM-025-SSA1-1993, NOM-026-SSA1-1993, NOM-048-SSA1-1993, NOM-040-SEMARNAT-2002, NOM-043-SEMARNAT-1993, NOM-085-SEMARNAT-1994, NOM-121-SEMARNAT-1997, NOM-041-SEMARNAT-1999, NOM-042-SEMARNAT-1999, NOM-044-SEMARNAT-1993, NOM-045-SEMARNAT-1996, NOM-048-SEMARNAT-1993, and NOM-050-SEMARNAT-1993. SEM-05-003 (Environmental Pollution in Hermosillo II), Determination under Articles 14(1) and (2) (9 November 2005).

<sup>10</sup> Submission, pp. 1-5.

<sup>11</sup> Ibid., pp. 5-6.

<sup>12</sup> Ibid., pp. 58, 61.

<sup>13</sup> Ibid., pp. 6-7.

failure to fulfill specific obligations created by the environmental law. The Submitters report that the matters raised by the submission have been made known to the relevant authorities in Mexico<sup>14</sup> and that the Submitters have pursued available remedies.<sup>15</sup> The Submitters indicate that those proceedings ended without satisfactory resolution of the irregularities asserted in the submission.<sup>16</sup>

#### IV. SUMMARY OF THE RESPONSE OF THE PARTY

Mexico's response is divided into two sections, the first setting out the reasons why Mexico believes the Secretariat should have dismissed the submission, and the second containing Mexico's *ad cautelam* response, which argues that the preparation of a factual record is not warranted.

##### A. Dismissal of Submission

Mexico asserts that the submission does not meet several of the NAAEC Article 14 requirements, contending that the Submitters did not pursue all remedies available to them under the Party's law;<sup>17</sup> did not provide sufficient information to support their assertions;<sup>18</sup> did not provide documentation showing harm to the Submitters or the population of the city of Hermosillo;<sup>19</sup> and based their arguments principally on mass media reports.<sup>20</sup>

##### B. *Ad cautelam* Response

In its response, Mexico invokes Article 45(1)(a) and (b) in arguing that the submission does not assert failures to effectively enforce environmental law as contemplated by the NAAEC. Mexico asserts that the authorities have properly assigned resources to environmental matters of higher priority in order to respond to the specific environmental issues of Sonora, and particularly those of the city of Hermosillo.<sup>21</sup> The response states that the lack of street paving is responsible for 78 percent of suspended particulate pollution and that the weather and topography of the city of Hermosillo are, along with the lack of paving, the main causes of air

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<sup>14</sup> Documents dated 14 January 1999, 8 July 2004, 8 September 2004, 9 September 2004, and 13 September 2004.

<sup>15</sup> The Submitters assert that remedies and proceedings were pursued before the Sonora State Human Rights Commission (*Comisión Estatal de Derechos Humanos de Sonora*), the National Human Rights Commission (*Comisión Nacional de Derechos Humanos*), the Second District Court in the state of Sonora, the Third Court of the Fifth Circuit, the First District Court in the state of Sonora, and the Fifth Court of the Fifth Circuit.

<sup>16</sup> Submission, p. 15.

<sup>17</sup> Party Response, pp. 3-6.

<sup>18</sup> Ibid., pp. 7-27.

<sup>19</sup> Ibid., pp. 17-29.

<sup>20</sup> Ibid., pp. 29-30.

<sup>21</sup> Ibid., p. 31.

pollution.<sup>22</sup> For these reasons, Mexico has decided to concentrate on paving of streets as the most effective measure to counter particulate air pollution. Mexico notes that the exercise of the powers set out in the environmental law is not mandatory but discretionary, noting that no time limits are established in which they must be exercised. According to Mexico, the exercise of its authority responds to the dictates of legal reform and resource availability.<sup>23</sup>

At the federal level, Mexico explains that Semarnat has been monitoring air pollutants emitted by facilities under federal jurisdiction since 1998 and is currently implementing the pollutant release and transfer register (PRTR).<sup>24</sup> Mexico notes that Semarnat has issued 92 operating licenses and single environmental licenses<sup>25</sup> and that the 2003 report on the COA program presented data on the emission of 943,959 tons of air pollutants in the state of Sonora.<sup>26</sup> From 1998 to 2005, Profepa conducted 28 site inspections resulting in 16 administrative orders,<sup>27</sup> three resolutions resulting in the closing of administrative files, two open administrative files, and fines in an amount of P\$325,050.<sup>28</sup> Mexico reports that Semarnat is coordinating with the municipality of Hermosillo to control air emissions from the brick industry and for operation of air quality monitoring equipment.<sup>29</sup>

At the state level, Mexico states that the Ministry of Urban Infrastructure and Environment has, since 1994, regulated activities potentially giving rise to increased air pollution in the state through the issuance of 451 environmental impact orders, 91 state operating licenses, and 228 operating reports.<sup>30</sup> From 1999 to 2005, the State conducted 90 site inspections in the city of Hermosillo to verify compliance with state environmental law. These inspections gave rise to orders of sanctions and corrective measures.<sup>31</sup> Mexico notes that on 5 September 2000, an agreement between Semarnat and the state of Sonora to transfer the operation of air quality monitoring equipment to the state was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF).<sup>32</sup>

The response emphasizes the discretionary actions taken by Sonora in assigning resources to other environmental matters, noting a program whereby 282,909 m<sup>2</sup> of streets were paved in the city of Hermosillo in 2005. It also cites the Urban Transit Modernization Program (*Programa*

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<sup>22</sup> Ibid., p. 38. The Party, although without citing the studies, asserts that the US Environmental Protection Agency (EPA) attributes 78 percent of particulate pollution to lack of paving.

<sup>23</sup> Party Response, p. 32-3.

<sup>24</sup> Ibid., p. 40. It notes that the following are being monitored: SO<sub>2</sub>, NO<sub>x</sub>, HC, CO, CO<sub>2</sub>, VOC, oils and lubricants, settleable solids, suspended solids, biological oxygen demand, arsenic (As), cadmium (Cd), cyanide (CN), copper (Cu), chromium (Cr), lead (Pb), mercury (Hg), nickel (Ni), nitrogen (N), hazardous waste, nitric oxide, and 2,4-toluenediisocyanate.

<sup>25</sup> Of these licenses, 24 percent were granted to companies in the municipality of Hermosillo; i.e., approximately 22 fixed sources under federal jurisdiction.

<sup>26</sup> Party Response, p. 42.

<sup>27</sup> Ibid., pp. 4-44.

<sup>28</sup> Ibid., p. 51.

<sup>29</sup> Party Response, Appendix H (Exhibit 8), Coordination Agreement between Semarnat and the state of Sonora.

<sup>30</sup> Party Response, p. 44.

<sup>31</sup> Ibid., p. 56.

<sup>32</sup> In addition to Hermosillo, the air quality monitoring equipment is located in the municipalities of Agua Prieta, Cajeme, Cananea, Naco, Nacozari de García, Navojoa, Nogales, and San Luis Río Colorado.

*de Modernización de Transporte Urbano*—SUBA) as another measure designed to counter particulate pollution.<sup>33</sup>

At the municipal level, Mexico explains that Hermosillo has implemented an Air Quality Assessment and Improvement Program (*Programa de Evaluación y Mejoramiento de la Calidad del Aire*—PEMCA) that provides for the establishment and operation of monitoring stations.<sup>34</sup> The response maintains that there has been a reduction in the concentration of total suspended particles (TSP) and particulates less than 10 microns in diameter<sup>35</sup> (PM<sub>10</sub>) and asserts that the municipality places conditions on air pollution emissions by means of environmental impact assessment review.<sup>36</sup> It asserts that the municipality has an environmental complaint response mechanism,<sup>37</sup> an environmental contingency program,<sup>38</sup> and a tire recycling program. It further states that the municipality is taking actions to address air pollution problems associated with the brick industry.<sup>39</sup> Finally, the response notes that the municipality has a draft ecology and environmental protection regulation which, once enacted, will enable the municipality to enact complementary technical standards.<sup>40</sup> Mexico states that no vehicle inspection is taking place due to a lack of specific information necessary to develop such a program.<sup>41</sup>

## V. ANALYSIS

In light of the Party's response, the Secretariat finds that the submission warrants the preparation of a factual record as recommended in this notification and hereby provides the reasons for this recommendation.

