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MINISTRY OF THE ENVIRONMENT AND NATURAL RESOURCES
LEGAL AFFAIRS COORDINATING UNIT
F.I. […]
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DIRECTOR, SUBMISSIONS ON ENFORCEMENT MATTERS UNIT
COMMISSION FOR ENVIRONMENTAL COOPERATION

Pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation, the Government of the United Mexican States, in its capacity as Party, hereby provides the *ad cautelam* Party Response to submission SEM/09-002 (Wetlands in Manzanillo) filed by Bios Iguana, A.C.

I. INTRODUCTION

On 2 February 2009, Bios Iguana, A.C., represented by Gabriel Martínez Campos and Esperanza Salazar Zenil (hereinafter, the "Submitters"), pursuant to Article 14 of the North American Agreement on Environmental Cooperation (hereinafter, NAAEC or the "Agreement"), filed a citizen submission with the Secretariat of the Commission for Environmental Cooperation (CEC) asserting that Mexico is failing to effectively enforce its environmental law in relation to environmental impact assessment and authorization for the "Manzanillo LP Gas Supply Plant Project" (*Proyecto de Planta de Suministro de Gas LP Manzanillo;* hereinafter, the "Manzanillo LPG Project") and the Manzanillo Liquid Natural Gas Terminal Project (*Terminal de Gas Natural Licuado Manzanillo;* hereinafter, the "Manzanillo LNG Project"), as well as to the amendment of the ecological zoning and urban development programs for that region.

On 9 October 2009, the CEC Secretariat issued a Determination (hereinafter, the "First Determination") in which it found that submission SEM/09/002 did not meet all the requirements of NAAEC Articles 14(1) and (2) and notified the Submitters of the deadline for filing a revised submission. On 2 November 2009, a revised submission was filed with the Secretariat.

On 13 August 2010, the Secretariat issued a determination (hereinafter, the "Second Determination") in which it decided to request a Party Response in regard to alleged

failures to effectively enforce various legal provisions contained, *inter alia,* in the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (the Ramsar Convention); the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS); the Regulations to the LGEEPA respecting Environmental Impact Assessment (REIA) and Ecological Zoning (ROE); the Environment Act for Sustainable Development of the State of Colima (*Ley Ambiental para el Desarrollo Sustentable del Estado de Colima*—LADSEC); the Human Settlements Act of the State of Colima (*Ley de Asentamientos Humanos del Estado de Colima*—LAHEC); and Mexican Official Standards NOM-SEMARNAT-059-2001, Environmental protection–Mexican native species of wild flora and fauna-Risk categories and specifications for their inclusion, exclusion, or change–List of species at risk (NOM 059), and NOM-SEMARNAT-022-2003, Specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones, in relation to the submission's assertions concerning the alleged illegal amending of the Manzanillo Urban Development Program (*Programa de Desarrollo Urbano de Manzanillo*—PDUM), and the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed (*Programa Regional de Ordenamiento Ecológico Territorial de la Subcuenca Laguna de Cuyutlán*—PROETSLC), as well as the alleged improper environmental impact approvals granted for the Manzanillo LPG Project and the Manzanillo LNG Project.

In response, the Government of Mexico has produced this Party Response in accordance with NAAEC Article 14(3) and paragraphs 9.2 and 9.3 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines").

This response begins by notifying the Secretariat of the existence of quasi-judicial administrative proceedings and judicial proceedings in Mexico that constitute grounds under NAAEC Article 14(3)(a) for automatic termination of the submission, since these proceedings were initiated before a Party in a timely fashion and in accordance with its law, and since their subject matter coincides with the assertions made by the Submitters.

Following this, the response presents considerations relating to the decision to request a response to submission SEM/09-002, since this Party contends that, in the case at issue, not all the requirements and criteria of NAAEC Articles 14(1) and (2) were met, nor was the information requested by the Secretariat in its First Determination provided. Information is then presented in relation to each of the matters which, according to the Secretariat's determinations, merits a Party Response in regard to various assertions made by the Submitters.

This analysis includes the Party's interpretation of the provisions constituting environmental law in the sense of NAAEC Article 45(2) and their relationship to the assertions contained in the submissions. From the Government of Mexico's perspective, the determination of which provisions constitute environmental law pursuant to the

Agreement must be done with special care and with adherence to strict criteria consistent with the purposes of that international instrument and with respect for the scope of cooperation intended by the Parties therein.

As explained in this Response, in the Mexican legal system, different areas of jurisdiction are assigned by the Mexican Constitution to the authorities of the different orders of government. Based on this, the state and municipal authorities, duly exercising their powers in these areas and in accordance with the applicable local legal provisions, have revised and updated their land use planning instruments.

In the case at issue, based on an interpretation in the Second Determination concerning the scope and applicability of Mexican legal concepts, such as the regulatory power of the Federal Executive Branch and the suppletivity of federal legal provisions to local law, the Government of Mexico is requested to provide information on the effective enforcement of its environmental law according to criteria whereby it is neither proper nor possible to explain the issues in question, since in the Mexican legal system, these concepts do not operate in the manner suggested by the CEC Secretariat, nor are they provisions corresponding to the purposes defined by the Agreement.

Additionally, this Response explains how the federal environmental authority assessed the projects mentioned by the Submitters, considering the enforcement of the relevant legal provisions in the manner in which the Mexican legal system allows for their enforcement. Furthermore even though submission SEM-009-02 does not state the relationship between the Manzanillo LPG and LNG Projects and the alleged violation of the Ramsar Convention provisions that its cites, this Response informs the CEC of the measures whereby the Government of Mexico has implemented that international treaty in domestic law.

In summary, as explained in detail in the body of this Response, the Government of Mexico contends that a consideration of the assertions contained in submission SEM/09/002 along with the applicable legal provisions does not indicate that any failure to effectively enforce Mexico's environmental law has occurred.

Moreover, the CEC Secretariat is hereby informed, pursuant to NAAEC Articles 39 paragraphs I and II; Articles 3 paragraphs II and VI, 13 paragraph V, 14 paragraphs III, IV and VI, 18, and other applicable articles of the Federal Transparency and Access to Governmental Public Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*—LFTAIPG), that the information contained in sections II, IV.9, and IV.11 of this Response, as well as all information relating to pending proceedings and compliance with the conditions of the environmental impact authorization for the Manzanillo LNG Project presented in this Response, shall be considered confidential information. Likewise, Appendices 1, 2, 12, 14, 21, 22, and 23 contain reserved and confidential information.

II. NOTIFICATION OF PENDING PROCEEDINGS AS GROUNDS FOR AUTOMATIC TERMINATION OF THE SUBMISSION

[…][1,2,3,4]

Finally, taking into consideration that, pursuant to LFTAIPG Articles 13 paragraph V, 14 paragraphs III and IV, and 15, information relating to procedural strategies in judicial or administrative proceedings pending final judgment, criminal investigations, judicial proceedings, and quasi-judicial administrative proceedings pending final judgment is considered confidential, the information in this section, and the information contained in this Party Response and its appendices relating to matters subject to review by the competent national authorities in the proceedings described shall be handled as such in this case.

III. CONSIDERATIONS IN REGARD TO THE ACCEPTANCE OF THE SUBMISSION FOR FURTHER STUDY PURSUANT TO NAAEC ARTICLES 14(1) and (2)

III.1 Non-fulfillment of the NAAEC Article 14(1) requirements

In its First Determination, the Secretariat found that submission SEM-009-02 could not be reviewed since it did not fully meet the Article 14(1)(c) requirement in that it did not provide sufficient information concerning some of the assertions made by the Submitters, who were therefore requested to clarify the following matters, among others, in a revised version of their submission:

 The extent to which the Coordination Agreement to support the formulation, promulgation, and enforcement of the Regional Ecological Zoning Plan for the Laguna de Cuyutlán can be considered environmental law in the sense of the NAAEC

The Party contends that the revised submission does not adequately respond to the Secretariat's request, for the reasons set out below.

In its First Determination, the Secretariat stated, in relation to the aforementioned Coordination Agreement, that, "While its provisions contain obligations for the authorities at different levels (federal, state, municipal), *it is considered solely to guide the Secretariat's analysis, since the extent to which the Coordination Agreement is an environmental law is unclear.* However, the Submitters may present more information on this regard in a revised submission to clarify why they consider the Coordination Agreement an environmental law."[5] (Emphasis added.)

The submission asserts that the Coordination Agreement is an agreement entered into under LGEEPA Article 20 bis 2 and ROE Articles 7 paragraph I, 8, and 10, and that "coordination agreements are matters of public law and are binding upon the

[1] […]
[2] […]
[3] […]
[4] […]
[5] First Determination at 9.

signatories, so that said instrument is clearly binding on Semarnat, and DGIRA should have verified compliance therewith when assessing the suitability of the projects in environmental terms."[6]

Irrespective of the analysis of these assertions presented below in this Response, it should be noted that the issue on which the Secretariat requested clarification from the Submitters *did not concern the legal nature of the Agreement and the scope of the undertakings it contains but rather its status as environmental law in the sense of NAAEC Article 45(2).* This issue is not addressed in the revised submission, nor is it analyzed in light of NAAEC Article 45(2). Nor is sufficient information provided that would allow the Secretariat to review the assertion, including documentary evidence supporting the assertions as required by paragraph 5.3 of the Guidelines.

Mexico argues that in order to address this request, the Submitters should have substantiated, and the Secretariat determined, in any case: i) that the Coordination Agreement is a law or regulation of the Party, or provisions of a law or regulation of the Party, and ii) that being a law or regulation of the Party, its primary purpose is environmental protection or the prevention of a danger to human life or health, which in the case at issue cannot be substantiated or supported. Therefore, the Government of Mexico contends that, adhering to the First Determination, the Secretariat should not have found that the Submitters complied with the request made pursuant to NAAEC Article 14(1)(c), much less should it have included the Coordination Agreement in the request for a Party Response to the Government of Mexico, in particular in paragraphs 71(c) and (j) of the Second Determination.

Extent to which the ROE is suppletive to the LADSEC

In the revised submission, referring only to LADSEC Article 1 paragraph VII – which concerns the regulation of liability for environmental harm and the establishment of mechanisms for incorporating environmental costs into production processes and processes for repair of environmental harm – the Submitters reiterate the interpretation contained in the original submission, stating that the LGEEPA Regulation applies to ecological zoning processes based on local law.[7]

The Party contends that the Submitters' and the Secretariat's interpretation is incorrect for the reasons indicated further below in this Party Response. In addition, the Government of Mexico notes that the reference to the suppletivity of the federal regulation to local law was not a matter raised by the Submitters, but rather introduced by the CEC Secretariat into its review, on the basis of which it has requested a Party Response including information on the effective enforcement of the ROE in regard to the issues raised by the Submitters.

Subject to the analysis of the foregoing in the relevant section of this Response, the

[6] Revised Submission at 6.
[7] Revised Submission at 6.

Party contends that on this point as well, the Submitters failed to clarify the matters requested by the Secretariat, nor did they provide additional information that would allow their assertions to be reviewed.

Why the federal authorities responsible for environmental impact assessment of the matters covered by the LGEEPA should apply LADSEC Articles 40 and 62 in the corresponding procedure

The Secretariat found in its First Determination that the LADSEC, as a local law, is applicable only to acts of the State of Colima authorities in matters under their jurisdiction, and not in respect of the federal authorities who issued the environmental impact authorization. In the revised submission, without providing further information in this regard, the Submitters argue that since it is a law relating to natural resources and the environment, the LADSEC "is applicable to Semarnat," pursuant to Article 32 bis paragraph V of the Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal*—LOAPF).

In paragraph 71(d) of the Second Determination, the Secretariat requests that the Party Response include matters relating to the failure to effectively enforce "LADSEC Article 40 and LGEEPA Article 35 as regards the alleged incompatibility of the Manzanillo LPG Project with the Ecological Zoning Program."

On this aspect, the Party contends that the Submitters did not provide information on this point that would allow for review of their assertions, especially given the Secretariat's reasoning in its Second Determination to the effect that the Submitters' interpretation is incorrect in stating that "the obligations established by LADSEC Article 40 apply to the state authorities and to works and activities in the state of Colima, but not to Semarnat. As regards the reference to LOAPF Article 32 bis, it is a provision granting authority to Semarnat within areas under federal jurisdiction; it does not give authority to Semarnat to enforce State law, in this case LADSEC Article 40. Therefore, the Secretariat finds that this assertion does not qualify for study in this process."[8]

Therefore, the Party contends that the request concerning the effective enforcement of LADSEC Article 40 should not have been included in this procedure, as was done in paragraph 71(d) of the Second Determination.

