

## **Reasons for Council Instructions regarding Submission SEM-09-002 (*Wetlands in Manzanillo*)**

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation (CEC) responsible for overseeing the implementation of the North American Agreement on Environmental Cooperation (NAAEC), the Council of the Commission for Environmental Cooperation (the “Council”), hereby makes public its reasons for the instructions to the Secretariat for the preparation of a factual record regarding submission SEM-09-002 (*Wetlands in Manzanillo*).

### **1. The Secretariat’s Article 15(1) Notification**

In its Article 15(1) Notification, issued on 19 August 2013, the Secretariat recommended to the Council that the development of a factual record was warranted in connection with the assertions of a failure to effectively enforce:

- (i) Human Settlements Act of the State of Colima (*Ley de Asentamientos Humanos del Estado de Colima*—LAHEC) Article 48 paragraph I, with respect to the amendment of the Manzanillo Urban Development Plan (*Programa de Desarrollo Urbano de Manzanillo*) (§103-125);
- (ii) General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) Article 20 *bis* 2 and Regulation to the LGEEPA Respecting Environmental Land Use Planning (*Reglamento de la LGEEPA en Materia de Ordenamiento Ecológico*—ROE) Articles 7, 8 and 10, with respect to the implementation of the Coordination Agreement for the Drafting, Issuance and Execution of the Regional Ecological Zoning Program for Laguna Cuyutlán (the “Coordination Agreement”) (§149-171);
- (iii) LGEEPA Article 35 and Regulation to the LGEEPA Respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental*—REIA) Article 13 paragraph III, with respect to the alleged failure to establish the relationship between the Manzanillo LPG Project and the environmental land-use plan (§182-197);
- (iv) LGEEPA Article 35 and REIA Article 13 paragraph III, with respect to the alleged failure to establish the relationship between the Manzanillo LNG Project and the environmental land-use plan (§202-220); and
- (v) LGEEPA Article 30, General Wildlife Act (*Ley General de Vida Silvestre*—LGVS) Article 60 *ter* and NOM-022-SEMARNAT-2003 *Establishing the specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove areas*), with respect to the environmental impact assessment for the Manzanillo LNG Project, and with specific reference to the hydrodynamic flow in the coastal wetland of the Cuyutlán Lagoon and REIA Article 47, concerning compliance with the conditions of the environmental impact authorization for the LNG project (§225-251).

## **2. The Council's Instruction to the Secretariat**

In Council Resolution 14-06, the Council instructs the Secretariat to prepare a factual record in connection with the alleged failure to enforce the following:

- a) LGEEPA Article 35 and REIA Article 13 paragraph III, with respect to the alleged failure to establish the relationship between the Manzanillo LPG Project and the environmental land-use plan;
- b) LGEEPA Article 35 and REIA Article 13 paragraph III, with respect to the alleged failure to establish the relationship between the Manzanillo LNG Project and the environmental land-use plan; and
- c) LGEEPA Article 30, LGVS Article 60 *ter*, and NOM-022, with respect to the environmental impact assessment for the Manzanillo LNG Project, and with specific reference to the hydrodynamic flow in the coastal wetland of the Cuyutlán Lagoon.

### **Reasons of Canada and Mexico**

#### **1. Explanation Regarding the Definition of “Environmental Law” under the NAAEC**

##### **A) Regarding Article 48 paragraph I of the LAHEC**

Article 48 paragraph I of the LAHEC does not meet the test of Article 45(2) of the NAAEC on the meaning of “*environmental law*,” given that said provision does not have as its *primary purpose* the protection of the environment nor the prevention of a danger to human life or health, but instead establishes the coherence of urban development programs with other planning instruments such as the environmental land-use plan.

Article 48 paragraph I of the LAHEC reads as follows:

**Article 48.** Municipal urban development plans shall contain the following, in addition to the basic elements to which Article 43 of this Act refers:

I. The consistency of the Municipal Urban Development Plan with the National, State, and Municipal Development Plans, the State Urban Development Plan, and the Environmental Land Use Plan;...

A simple mention of an instrument of environmental planning in a statute does not mean that the principal purpose of the provision falls within the meaning of Article 45(2) of the NAAEC and thus can be analyzed under the Submissions on Enforcement Matters Process (“SEM Process”).

In its Response, the Party advised that the *principle of sustainable development* in Article 25 of the Federal Constitution requires that all national policies include environmental protection objectives. However, the inclusion of these objectives in the development and execution of national policies does not mean that every one of them would fall under the scope of the SEM Process or fulfill the requirements of Article 45(2) of the NAAEC.

## **B) Regarding the Coordination Agreement**

In its Article 14(1)(2) Determination of 13 August 2010 (§35), the Secretariat acknowledged that the Coordination Agreement does not constitute environmental law” as defined in Article 45(2) of the NAAEC.

As advised by Mexico in its Party Response, the Coordination Agreement does not meet the test of Article 45(2) of the NAAEC on the meaning of “environmental law,” given that said Agreement does not constitute a statute or a regulation whose primary purpose is the protection of the environment, or the prevention of a danger to human life or health; it does not impose generally applicable obligations and it is only binding on the parties thereto. As an administrative instrument that lays out the process for the drafting, issuance and execution of the Regional Ecological Zoning Program for Laguna Cuyutlán, with the objective of determining the actions, timeframes and commitments pertaining to the agenda and calendar of that process, the Coordination Agreement falls outside the scope of the SEM Process.

### **2. Explanation Regarding the Secretariat’s Request for New Information**

In its Revised Submission of 2 November 1999, the Submitters alleged that the Government of Mexico issued its environmental impact authorization on condition of a hydrodynamic assessment of the Cuyutlán Lagoon that laid out how the LNG Project would affect the hydrological flow towards the lagoon, and further alleged that the Government of Mexico never received this assessment, which the Submitters consider is essential in order for the Government of Mexico to issue its authorization and to guarantee that the Cuyutlán Lagoon would not be affected by the development of the project. However, neither in their Original Submission nor in the Revised Submission did the Submitters cite Article 47 of the REIA as not being effectively enforced by the Government of Mexico.

Pursuant to Article 14(1) of the NAAEC and Guideline 5.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the identification by submitters of environmental law not being effectively enforced by a Party is a crucial element of the SEM Process, it being beyond the Secretariat’s mandate to include in its determinations any environmental law that does not form part of the assertions in a submission.

### **Reasons of the United States**

The United States agrees with Canada and Mexico that the specific issues mentioned in the instructions to the Secretariat in Council Resolution 14-06 should be included in the factual record. However, the United States would also have supported a broader scope for the factual record.

In taking this position, the United States wishes to stress that its views in this case do not reflect a judgment on the part of the United States as to whether Mexico is failing to effectively enforce its environmental law. The position of the United States in this case is based on a long-standing policy in favor of promoting openness and transparency in the SEM Process. This policy is reflected in Executive Order 12915 of May 13, 1994, which requires the United States, to the greatest extent practicable, to vote in favor of a factual record being prepared when recommended by the CEC Secretariat.