### A. Preliminary Issues

Mexico argues that the Secretariat should have dismissed the submission for failure to meet the requirements of Article 14. Mexico asserts that the Submitters did not pursue all remedies available to them under Mexico's law; that they did not provide documentary evidence to support their assertions; that the submission does not allege harm to the person or organization making it; and that the submission is principally based on mass media reports.

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<sup>33</sup> Party Response, pp. 44-5, 53-8.

<sup>34</sup> Ibid., p. 46.

<sup>35</sup> Ibid., p. 63.

<sup>36</sup> Ibid., p. 47.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., p. 48.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., pp. 46-9, 58-64.

<sup>41</sup> Ibid., pp. 61-4.

## 1. Remedies Available to the Submitters

Pursuant to NAAEC Article 14(3)(b)(ii), the Party may inform 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.” Mexico asserts that the Submitters should have pursued the citizen complaint mechanisms prescribed by the LEES and the LGEEPA in order to establish the existence of alleged failures to effectively enforce the environmental law, instead of filing documents with federal and state authorities that, in Mexico’s view, are requests for information and not administrative remedies.<sup>42</sup> Nonetheless, the NAAEC does not require all remedies available under the concerned Party’s law to be pursued; rather, submitters must show that reasonable actions have been taken to pursue domestic remedies.<sup>43</sup> The Secretariat does not find the Submitters’ decision to address the matter contemplated in the submission by means of *amparo indirecto*, one of the remedies provided by Mexican law for settlement of disputes, to be unreasonable.<sup>44</sup> Further, the Secretariat did not consider the Submitters’ requests for information as a pursuit of remedies in its determination of 9 November 2005, and only assessed them in ascertaining whether the submission met the requirements of Article 14(1)(c) and (e).<sup>45</sup>

Mexico nonetheless discounts various actions that the Submitters did pursue. The *amparo indirecto* (first instance constitutional relief) motion 894/2004 filed by one of the Submitters claims that federal, state and municipal authorities are failing to enforce air emissions laws. Mexico maintains that this *amparo indirecto* was dismissed on the grounds that other available remedies had not been exhausted. Mexico asserts that other proceedings are pending and that it would be prevented from providing information for developing a factual record, but did not provide information about such proceedings.<sup>46</sup> Mexico notes also that *amparo* appeal (*amparo en revisión*) 10/2005, which appealed the dismissal of *amparo indirecto* 894/2004, was also dismissed because the petitioners failed to establish their legal standing.<sup>47</sup> Mexico argues that a complaint filed with the Sonora CNDH against the municipality of Hermosillo asserting failure to issue the municipal environmental protection program and the municipal environmental regulation does not constitute a remedy since it does not challenge administrative acts. Rather, the complaint is a nonjurisdictional mechanism (outside of the judicial system) whereby the ombudsman issues a non-binding recommendation in cases of human rights violations.<sup>48</sup>

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<sup>42</sup> Ibid., pp. 3-4

<sup>43</sup> In its response on the issue of private remedies available, Mexico argues that the Submitters should have filed a citizen complaint demanding that the state or federal authorities investigate alleged failures of environmental law enforcement; Party Response, pp. 3-4. The Secretariat notes that Mexico appears to distance itself from its previous position that the citizen complaint is not a remedy under the Party’s law. Cfr. SEM-98-006 (Aquanova), Party Response (14 June 1999); SEM-96-001 (Cozumel), Party Response (22 March 1996); SEM-98-005 (Cytrar I), Party Response (5 July 1999).

<sup>44</sup> The Secretariat also finds that in light of the Submitters’ pursuit of an *amparo indirecto* as a means of resolving the matter raised in the submission, Mexico’s assertions regarding the nature of the complaints before human rights bodies do not provide a reason to dismiss the submission.

<sup>45</sup> SEM-05-003 (Environmental Pollution in Hermosillo II), Article 14(1) and (2) Determination (9 November 2005), pp. 11-12.

<sup>46</sup> Party Response, Ibid., pp. 4-5.

<sup>47</sup> Ibid., p. 5

<sup>48</sup> Ibid., pp. 5-6.

Mexico concludes that *amparo* action 620/1999 and its corresponding remedy, as well as the complaints before the CNDH and the CEDH, were dismissed because they do not challenge administrative acts.

The Secretariat notes that *amparo* action 894/2004 was not dismissed on the grounds that related proceedings were pending, but rather because the plaintiff did not establish legal standing.<sup>49</sup> The dismissal of *amparo* action 894/2004 by the First District Judge of the state of Sonora was not based on the principle of *definitividad* (the plaintiff's obligation to exhaust all remedies provided by the law governing the challenged act before filing an *amparo* action) but rather on the test for standing:

the claimed act through a guarantee trial [i.e., *juicio de amparo*] must inflict harm or injury to any citizen's rights or assets, in order to constitute standing [... Therefore] harm to a legally protected subjective right was not evident.<sup>50</sup>

The Fifth Court of the Fifth Circuit (*Quinto Tribunal Colegiado del Quinto Circuito*), in *amparo* appeal 10/2005, upheld the decision in *amparo* 894/2004—denial of standing—when insisting that:

It must be exactly defined that an act claimed through a guarantee trial [i.e., *juicio de amparo*] necessarily has to inflict harm or injury to a citizen's rights or assets, in order to claim that standing is on its side, which does not occur in the specific case.<sup>51</sup>

As a result, the sentence was upheld and the case was closed. The Secretariat is not aware of any pending proceedings that would prevent Mexico from providing information for the preparation of a factual record.

## 2. Other Preliminary Issues

Mexico alleges that the submission should have been dismissed because the Submitters did not provide sufficient evidence to support it; did not allege harm to the Submitters; and based their arguments principally on mass media reports.

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<sup>49</sup> The Party states in its response that: "... in regard to *amparo indirecto* 894/2004 ... it was dismissed because the criterion of *definitividad* was not met ... and thus, the Secretariat is incorrect in stating that 'the Submitters took reasonable actions to pursue private remedies available under the Party's law,' since pursuing *amparo* without first exhausting ordinary remedies is not and should not be considered reasonable... and therefore it cannot be assumed that the remedy was pursued in accordance with Mexican law (emphasis in original); Party Response, p. 4.

<sup>50</sup> Submission, *amparo* no. 894/2004, pp. 9, 12. The Submitters discussed this issue in a filing made in connection with submission SEM-04-002 (Environmental Pollution in Hermosillo): "[P]rivate parties have no standing to pursue ordinary remedies or to file an *amparo* action in regard to acts that affect the community." SEM-04-002 (Environmental Pollution in Hermosillo), Complementary Information (9 December 2004), p. 2.

<sup>51</sup> Submission, *amparo* appeal no. 10/2005, p. 14.



Concerning the argument that the submission should have been dismissed because the Submitters did not provide sufficient information to support it, the Secretariat deemed, in its determination of 9 November 2005, that the submission met the requirements of NAAEC Article 14(1)(c).<sup>52</sup> Attached to the submission were official documents and other documents in which one of the Submitters notified the state and municipal authorities of his allegations of failures to effectively enforce the environmental law and requested information regarding air pollution prevention and control actions in areas under state jurisdiction; air pollution control programs;<sup>53</sup> and monitoring and enforcement of air emissions standards.<sup>54</sup> The Submitters allege that the state authorities did not respond to their information requests in a timely manner,<sup>55</sup> and the Secretariat found no reason to require the Submitters to submit more information. The Submitters did not attach additional information about programs such as ambient air quality monitoring and vehicle inspection because—as Mexico states in its response—they did not exist. Nor does the Secretariat fault the Submitters for not attaching information regarding the paving program or the SUBA because the official documents responding to requests by one of the Submitters do not indicate the existence of those or other discretionary programs.