What was the specific act of authority whereby, according to the Submitters' assertions, the Government of the State of Colima "improperly validated, within the scope of its jurisdiction, the construction, operation and functioning of the Manzanillo LPG Project"[9]

The Submitters assert that "in allowing the amendment of the PDUM by the municipality of Manzanillo, the Government of Colima improperly validated the construction,

[8] Second Determination at 14.
[9] First Determination at 12.

operation, and functioning of the Manzanillo LPG Project" and that "as of 12 June 2004, the Government of Colima improperly validated, within the scope of its jurisdiction, the construction, operation, and functioning of the Manzanillo LPG Project," since with the alleged "approval" of the state, the municipality amended the Regional Ecological Zoning Program in the conservation and protection area of UGAs Ent5 and Ent4 in Ejido de Campos."[10]

The Secretariat acknowledges that this request was not addressed by the Submitters yet still requests the Party to include information in its Response concerning the Government of Colima's involvement in the revision of the PROETSLC to allow the Manzanillo LPG Project to proceed, this being relevant to determining the enforcement of LADSEC Article 40, *which is apparently excluded from the analysis due to what appears in the preceding paragraph, which reads*:

> 52. The Submitters further state that "as of 12 June 2004, the government of Colima improperly, within the scope of its jurisdiction, validated the construction and operation of the Manzanillo LPG Project" since with the alleged "consent" from the State, the Municipality modified the Ecological Zoning Program in the conservation and protection zones UGA Ent5 39 and Ent 4 40 in the Ejido of Campos. The Secretariat finds that this assertion qualifies for review, but only within the enforcement scope of LADSEC Article 40 and in light of ROE Articles 8 and 10 and the commitments adopted by the government of the State of Colima in the Coordination Agreement. The Secretariat notes that even if the revised submission does not further elaborate on arguments to determine how the State government "validated" the Manzanillo LPG Project, the Party in question may provide in a response the role of the government of the State of Colima in modifying the Ecological Zoning Program to allow the Manzanillo LPG Project in the Laguna de Cuyutlán, since such matter is relevant when considering effective enforcement of LADSEC Article 40.[11]

The Party contends that the Submitters' arguments cannot be considered in studying the Secretariat's question, since they do not explain precisely what is the legal jurisdiction of the Government of the State of Colima over the alleged "validation," nor do they indicate, in response to the request in the First Determination, specific acts of authority that would allow the Secretariat to study the corresponding assertions.

The relationship between the Semarnat's commitments under the Coordination Agreement and federal environmental impact assessment, "clarifying their assertion that the Coordination Agreement is binding upon Semarnat as the authority issuing the environmental impact authorization of the Manzanillo LPG Project and demonstrating how it relates to LGEEPA and the Ecological Zoning Regulations"

The Party contends that on this point, the Submitters also failed to address, and the Secretariat did not note, the central issue raised in the First Determination, which was to determine whether said Coordination Agreement "is binding upon Semarnat as the authority issuing the environmental impact authorization of the Manzanillo LPG Project and demonstrating how it relates to LGEEPA and the Ecological Zoning Regulations."

[10] Revised Submission at 6.
[11] Second Determination at 15.

In relation to this section, it would appear that the Secretariat does not consider the Coordination Agreement to be applicable in the manner described by the Submitters, since it states: "In any case, the Coordination Agreement can only be analyzed as an implementation device of LGEEPA Article 20 bis and ROE Article 7, quoted in the submission and serves as a referent to commitments adopted by authorities charged with enforcement of environmental law in question." Nevertheless, in paragraphs 71(c) and (j) of the Second Determination, the Party is requested to provide information concerning fulfillment of the Coordination Agreement.

III.2. Failure to meet the NAAEC Article 14(2) criteria

In its First Determination, the Secretariat alluded to its duty to ascertain, during the initial review of a submission, whether the submission addresses the criteria of NAAEC Article 14(2), as prescribed also by paragraph 5.6 of the Guidelines. In this regard, in its First Determination, the Secretariat found that the submission did not meet the criteria of NAAEC Article 14(2)(c) and (e), in that it did not specify the issue of harm. For greater clarity, in its First Determination, the Secretariat noted as follows:

> The Secretariat notes that the Submitters did not provide *information* on the status of the LNG and LPG projects referred in their submission. More information regarding whether any of these projects have commenced — *and whether any environmental impacts have been observed* — may allow the Secretariat to consider, in a further phase of the process, whether the alleged harm is due to the asserted failure to evaluate the environmental impact of the gas projects in the Laguna de Cuyutlán. (Emphasis added.).

In this regard, the revised submission asserts as follows:

> *CURRENT STATUS OF PROJECTS:*
> 3.11.- Construction of the infrastructure for the Manzanillo LPG Project began in September 2004, and the tank farm, consisting of 20 spherical tanks (Appendix 24 photos 1 and 2) is practically completed and is now operating, with traffic of 40 tank trucks daily. This project has severely altered the landscape as well as the habitat for species of mammals and reptiles, including green and black iguana and three species of sea turtle all listed in NOM-059-SEMARNAT-2001, and especially local and migratory birds, especially shorebirds. Furthermore, the Project intends to install a 327-km gas pipeline that would seriously impact 25 municipalities in the states of Colima and Jalisco. The LNG Project began work on 15 June 2008. Initial work involved clearing of a large area of palms, fruit trees, and native species (Appendix 24, photos 3 and 4). Later, filling began on a 400 m by 100 m area within the lagoon, starting from the edge of the mangrove ecosystem (Appendix 24, photos 5, 6, and 7). This caused serious harm to species of fish, crustaceans, and mollusks as well as to the benthos, considerably affecting inshore fishing and irreversibly altering water flow, which will harm the entire wetland. The worst is yet to come, since the Project plans to extend the Tepalcates Canal (Appendix 24, images 8 and 9) from its current 90m to 400m, as well as to dredge the canal and the lagoon to 16 m. This would greatly alter water flow in the four basins of the lagoon and would also alter the salinity of the water, which would irreversibly impact the mangrove ecosystem throughout the wetland. Finally, the project will install a gas pipeline running through 25 communities of Colima and Jalisco and affecting two wetlands of great biological value in the latter.[12]

In the case at issue, the Government of Mexico contends that the Submitters' assertions

[12] Revised Submission at 14–15.

do not meet the criterion of NAAEC Article 14(2)(a), which requires the Secretariat to determine *whether the submission alleges harm to the person or organization making the submission.* The Submitters provide no evidence that could be construed to indicate that the environmental impact authorization granted by the competent authorities for the Manzanillo LPG and LNG Projects is personally harming them or the organization they represent.

Additionally, the Submitters do not provide any evidence to substantiate causation; i.e., that any environmental harms were actually a consequence of the development of the projects. They state in the above-transcribed paragraph that from their particular point of view, the Manzanillo LPG Project has severely altered the landscape and the habitat for various species and will affect 25 municipalities (though they do not specify how it will affect them). Concerning the Manzanillo LNG Project, the Submitters simply state that it has caused severe harm to several species, that the alteration of water flow will harm the entire wetland, and that "the worst is yet to come," since the Project "plans to extend the Tepalcates Canal." That is, the Submitters do not even refer to matters that are in fact taking place, nor do they provide documents to support their assertions.

In light of the foregoing, it is hereby noted that there does not exist any information to support the Submitters' assertions of harm, or to indicate that harm is being caused to them, but only that, in their judgment, environmental harms are being caused and will be caused to ecosystems and natural resources in the region. Based on these assertions, the Party insists, and without any evidence to support them, the Secretariat has determined that "the alleged harm is due to the alleged failure to effectively enforce the environmental law, and therefore meets the requirements of Article 14(2)(a)."

The Party contends that in order to meet the aforementioned NAAEC criterion, the making of allegations based on the Submitters' mere subjective perception cannot be considered sufficient; rather, adhering to the text of Article 14(2)(a), the Secretariat should have ascertained that: i) harm to the Submitters was being alleged, and that ii) the alleged harms were in some way supported by the submission, which is not the case here. Therefore, the Party contends that the issues raised in the First Determination were not addressed in the revised submission and that it therefore does not qualify for review following the Secretariat's original reasoning.

IV. RESPONSE TO THE ISSUES REQUESTED IN THE SECRETARIAT DETERMINATIONS

IV.1 Effective enforcement of LAHEC Article 48 paragraph I in relation to the mechanisms for consistency that should have been considered when amending the PDUM[13]

The original submission states as follows:

[13] Second Determination at 22, section IV(a).

> a. The authorities of this municipality amended the Manzanillo Urban Development Program, published in the Official Gazette of the State of Colima (*Periódico Oficial del Estado de Colima*), on 12 June 2004 (Appendix 5), which entailed changing the land use from a forested area to a medium-term urban reserve and changing the zoning from ecotourism to high-impact and high-risk heavy industry.
>
> In so doing, they failed to comply with the PROETSLC ecological criteria by effecting amendments unfavorable to the area's protection and conservation.…[14]

In its First Determination, the Secretariat found that LAHEC Article 48 paragraph I constitutes environmental law in the sense of the NAAEC "since, among the main purposes of the urban development programs – as defined by LAHEC – is the protection of the environment."[15]

The Secretariat also concluded in its First Determination that urban development and ecological zoning programs are not environmental law in the sense of the NAAEC because "the Mexican courts have held that urban development programs are, in any case, administrative acts that 'while having general effects, [are] not equal to a law.' The programs cited by the Submitters do not qualify as environmental law."[16] In clear contradiction with this reasoning, the Secretariat goes on to state:

> It is clear that the Manzanillo Urban Development Program is subject to the LAHEC and that according to Article 48 section I must include "consistency mechanisms". The Secretariat further notes that Article 5 section XIII of this law defines the term "urban development program," finding environmental protection among its elements, which confirms that the assertion regarding the amendments to the Manzanillo Urban Development Program may be analyzed, *provided that the analysis refers to the environmental aspects of the program.* (Emphasis added.)

Based on these considerations, in its Second Determination, the Secretariat requests a response from Mexico in regard to the alleged failure to effectively enforce LAHEC Article 48 paragraph I, in relation to the mechanisms for compatibility with other ecological zoning programs that should have been considered when amending the PDUM.[17]

The Government of Mexico does not share the Secretariat's interpretation in the transcribed paragraphs. In the first place, it should be noted that LAHEC Article 48 paragraph I does not meet the requirements of NAAEC Article 45(2), since *its primary purpose is not the protection of the environment or the prevention of a danger to human life or health, but rather the establishment of the content of municipal urban development programs, including analysis of their compatibility with other state land use planning instruments.* For further clarity, LAHEC Article 48 paragraph I reads as follows:

> **ARTICLE 48.-** Municipal urban development programs shall, in addition to the basic features to which Article 43 of this Act refers, contain the following:

[14] Original Submission at 6.
[15] First Determination at 8.
[16] First Determination at 9.
[17] Second Determination at 22.

> I. The compatibility of the Municipal Urban Development Program with the National, State, and Municipal Development Programs, the State Urban Development Program, and the Ecological Zoning Program of the Territory;

The Party contends that the mere mention of an environmental policy instrument in LAHEC Article 48 paragraph I alongside other planning instruments that must be taken into account in the drafting of municipal urban development programs does not show, as required by Article 45(2) of the Agreement, that the primary purpose of that provision is environmental protection or the prevention of a danger to human life or health, nor does it determine the nature of the provisions to be that of "environmental law." Therefore, the Secretariat's interpretation and consequent request to the Government of Mexico to justify its effective enforcement exceeds the scope of the NAAEC.

Second, the Secretariat's interpretation exceeds the provisions of NAAEC Article 45(2), which does not stipulate that the status of a provision as "environmental law" is determined by the scope (general, or of administrative acts with general effects) of the Party's provisions but rather, that it is determined by its *primary purpose* being related to environmental protection or the prevention of a danger to human life or health. Thus, the Secretariat's decision to exclude the Urban Development Program is correct, as this instrument cannot be considered environmental law because its primary purpose is not related to the criteria of NAAEC Article 45(2); *however, the reasons adduced for excluding it are inconsistent with the Agreement*. This clarification is relevant since, based on this interpretation, contradicting its previous determination that the PDUM cannot be considered environmental law, the Secretariat finds itself competent to review "the environmental aspects of the program."

On this point, the Party contends that the Secretariat also exceeds the scope of the NAAEC when it interprets LAHEC Article 5 paragraph XIII (*a provision that was, moreover, not cited by the Submitters*) to conclude that "environmental protection [is] *among its elements,* which confirms that the assertion regarding the amendments to the Manzanillo Urban Development Program may be analyzed, provided that the analysis refers to the environmental aspects of the program." (Emphasis added.) NAAEC Article 45(2) states that the provisions qualifying for analysis within submissions on enforcement matters are those whose *primary purpose* is environmental protection, *not all those domestic provisions which, with adherence to the principle of sustainability contemplated in Article 25 of the Mexican Federal Constitution, include the incorporation of environmental protection criteria as part of their object.* In the case at issue, it is evident from the provision included by the Secretariat in its Determination that, *inter alia, the programs have as their purpose* that of protecting the environment, improving urban structure, regulating property in population centers, and establishing the basis for implementing measures, works, and services relating to urban infrastructure.[18]

[18] "ARTICLE 5.- For the purposes of this Act, the following definitions apply:…
XIII. URBAN DEVELOPMENT PROGRAM: The set of standards and provisions governing and regulating the foundation, conservation, improvement, and growth of population centers; as well as determining the provisions, reserves, and uses of areas and lots, with a view to improving urban structure, protecting the environment, regulating property in population centers, and laying the groundwork for the implementation

For these reasons, the Government of Mexico contends that the review of LAHEC Article 48 paragraph I and the PDUM, including "their environmental aspects," should not be included in this procedure.

Notwithstanding the foregoing, it should be specified that the PDUM was published in the Official Gazette of the State of Colima on 4 November 2000, *when the PROETSLC had not yet been promulgated. However,* the formulation of the PROETSLC was considered among the short-term goals of the PDUM, specifically in Article 25:

ARTICLE 25. SHORT-TERM ENVIRONMENTAL ASPECTS 2000

IX. ECOLOGICAL ZONING FOR THE LAGUNA DE CUYUTLÁN

As regards the amending of the PDUM, a distinction must be made between the Manzanillo LPG and LNG Projects, which are included under the same assertion by the Submitters. This is because, as may be noted from a perusal of the Agreement amending the PDUM, the latter project was not taken into consideration in that process.[19] For greater clarity, the Agreement in question only refers to the LPG Distribution Project where it states the following in Recitals 4 and 6:

> 4.- Whereas Zeta Gas del Pacifico, S.A de C.V, attests that it is the beneficiary of a commodate (gratuitous loan) and the legal holder of lots 61Z-1 P3/4, 72-Z1 P ¾, 76 Z-1 P3/4, 77 Z-1 P ¾, 80 Z-1 P3/4, 83 Z-1 P ¾, 89 Z-1 P ¾, and 90 Z-1 P ¾, all in Ejido de Campos, by virtue of deeds issued by the National Agrarian Registry [*Registro Agrario Nacional*] and entered in the Public Register of Property [*Registro Público de la Propiedad*].…
>
> 6.- Whereas Zeta Gas del Pacífico, S.A. de C.V. has entered into a commodate for the land mentioned in the fourth recital to invest in a LP gas storage and distribution plant and that, to influence the corresponding administrative procedures, it requested the Municipality to assign a high-impact industrial use in the Urban Development Program of Manzanillo, Colima, which would be compatible with the activity that the company seeks to carry out.