In contrast, the submission does contain information about requests filed with the authorities,<sup>56</sup> documents issued by the authorities,<sup>57</sup> health effects caused by air pollutants,<sup>58</sup> and background on the air quality monitoring program,<sup>59</sup> all of which constitute factors that the Secretariat took into account.

Mexico further notes that one of the Submitters made a request for information<sup>60</sup> but never picked it up after Semarnat made it available. Semarnat provided the Submitter with written

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<sup>52</sup> In previous notifications, the Secretariat has recognized that the Submitters do not generally have the same access as governments to evidence or to resources for gathering evidence. See SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2005).

<sup>53</sup> Air pollution control programs include air quality monitoring and vehicle inspection.

<sup>54</sup> Letters dated 7 and 8 September and 4 October 2004, to the constitutional governor of the state of Sonora, the municipality of Hermosillo, the Semarnat official in the state of Sonora, the Ministry of Urban Infrastructure and Environment, and the Sonora state Ministry of Public Health.

<sup>55</sup> In document 10-1978-04, dated 11 November 2004, issued by the Ministry of Urban Infrastructure and Environment (attached to the Submission), the authority states that it is not competent to propose plans for verification, monitoring, and control of limits set out in the Mexican Official Standards because, allegedly, this power rests with the federal authorities alone. In reality, several of the NOMs cited by the Submitters establish the state governments' obligation to propose their own verification plans.

<sup>56</sup> See note 54, *supra*.

<sup>57</sup> Documents issued by the Sonora state government, the Ministry of Urban Infrastructure and Environment, and the Sonora state Ministry of Public Health.

<sup>58</sup> Health effects of ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, TSP, PM<sub>10</sub>, and lead. Submission, p. 25.

<sup>59</sup> "... in late 1997, the office of the federal Ministry of the Environment, Natural Resources, and Fisheries in Sonora notified the current municipal government that it possessed particle sampling equipment that could be transferred to the Municipality ...". Submission, p. 24.

<sup>60</sup> Request for information of 8 September 2004, signed by Domingo Gutiérrez Mendivil.

notice<sup>61</sup> of the cost and the procedure for obtaining a copy of the information. Mexico informed the Secretariat that its response also contains the information that it made available to the Submitters.<sup>62</sup> The Secretariat notes that even if this information had been included in the submission, the response leaves open certain matters, as further explained in this notification to Council.

The response also asserts that the submission does not provide evidence of harm to the person or organization filing it, as stipulated by Article 14(2)(a).<sup>63</sup> The Secretariat observes that the submission does indicate the possible health effects on Hermosillo residents of high concentrations of ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, TSP, PM<sub>10</sub>, and lead.<sup>64</sup> As stated in its Article 14(2) determination, the Secretariat finds that the submission does appear to be aimed at promoting enforcement of air pollution laws, in view of the health effects on members of the public, in particular, the residents of Hermosillo.<sup>65</sup>

The Secretariat previously considered, with reference to Article 14(2)(d), whether the submission is based on mass media reports. While the Submitters attached photographs and media articles to the submission, some of which provide information on air pollution, they also included other information. The Secretariat concludes that Mexico's arguments regarding the Submitters' reliance on mass media information do not provide a reason not to recommend a factual record.

In light of these considerations, the Secretariat concludes that Mexico's arguments on preliminary matters do not preclude recommending the preparation of a factual record.

## **B. The submission warrants the preparation of a factual record**

Having considered the submission in light of Mexico's response, the Secretariat concludes that the response leaves open central questions raised in the submission. The assertions in the submission revolve around failures to effectively enforce the environmental law in relation to air pollution control in the city of Hermosillo, Sonora. The Secretariat finds that, in light of Mexico's response, some of the assertions in the submission do not justify the preparation of a factual record, while others do.

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<sup>61</sup> Document no. SEMARNAT/UCPAST/04/726 of 7 October 2004, issued by the Social Participation and Transparency Coordinating Unit (*Unidad Coordinadora de Participación Social and Transparencia*) of Semarnat. Party Response, Appendix A (Exhibit 1).

<sup>62</sup> Telephone conversation with staff of Semarnat's Legal Affairs Coordinating Unit (*Coordinación General Jurídica*), 10 May 2006.

<sup>63</sup> Party Response, pp. 27-9.

<sup>64</sup> Submission, p. 25. Although the Submitters describe the health effects of air pollutants in the context of statements by an authority published in the media, this does not affect the merit of the arguments in the Submission, since a mere description of health harm is sufficient to meet the criterion of NAAEC Article 14(2).

<sup>65</sup> SEM 05-003 (Environmental Pollution in Hermosillo II). NAAEC Article 14(1)-(2) Determination. 9 November 2005, p. 13.

The assertions for which the Secretariat recommends a factual record are those referring to the failure to fulfill obligations that Mexico has imposed on itself, where the response does not provide information indicating that they have been fulfilled. Although Mexico's response contains information on discretionary resource allocation measures, central questions remain open as to how these measures contribute to air pollution control in Hermosillo.

In contrast, the Secretariat does not recommend a factual record in regard to assertions for which Mexico provided information regarding its enforcement actions that appears to respond adequately to the central questions raised by the Submitters. Without intending to present a conclusion on whether Mexico has failed to effectively enforce its environmental law with respect to those assertions, the Secretariat does not find it appropriate to recommend a factual record with respect to them.

**1. Preparation of a factual record is recommended in relation to several failures to enforce by the government of Sonora and the municipality of Hermosillo**

The Submitters assert that the governments of Sonora and Hermosillo failed to establish and operate or, as applicable, approve the establishment and operation of inspection centers for private and public motor vehicles. They further allege that the government of Sonora failed to propose plans for inspection, monitoring, and control of the limits set out in the applicable NOMs. They also assert that the municipality of Hermosillo is not taking the actions necessary to reduce or control air pollutant emissions so as to ensure satisfactory air quality for public well-being and ecological balance.

**a. Establish mandatory vehicle inspection programs and establish and operate vehicle inspection centers.** LGEEPA Articles 7, paragraph III, and 8, paragraph III; RPCCA Article 4, paragraph III; and LEES Articles 73, paragraphs V and VII, and 85, paragraph B, subparagraph I establish the obligation of the governments of Sonora and Hermosillo to prevent and control air pollution from mobile sources; to determine the requirements and procedures for regulation of motor vehicle pollutant emissions; to enforce traffic control measures; to ban traffic in serious cases of pollution; and to implement mandatory vehicle inspection programs, with an exemption only for vehicles used in federal public transit.

The Submitters assert that the governments of Sonora and Hermosillo did not implement a vehicle inspection program in Hermosillo, nor did they establish and operate inspection centers or authorize their establishment and operation by third parties.<sup>66</sup> The information provided by the Submitters indicates that the government of Sonora did not implement this program because it has no information on air quality.<sup>67</sup>

Mexico confirms in its response that it has not implemented the vehicle inspection program because it does not have adequate data on vehicle emissions and their impact on air quality. Mexico argues that "Hermosillo faces extreme natural weather variations every year, making it impossible to perform a precise analysis of monitors in order to obtain the data necessary to

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<sup>66</sup> Submission, p. 6.

<sup>67</sup> Document number 10-1978-04, dated 11 November 2004, issued by the Ministry of Urban Infrastructure and Environment.

devise and operate a vehicle inspection program.”<sup>68</sup> Mexico argues that it is preparing to install an ambient air monitoring station for development of the relevant program.<sup>69</sup> It asserts that, in view of the environmental conditions prevailing in Hermosillo and the priority placed on mitigating TSP and PM<sub>10</sub> levels in the city, the municipality has made a *bona fide* decision to allocate resources to actions that are more effective. These consist of street paving and a mass transit program.

As explained further at the end of this notification, the Secretariat finds that the decision to allocate resources to paving and mass transit does not preclude a factual record on the assertions regarding the failure to implement a vehicle inspection program. In regard to the mandatory vehicle inspection program, central questions remain open as to the steps the competent authorities have taken to enforce LGEEPA Articles 7, paragraph III, and 8, paragraph III; RPCCA Article 4, paragraph III, and LEES Articles 73, paragraphs V and VII, and 85, paragraph B, subparagraph I. For example, questions remain open as to whether a draft vehicle inspection program exists or is being developed, whether its scope has been defined, and whether resources have been allotted or estimated in order to implement it at some point. In regard to the obligation to implement a vehicle inspection program, the Secretariat has previously determined that a submission asserting that a Party is failing to enforce a self-imposed obligation may give rise to the preparation of a factual record, even where the legal provision does not establish a specific timetable and leaves certain matters to the government’s discretion.<sup>70</sup>

A factual record could contain relevant information on difficulties or challenges related to the effective enforcement of the provisions cited by the Submitters through implementation of a vehicle inspection program. In preparing the factual record, the Secretariat could gather information on the status of the ambient air monitoring system in Hermosillo to establish a vehicle inspection program; the type of data required to implement such a program; the measures already taken to prepare and plan it, and the implementation of other strategies to make it more effective.

**b. Propose plans for verification, monitoring, and control of the limits set out in Mexican Official Standards NOM-020-SSA1-1993 to NOM-026-SSA1-1993.** LGEEPA Article 7, paragraph XIII; RPCCA Articles 16 and 41, paragraph I; LEES Article 73, paragraphs VI and IX, and the NOMs that set criteria for assessment of ambient air quality<sup>71</sup> establish the

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<sup>68</sup> Party Response, p. 61.

<sup>69</sup> Ibid, p. 62.

<sup>70</sup> SEM-04-005 (Coal-fired Power Plants), Article 14(1) Determination (16 December 2004), p. 4. See also SEM-03-001 (Ontario Power Generation), Article 14(1) and (2) Determination (19 September 2003), pp. 4-5.

<sup>71</sup> NOM-020-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to ozone (O<sub>3</sub>). Legal limit for ozone (O<sub>3</sub>) concentration in ambient air as a public health protection measure; NOM-021-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to carbon monoxide (CO). Permissible value for carbon monoxide (CO) concentration in ambient air as a public health protection measure; NOM-022-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to sulfur dioxide (SO<sub>2</sub>). Legal limit for sulfur dioxide (SO<sub>2</sub>) concentration in ambient air as a public health protection measure; NOM-023-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to nitrogen dioxide (NO<sub>2</sub>). Legal limit for nitrogen dioxide (NO<sub>2</sub>) concentration in ambient air as a public health protection measure; NOM-024-SSA1-1993:

obligation of the state of Sonora to implement and operate air quality monitoring systems; to prepare state-of-the-environment reports; and to prepare plans for verifying, enforcing, and monitoring compliance with the standards for ozone (O<sub>3</sub>), carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>), nitrogen dioxide (NO<sub>2</sub>), total suspended particles (TSP), and particulate matter less than 10 microns (PM<sub>10</sub>). The deadline for proposing such verification plans is 180 calendar days following the publication of the NOMs on ambient air quality. The Submitters assert that this deadline passed in mid-1995.

The obligation to propose such plans and programs is clearly established in Mexican environmental law, which set out the specific actions and the deadlines by which the government of the state of Sonora must propose mechanisms for verification, monitoring, and control of the ambient air quality NOMs cited in the submission. These standards set maximum pollutant concentration values as a public health protection measure, as a criterion for establishment of environmental policies, and as a reference standard for environmental pollution prevention and control actions.<sup>72</sup>

Mexico explains that the municipality of Hermosillo has implemented PEMCA in order to “evaluate air pollution levels and compare them with the NOMs for TSP and PM<sub>10</sub>.”<sup>73</sup> This air quality evaluation and improvement program operates three PM<sub>10</sub> and TSP monitoring stations located in the northwest, north, and central parts of the city of Hermosillo. According to Mexico, it is a “reliable diagnosis of the status of urban air quality in Hermosillo”<sup>74</sup> serving as a basis for taking actions to improve air quality in the city and, more generally, for stricter law enforcement.<sup>75</sup> The government of Mexico further asserts that the PEMCA results show that air quality in the city has improved as a result of the municipality’s air quality improvement activities.

The Secretariat reviewed the PEMCA reports in the light of the response and the NOMs relating to ambient air quality. PEMCA focuses on PM<sub>10</sub> and TSP monitoring to the exclusion of ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead, all of which require monitoring under applicable NOMs.<sup>76</sup> While the response indicates that SO<sub>2</sub> and NO<sub>x</sub> are being monitored by stations owned by Semarnat and private companies, questions remain open regarding whether and how this monitoring contributes to verification of the NOMs discussed in this section and, in general, to air quality management and control in Hermosillo, since none of these data were attached to the response; nor are they found in the PEMCA reports.

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Environmental health. Criterion for assessment of ambient air quality with respect to total suspended particles (TSP). Permissible value for total suspended particle (TSP) concentration in ambient air as a public health protection measure; NOM-025-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to particles of diameter less than 10 microns (PM<sub>10</sub>), permissible value for particles of diameter less than 10 microns (PM<sub>10</sub>) in ambient air as a public health protection measure; NOM-026-SSA1-1993: Environmental health. Criterion for assessment of ambient air quality with respect to lead (Pb). Legal limit for lead (Pb) concentration in ambient air as a public health protection measure.

<sup>72</sup> See section 0, “Introducción,” of the cited NOMs.

<sup>73</sup> Party Response, p. 46.

<sup>74</sup> Ibid., p. 59.

<sup>75</sup> Ibid.

<sup>76</sup> See note 71 *supra*.

Mexico states that environmental conditions in Hermosillo are such that it is reasonable to focus on particulate monitoring. Nevertheless, PEMCA reports since 2000 have recommended the creation of an ambient air quality monitoring network and have acknowledged that, in addition to dust attributable to the lack of street paving, motor vehicle emissions are one of the main sources of air pollution in the city.<sup>77</sup>

The PEMCA reports contain a recommendations section that is apparently intended to offer guidance to the environmental authorities of Hermosillo. However, it is unclear that these recommendations have any effect on air quality control activities or stricter law enforcement, as Mexico asserts in its response. Several PEMCA recommendations coincide with central aspects raised in the submission, such as a review of motor vehicle emission strategies,<sup>78</sup> development of air quality improvement programs,<sup>79</sup> and implementation of a vehicle inspection program.<sup>80</sup> It is also indicated that paving operations should prioritize the areas with the highest pollution indicators.<sup>81</sup> The response does not make clear whether or how the authorities have followed up on the PEMCA recommendations.

PEMCA identifies the limitations of the existing monitoring system, acknowledging that the equipment “is utterly obsolete for the purposes of observing daily and annual trends. It is therefore recommended that this equipment be automated ... for the purposes of notifying the public about air quality issues.”<sup>82</sup> The reports have also documented the lack of data capture equipment<sup>83</sup> and the insufficiency of information about the status of PM<sub>10</sub> in the city.<sup>84</sup> An examination of the data revealed certain inconsistencies, raising concerns about the comparability of the data. In some cases, the northeast, northwest, and central stations are presented,<sup>85</sup> while in others, the north, northwest, and south stations are presented;<sup>86</sup> the

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<sup>77</sup> PEMCA technical reports, February to December 2000, p. 6; February 2001 to January 2002, p. 11; January to December 2004, p. 13.

<sup>78</sup> PEMCA technical reports, February to December 2000, pp. 5-6, and 4 May 2001 to 30 May 2002, pp. 12-13.

<sup>79</sup> PEMCA technical reports, 4 February 2001 to 30 January 2002, p. 12, and January to December 2004, pp. 14, 15.

<sup>80</sup> PEMCA technical reports, 4 February 2001 to 30 January 2002, p. 12, and 4 May 2001 to 30 May 2002, pp. 12-13.

<sup>81</sup> PEMCA technical report, January to December 2004, pp. 14-15.