The Agreement in question presents the following as reasons justifying, in the judgment of the municipal and state authorities, the amending of the land uses applicable to the lots in question: i) that the authorities are adhering to the provisions of chapter XXXVI of the Zoning Regulation of the State of Colima[20] (Service and Fuel Supply Stations); ii) that industrial, commercial, and service uses are planned for the zone in question in the future (Recital 2), and iii) that a portion of the lots held by Zeta Gas, S.A. de C.V. were zoned for Ecotourism (TE), a designation which, since it is not to be found in the

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of measures, works, and services relating to urban infrastructure and equipment;…

[19] In this regard, doc. no. S.G.P.A./DGIRA.DG.0465.08, containing the environmental impact authorization for the Manzanillo LNG Project, states on p. 39 that "for the Project (Basic Project and Alternative 1), this ordinance only has influence on an area of approximately 6.83 hectares (approximately 3.8% of the total area thereof), located to the northeast of the Project, while the rest, which is the majority, is not covered by this ordinance. As regards 'Alternative 2 (Omega),' it is not covered by the ordinance in question."

[20] The text of the regulation is available at http://www2.scjn.gob.mx/legislacionestatal/Default.htm (last viewed 22 September 2010).

applicable state provisions, lacked legal basis (Recital 5).

Thus, the state and municipal authorities, exercising the powers vested in them by the applicable local laws to draft and revise land use planning instruments under their jurisdiction, found it necessary to amend the PDUM to observe the requirements of the Zoning Regulation of Colima, defined in the state context as the mechanism for the promotion of coherence among land use planning, ecological zoning, and risk prevention and control provisions,[21] through the establishment of technical and procedural standards for the formulation and administration of land use planning and zoning in communities in the state, by means of the urban development programs promulgated for that purpose.[22]

The foregoing cannot be considered a failure to effectively enforce Mexican environmental law since the amendment made to the PDUM by the state and municipal authorities in any case reflects the reasonable exercise of their discretion in regard to regulatory matters.

IV.2 Effective enforcement of ROE Articles 6, 13, 14, 36, 48, 49, and 50 in respect of the alleged illegal amending of the Ecological Zoning Program[23]

In its First Determination, in relation to the Submitters' assertions concerning the process followed by the authorities of the State of Colima when they amended the PROETSLC,[24] the Secretariat stated to the Submitters that "[ROE] Article 1 … provides a federal scope of application of the regulation"[25] and requested clarification in a revised submission on "the issues within the state environmental law (i.e., the LADSEC) that warrant such supplemental application."

In its Second Determination the Secretariat states:

> 34. Concerning LADSEC Article 1 paragraph VII, it establishes that the LADSEC is a matter of public order and the common interest; that its purpose is environmental protection, promoting sustainable development, and laying the foundations for regulation of liability for environmental damage. The last paragraph of the article in question provides for the suppletive character of federal and state law where LADSEC is silent, a provision which serves to guide the Secretariat's review of the LADSEC.…
>
> 36. As to LGEEPA Article 20 bis 2, and ROE Articles 8, and 10, they qualify as environmental law since they refer to the drafting and issuance of coordination agreements for ecological zoning. The LGEEPA definition of ecological zoning comprises the objective of environmental protection. Likewise, after consideration of these provisions it is clear that the purpose—among others—of preparing and implementing ecological zoning programs is to protect the environment, and thus

[21] Recital 4 of Order No. 265 promulgating the Human Settlements Act (*Ley de Asentamientos Humanos*) of the State of Colima, published in the Official Gazette of the State of Colima on 7 May 1994.
[22] Article 1 of the Regulation.
[23] Second Determination at 22, paragraph 71(b).
[24] See Original Submission at paras. 1.7–1.8.
[25] First Determination at 11.

these provisions qualify as environmental law.[26]

The Government of Mexico disagrees with the Secretariat's interpretation as to the suppletivity of the *federal ecological zoning regulation* to the provisions of *state law*. Additionally, it is hereby noted that the Secretariat includes in its Determination, to support its interpretation, arguments and provisions that were not mentioned by the Submitters, applying a mechanism equivalent to that of *suplencia de la queja* (where a judge includes in his decision elements not included in the plaintiff's complaint) that is not contemplated by the NAAEC, nor is it among the powers vested in it by NAAEC Article 14 that enable it to review submissions asserting that a Party is failing to effectively enforce its environmental law.

This is the case because, in their assertions on this point, the Submitters only mention LADSEC Article 1 paragraph VII[27] and *never mention the suppletivity of the federal regulation in the case at issue, nor do they even cite the last paragraph of LADSEC Article 1*.

For greater clarity, the Submitters only cite the paragraph of LADSEC Article 1 which states that the LADSEC establishes the basis for "regulation of liability for environmental harm and the establishment of mechanisms for incorporating environmental costs into production processes, as well as mechanisms for repair of environmental harm." The Secretariat includes in its review the last paragraph of the article, which provides that "Where this Act is silent on any matter, those provisions contained in other laws, regulations, standards, and other federal or state legal provisions that relate to the matters covered by this Act shall apply." The Secretariat even acknowledges this when it clarifies, in footnote 63 of the Second Determination, that *"Even if none of the original and revised submission explicitly refer to the last paragraph, the Submitters quote LADSEC Article 1 which is comprehensive to its last paragraph."* (Emphasis added.)

The Party contends that the Secretariat exceeds its legal jurisdiction when it studies matters other than those raised in submissions. This impairs legal certainty and the solidity of its determinations, since the NAAEC and the provisions deriving therefrom do not empower it to go beyond assertions made and provisions cited by Submitters. Additionally, even if the NAAEC stipulated that the Secretariat could carry out an analysis equivalent to *suplencia de la queja,* this could only occur *based on what is stated in the relevant assertions,* such that unless there is some minimal bit of reasoning presented in a submission – i.e., a cause of action − the Secretariat has no ability to determine whether, in the specific case at hand, the Party's environmental law was effectively enforced, in accordance with Article 14.[28]

[26] Second Determination at 11.

[27] The Original Submission refers to LADSEC Article 1 paragraph VIII while the Revised Submission refers to paragraph VII; see p. 6 of each submission. In any case, neither refers to the entirety of LADSEC Article 1 nor mentions its last paragraph.

[28] More specifically, see the judicial decision titled SUPLENCIA DE LA QUEJA DEFICIENTE (ALCANCE INTERPRETATIVO DEL ARTÍCULO 76 BIS, PARAGRAPH VI, DE LA LEY DE AMPARO). Novena Época, *Semanario Judicial de la Federación y su Gaceta*, Vol. XXI, April 2005, at 686 and Vol. XII,

Notwithstanding the foregoing, the Party contends that the Secretariat's interpretation concerning the suppletivity of a federal regulation to a local law is incorrect for the following reasons:

Scope of the regulatory power of the Federal Executive Branch

Article 89 paragraph I of the Political Constitution of the United Mexican States establishes the regulatory power of the Federal Executive Branch as follows:

> **Article 89.** The powers and obligations of the President are as follows:
>
> **I.** To promulgate and enact the laws passed by the Congress of the Union, seeing to their strict observance in the administrative sphere.

The scope of this regulatory power has been clearly marked out by the Federal Judiciary (*Poder Judicial de la Federación*) in various decisions, such as the following:[29]

> **REGULATORY POWER OF THE FEDERAL EXECUTIVE BRANCH. ITS PRINCIPLES AND LIMITATIONS.**
>
> The Supreme Court has repeatedly held that Article 89 paragraph I of the Federal Constitution establishes the regulatory power of the Federal Executive Branch, which refers to the possibility that this power provides for the strict observance of laws in the administrative sphere; that is, the Federal Executive Branch is authorized to issue those regulatory provisions that are necessary to the enforcement of the laws emanating from the legislative body. *These regulatory provisions, although similar from a material standpoint to the legislative acts passed by the Congress of the Union in that they are general, abstract and impersonal, and binding, are distinguished therefrom basically in two respects: first, because they come from the Executive Branch, a body distinct and independent from the Legislative Branch; second, because, by constitutional definition, they are provisions subordinate to the legal provisions they regulate and are not laws but rather general administrative acts whose scope is limited by the Law in question. Thus, it has been noted that the regulatory power of the President of the Republic is predicated on a fundamental principle: the principle of legality, from which, according to precedent, two subordinate principles derive: reserve of law* (reserva de ley) *and hierarchical subordination thereto. The first of these prevents a regulation from newly addressing matters reserved exclusively to laws emanating from the Congress of the Union; or, in other words, prohibits laws from delegating the content of the matter that they are constitutionally mandated to regulate. The second principle consists in the requirement for a regulation to be preceded by a law whose provisions it elaborates on, complements, or details and in which it finds its justification and measure. Thus, the regulatory power of the Federal Executive Branch has as its primary purpose that of improving the operation of the administrative sphere, but always on the basis of the laws under which the regulations are made.* Ultimately, in the federal legal system, the Congress of the Union holds broad, abstract, impersonal, and unrestricted legislative powers set out in the Political Constitution of the United Mexican States to promulgate laws in the different domains contemplated in the Constitution; therefore, in these domains, it is this legislative body which must materially produce the provisions in question, and while the normative power of the President of the Republic cannot be ignored, since that power of the President is also expressly recognized in the Constitution, *that power of the Executive is limited by the legal provisions that it elaborates on or details and that*

December 2000, at 22, respectively.

[29] Location: Novena Época, *Semanario Judicial de la Federación y su Gaceta* XXX, August 2009, at 1067.

are issued by the legislative body in question.

Thus, the Regulation to the LGEEPA respecting Ecological Zoning issued by the President, the head the Federal Executive Branch, on the basis of Article 89 paragraph I of the Federal Constitution, only regulates and is applicable to those provisions of *the LGEEPA referring to ecological zoning under federal jurisdiction, and has as its purpose that of marking out the limits that shall govern the actions of the federal government* in matters contemplated in LADSEC Article 1, and may not in any case be construed to regulate − even suppletively − the LADSEC or the application of environmental policy instruments under state or municipal jurisdiction, including ecological zoning programs encompassing part of the territory of a federative entity, as in the case of the PROERSLC [sic].

Scope of suppletivity in the Mexican legal system

The last paragraph of LADSEC Article 1 provides as follows:

> **ARTICLE 1.-** This Act is a matter of public order and the societal interest, its provisions are compulsory, they apply within the sphere of jurisdiction of the State, and their object is the preservation and restoration of ecological stability, environmental protection, and the promotion of sustainable development, establishing the basis for:
>
> *…*
>
> *Where this Act* is silent on any matter, those provisions contained in other laws, regulations, standards, and other *applicable* federal or state legal provisions that relate to the matters covered by this Act shall apply. (Emphasis added.).

It can be inferred from these paragraphs that the ROE, as a regulatory provision issued by the Federal Executive Branch, *is not a legal provision applicable to matters on which the LADSEC is silent,* and therefore does not meet the supposition of suppletivity invoked by the Secretariat of its own accord. The Secretariat's interpretation concerning the suppletivity of the ROE to the environmental protection provisions of local law is equally inadequate from the standpoint of the criteria under which this legal concept operates. In this regard, Mexican courts have held that *the object of suppletivity is to fill legislative voids and to achieve the purpose of the provision supplemented, but not to create institutions not regulated by the law to be supplemented*.[30]

In the case at issue, the Secretariat's interpretation seeks to include, as suppletive to the applicable local law, provisions not regulated thereby, such as those obligating *Semarnat* to:

[30] For further reference, see the judicial decision titled MERCADO DE VALORES. AL PROCEDIMIENTO ADMINISTRATIVO QUE ESTABLECE LA LEY RELATIVA NO LE ES APLICABLE SUPLETORIAMENTE LA FIGURA DE LA CADUCIDAD PREVISTA EN EL ARTÍCULO 60 DE LA LEY FEDERAL DE PROCEDIMIENTO ADMINISTRATIVO (LEGISLACIÓN VIGENTE DE 2004 A 2006). Location: Novena Época. *Semanario Judicial de la Federación y su Gaceta* XXX, December 2009, at 305.

i) observe certain criteria in processes for the drafting and amendment of ecological zoning programs *under its jurisdiction* (Article 6);

ii) record progress on ecological zoning processes *under its jurisdiction* in the environmental register (Articles 13 and 14);

iii) see to the amendment of *the general ecological zoning plan for the country* where new priority areas arise (Article 36);

iv) see to the amendment of regional ecological zoning programs *under its jurisdiction* under the circumstances provided by the regulation in question (Article 48);

v) see to the amendment of those ecological guidelines and strategies set out in regional ecological zoning programs *under its jurisdiction* that are unnecessary or inadequate to alleviate environmental conflict and to achieve the corresponding environmental indicators, where such amendment conduces to the alleviation of adverse environmental impacts caused by economic activity, human settlements, or natural resource use (Article 49), and

vi) observe, in processes for the amendment of ecological zoning programs *under its jurisdiction*, the same rules observed for their issuance (Article 50).