<sup>82</sup> Ibid., p. 14.

<sup>83</sup> PEMCA Bulletin, January 2002, p. 1. It is indicated that readings could not be taken during this period due to a shortage of Dickson charts (volumetric flow recorders) and motors; PEMCA technical report, July 2003, p. 1. The PEMCA technical report for July 2003 states that monitoring in that month was limited by the shortage of motors for monitoring and that only the monitoring stations at CBTIS (*Centro de Bachillerato Tecnológico Industrial y de Servicios*) and Cesues (*Centro de Estudios Superiores del Estado de Sonora*) collected data.

<sup>84</sup> PEMCA technical report, January to December 2004, pp. 5, 9. This report acknowledges major gaps during extensive periods of sampling due to a shortage of filters and recommends that monitoring equipment be automated for better data capture. The 2005 PEMCA technical report notes (p. 13) that for “the COBACH Villa de Seris station, only two of the four yearly quarters are valid; therefore, the data from the station cannot be validated.”

<sup>85</sup> PEMCA technical reports, February-December 2000 and 2001-2002.

<sup>86</sup> PEMCA technical report, 2005.

information is presented as monthly reports,<sup>87</sup> periodic reports<sup>88</sup> or annual reports,<sup>89</sup> and there are also inconsistencies in comparisons with values set out in the corresponding standards.<sup>90</sup> Given the inconsistent data, the Secretariat sees no basis for the conclusion in the response that air quality has improved.

As noted above, the Secretariat has found that a submission asserting that a Party is failing to enforce a legal obligation imposed upon itself may give rise to the preparation of a factual record.<sup>91</sup> The response leaves open several central questions relating to the implementation of the legal mandate to monitor air pollutants. A factual record would facilitate understanding of the state and municipal goals and actions in the city of Hermosillo for the preparation and implementation of plans and programs to monitor ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. It would also help to understand how PEMCA data are harmonized with the objectives of other programs, such as vehicle inspection, paving, and mass transit. Furthermore, it could present information on the role of PEMCA recommendations in the control of air pollution and the effective enforcement of environmental law. Likewise, a factual record could contain information about the scope of the existing monitoring system and any scheduled improvements to it.

**c. *Reduce or control air pollutant emissions, whether from artificial or natural, fixed or mobile sources, in order to guarantee satisfactory air quality for the well-being of the population and ecological balance.*** RPCCA Article 13 provides that air pollutant emissions must be reduced or controlled in order to guarantee satisfactory air quality for the well-being of the population and ecological balance. Mexico, in stating that air quality has visibly improved, limited its consideration of this issue to PEMCA.<sup>92</sup> In addition, it asserts that air quality depends on other factors, including the volume and condition of vehicles as well as emissions from fixed sources. The Secretariat finds that the actions to reduce and control ambient air pollutant emissions constitute a central issue that can be addressed in relation to PEMCA, the vehicle inspection program, and other actions to achieve the goals of RPCCA Article 13.

A factual record could present information on specific actions to reduce and control pollutant emissions in the city of Hermosillo, particularly emissions of ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead, which are not included in PEMCA monitoring. It could also present information on the possibility of effectively reducing or controlling emissions from mobile sources by means of a vehicle inspection program.

**d. *Enact the municipal environmental protection program.*** LGEEPA Article 8, paragraph XV gives the municipal authorities the power to enact a municipal environmental protection

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<sup>87</sup> PEMCA technical reports, January 2002; February 2002; March 2002; April 2002; May 2002; June 2002; July 2002; August 2002; September 2002; April 2003; June 2003; July 2003; August 2003; September 2003, and October 2003.

<sup>88</sup> PEMCA technical reports, February-December 2000; February 2001 to January 2002; May 2001 to May 2002; January-December 2004.

<sup>89</sup> PEMCA technical report, 2005.

<sup>90</sup> For example, the annual TSP report for 2004 compares values with the average annual limit, while in 2005 the values are compared with the 24-hour average.

<sup>91</sup> See note 70, *supra*.

<sup>92</sup> Party Response, p. 63.

program. Mexico asserts that the municipality has discretion in establishing the municipal environmental protection program and is not required to do so within a given period of time, since provisions that grant powers do not impose obligations.<sup>93</sup> It further notes that the municipality is implementing this program, although there is no further reference to it in the response, nor is information relating to the program attached to the response as an appendix. The response does not clarify whether—or, at any rate, how—the municipality of Hermosillo is fulfilling its authority to devise, implement, and evaluate the municipal environmental protection program. Regardless of whether LGEEPA Article 8, paragraph XV imposes a strict obligation on municipalities, the Secretariat recommends that information regarding the actions by Hermosillo to establish a municipal environmental protection program be included in a factual record in order to shed light on the context for the municipality of Hermosillo's actions with respect to pollutant monitoring and vehicle inspection.

## **2. Preparation of a factual record is not recommended in relation to alleged failures to enforce by the federal government**

The Submitters assert that Semarnat and Profepa have failed to: **a)** enforce and promote compliance with NOMs governing air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo, and **b)** make recommendations to the Sonora state government and the municipality of Hermosillo that they take steps to prevent and control air pollution. The Submitters note the obligations of the governments of Sonora and Hermosillo at which federal recommendations should allegedly be directed.<sup>94</sup>

**a. Enforce and promote compliance with the NOMs.** LGEEPA Articles 5, paragraphs II, V, and XIX, and 16, as well as RPCCA Article 3, paragraph VII give the federal government powers to apply environment policy instruments; to issue Mexican official standards; to take enforcement action in relation to matters prescribed by law; and to take actions for protection of air quality in zones and for sources under federal jurisdiction.

In its response, Mexico notes that it has conducted 18 site inspections of establishments under federal jurisdiction in the municipality of Hermosillo, issued 15 orders, and signed one resolution to conclude an administrative proceeding. In addition, it indicates the types of air pollution control irregularities encountered during its site inspections, which resulted in total fines of P\$325,000. Attached to the response are copies of two administrative proceedings instituted by Profepa, and Mexico has made available other law enforcement files for review.<sup>95</sup>

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<sup>93</sup> This argument of the Party is contradicted by an administrative decision of the Second Court of the Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*): *Power. The use of this verb in legal provisions does not necessarily imply discretionary power*, Judicial Weekly of the Federation (*Semanario Judicial de la Federación*) VI, August 1997, p. 217. “In the legislative sphere, the verb ‘power’ does not necessarily have the meaning of discretionality; rather, there are situations in which it is used with the meaning of ‘mandatory character’, in which case it is construed as a duty [...]”

<sup>94</sup> Submission, pp. 5-6.

<sup>95</sup> Party Response, p. 51.



The Secretariat finds no grounds for preparation of a factual record on these matters, as the information submitted by Mexico concerning the performance of site inspections, the issuance of administrative orders, and the imposition of the corresponding fines in instances of environmental noncompliance, appears to respond satisfactorily to the submission's assertions. The submission contains no further information indicating in what sense the federal government has failed to enforce and promote compliance with the air pollution-related NOMs.

**b. *Make recommendations to the governments of the state of Sonora and the municipality of Hermosillo.*** LGEEPA Article 5, paragraph XVIII gives the federal government the power to make recommendations to the authorities for the purpose of promoting compliance with environmental law.

In its response, Mexico clarifies that the recommendations to federal, state, and municipal authorities to which the Submitters refer are contemplated in LGEEPA Article 195<sup>96</sup> and are only applicable where a citizen complaint is filed with Profepa.<sup>97</sup> Mexico states that, notwithstanding that requirement, it has engaged in intergovernmental cooperation in the form of an agreement between Semarnat and the state of Sonora to implement an air quality monitoring program in various municipalities, including Hermosillo.<sup>98</sup>

The Secretariat notes that Article 5, paragraph XVIII does not expressly refer to LGEEPA Article 195; hence the power to make recommendations to the authorities may be construed more broadly than in the Party's interpretation. It is understood, moreover, that the federal government may make recommendations concerning some of the obligations of the governments of Sonora and Hermosillo, such as air pollution monitoring. Mexico attached to the response a Coordination Agreement between Semarnat, the state of Sonora and several municipalities, including Hermosillo. Under this Agreement, Semarnat agrees to make recommendations to municipalities for the operation of air monitoring equipment.<sup>99</sup> This agreement was signed pursuant to Article 5, paragraph XVIII and serves as the legal basis for the recommendations that allegedly were not made. In light of the response, the Secretariat has not identified the existence of open questions that warrant the preparation of a factual record on this point.

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<sup>96</sup> LGEEPA Article 195. Where it is evident from the results of the investigation conducted by Office of the Federal Attorney for Environmental Protection that acts, facts or omissions of the federal, state, or municipal authorities are at issue, the Office shall issue the recommendations necessary to ensure that the latter take the appropriate actions. The recommendations of the Office are public, independent, and non-binding.

<sup>97</sup> Party Response, p. 52.

<sup>98</sup> Specific Coordination Agreement between the Ministry of Environment, Natural Resources, and Fisheries and the state of Sonora with the object of implementing an Air Quality Management and Assessment Program (*Programa de Gestión and Evaluación de la Calidad del Aire*) in regard to the operation of air quality monitoring equipment in the municipalities of Agua Prieta, Cajeme, Cananea, Hermosillo, Naco, Nacozari de García, Navojoa, Nogales, and San Luis Río Colorado, Sonora, published in the DOF on 5 September 2000.

<sup>99</sup> "It corresponds to 'SEMARNAP' [...] to provide technical assistance to 'MUNICIPALITIES' required by these in order to obtain a more adequate and efficient operation of ambient air monitoring stations. [...] Participate in technical personnel training. [...] Conduct supervision and auditing activities to ambient air monitoring system [...]" *Ibid*, p. 32.

### **3. Preparation of a factual record is not recommended in relation to certain alleged failures to enforce by the Sonora state government**

The Submitters assert that at the state level, the executive branch of the state of Sonora, the Ministry of Urban Infrastructure and Environment, and the Ministry of Health have failed to: **a)** take actions for air pollution prevention and control for areas and properties under state jurisdiction; **b)** define, in the State Urban Development Plan, the zones in which polluting industrial facilities may be sited; **c)** enforce the NOMs related to air pollution control, within the scope of its jurisdiction; **d)** enact the relevant environmental technical standards, and **e)** issue regulations, administrative orders, and other provisions in the area of air pollution, as well as to update the state environment plan.

**a. Air pollution prevention and control actions.** LGEEPA Article 7, paragraph III; RPCCA Article 4, and LEES Article 73, paragraph I confer states and municipalities the power to prevent and control air pollution within their jurisdiction.

Mexico maintains that the environmental impact permits<sup>100</sup> and operating licenses issued include air pollution reduction measures. It argues that flora rescue, reforestation, irrigation, paving, and sound waste management programs have been implemented.<sup>101</sup> It adds that coordination agreements have been signed and coordination activities have taken place between Semarnat<sup>102</sup> and educational institutions.<sup>103</sup> It states that between 2003 and 2005 it donated 28,798 plants and that in 2005 it approved five open-air fires for drill purposes. It clarifies that all these activities have an impact on air pollution control. In light of the response and in the absence of more specific assertions, the Secretariat finds no open questions that warrant the preparation of a factual record.

**b. State Urban Development Plan.** LEES Articles 112, paragraph II, and Article 73, paragraph II create the obligation for the governments of Sonora and Hermosillo, within their respective jurisdictions, to apply general criteria for protection of the atmosphere by defining zones in which polluting industrial facilities may be sited.

Mexico attached to its response the State Development Program, which contains considerations in regard to environmental protection. The Secretariat notes that, although this program does not include zones in which polluting industrial facilities may be sited, the zones are defined in the Hermosillo municipal urban development plan. The Secretariat does not see the need to recommend a factual record in this regard, because the general criteria for protection of air quality in urban zoning are provided for in the actions of the Hermosillo government

**c. Enforce the NOMs related to air pollution control.** LGEEPA Article 7, paragraph XIII gives the state of Sonora the power to enforce the federal air pollution-related NOMs. The

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<sup>100</sup> The Party asserts the existence of 451 environmental impact orders or decisions; Party Response, p. 53.

<sup>101</sup> Party Response, p. 54.

<sup>102</sup> See note 98, *supra*.

<sup>103</sup> Party Response, p. 54.

submission cites the NOMs that set limits for pollutant emissions from fixed and mobile sources.<sup>104</sup>

Mexico argues that, from 1999 to 2005, the Ministry of Urban Infrastructure and Environment conducted a total of 90 site inspections to verify compliance with various legal provisions, including the air pollution-related NOMs. The site inspections resulted in the imposition of sanctions, including fines and closings, as well as orders of technical measures to correct the irregularities detected. Mexico has attached a copy of an administrative file corresponding to a site inspection conducted to verify compliance with the pollutant concentration limits established in the standards.<sup>105</sup>

Mexico's response appears to answer the Submitters' assertion and, in the absence of specific assertions in the submission as to how the environmental authority is failing to effectively enforce this provision, the Secretariat finds no sufficient grounds for recommending a factual record in this regard.

**d. *Enact the relevant environmental technical standards.*** LEES Article 75 establishes that air pollutant emissions are governed by the environmental technical standards issued by the Ministry of Urban Development and Environment.

Mexico states in its response that pursuant to Transitory Article 4 of LEES, the provisions of the LGEEPA, its regulations, and the air emissions-related standards apply where the LEES is silent on a given issue. The response also includes a list of NOMs relating to the measurement of air pollutants and emissions from fixed and mobile sources. The information provided by Mexico appears to respond satisfactorily to the Submitters' assertion as to the alleged nonexistence of emissions-related standards. In the absence of specific assertions about the absence of standards, the Secretariat finds no sufficient reasons to recommend a factual record in this regard.

**e. *Enact legislation on air pollution and update the state environment plan.*** LGEEPA Article 10 and LEES Article 139 give the state of Sonora the power to enact environmental laws, regulations, and administrative provisions. In its response, Mexico argues that there is no legal void at the local level in regard to air emissions since the LEES provides that federal law applies in the absence of mandatory provisions in state law. In light of Mexico's response and in the absence of further assertions as to the alleged nonexistence of emissions-related legislation, the Secretariat finds no sufficient reasons to recommend a factual record in this regard.

In regard to the state environment plan, the Secretariat finds no sufficient reasons to recommend a factual record because the cited provisions are not related to that instrument. While Mexico's response does not address this assertion in detail, it is unclear how it should

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<sup>104</sup> NOM-040-SEMARNAT-2002, NOM-043-SEMARNAT-1993, NOM 085-SEMARNAT-1994, NOM-121-SEMARNAT-1997, NOM-041-SEMARNAT-1999, NOM-042-SEMARNAT-1999, NOM-044-SEMARNAT-1993, NOM-045-SEMARNAT-1996, NOM-048-SEMARNAT-1993, and NOM-050-SEMARNAT-1993.

<sup>105</sup> Party Response, Appendix U (Exhibit 21).

have done so, since the submission does not contain specific arguments, nor does it indicate the basis for the alleged obligation. In the absence of sufficient grounds, the Secretariat does not recommend that this aspect be included in a factual record.

**4. Preparation of a factual record is not recommended in relation to certain alleged failures to enforce by the municipality of Hermosillo**

The Submitters maintain that the municipality of Hermosillo has failed to: **a)** carry out air pollution prevention and control actions for areas and properties under municipal jurisdiction; **b)** define, in the Municipal Urban Development Plan, the zones in which polluting industrial facilities may be sited; **c)** enforce the NOMs related to air pollution control, within the scope of its jurisdiction; **d)** create the Municipal Environment Commission (*Comisión Municipal de Ecología*) as prescribed by Article 138 of the applicable local law, and **e)** issue the mandatory regulations, administrative orders, and other provisions necessary, within its administrative sphere, to guarantee strict compliance with state environmental law, including the municipal environmental regulation, the environmental contingency response plan, and an air quality management plan.