The PROETSLC *is not an instrument under federal jurisdiction* because it is a regional ecological zoning program encompassing *part of the territory of a federative entity* and is therefore, pursuant to LGEEPA Articles 6 paragraph IX and 20 Bis 2 first paragraph, governed by the provisions of the LASDEC [sic].

For greater clarity, LGEEPA Article 7 provides as follows:

> **ARTICLE 7.** The States, in accordance with this Act and the applicable local laws, have the following powers:…
>
> **IX.-** The drafting, promulgation, and enforcement of the ecological zoning programs to which Article 20 BIS 2 of this Act refers, with the participation of the corresponding municipalities;

As for Article 20 Bis 2, its first paragraph provides as follows:

> **ARTICLE 20 BIS 2.-** The governments of the States and the Federal District, *as prescribed by the applicable local laws*, may draft and promulgate regional ecological zoning programs *encompassing the entirety or a part of the territory of a federative entity*. (Emphasis added.)

The PROETSLC corresponds to the type of ecological zoning program contemplated in the transcribed provision and it was therefore promulgated and amended by executive orders of the Governor (*Titular del Ejecutivo Local*) of the State of Colima, on the basis, *inter alia,* of LADSEC Articles 16 paragraphs I and II (provides that the Ministry of Urban Development (*Secretaría de Desarrollo Urbano*) and the municipalities are state

environmental authorities);[31] 17 paragraph VIII (empowers the Governor of Colima to promulgate, *inter alia,* ecological zoning programs); 34 paragraph II (determines state jurisdiction over ecological zoning programs covering part of the territory of Colima), and 38 paragraph V (establishes the procedure for the drafting, promulgation, amendment, and registration of state ecological zoning procedures). None of these provisions was cited by the Submitters, and thus it is not possible to review the effective enforcement of the Party's environmental law in connection with the promulgation and drafting of ecological zoning programs under state jurisdiction, as is the case of the programs under discussion.

In the case under review, the claim that the powers vested *exclusively* in the federal environmental authority by the ROE extend to the state and municipal authorities, as well as the intent to introduce criteria and concepts not contemplated in the applicable local law (LADSEC) into state ecological zoning process is improper, since the LADSEC: i) does not obligate the state authorities to observe the criteria of ROE Article 6; ii) does not regulate the environmental register contemplated in ROE Articles 13 and 14 as an instrument wherein progress on regional ecological zoning programs shall be recorded; iii) makes no reference whatsoever to the federal ecological zoning program to which ROE Article 36 refers; iv) does not subject to ROE Articles 48 and 49 the powers of the state authorities to amend ecological zoning programs under their jurisdiction, and v) does not provide that the state authorities shall observe, in amending programs under their jurisdiction, the same rules that are applicable to their promulgation, as prescribed by ROE Article 50 in respect of the amendment of programs under federal jurisdiction.

For the foregoing reasons, the Secretariat's request to the Government of Mexico for a response to the Submitters' assertions concerning alleged failures to effectively enforce ROE Articles 6, 13, 14, 36, 48, 49, and 50, on the basis of its interpretation of the putative suppletivity of the ROE to local environmental law, is incorrect and cannot account for matters related to its effective enforcement because, in this case, the ROE is not applicable.

In this regard, the Party contends that the interpretation suggested by the Secretariat might not only translate into an encroachment upon the jurisdiction granted by LGEEPA Article 20 bis 2 to state congresses to promulgate laws according to which they shall draft, promulgate, and enforce ecological zoning programs encompassing part or all of the territory of a federative entity, but also exceeds the scope of the regulatory authority of the Federal Executive Branch as well as that of the legal concept of suppletivity, and cannot relate to the effective enforcement of the Party's environmental law, since such enforcement, in order to be effective, would in the first place have to conform to the division of jurisdiction enshrined in the Constitution and in Mexican law.

IV.3 Effective enforcement of LGEEPA Article 20 Bis 2 and ROE Article 7 in respect of the alleged violation of the Coordination Agreement, as well as of ROE

[31] This legal basis only appears in the Order revising the PROETSLC.

Articles 8 and 10 in regard to alleged amendments to the Regional Ecological Zoning Program in violation of the Coordination Agreement[32]

In its Second Determination, the Secretariat states:

> 35. Concerning the Coordination Agreement, with the information in the revised submission, *the Secretariat concluded that it does not constitute environmental law, since it does not establish obligations of a general nature, and is only applicable to the parties that have signed it*. In any case, the Coordination Agreement can only be analyzed as an implementation device of LGEEPA Article 20 bis and ROE Article 7, quoted in the submission and serves as a referent to commitments adopted by authorities charged with enforcement of environmental law in question.… (Emphasis added.)
>
> 48. *The Secretariat accordingly finds that the assertion of violation of the Coordination Agreement qualifies for review under NAAEC Articles 14 and 15.*[33] (Emphasis added.)

In view of these paragraphs from the Second Determination, it is hereby noted that the Secretariat states, in its analysis of the Submitters' assertions, that the Coordination Agreement *is not environmental law in the sense of the NAAEC*, only to then change its mind, without giving any explanation or reasoning, and determine that the Coordination Agreement *does qualify for review under NAAEC Articles 14 and 15.* This inconsistency leaves the Party with serious doubts about the process followed by the Secretariat in determining which provisions qualify for review of effective enforcement.

The Government of Mexico contends that the review of the provisions cited by the Submitters cannot take place in the manner described by the Secretariat in its Second Determination, for the reasons set out below:

 In the case at issue, only the first paragraph of LGEEPA Article 2 Bis 2, establishing the jurisdiction of the governments *of the federative entities, as prescribed by the applicable local laws, over the drafting and promulgation of regional ecological zoning programs encompassing all or part of the territory of a federative entity,* is applicable. This is the case for the PROETSLC.

 The Coordination Agreement was signed by authorities of the three orders of government on 16 August 2000. The ROE was published in the Official Gazette of the Federation on 8 August 2003 and came into force the next day. *That is, the ROE was not in force, nor did it serve as the legal basis for the signing of the Coordination Agreement.*

 As stated above, the ROE, and in particular Article 7 since it is mentioned by the Secretariat, is not applicable to the case at issue, since the ROE itself refers exclusively to *federal ecological zoning and not to state zoning programs such as the PROETSLC. For greater clarity, the cited article provides as follows:*

[32] Second Determination at 22, paras. 71(c) and (j).
[33] Second Determination at 14.

Article 7.- Ecological zoning *under federal jurisdiction* shall be carried out through the ecological zoning process and shall have the following as outcomes:

I. Coordination agreements that may be signed with:
a. Those *agencies and entities of the Federal Public Administration that are competent to take measures* affecting the study area, and
b. The federative entities, their municipalities, the Federal District, and those of its boroughs within the study area.
II. Ecological Zoning Programs, which shall contain:
a. The ecological zoning model containing the regionalization or the determination of ecological zones, whichever applies, and the ecological guidelines applicable to the study area and, as applicable, the order promulgating them, and
b. The ecological strategies applicable to the ecological zoning model;
and
III. The environmental log.
The Ministry may see to the initiation of the ecological zoning process at each of its stages, as required. (Emphasis added.)

ROE Article 8 refers to coordination agreements which may be signed by Semarnat, *on a purely discretionary basis,* with regard to ecological zoning processes under *federal jurisdiction*. In the case of the PROETSLC, Semarnat did not see to its revision and therefore the criterion of ROE Article 8 does not obtain:

Article 8.- *The Ministry* shall see to the signing of any coordination agreements that are required *pursuant to paragraph I of the preceding article,* or, as the case may be, *to the revision of any such existing agreements as a basis for any ecological zoning program in force, for the purpose of adapting them to the provisions of this Regulation*.

The purpose of coordination agreements is to determine the measures, time periods, and commitments making up the agenda of the ecological zoning process, and such agreements shall contain, at a minimum:

I. The basis for specifying the study area to be encompassed by the ecological zoning process;
II. The guidelines, criteria, and strategies allowing for the implementation of the ecological zoning process;
III. The identification and designation of the authorities and institutions that shall take any measures resulting from the coordination agreements, as well as the areas of involvement and the responsibilities of each of them for the effectuation and implementation of the ecological zoning process;
IV. The formation of the body that shall implement and oversee the ecological zoning process;
V. The initial measures that each party to the agreement shall take in order to see to the commencement and effective realization of the ecological zoning process;
VI. The determination of the outcomes to be expected from the ecological zoning process;
VII. Any remaining matters to be included as schedules to the coordination agreements;
VIII. Sanctions and liability to be incurred by the parties in case of default, and
IX. Any remaining stipulations considered necessary by the parties for proper fulfillment of undertakings under the agreement.

Nor is ROE Article 10 applicable to the case at issue since it refers to coordination agreements contemplated in the ROE, which is not the case of the Coordination Agreement whereby the PROETSLC was drafted.

Irrespective of the foregoing considerations about the legal impediments to studying effective enforcement of the environmental law by the Government of Mexico, and in the spirit of helping to achieve the goals of NAAEC Article 1(h), we proceed to set forth certain considerations that will serve to contextualize the Submitters' assertions as to the alleged illegality of the amending of said local land use planning instrument.

The original submission reads as follows:

> 1.6. On 3 May 2007, the Government of Colima arbitrarily amended the PROETSLC (APPENDIX 6). This amendment amounted to changing the UGAs, which consisted of conservation, protection, and restoration status, to industrial and port status. These UGAs correspond to the siting of the Manzanillo LNG Project and the Manzanillo LPG Project in the municipality of Manzanillo, Colima.
>
> 1.7. Pursuant to LADSEC Article 1 paragraph VIII, ROE Articles 6, 36, 48, 49, and 50 are applicable. In this regard, the Government of Colima and the municipalities are authorized to amend the PROETSLC so as to diminish the adverse environmental impacts caused by economic activity, but not to increase those impacts, as occurred with the Laguna de Cuyutlán projects.[34]

As shall be demonstrated in this section, the revision of the PROETSLC resulted in *a comprehensive overhaul* and not, as the Submitters state, exclusively in the modification of the Environmental Management Units (*Unidades de Gestión Ambiental*–UGA) in which the Manzanillo LNG and LPG Projects are located.

On 3 May 2007, based on the relevant powers of the state government under LGEEPA Articles 7 paragraph IX and 20 Bis 2 as well as LADSEC Article 17 paragraph VIII, *inter alia,* the Order revising the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed was published in the Official Gazette of the State of Colima. On this point it must be reiterated that, contrary to the Submitters' assertions, the amending of ecological zoning programs under state jurisdiction such as the PROETSLC is not circumscribed by the ROE criteria, but rather is a matter for the exercise of the state authorities' discretionary powers to determine, in accordance with the procedures prescribed by the applicable local laws, when and how such processes should be carried out.

Based on the foregoing, the revision process for the Ecological Zoning Program took place in several stages which, as set out in the recitals of the Order in question, included the following measures:

 On 18 December 2004, Notice No. 58, the notice of the process to be followed in drafting the amendment to the PROETSLC, was published in the Official Gazette of the State of Colima, with the Environment Division (*Dirección de Ecología*) of the Ministry of Urban Development responsible for coordination of the process.

 Following the technical work necessary to support the drafting of the document, the

[34] Original Submission at 6.

draft amendment to the PROETSLC was produced with the involvement of the three orders of government.

 On 9 and 13 April 2005, the commencement of the public consultation process on this document was publicized through publication of Notice No. 29 in the Official Gazette of the State of Colima and in the newspapers *Diario de Colima* and *El Correo de Manzanillo*. The public consultation period took place April 11−22 with a document made available to the public at various sites, such as at the offices of the state Ministry of Urban Development and on the http://www.colima-estado.gob.mx and http://manzanillo.gob.mx websites. During this period, comment boxes with custom-designed forms were set up, along with an e-mail address, sedur@colima.com, to which to send comments.[35]

 On 22 April 2005, a forum was held, as per the public consultation guidelines, at the Museum of Archaeology of the Universidad de Colima, with various federal, state and municipal authorities, community organizations, business associations, academics, and other interested parties in attendance.[36]

 Pursuant to the LADSEC, the Ministry of Urban Development of the State of Colima received and considered the proposals and observations made during the public consultation process, concluding that what was needed was not "a modification of the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed but rather a comprehensive overhaul of this program, since ecological zoning is a dynamic and comprehensive policy instrument designed to 'regulate or induce land uses and economic activities' having a direct influence over economic and social needs without compromising the environment, and that given the concerns expressed by the public, the solution must be looked for in clear land and resource use policies, with proposals grounded in law and backed by scientific data on social, economic, and environmental aspects, with information on the suitability of the land and relevant areas for conservation, as well as the fragility and vulnerability of ecosystems to various types of land and resource use."[37]

 On 22 February 2006, the Mexican Construction Industry Association (*Cámara Mexicana de la Industria de la Construcción*), Colima Division, with the participation of the Ministry of Urban Development of Colima, retained the Universidad Autónoma de Morelos for the purpose of developing the "Revision of the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed" project. For guidance, a technical committee was formed, with representation of the state offices of Semarnat, the Ministry of Social Development (*Secretaría de Desarrollo Social*) and the Ministry of Agriculture,

[35] The Order takes note of two proposals for participation by a Mr. Bernardo and by José Arturo Sánchez Ochoa.
[36] According to the same Order, the following individuals formally applied to participate in the forum: Francisco de Jesús Ascencio Mejillón, Juan José Guerrero Dueñas, José Luis Gómez Castillo, Candelaria Ruíz Márquez, Héctor Vargas Rivera, Alma Edith Espinoso López, and María Guadalupe Gutiérrez Ruiz.
[37] Order at 2.

Livestock, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*); the Regional Office of the State Water Commission (*Comisión Estatal del Agua*); the state ministries of urban development, planning, economic development, tourism, and rural development; the municipalities of Manzanillo and Armería, and the Universidad de Colima.

 In the process of carrying out the study for the revision of the PROETSLC, four public workshops were held: on 17 March, 7 April, and 4 and 26 May 2006.

 On 7 June 2006, another public consultation forum was held at the offices of the Association of Customs Agents of the Port of Manzanillo (*Asociación de Agentes Aduanales del Puerto de Manzanillo*), where parties with an interest in the document titled "Revision of the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed" had a chance to participate by registering on site to present submissions. The Order in question records the presentation of 24 submissions and the attendance of various participants from the public, private, academic, and community sectors.

It should be emphasized that the Order revising the PROETSLC presents, *inter alia,* the following arguments supporting the revision:

> this area is currently under a great deal of pressure stemming from existing development processes (Manzanillo coal-fired power plant, Z Gas and Global Gas, salt mining, and growth of the city of Manzanillo) as well as from the imminent construction of new facilities and infrastructure (in the short, medium, and long run) such as the following strategic projects: the regasification plant, the new rail line, the construction of a gas pipeline, the construction of a port on the second basin of the lagoon. All of this compels us to indicate environmental management initiatives designed to mitigate the effects of this pressure within the time horizon of the development initiative.
>
> In this regard, it is important to realize that there is imminent urban/port development taking place in the study area; that there are associated projects currently taking place that have not been taken into account, such as the new rail line, the port facility, the gas pipelines, and so forth; and that, consequently, the current dynamic entails changes to the development model along the following lines: resolution and minimization of environmental conflicts, internalization of environmental costs, and restoration of the Subwatershed.[38]

Based on a comprehensive analysis of the revision of the PROETSLC it may be observed, for example, that the area intended for protection in the subwatershed rose from 6,233.9 to 11,930.8 hectares, for an increase of 5,696.8 hectares. As an example, it is proposed under the protection policy to declare as protected natural areas those ecosystems with high taxonomic and functional richness. In particular, basins III and IV are planned to be a protected natural area, and are to be registered as a protected site under the Ramsar Convention.[39]

Likewise, in the comprehensive revision of the PROETSLC, the areas intended for use

[38] Order revising the PROESLC [sic], at 3.
[39] Order revising the PROESLC [sic], at 6.

decreased from 36,397.0 hectares in 2003 to 16,985.4 hectares in 2007, for a decrease of 19,411.7 hectares covered by a policy of use in the Subwatershed.

The foregoing can be seen with greater clarity in the following tables produced for this Party Response by the Environmental Policy and Regional and Sectoral Integration Branch (*Dirección General de Política Ambiental y Integración Regional y Sectorial*) of Semarnat:

Regional ecological zoning for Laguna de Cuyutlán, Colima

Comparative table between the 2003 Order and the 2007 revision

Laguna de Cuyutlán	2003 Order	2007 Revision	Difference
No. of UGAs	46	65	19.0
Study area (ha)	69,472.2	53,609.8	- 15,862.4
No. of policies	4	5	1.0
Protection (ha)	6,233.9	11,930.8	5,696.8
Conservation (ha)	7,787.6	4,543.8	- 3,243.9
Restoration (ha)	19,053.6	18,802.4	- 251.2
Use (ha)	36,397.0	16,985.4	- 19,411.7
Use/conservation (ha)	-	1,347.5	1,347.5

COMPARATIVE TABLE, AREA (HA) COVERED BY EACH ENVIRONMENTAL POLICY UNDER THE 2003 ORDER WITH RESPECT TO THE 2007 PROPOSED REVISION

2003/2007	Protection	Conservation	Restoration	Use	Use/Conservation	No assigned policy (outside 2007 study area)	Subtotal for 2003 policy
Protection	2,964.0	2,569.8	19.6	320.5	360.0	-	6,233.9
Conservation	709.9	1,076.7	5,100.1	759.6	-	141.4	7,787.6
Restoration	7,344.4	485.4	10,406.6	629.9	68.6	118.7	19,053.6
Use	728.4	330.3	2,360.6	13,370.5	918.9	18,688.3	36,397.0
Use/Conservation	-	-	-	-	-	-	-
No assigned policy (outside 2003 study area)	184.0	81.6	915.5	1,904.8	-	-	3,086.0
Subtotal for 2007 policy	11,930.8	4,543.8	18,802.4	16,985.4	1,347.5	18,948.4	
	TOTAL AREA 2003	69,472.2					
	TOTAL AREA 2007	53,609.8					

Additionally, Appendix 3 of this Response contains maps produced by Semarnat for comparative study of the amendments to the PROETSLC.

In the case at issue, the Manzanillo LNG Project is located in UGAs 39 AEi (Use), 41CEncLe (Conservation), and 47 RcEntLfe (Restoration with conservation guidelines). For greater clarity, in the current PROETSLC, the regulation of these UGAs is as follows:

UGA/Policy	Applicable ecological guideline	Applicable ecological criteria
39 Aei Use	Industrial and service space	AH12 INF 2,3,7,20,21 IN 2, 3, 4, 5, and 7 MA2
41 C EncLe Conservation	Natural aquatic space with limited economic activity (ecotourism)	DS1 GA3 AH11, 15 and 19 INF 3, 8, 9, 22, 23, 24, 25 and 27 FFC2, 6, 9, and 17 FFP 1, 7, 14, 15, 16, 17, 18, 19, 21 and 22 ED4 and 5 TU1, 2, 3, 4, 6, 7 and 8 ED 11 INF 10, 11 and 20 MA 4 PUE 2
47 Rc EntLfe Restoration with ecological guidelines for conservation	Natural terrestrial space with limited economic activity (forestry, low-impact ecotourism)	DS2 GA3 AC1 AH 10, 11 and 14 INF 5, 7, 8, 10 and 11 FFR1, 2, 4, 5, 6, 7, 8, 12 FFC 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13 FFP 1, 4, 5, 12 and 20 FOR 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 17 ED 2, 3, 4, 6, 7, 8, 9 MI 1, 4, 5 and 6 PUE 2

Thus, the comprehensive revision process for the PROETSLC included various criteria concerning human settlements (AH), sustainable development (DS), infrastructure (INF), wildlife under restoration (FFR), wildlife under conservation (FFC), wildlife under protection (FFP), water management (MA), and others to promote mitigation and restoration of the adverse environmental impacts of works or activities allowed therein, applied by means of other environmental policy instruments such as environmental impact assessment. Examples of these criteria would be the following:

 FFR 1 and 4. Establishing that the UGA shall be restored, preferably with native vegetation, and that the riparian vegetation shall be restored.

 INF3. Allows construction of works related to infrastructure and services, conditional upon any environmental impact assessment that is carried out under applicable federal and state laws.

 INF 8. Allows infrastructure works provided that they do not affect coastal dune stability, the water balance in the lagoon, or ecosystem function.

 INF 20. The design and operation of infrastructure and service projects shall comprehensively demonstrate and consider benefits to the structure and the ecological processes of the lagoon system, as well as causing synergistic positive impacts with other projects, thus contributing to the conservation of the subwatershed.

 MA 2. Projects or activities to be carried out shall not limit the flow or exchange of water and aquatic organisms between the lagoon and the ocean. Preferable designs will favor these exchanges and attempt to improve the water balance in the lagoon system.

Additionally, Articles 11 and 12 of the Order revising the PROETSLC provide that the PROETSLC must go through a process of continuous and systematic assessment and monitoring in the form of an environmental log kept by the Ministry of Urban Development of the State of Colima. This log, *which derives from this order and not from the ROE* as the Submitters erroneously assert, is available for consultation online at http://bitacora-environmental.col.gob.mx/bitacora/.[40] The PROETSLC environmental log is in the process of creation, subject to the budgetary and resource capacity of the competent authorities.

IV.4 Effective enforcement of Articles 1, 2, 3, and 4 of the Ramsar Convention with respect to alleged harm to the Laguna de Cuyutlán wetlands[41]

The Government of Mexico acknowledges that the Ramsar Convention was incorporated into the domestic legal framework by being signed, approved, and ratified in accordance with the Political Constitution of the United Mexican States. More specifically, on 29 August 1986 the Order promulgating the Convention on Wetlands of International Importance, especially as Waterfowl Habitat, and the protocol amending it, adopted in the cities of Ramsar and Paris, on 2 February 1971 and 3 December 1982, respectively, was published in the Official Gazette of the Federation. On 4 July 1986, Mexico deposited its instrument of acceptance and listed Ría Lagartos, comprising an area of 60,348 hectares in the state of Yucatán, under no. 322 of the Ramsar List as a wetland of international importance, especially as waterfowl habitat.

It is important to emphasize at this point that *the Laguna de Cuyutlán has not been designated by Mexico as a Ramsar site,* and it is therefore clear that the Laguna de Cuyutlán has not entered the purview of said international convention.

[40] Last viewed 27 September 2010.
[41] Second Determination at 22, para. 71(i).

Notwithstanding the foregoing, for better understanding of the effective enforcement of the Ramsar Convention in the domestic sphere, it is necessary to emphasize that such enforcement does not take place directly but rather through the formal requirements for the incorporation of international law into the positive law of our country, as is the ordinary procedure, in which, where the importance of the matter governed by the treaty in question is noted, the domestic law is adapted by means of domestic provisions (constitutional, legislative, administrative, etc.), revising or, as necessary, enacting the domestic laws necessary to guarantee that the norms and procedures in question can be enforced within the domestic sphere.[42]

To address the requirement of paragraph 71(i) of the Secretariat's Second Determination, and given that the Submitters did not provide information that would allow for a consideration of the degree to which this international instrument is related to assertions concerning effective enforcement of environmental law, we proceed to discuss the specific commitments undertaken by the Parties to the Convention with a view to contextualizing the Submitters' assertions of Mexico's alleged failure to enforce said treaty. We then explain how the commitments made under Articles 2, 3, and 4 of the treaty have been incorporated into domestic law.[43]

Article 2 of the Ramsar Convention

Pursuant to Article 2, the Parties to the Convention shall designate suitable wetlands within their territory for inclusion in a List of Wetlands of International Importance (the "List") which is maintained by the bureau established under Article 8 (paragraph 1), and shall designate at least one wetland to be included in the List when signing the Convention or when depositing their instrument of ratification or accession (paragraph 4). Wetlands should be selected for the List on account of their international significance in terms of ecology, botany, zoology, limnology, or hydrology. The same article stipulates that any Contracting Party shall have the right to add to the List further wetlands situated within its territory, to extend the boundaries of those wetlands already included by it in the List, or, because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List (paragraph 5).

Thus, while it is true that in signing the Ramsar Convention, the Contracting Parties took on the commitment of designating suitable wetlands for inclusion on the List, the identification and designation of such wetlands is a discretionary matter for each of the Parties. This is reaffirmed in paragraph 5 of Article 2 which in fact establishes the right of the Party to delete or restrict the boundaries of wetlands already included in the List because of its urgent national interests.

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[42] For further reference, see the judicial decision titled TRATADOS INTERNACIONALES. INCORPORADOS AL DERECHO NACIONAL. SU ANÁLISIS DE INCONSTITUCIONALIDAD COMPRENDE EL DE LA NORMA INTERNA. Novena Época, *Semanario Judicial de la Federación y su Gaceta*, XXVI, July 2007, at 2725.

[43] Article 1 of the Convention contains the definitions. The Secretariat specifies that it is only being studied for reference purposes, and it is therefore not included in the Party Response.

Notwithstanding the foregoing, the Submitters do not state how they come to the conclusion that Mexico is failing to fulfill these obligations, especially given that *the Laguna de Cuyutlán has not been designated as a Ramsar site by the Government of Mexico*.

Contrary to what is asserted in submission SEM-009-02, Mexico has faithfully fulfilled its obligations under this article, since it is currently the country with the second-largest number of wetlands of international importance under the Ramsar Convention, with a total of 130 designated sites for a combined total of 8,890,928 hectares, making Mexico the country with the fifth-largest designated area, after Canada, Chad, Russia, and the Republic of the Congo.

Article 3 of the Ramsar Convention

Pursuant to this article, Contracting Parties undertake to formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory. In addition, each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing, or is likely to change as the result of technological developments, pollution, or other human interference, and shall pass information on such changes to the entity responsible for continuing bureau duties.

Mexico has enacted various provisions conducing to the goals of Article 2 of the Ramsar Convention and incorporating it into the domestic legal framework.

As an example, LGEEPA Article 28 paragraph X provides that the following shall be subject to the federal environmental impact assessment procedure: works and activities in wetlands, mangrove ecosystems, lagoons, rivers, lakes, and ponds connected to the ocean, as well as in coastal or federal zones, where such works and activities may cause ecological instability or exceed the limits and conditions set out in the applicable provisions for protection of the environment and for the preservation and restoration of ecosystems, with a view to preventing or minimizing their negative impacts on the environment.

Similarly, Mexico has incorporated the aforementioned provisions of the Ramsar Convention into its domestic law by means of LGVS Article 60 ter, which prohibits works or activities that affect any of the following: the integrity of water flow in a mangrove ecosystem; the ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; nesting, breeding, refuge, feeding, and spawning areas; and interactions between the mangrove ecosystem, rivers, dunes, the adjacent marine area, and corals, or which cause changes in ecological characteristics and services.