**a.** *Air pollution prevention and control actions for areas and properties under municipal jurisdiction.* RPCCA Article 4, paragraph III, and LEES Article 73, paragraph I give the municipality of Hermosillo the power to take air pollution prevention and control actions for areas and properties under municipal jurisdiction.

Mexico asserts in its response that Hermosillo is taking the actions necessary to prevent and control air pollution in the municipality, since it is conducting air quality monitoring in the city through PEMCA. It asserts that with PEMCA data, it is enforcing environmental law more strictly. Mexico further asserts that Hermosillo has environmental impact assessment mechanisms to ensure that establishments comply with existing environmental laws. It notes that through the Environmental Complaints Program (*Programa de Atención de Denuncias Ambientales*), petitions from citizens on environmental matters under municipal jurisdiction are addressed. It notes that in terms of air pollution, cases of garbage burning, wood-burning stoves, and use of solvents and paints at open-air sites and brick factories have been addressed. It asserts that 36 cases were addressed in 2003 and that 39 cases were addressed in 2005.

The Secretariat finds that, in the absence of more specific arguments in the submission as to the alleged failure to enforce in relation to air pollution prevention and control actions in areas and at sites under municipal jurisdiction, there are no grounds for reviewing this assertion any further in a factual record.

**b.** *Define, in the Municipal Urban Development Program, the zones in which polluting industrial facilities may be sited.* RPCCA Article 13, paragraph I, and LEES Article 73, paragraph II provide that air quality must be satisfactory in areas of human settlements; they further stipulate the obligation to apply general criteria for protection of the atmosphere, defining zones in which polluting industrial facilities may be sited.

Mexico attached to its response the Hermosillo Municipal Urban Development Program (*Programa Municipal de Desarrollo Urbano del Centro de Población de Hermosillo*)<sup>106</sup> and indicated the Internet address of the municipal government where the full document may be downloaded.<sup>107</sup> The program contains an assessment of the physical, social, and economic environment of the city. It notes that “industrial areas in general, and emitters of high levels of air pollution in particular, must be sited downwind of the localities of this city in order to facilitate the elimination of pollutants and reduce risks.”<sup>108</sup> The plan also includes the requirement for industrial facilities to file an environmental impact authorization, which—according to Mexico—contains air pollution-related restrictions.<sup>109</sup> The maps included with the program delimit the primary zoning of the urban center, which recognizes the urban structure of the city and establishes zoning for the activities of *micro industry, light industry, medium-size industry, and heavy industry*.

The response appears to satisfy the Submitters’ assertion in that the municipality of Hermosillo gave consideration to RPCCA Article 13, paragraph I, and LEES Article 73, paragraph II in the Municipal Urban Development Program. Because the submission does not contain specific assertions questioning the possible defects of the program, the Secretariat considers that this assertion does not warrant review in a factual record.

**c. Enforce NOMs related to air pollution control, within the scope of its jurisdiction.** LGEEPA Article 8, paragraphs III and XII provide that municipalities have the responsibility to enforce the legal provisions governing air pollution prevention and control. The Submitters also cite the NOMs that the government of Mexico is allegedly failing to enforce.

Mexico notes in its response that Hermosillo is implementing PEMCA and the Environmental Complaints Program in order to enforce the pollutant concentration limits set out in the NOMs. It notes that a total of 75 citizen petitions were addressed at the municipal level in 2003 and 2005.

The Secretariat’s analysis of Mexico’s assertions about PEMCA is provided above. Concerning enforcement of the NOMs, as discussed in (a) above, Mexico submitted information supporting the existence of inspection and enforcement actions taken by the municipality of Hermosillo. Therefore, in the absence of specific assertions by the Submitters, the Secretariat does not find that inclusion of this aspect in a factual record is warranted.

**d. Create the Municipal Environment Commission as prescribed by Article 138 of the applicable local law.** LEES Article 138 provides that in each municipality of the state of

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<sup>106</sup> Hermosillo Municipal Urban Development Plan (*Programa Municipal de Desarrollo Urbano del Centro de Población de Hermosillo*), 2003 update, approved in municipal council session on 21 August 2003, published in the official state government bulletin.

<sup>107</sup> Hermosillo Municipal Urban Development Plan. Municipality of Hermosillo, Sonora. URL: <[http://www.hermosillo.gob.mx/control.php?&topgroupname=Inicio&groupname=Gobierno&subgroupname=paramunicipal\\_implan&contentname=pmdu](http://www.hermosillo.gob.mx/control.php?&topgroupname=Inicio&groupname=Gobierno&subgroupname=paramunicipal_implan&contentname=pmdu)>. Party Response, Appendix V (Exhibit 22).

<sup>108</sup> Hermosillo Municipal Urban Development Plan, p. II-15.

<sup>109</sup> “Such decisions are made conditional on the implementation by the persons responsible of measures whereby environmental impacts on air quality are minimized, avoided, or mitigated...” Party Response, p. 44.

Sonora, a municipal environment commission shall be created, and its sessions shall be governed by the corresponding regulation. Mexico, in its response, asserts that Hermosillo is working on a draft environmental impact regulation that will clarify the roles of that commission. It notes that in its absence, the Advisory Council on Sustainable Development (*Consejo Consultivo para el Desarrollo Sustentable*) was created through a resolution published in DOF on 21 April 1995, with a mandate to protect ecosystems and natural resources and provide for their sustainable use. As provided by the resolution, the Advisory Council has institutional coordination functions, which are the same that are provided by LEES for the Municipal Environment Commission.

The Secretariat finds no compelling grounds to include assertions regarding the Municipal Environment Commission in the factual record recommended in this notification.

*e. Issue the mandatory regulations, administrative orders, and other provisions necessary, within its administrative sphere, to provide for strict compliance with state environmental law, including the municipal environment regulation, the environmental contingency response plan, and an air quality management program.* LGEEPA Articles 8, paragraph XI, and 10, and LEES Articles 73, paragraph VIII, and 139 give the municipal authorities the power to enact administrative provisions within their respective jurisdictions, and to take preventive measures to avoid air pollution-related environmental contingencies.

Mexico states in its response that, pursuant to LEES Transitory Article 4, while the municipality of Hermosillo enacts mandatory provisions, the provisions of the LGEEPA, its regulations, and the air emissions-related standards apply where the municipal provisions are silent on any issue. It further asserts that it has implemented PEMCA, which provides for monitoring of air quality in Hermosillo. Attached to the response is the environmental contingency response program,<sup>110</sup> which contains air pollution data for the municipality and describes proposed actions to reduce winter pollutant concentrations.

For the reasons stated above in regard to the alleged failure to enact state standards,<sup>111</sup> the Secretariat does not recommend further consideration of the assertion regarding the alleged nonexistence of municipal standards. Concerning the environmental contingency response program, Mexico's information on winter environmental contingency response actions appears to respond satisfactorily to the Submitters' assertion concerning the alleged nonexistence of such a program.

Mexico does not present a specific response concerning the alleged failure to establish an air quality management program. The Secretariat was unable to identify the provision ordering or empowering the municipal authorities to create this program, and the Submitters' assertions regarding the alleged failure to establish this program are vague. Therefore, the Secretariat finds that the assertions regarding the alleged lack of such a program do not warrant preparation of a factual record.

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<sup>110</sup> Party Response, Appendix P (Exhibit 16).

<sup>111</sup> See section V, subsection B, paragraphs 3(d) and (e) of this notification.

### C. Consideration of Article 45(1)(a) and (b)

Mexico maintains, with reference to NAAEC Article 45(1),<sup>112</sup> that (i) its discretionary enactment of regulations and standards to counter air pollution amounts to a reasonable exercise of its authority and (ii) it has made *bona fide* decisions to allocate resources to higher-priority environmental matters, including street paving, modernization of mass transit, monitoring, and contingency plans.<sup>113</sup>

In previous situations, the Secretariat has noted that factual records can be an appropriate means for presenting information that will allow the public to draw its own conclusions as to whether, in the sense of section Article 45(1), a Party has exercised its discretion reasonably or made a *bona fide* allocation of resources to matters of higher priority such that it has not failed to effectively enforce its environmental law.<sup>114</sup> The Secretariat reviews the response in light of Article 45(1) in order to determine whether it resolves central issues relating to the effective enforcement of environmental law raised in the submission.