Indeed, in the preamble (*Exposición de Motivos*) to the legal reform whereby this provision was included in this Act, explicit reference is made to fulfillment of the

objectives of the Ramsar Treaty, as follows: “In fact, it is the value placed on this function which gave rise to the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar). Since Mexico is a party to this convention, it has an obligation, now and for the future, to prevent progressive encroachment upon wetlands and loss thereof, including mangrove ecosystems, since otherwise harm will be caused not only to these but also to migratory waterbirds, which are considered an international resource under Ramsar.”[44]

Additionally, and in the specific case of the Laguna de Cuyutlán subwatershed – which, we reiterate, is not a Ramsar site – wetland protection was considered in the planning process carried out by the Government of the State of Colima for the revision of the PROETSLC, which contains, in the “Protection Policy” section, a declaration of basins II and III as a protected natural area, and provides for the inclusion of that area on the Ramsar Convention List.[45]

Furthermore, the PROETSLC includes various criteria for wetland protection, which must be applied to the relevant UGAs by means of any environmental policy instruments that may be applicable. An example is the following criterion:[46]

> **INF 27.** Any work or activity carried out in a mangrove ecosystem shall ensure that it does not interfere with the following key factors:
> - The natural laminar flow or natural patterns of circulation.
> - The natural variation in the flooded area, either of the river or watercourse on the one hand, or of the tides or the natural flooding cycles on the other.
> - The natural flow of sediments and nutrients or the natural water quality.
> - The natural flow of fresh water from adjacent rivers or watercourses.
> - The natural water temperature.
> - The natural water salinity.
> - The natural flow of propagules of each mangrove species.

As shall be explained further below in this Party Response, these provisions are enforced in the domestic legal framework by means of management instruments such as environmental impact assessment, in which projects are specifically assessed with reference to the aforementioned criteria.

Article 4 of the Ramsar Convention

Article 4 of the Convention provides that each Party shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and shall provide adequately for their wardening.

Mexico has enforced this article by designating on the List several wetlands that form a part of national protected natural areas. Of the 130 Ramsar sites in Mexico, 56 are

[44] http://www2.scjn.gob.mx/leyes/Default.htm (last viewed 27 September 2010).
[45] Order revising the PROETSLC, at 6.
[46] *Ibid.* at 22.

protected natural areas (Appendix 4).[47] The following are examples of this congruency of Ramsar sites with protected natural areas:

 Agua Dulce. Pinacate Biosphere Reserve and Gran Desierto de Altar. Sonora.

 Cuatro Ciénegas. Wildlife Protection Area. Coahuila.

 Laguna de Términos. Wildlife Protection Area. Campeche.

 Yum Balam. Wildlife Protection Area. Quintana Roo.

 Nahá and Metzabok. Wildlife Protection Area. Chiapas.

 Ría Lagartos. Wetland of International Importance, especially as Waterfowl Habitat. Biosphere Reserve. Yucatán.

 Isla San Pedro Mártir. San Pedro Mártir Biosphere Reserve. Sonora.

 Islas Marietas. Islas Marietas Biosphere Reserve. Nayarit.

 Laguna de Meztitlán. Biosphere Reserve. Hidalgo.

 Laguna Ojo de Liebre. Biosphere Reserve. Baja California Sur.

 Laguna San Ignacio. Biosphere Reserve. Baja California Sur.

 Manglares de Nichupté. Wildlife Protection Area. Quintana Roo.

 Otoch Ma´ax Yetel Kooh. Wildlife Protection Area. Yucatán.

 Arrecife Alacranes. National Park. Yucatán.

 Arrecife de Cozumel. National Park. Quintana Roo.

 Arrecife de Puerto Morelos. National Park. Quintana Roo.

 Bahía de Loreto. National Park. Baja California Sur.

 Cañon del Sumidero. National Park. Chiapas.

 Cabo Pulmo. National Park. Baja California Sur.

 Isla Contoy. National Park. Quintana Roo.

[47] This appendix includes a list of all the Ramsar sites in Mexico that are also protected natural areas.

- Isla Isabel. National Park. Nayarit.

- Sistema Arrecifal Veracruzano. National Park. Veracruz.

- Chamela Cuixmala. Biosphere Reserve. Jalisco.

- Pantanos de Centla. Biosphere Reserve. Tabasco.

- Ría Celestún. Biosphere Reserve. Yucatán.

Paragraph 2 of Article 4 provides for compensation when wetlands are deleted or restricted *where they are included in the List,* which is not the case of the Laguna de Cuyutlán wetlands. Paragraphs 3 and 5 refer to encouragement of research, exchange of data and publications, and domestic capacity building for wetland protection. Paragraph 4 contains the Parties' commitment to endeavour through management to increase waterfowl populations on appropriate wetlands.

In this regard, since the submissions do not include relevant information, it is not clear how these last provisions relate to alleged failures to effectively enforce the Party's environmental law.

Notwithstanding the foregoing, it must be emphasized that in Mexico, various measures related to knowledge and monitoring of mangrove ecosystems are being taken. An example of these measures is the program titled "Mangroves of Mexico: Current Status and Establishment of a Long-Term Monitoring Program" (*Los manglares de Mexico: estado actual y establecimiento de un programa de monitoreo a largo plazo*)[48] of the National Biodiversity Commission (*Comisión Nacional para el Uso y Conocimiento de la Biodiversidad*—Conabio), which is designed to produce reliable information about the current extent and distribution of mangroves in Mexico as well as to identify processes that are impacting these ecosystems. The monitoring results will be useful in devising suitable public policy and making decisions concerning the conservation, management, and ecological restoration of the country's mangrove ecosystems.

As part of this program, Conabio is producing a national mangrove inventory. From May 2006 to September 2008, the baseline data was established for Mexico's mangrove ecosystems based on a document titled "Distribution Maps of Mexican Mangrove Ecosystems" (*Cartografía de la distribución de los manglares de Mexico*) (1:50,000). The result was to identify 81 priority sites on the basis of their biological relevance or their need for ecological rehabilitation, including the Laguna de Cuyutlán.[49]

Currently, Conabio is working to identify changes in the spatial distribution of mangrove ecosystems with a view to assessing land use changes over a period of approximately

[48] http://www.biodiversidad.gob.mx/ecosistemas/manglares/manglares1.html (last viewed 27 September 2010).
[49] http://www.biodiversidad.gob.mx/ecosistemas/manglares/pdf/lista_sitios.pdf (last viewed 27 September 2010).

30 years (depending on available data), and to identifying the principal agents of transformation impacting this ecosystem as well as the fragmentation processes affecting mangrove ecosystems throughout the country. The next step in this program will be to systematically monitor the mangrove ecosystem and to disseminate data through the Conabio GIS.

In terms of international cooperation, Mexico has participated actively in meetings with other countries of the region to share experiences and build capacity on wetlands of international importance. As an example, the National Protected Natural Areas Commission (*Comisión Nacional de Areas Naturales Protegidas*), along with the Arizona Game and Fish Department of the United States of America and other local partners, has helped provide wetland training for over 600 officials of different levels of government, as well as civil society organizations. It has done this by holding, for the eighth consecutive year, a workshop on wetland conservation and management in different states of the republic. Similarly, with the support of the United States International Development Cooperation Agency, more than 100 people from communities located within or near Ramsar sites in Mexico have been trained in ecotourism with a focus on environmental competitiveness.

In regard to the Ramsar Convention provisions on communication, education, and public awareness (CEPA), Semarnat's Sustainable Development Education and Capacity Building Center (*Centro de Educación y Capacitación para el Desarrollo Sustentable*) has seen to the creation of nine CEPA centers which function as operational bureaus involved in raising public awareness to the functions and value of wetlands, emphasizing the role played by every citizen in their conservation. These CEPA centers are located in the Xochimilco (Mexico City), Pátzcuaro (Michoacán), La Mancha (Veracruz), Mazatlán (Sinaloa), Dzilam de Bravo (Yucatán), Laguna Madre (Tamaulipas), La Encrucijada (Chiapas), Sierra de Santa Rosa (Guanajuato), and Bahías de Huatulco (Oaxaca) Ramsar sites.

It deserves to be emphasized that for the first time in the world, the Secretary-General, on 9 March 2012, gave Semarnat, on behalf of the Government of Mexico, an award for its excellence in the implementation of the Ramsar Convention (Appendix 5).

Thus, it is evident that Mexico has enforced the provisions of the Ramsar Convention by designating suitable wetlands for the List, including these wetlands in protected natural areas, considering wetland protection as part of land use planning processes and in promulgating domestic law, and by promoting research, capacity building, and information exchange. In any case, the provisions of the Ramsar Convention cited in the submissions, as regards their enforcement in the domestic sphere, translate into the exercise of the Party's discretionary power, which it shall exercise within the limits of its capacities, subject to the applicable legal provisions and the availability of resources.

IV.5 Effective enforcement of LADSEC Article 40 and LGEEPA Article 35 as regards the alleged incompatibility of the Manzanillo LPG Project with the

PROETSLC[50]

In both the First and the Second Determinations, the Secretariat stated that the alleged failure to effectively enforce LADSEC Article 40 by Semarnat when it granted environmental impact authorization to the Manzanillo LPG Project *did not warrant further study*, since it is "a state law that applies to Colima state authorities when issuing authorizations and not to the federal authorities that issued the environmental impact authorization," and therefore "the obligations established by LADSEC Article 40 apply to the state authorities and to works and activities in the state of Colima, but not to Semarnat."[51]

This interpretation is valid because LADSEC Article 40 refers exclusively to works and activities carried out by the state and *under state jurisdiction*, as well as to the granting of permits and authorizations *under state jurisdiction*. For greater clarity, LADSEC Article 40 provides as follows:

> **ARTICLE 40.-** Works and activities carried out in the state as well as the granting of land use or construction permits and zoning certificates are subject to the provisions of the applicable ecological zoning and land use planning programs.

LADSEC Article 40 cannot be enforced in the abstract with respect to the Project, but rather exclusively through the environmental policy instruments contemplated in the local law, such as environmental impact assessment of works and activities under local jurisdiction carried out in Colima, which does not correspond to the case at issue, since the Manzanillo LPG Project *is under federal jurisdiction, subject to environmental impact assessment by the federal authority pursuant to the LGEEPA and not covered by the LADSEC.*

For these reasons, Mexico argues that it is improper to have asked the Government of Mexico, in paragraph 71(d) of the Second Determination, to provide a response in relation to the effective enforcement of LADSEC Article 40 and the compatibility of the Manzanillo LPG Project with the PROETSLC, since the compatibility of this federal project with all applicable legal instruments was verified by means of the LGEEPA-prescribed environmental impact assessment procedure.

Now, concerning the enforcement of LGEEPA Article 35 in relation to the alleged incompatibility of decision S.G.P.A/DGIRA.DEI.1443.04 with the PROETSLC, the Submitters state:

> 2.5. On 23 June 2004, Semarnat granted environmental impact authorization to Z Gas del Pacífico (APPENDIX 9) via doc. no. S.G.P.A./DGIRA.DEI.-1443.04. This document admits that there is inconsistency with the land use policies and the zoning (see pp. 11 and 12 of this authorization). However, it does not analyze the fact that this program was amended after Z Gas

[50] Second Determination at 22, para. 71(d).
[51] Second Determination at 14.

del Pacífico filed its EIS for the Manzanillo LPG Project.[52]

Contrary to what is asserted, doc. no. S.G.P.A./DGIRA/DEI.1443.04 includes the assessment carried out by the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) concerning the relationship between the PROETSLC and the environmental impact assessment for the Project (Appendix 6).

It is important to stress that in the Mexican legal system, the environmental impact assessment procedure prescribed by LGEEPA Article 28 is the instrument for the material verification of *the effective enforcement of those legal provisions that must be observed for the promotion of the sustainability of works and activities carried out,* by means of the establishment, as applicable, of conditions on the performance of such works and activities where they may cause ecological instability or exceed the limits and conditions set out in the applicable provisions for environmental protection and for ecosystem preservation and restoration, with a view to preventing or minimizing their negative impact on the environment.

In regard to the project in question, the environmental impact statement (EIS) for the Manzanillo LPG Project, filed on 24 February 2004 by Zeta Gas del Pacifico S.A. de C.V. (hereinafter, "Zeta Gas" or the "Developer"), states that "there exist two ecological zones near the Project site: 1) a regional zone comprising the Laguna de Cuyutlán and the municipalities of Manzanillo and Armería, and 2) a state ecological zone comprising a large part of the State of Colima."[53]

Concerning the PDUM, the Developer stated that "the Project is located within the Ecotourism (TE) category" (Appendix 7).[54]

As well, the decision granting conditional authorization to the Project states that via document no. SGPA/DGIRA/DEI.0605/04 of 12 April 2004, the DGIRA asked the Developer to present "copies of applicable documents establishing the land use objectives, policies, and strategies at the site where the Project is to be carried out (Regional Ecological Zoning Program of the State of Colima, Regional Ecological Zoning Program for Laguna de Cuyutlán, Colima, and Urban Development Plan of Manzanillo, Colima), including maps indicating environmental management units (UGAs) in which it is shown whether there is compatibility of the site where the Project is to be carried out with these ordinances" (Appendix 8).

The same decision notes that on 18 May 2004, in file ZETA-004/04, Zeta Gas submitted the required additional information, referring to the siting of the Project within UGAs Ent_5 39 and Ent_4 40 of the PROETSLC. In the same document, the Developer sited its Project within the PDUM, stating that the applicable land use in the PDUM was that of

[52] Revised Submission at 8.
[53] Manzanillo LPG Project EIS, at 185.
[54] Manzanillo LPG Project EIS, at 195.