Mexico explains that the enactment of regulations, Mexican official standards, and other legal provisions are discretionary acts that do not arise from an obligation.<sup>115</sup> Mexico argues that the promulgation of environmental law is a power exercised as a function of administrative needs, legal reform, and resource availability.<sup>116</sup> Mexico presents a list of air pollution-related legislation enacted by the federal government. It argues that there are no legal gaps in local and municipal law since, pursuant to LEES Transitory Article 4, the LGEEPA and the provisions flowing from it apply in the state of Sonora and the municipality of Hermosillo where local and municipal law are silent on any issue.

Mexico further asserts that the Sonora and Hermosillo actions are the result of *bona fide* resource allocation decisions whereby the state and local governments have opted for higher-priority air pollution control programs. Mexico asserts that instead of implementing a vehicle inspection program, Sonora and Hermosillo decided to focus their efforts on the elimination of dust particles through the implementation of a street paving program and the SUBA program.<sup>117</sup>

The Secretariat finds that the enactment of laws, regulations, and standards in Sonora and Hermosillo is a matter that LEES addresses through the supplemental applicability of LGEEPA

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<sup>112</sup> Article 45: Definitions:

1. For purposes of this Agreement:

A Party has not failed to “**effectively enforce its environmental law**” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;...

<sup>113</sup> Party Response, pp. 31-9.

<sup>114</sup> SEM-97-006 (Oldman River II), Article 15(1) Notification to Council (19 July 1999); SEM-99-002 (Migratory Birds), Article 15(1) Notification to Council (15 December 2000).

<sup>115</sup> Party Response, p. 32.

<sup>116</sup> Ibid., p. 33.

<sup>117</sup> Party Response, p. 62.

and other legal provisions arising from it. Therefore, the Secretariat declines to include this aspect in a factual record.

Concerning the arguments about *bona fide* resource allocation decisions, the response does not resolve central issues raised in the submission. While Mexico explains why the state of Sonora and the municipality of Hermosillo used resources in the paving program and the SUBA program, central information is lacking regarding how these programs relate to air pollution reduction goals, indicators, or data related to air quality improvement, as further explained below.

### **1. Paving Program**

Mexico's response does not show that the paving program of the municipality of Hermosillo includes air pollution-related objectives, air quality information, and does not demonstrate its relationship with other environmental actions, programs, or policies.<sup>118</sup> Information is also lacking on whether the program has had any effect on air quality. The Hermosillo air quality monitoring reports<sup>119</sup> do not indicate whether TSP and PM<sub>10</sub> levels have improved as a result of the paving program; whether the municipality seeks to achieve any specific goals with this program; or whether there is any information that can justify the municipality's expectation of reducing air pollution by paving streets. The Secretariat finds that although Mexico asserts that 283,909 m<sup>2</sup> of streets "where the continuous movement of vehicles stirred up tons of dust and biological waste every day" were paved in 2005,<sup>120</sup> this qualitative assessment is not correlated with TSP and PM<sub>10</sub> monitoring results or any specific data.

### **2. SUBA Program**

Mexico notes that Hermosillo is modernizing its public mass transit system through the SUBA program with the purpose of "decreasing combustion gas and dust emissions generated by the existing fleet, as well as particle emissions; furthermore, in redesigning routes, mass transit traffic is preferentially being routed via paved streets."<sup>121</sup> As in the case of the paving program, Mexico reiterates that these are *bona fide* resource allocation decisions.

The Secretariat finds that information is lacking on the SUBA program's goals for reducing air pollution in Hermosillo. The background<sup>122</sup> and objectives<sup>123</sup> of the SUBA program indicate

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<sup>118</sup> The paving program alleged by the Party was not attached to the response although it was quoted as Exhibit 9. On 6 September 2006, the Secretariat requested from the concerned Party a copy of the respective program and on 2 February 2007, the Party sent a copy of the pavement plan published in the Sonora Official Gazette on 4 April 2005.

<sup>119</sup> Party Response, Appendices L and M (Exhibit 12).

<sup>120</sup> Party Response, p. 45.

<sup>121</sup> Ibid., p. 46.

<sup>122</sup> Background; lack of existing road coverage; lack of a service management and planning system; lack of control over revenues and revenue collection; obsolescence of vehicle fleet; inadequate conditions for circulation of units; insufficiency of signage and bus stops, and lack of bus driver training; Party Response, Appendix J (Exhibit 10).

<sup>123</sup> The objectives of the program are to achieve a system of efficient and effective transit; create an attractive, economical system for the public; meet the public's mobility needs; reduce travel time; create an option to



that its main purpose is to render transit in the municipality more efficient. However, information is lacking on how the SUBA program responds to concerns about air pollution.

A factual record would help to understand the characteristics and results of the paving and urban transit programs as compared with the vehicle inspection program, particularly with respect to air pollution reduction. This information would allow interested persons to reach their own conclusions as to the relative priority of paving and urban transit programs as compared with vehicle inspection programs, so as to assess the priorities of the competent authorities. It would also help to understand the justification for allocation of resources to each program. A factual record would provide an opportunity to detail the data compilation process for implementation of the vehicle inspection program pursuant to LEES Article 85, paragraph B, subparagraph I.

Therefore, the Secretariat finds that the issues contemplated in Article 45(1) raise questions that may be addressed in the factual record recommended in this notification. Consistent with the Secretariat's practice of not stating a conclusion in the Article 14 and 15 process as to whether or not a Party is failing to effectively enforce its environmental law, the information included in a factual record would enable interested persons to reach their own conclusions in this regard.

## **VI. RECOMMENDATION**

The submission and Mexico's response, taken together, leave open central questions to whether, in the case of some assertions with respect to air pollution in Hermosillo, Mexico is failing to effectively enforce LGEEPA Articles 7, paragraphs III and XIII, and 8, paragraphs III and XV; RPCCA Articles 4, paragraph III, 16, 41, paragraph I, and 13; LEES Articles 73, paragraphs V, VI, VII, and IX, and 85, paragraph B, subparagraph I, as well as several of the Mexican Official Standards cited in the submission.<sup>124</sup>

The Secretariat concludes that the response leaves open central questions related to the effective implementation of the programs contemplated in Mexico's environmental law. The submission raises issues concerning the effective enforcement of Mexico's air emissions law; the implementation of vehicle emissions verification and inspection programs; the effectiveness of the air quality monitoring system; and plans to verify, monitor and control ozone, carbon monoxide, sulfur dioxide, and nitrogen dioxide. Mexico's response leaves these issues open. Information is also lacking as to how the paving program and the SUBA program discussed in Mexico's response are related to the fulfillment of specific legal obligations that form the basis of the assertions in the submission.

A factual record would clarify these open issues by presenting relevant information on the enforcement of these provisions by the state and municipal governments. It would help to ascertain the manner in which measures are selected to meet mandatory obligations to mitigate

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induce people to use public transit instead of their cars; define punctual schedules and routes, and efficiently publicize routes and schedules; Party Response, Appendix J (Exhibit 10).

<sup>124</sup> See note 71, *supra*.

air pollution in Hermosillo, their level of priority with respect to other programs and, as applicable, their relationship to other programs.

Consequently, pursuant to NAAEC Article 15(1) and for the reasons indicated herein, the Secretariat hereby notifies Council of its determination that the preparation of a factual record for submission SEM-05-003 (Environmental Pollution in Hermosillo II) is warranted.

Respectfully submitted for your consideration on 4 April 2007.

*(original signed)*  
Per: Geoffrey Garver  
Director  
Submissions on Enforcement Matters Unit