Forested Area with Low-Density Ecotourism Land Use (Appendix 9).[55]

In Recital 5, "Planning Instruments," of the same decision, the DGIRA stated that the zone where the Manzanillo LPG Project was to be carried out is not incompatible with the applicable policies or legal instruments for the following reasons:

> The DGIRA finds that the zone where the Project is to be carried out is not incompatible with the land use policies established in the applicable ordinances or legal instruments, in accordance with the considerations set out in the "DECISION AMENDING THE MANZANILLO URBAN DEVELOPMENT PROGRAM IN RESPECT OF THE CLASSIFICATION OF THE AREAS OF THE FOLLOWING LOTS IN EJIDO CAMPOS: 61 Z-1 P3/4, 62 Z-1 P3/4, 72 Z-1 P3/4, 76 Z-1 P3/4, 77 Z-1 P3/4, 80 Z-1 P3/4, 81 Z-1 P3/4, 83 Z-1 P3/4, 89 Z-1 P3/4, and 90 Z-1 P3/4 FROM FORESTED AREA (AR-FOR) TO MEDIUM-TERM URBAN RESERVE (RU-MP), AS WELL AS THEIR ZONING, WHICH CHANGES FROM ECOTOURISM (TE) TO HIGH-IMPACT AND HIGH-RISK HEAVY INDUSTRY (I3).…
>
> Considering that both the POETEC and the PROETSLC are instruments that must be applied by the competent administrative bodies of this entity (state and municipal), the DGIRA finds that the observations set down in this document are without prejudice to the environmental powers held by the Federation, the states, the Federal District, and the municipalities, under the principle of concurrence set forth in Article 73 paragraph XXIX-G of the Constitution of the United Mexican States.
>
> In accordance with Article 115 of the Political Constitution of the United Mexican States, establishing the powers vested in the municipalities, including regulation of land use, as well as LGEEPA Article 8 paragraph II, establishing their powers to enforce the environmental policy instruments set out in the applicable local laws as well as the preservation and restoration of ecological stability and environmental protection on property and in zones under municipal jurisdiction, in matters not expressly assigned to the Federation or the states, the DGIRA finds that the Developer must apply to the local (state and municipal) bodies, which shall, within the scope of their respective jurisdictions, decide as appropriate with reference to the legal provisions applicable to the particular case in question.[56]

In other words, contrary to what is asserted, the DGIRA included in its assessment a consideration of the Project's relationship to the zoning and land use planning instruments that are applicable in the region.

IV.6 Effective enforcement of LGEEPA Articles 30 and 35 and REIA Articles 2, 4 paragraph IV, and 13 in respect of the Manzanillo LPG Project EIS[57]

In regard to the Manzanillo LPG Project, it is evident from a reading of submission SEM-09-002 that the Submitters only mention a failure to effectively enforce the first paragraph of LGEEPA Article 30, not the entirety of LGEEPA Articles 30 and 35 nor of REIA Articles 2, 4 paragraph IV, and 13. To wit, the revised submission asserts that:

> 2.3. On this point, we must note that the environmental impact statement (EIS) filed by Z Gas del Pacifico S.A de C.V. did not provide a serious and realistic description of the possible impacts on

[55] Disc 9, Clarification Document.
[56] Authorization S.G.P.A./DGIRA/DEI.1443.04, at 13–14.
[57] Second Determination at 22, para. 71(e).

> the ecosystem that could be affected by the work or activity to be carried out, nor did it consider the sum total of the elements making up these ecosystems, nor any preventive, mitigation, or other measures necessary to prevent and minimize negative impacts on the environment, as provided by the first paragraph of LGEEPA Article 30.[58]

The first paragraph of LGEEPA Article 30 provides that, to obtain the authorization in question, interested parties shall file with the Ministry an EIS that must contain, at a minimum, a description of the possible impacts on the ecosystem or ecosystems susceptible to being affected by the work or activity in question, considering the sum total of the elements making up these ecosystems as well as any preventive, mitigation, or other measures that may be necessary to prevent and minimize negative impacts on the environment.

In the case at issue, the Submitters do not assert that the Z Gas EIS failed to fulfill these requirements, but rather that in their judgment it "did not provide a serious and realistic description … nor did it consider the sum total of the elements making up these ecosystems, nor any preventive, mitigation, or other measures necessary to prevent and minimize the negative impacts on the environment." On this point, irrespective of what the Submitters might consider to constitute a "serious and realistic" description of the factors mentioned in the applicable legal provisions, what is certain is that the Manzanillo LPG Project EIS contains the following sections meeting the requirements of the first paragraph of LGEEPA Article 30:

 Concerning the description of the possible impacts on the ecosystem or ecosystems that could be affected by the work or activity to be carried out, considering the sum total of the elements making up these ecosystems, chapter V of the Manzanillo LPG Project EIS, titled "Identification, Description, and Assessment of the Impacts," presents the following information:

> V.1 Identification of impacts on the structure and functions of the regional environmental system.
> V.1.1. Construction of the scenario modified by the Project.
> V.1.2. Identification and description of sources of change, disturbance, and impact.
> V.1.3. Qualitative and quantitative estimation of changes to the regional environmental system.
> V.2. Techniques for assessing environmental impacts.
> V.3 Environmental impacts generated.
> V.3.1 Identification of impacts.
> V.3.2. Selection and description of significant impacts.
> V.3.3. Assessment of environmental impacts.
> V.4. Delimitation of the area of influence.[59]

 In regard to preventive, mitigation, or other measures necessary to prevent and minimize negative impacts on the environment, chapter VI of the EIS, titled "Strategies for Prevention and Mitigation of Cumulative and Residual Environmental Impacts on the Regional Environmental System," presents the following information:

> VI.1 Grouping of impacts by proposed mitigation measures.

[58] Revised Submission at 7, point 2.3.
[59] Manzanillo LPG Project EIS, Contents, Disc 7.

VI.1.1. Preventive measures:
VI.2 Description of the strategy or system for mitigation measures.
VI.2.1. Mitigation measure.
VI.2.2. Technical specifications and/or systems of procedures.
VI.2.3. Duration of mitigation works and activities. Specify stage of Project in which they will be required as well as its duration.
VI.2.4. Operating and maintenance specifications.
VI.2.5. Supervision of the mitigation activity or work.[60]

In addition, the Manzanillo LPG Project EIS, as prescribed by the second paragraph of LGEEPA Article 30, included a detailed risk analysis produced by the Developer in accordance with the Guide to the submission of the Level 3 Environmental Risk Study, proposed by Semarnat, which included the following chapters:

1. General information on the Developer.
2. General description of the Project.
3. Aspects of the natural and socioeconomic environments.
4. Integration of the Project into the policies set out in urban development programs.
5. Description of the process.
6. Risk analysis and assessment.
7. Summary.
8. Identification of the methodological instruments and technical aspects supporting the information presented in the environmental risk study.[61]

In relation to the requirements for additional information in the federal environmental impact assessment procedure and to the third paragraph of LGEEPA Article 30, it is hereby noted that this requirement is only triggered where a project is modified following the filing of an environmental impact statement. Where such modifications occur and are made known to the Ministry by the developers, the Federal Authority may decide whether the filing of additional information is necessary in order to assess any environmental impacts that may be caused by such modifications and, as applicable, require the interested parties to file such information.

In the case at issue, this requirement is not applicable, since the only modification made to the Project was to change the name from “Port Terminal for Storage and Distribution of Liquid Petroleum Gas” to “LP Gas Supply Plant.” This change to the name of the Project has no bearing on the environmental impacts it could cause, which is the issue of concern in LGEEPA Article 30.

Concerning the last paragraph of LGEEPA Article 30, it is hereby noted that this paragraph does not apply to the case at issue since it refers to the content of the preventive report, the characteristics and modalities of environmental impact statements, and risk studies *to be established in the REIA.*

As indicated in the previous section, via doc. no. SGPA/DGIRA/DEI.0605/04 of 12 April 2004, the DGIRA asked Zeta Gas to submit additional information that would allow for

[60] Ibid.
[61] Executive Summary of Level 3 Environmental Risk Study, proposed by Semarnat.

the adequate assessment of the Manzanillo LPG Project. The additional information requested by the DGIRA coincides with the information which, in the Submitters' view should have been submitted for the purpose of assessing preventive, mitigation and/or compensatory measures for the possible impacts of the Manzanillo LPG Project, since the Developer was asked to:

> 4. Complement the description of the operating stage of the Project, indicating the characteristics of the tankers, the frequency of supply, the maritime shipping routes in the area, and safety measures for docking at the unloading site.
>
> 5. Clarify the following information:
>
> > a) What will be the impact of materials removed by felling and clearing … as well as whether or not there will be material synergistic impacts caused by the disposal of these materials on the proposed site.
> >
> > b) …
> >
> > c) The current topographic conditions on the site and the desired configuration at the conclusion of Project development, indicating whether there will be any vulnerabilities at the site in view of the possibility of hurricanes, tsunamis, and earthquakes and, as applicable, any special measures needed to protect against such eventualities.
> >
> > d) …
> >
> > e) The ecological importance of the coastal dunes at the site where the Project is to be carried out, as well as their relationship to the existing vegetation and to soil stability.
> >
> > f) What will be the fate and/or treatment of marine and submarine materials and infrastructure at the abandonment stage and, as applicable, what restoration measures would be applied, and what will be the disposal sites?
> >
> > g) What were the plant species found at the Project site during the fieldwork, indicating what the term "successional vegetation" refers to, as well as the volumes of impact, considering that in the event of impact on areas with forest or jungle vegetation, information corresponding to the land use change must be attached.…
> >
> > h) Update the information concerning wildlife species with protected status, referring to NOM-059-SEMARNAT-2001, since NOM-059-ECOL-1994 is no longer in force, and, further to observations by the environmental authority of the State of Colima, whether there would be influence on species listed in the standard, since this is an area through which wildlife moves freely. In addition, it must be clarified whether there would be any impact on turtle nesting areas in the region ….
>
> 6. Complement chapter V, "Identification, Description, and Assessment of Environmental Impacts," considering the traffic and operation of tankers as well as the possibility of accidents ensuing from tanker traffic and unloading of LP gas and propane gas. In addition, the impact radii obtained in the risk study must be considered in order to determine the environmental impacts that would result from an environmental risk event.
>
> 7. Clarify chapter VI, "Preventive and Mitigation Measures for Environmental Impacts": What will the proposed measures consist of? For example:

- Implement an environmental protection plan and a soil restoration plan.
- Control erosion processes on modified slopes.
- Species salvage plan and soil remediation system.
- Verify revegetation and reforestation measures implemented.
- Describe expected environmental prognosis in terms of environmental quality….[62]

As stated above, with document OFI-ZETA-004-04 of 18 May 2004, the Developer submitted the requested documentation, which was analyzed and assessed in Recital 2(4) of decision S.G.P.A./DGIRA/DEI.1443.04, in which the DGIRA stated:

> d. The description of the operating stage of the Project was complemented, indicating the characteristics of the tankers, … as well as safety measures for docking at the unloading site.
>
> e) The following information was clarified:
>
> - Volumes of materials removed by felling and clearing, as well as a brief description of the environmental impacts deriving from the management of this material.
> - …
> - Current topographic conditions on the site and the desired configuration at the conclusion of Project development.
> - …
> - A very brief indication was given of the ecological importance of the coastal dunes at the site, as a physical barrier against hurricanes and waves, as well as the stability provided by the dune vegetation and its importance as wildlife habitat, especially for turtles, stating that even if and when the dunes are affected, concrete and metal mesh embankments will be installed to consolidate the cut, and this is expected to maintain the dunes' stability and ecological conservation.
> - The activities to be carried out at the abandonment stage of the Project were described in broad outline.
> - It was clarified that the site does not require a land use change since the species of vegetation present on the site are cultivated and secondary species.
>
> f) The environmental impacts arising from tanker operation were described, along with the possible accidents arising from tanker traffic and unloading of LP gas.
>
> g) A list of environmental impacts that will occur due to Project development was presented along with mitigation measures.
>
> h) Additionally, the Developer attached doc. no. SGAPARN.UGA.-0951/04 of 6 May 2004 whereby the Semarnat office in the State of Colima notified the Developer that the beach adjacent to the lot harbors nesting areas for sea turtles of the species *Dermochelys coriacea* (leatherback sea turtle), *Lepidochelys olivacea* (olive Ridley sea turtle), and *Chelonia agassizi* (black sea turtle), recommending several measures to reduce impact on these species.

In addition, it is evident from Recital 7 of the decision that the DGIRA obtained specific information about the environmental characterization of the Project site and detected the main environmental impacts and risks on the coastal dunes, soil, vegetation and plant cover, flora and fauna, water quality, and vegetation, flora, fauna, and hydrology.[63] In this regard, the DGIRA stated in its decision that "the Developer indicated a set of

[62] Doc. no. SGPA/DGIRA/DEI.0605/04 of 12 April 2004.
[63] Recital 7 of the decision, at 21.

preventive, mitigation, or other measures necessary to prevent and minimize negative impacts on the environment, including possible construction designs that would be applied to reduce and/or minimize environmental harms caused by an adverse event, all in accordance with LGEEPA Article 30."[64]

As a consequence of the filing of the EIS on 24 February 2004, and as stated in Recital I of environmental impact authorization no. S.G.P.A./DGIRA.DEI.1443.04, the Manzanillo LPG Project was registered under no. 06CL2004G0001 and its file was duly created by the DGIRA.[65]

In regard to the effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III, the Submitters state:

> 2.16. As stated above, originally, the EIS did not discuss any relationship with the applicable planning instruments and legal instruments, such as the Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed and NOM-022-SEMARNAT-2003, in accordance with REIA Article 13 paragraph III. This is done [sic] without being requested as additional information and until the state government amends the PROETSLC.[66]

Contrary to what is asserted, chapter III of the Manzanillo LPG Project EIS develops the relationship with the applicable environmental provisions and with the land use regulation, pursuant to LGEEPA Article 35, second paragraph:

> III. **Relationship with the applicable environmental provisions or with the land use regulation, as applicable**
> III.1. Sectoral information
> III.2. Relationship to development planning policies and instruments in the region:
> III.2.1. Regional development plans.
> III.2.2. Sectoral programs.
> III.2.3. Management programs for protected natural areas:
> III.2.4. Partial urban development programs:
> III.2.5. Declared local and regional ecological zoning ordinances:
> III.2.6. Planning committees for state or municipal development (COPLADES and COPLAMUN):
> III.2.6. Regional sustainable development programs (PRODERS):
> III.2.7. Environmental indicators.
> III.3. Analysis of normative instruments.
> III.3.1. Laws: LGEEPA, state ecological balance and environmental protection acts, National Waters Act, Forestry Act, other energy (oil and gas) sector-related regulations.
> III.3.2. International treaties and domestic agreements.
> III.3.3. Regulations: LGEEPA Regulations, regulations to state ecological balance and environmental protection acts, etc.
> III.3.4. Mexican Official Standards, Mexican Standards, Reference Standards, and Normative Agreements.
> III.3.5. Declarations of protected natural areas.
> III.3.6. Closed season orders.
> III.3.7. Hunting calendars.
> III.3.8. Municipal ordinances.

[64] Ibid.
[65] Authorization S.G.P.A./DGIRA/DG.0465.08, Recital I, at 1.
[66] Revised Submission at 12.

Based on the foregoing, the DGIRA, in Recital 5 of the relevant authorization, assessed the viability of the Manzanillo LPG Project, including its relationship to various planning instruments such as the POETEC, the PROETSLC, and the PDUM, and concluded as follows:

> The DGIRA finds that the area where the Project is to be carried out is not incompatible with the land use policies contemplated in the corresponding legal provisions or ordinances, in accordance with the considerations set out in the "DECISION AMENDING THE MANZANILLO URBAN DEVELOPMENT PROGRAM IN RESPECT OF THE CLASSIFICATION OF THE AREAS OF THE FOLLOWING LOTS IN EJIDO CAMPOS: 61 Z-1 P3/4, 62 Z-1 P3/4, 72 Z-1 P3/4, 76 Z-1 P3/4, 77 Z-1 P3/4, 80 Z-1 P3/4, 81 Z-1 P3/4, 83 Z-1 P3/4, 89 Z-1 P3/4, and 90 Z-1 P3/4 FROM FORESTED AREA (AR-FOR) TO MEDIUM-TERM URBAN RESERVE (RU-MP), AS WELL AS THEIR ZONING, WHICH CHANGES FROM ECOTOURISM (TE) TO HIGH-IMPACT AND HIGH-RISK HEAVY INDUSTRY (I3)…."
>
> Considering that both the POETEC and the PROETSLC are instruments that must be applied by the competent administrative bodies of this entity (state and municipal), the DGIRA finds that the observations set down in this document are without prejudice to the environmental powers of the Federation, the states, the Federal District, and the municipalities, under the principle of concurrence set forth in Article 73 paragraph XXIX-G of the Constitution of the United Mexican States.
>
> In accordance with Article 115 of the Political Constitution of the United Mexican States, establishing the powers vested in the municipalities, including regulation of land use, as well as the provisions of LGEEPA Article 8 paragraph II, establishing their powers to enforce the environmental policy instruments set out in the applicable local laws as well as to preserve and restore ecological stability and environmental protection on property and in areas under municipal jurisdiction, in matters not expressly assigned to the Federation or the States, the DGIRA finds that the Developer must apply to the local (state and municipal) bodies, which shall, within the scope of their respective jurisdictions, decide as appropriate with adherence to the legal provisions applicable to the particular case at issue.[67]

Furthermore, as mentioned in environmental impact authorization no. S.G.P.A/DGIRA.DEI.1443.04, the DGIRA conformed to the third paragraph of LGEEPA Article 35 by considering the possible impacts of works and activities on the ecosystems existing in the Project area, including the sum total of the elements making up these ecosystems and not merely any resources that might be subject to use or impact.

For example, in the technical justification of the authorization in question, the DGIRA found that the Project would not affect, in terms of environmental impact, any coastal dune or sea turtle nesting areas:

 Concerning the coastal dune area used for the installation of the LP gas and propane gas storage tanks, the DGIRA found that "the alteration that would occur can be mitigated and/or compensated for with the mitigation and compensation measures presented by the developer, as well as by minimizing the cutting volumes through limitations on the area authorized for development of the facilities comprising the LP gas terminal, thus avoiding a reduction [sic] in the adverse impact on the ecosystem through

[67] S.G.P.S./DGIRA.DG.0465.08, at 13-14.

the construction of engineering structures capable of consolidating the part of the coastal dunes that will not be affected and that is located adjacent to the ocean.[68]

 Concerning sea turtles, the DGIRA found "that no direct impact is foreseen on the areas used for nesting by the possible sea turtle species beaching in the area where the Project is to be carried out ….[69]

 In regard to the scenarios resulting from the environmental risk analysis, the DGIRA concluded that "there are no activities in the area that are incompatible with the Project, and moreover, there is nothing in the scenarios resulting from the environmental risk assessment that will affect vulnerable areas (human settlements) since the closest locality, Ocampo, is 4 km to the west of the site. Furthermore, there is a natural barrier (coastal dunes) which, should there be an unforeseen adverse occurrence, the blast wave would not directly extend to the probable turtle nesting areas, since the natural barrier would buffer and/or diminish the likelihood of environmental damage to the ecosystem involved in the Project, where ecosystem is understood as the basic functional unit of interaction of living organisms among one another and with the environment within a given space and time; therefore, the environmental risk is considered environmentally acceptable."[70]

In relation to the Secretariat's request for information on the effective enforcement of REIA Article 4 paragraph IV, the Party contends that this provision cannot be considered environmental law in the sense of the NAAEC, *since it is a jurisdictional provision;* that is, its object is exclusively that of regulating the powers vested by the LGEEPA in Semarnat within the context of environmental impact assessment procedures under its jurisdiction, and it is not of a substantive nature, as required by Article 45(2) of the Agreement; i.e., it is not designed to protect the environment or prevent a danger to human life or health. For greater clarity, REIA Article 4 paragraph IV provides as follows:

> ARTICLE 4.
>
> The Ministry has the power to:…
>
> IV. Carry out any public consultation process that may be required during the environmental impact assessment procedure;

Thus, in order to study the Submitters' assertions, it must be emphasized that the consideration of opinions expressed by interested parties during public consultation processes prescribed by domestic law falls within the ambit of the discretionary powers of the competent authorities. In fact, the holding of a public consultation within the federal environmental impact assessment procedure constitutes a discretionary power of the federal environmental authorities, since the wording of the article indicates that

[68] Authorization S.G.P.A./DGIRA. DEI.-1443.04, Recital 9, at 23.
[69] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 24.
[70] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 31.

Semarnat, at the request of any person in the community in question, *may* hold a public consultation on projects submitted to Semarnat.

Concerning the Manzanillo LPG Project, as is clear from Recital 1 of the authorization in question, the DGIRA did not receive any requests for public consultation, and so the condition for the application of REIA Article 4 paragraph IV is not met.

IV.7 Effective enforcement of LGEEPA Articles 30 and 35 and REIA Articles 2, 4 paragraph IV, and 13 in regard to the Manzanillo LNG Project EIS[71]

As regards the Manzanillo LNG Project, in relation to the first paragraph of LGEEPA Article 30, the EIS submitted by the CFE contains a chapter describing the possible impacts on ecosystems that could be affected by works and activities to be carried out, as well as a chapter concerning the development of preventive, mitigation, or other measures necessary to prevent and minimize the Project's negative impacts (Appendix 10):

> **V. Identification, description, and assessment of the cumulative and synergistic environmental impacts on the regional environmental system**
> V.1 Identification of impacts on the structure and function of the regional environmental system.
> V.1.1. Construction of the scenario modified by the Project.
> V.1.1.1 Identification and description of sources of change, disturbance, and impact.
> V.1.2.1 Identification of environmental components susceptible to impact.
> V.1.2.2 Identification of project-environment interactions.
> V.1.2.3 Map overlays.
> V.1.3 Qualitative and quantitative estimation of changes to the regional environmental system.
> V.1.3.1 Selection of indicators.
> V.2. Techniques for assessing environmental impacts.
> V.3 Environmental impacts generated.
> V.3.1 Identification of impacts.
> V.3.2 Selection and description of the impacts caused by implementation of the Manzanillo LNG Project.
> V.3.2.1 Description of environmental impacts at the site preparation and construction stage.
> V.4 Delimitation of the area of influence.
>
> **VI. Strategies for prevention and mitigation of environmental impacts on the regional environmental system**
> VI.1 Classification of mitigation measures by environmental component.
> VI.2 Grouping of impacts by proposed mitigation measures.
> VI.3. Description of the mitigation strategy or system for each relevant impact.
> VI.3.1 Site preparation and construction phase.
> VI.4 Description of residual impacts. [72]

In addition, the Manzanillo LNG Project EIS included a risk study, as prescribed by the second paragraph of LGEEPA Article 30, containing the following sections, which were considered during assessment of the Project (Appendix 11):[73]

[71] Second Determination at 22, para. 71(e).
[72] Manzanillo LNG Project EIS, Contents.
[73] Disc containing the risk study for the Manzanillo LNG Project.

I. Risk scenarios.
I.1 Description of the process.
I.2 Siting of the terminal in the base scenario and in Alternative 1 and Alternative 2 Omega.
I.3 Preventive measures.
I.4 Risk identification and ranking methodologies.
II Description of protection areas.
III Indication of environmental safety measures.
IV Conclusions and recommendations.

In relation to the requests for additional information as part of the federal environmental impact assessment procedure and to the third paragraph of LGEEPA Article 30, the Manzanillo LNG Project was not modified subsequent to its filing, and therefore the condition of that provision was not met.

Notwithstanding the foregoing, based on LGEEPA Article 35 Bis, second paragraph and REIA Article 22, the DGIRA, in document […], requested additional information for the assessment of the Project (Appendix 12). As was noted in Recital XLII of the environmental impact authorization for the Project, the CFE filed doc. 07/2007/JMRA-00373, providing a response on the environmental aspects requested by the DGIRA, including clarifications on the following items:

1. Coastline.
2. Dredging.
3. Water control structures.
4. Sea turtles.
5. Silting.
6. Mangroves.
7. Criterion INF.20.
8. Irregular settlements.
9. Sodium hypochlorite.
10. Dumping of dredged material.
11. NOM-022-SEMARNAT-2003.
12. Analysis of lagoon (indicators).[74]

In relation to the Manzanillo LNG Project, the Secretariat, in its Second Determination, requested a response from the Party in regard to the alleged failure to effectively enforce LGEEPA Articles 30 and 35 and REIA Articles 2, 4 paragraph IV and 13,[75] which are applicable to the requirements concerning EISs, the assessment and decision on EISs, jurisdiction over the enforcement of the REIA, the public consultation procedure, and the requirements concerning the regional modality of the EIS.

As is evident in Recital I of environmental impact authorization no. S.G.P.A./DGIRA.DG.0465.08 of 11 February 2008 (Appendix 13), on 8 November 2006

[74] Authorization S.G.P.A./DGIRA/DG.0465.08, at 11-12.
[75] Second Determination at 22.

the CFE submitted the Manzanillo LNG Project EIS, which was registered under no. 06CL2006G0008.[76]

In regard to the effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III, the Submitters state:

> 2.16. As stated above, originally, the EIS did not discuss any relationship with the applicable planning instruments and legal instruments, such as the Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed and NOM-022-SEMARNAT-2003, in accordance with REIA Article 13 paragraph III. This is done [sic] without being requested as additional information and until the state government amends the PROETSLC.[77]

It is evident from the transcribed paragraph that in the Submitters' opinion, the Manzanillo LNG Project EIS did not relate the Project in question to the applicable ecological zoning and to NOM-022-SERMARNAT-2003. However, as appears from the DGIRA decision, in the environmental impact assessment process, based on a review of chapter III of the EIS and of the additional information submitted by the Developer, the environmental impact assessment for the Project included assessment of the relationship to the following instruments:

- Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar sites).
- Ecological Zoning Program of the State of Colima (POETEC).
- PROETSLC.
- Urban Development Master Plan of the City of Manzanillo, Colima (PDDUCMC).
- LGVS Article 60 ter.
- Applicable Mexican Official Standards, including NOM-059-SEMARNAT-2001 and NOM-022-SEMARNAT-2003.
- Priority Bird Conservation Areas (AICAS).
- Priority Terrestrial Regions (RTPs).
- Priority Hydrological Regions (RHP).
- Priority Marine Regions (RMP).[78]

Additionally, in doc. […], the DGIRA asked the CFE for additional information concerning the relationship between the Project's works and activities and the Order revising the PROETSLC, as well as its relationship to LGVS Article 60 ter[79] (Appendix 14).

As appears from Recital LVI of environmental impact authorization no. S.G.P.S./DGIRA.DG.0465.08, on 10 October 2007, the DGIRA received doc. no. 7B/2007/JMRA-00533, in which the CFE submitted the information requested by the DGIRA.

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[76] Authorization S.G.P.A./DGIRA/DEI.1443.04, Recital I, at 1.
[77] Revised Submission at 12.
[78] S.G.P.S./DGIRA.DG.0465.08, at 26 (last paragraph), 29–47.
[79] S.G.P.S./DGIRA.DG.0465.08, at 15.

As appears from Recital 6(c) of the environmental impact authorization, the DGIRA reviewed the information in chapter III of the Project EIS and the additional information submitted by the Developer, and concluded that the Project was located within the following UGAs and covered by the following policies:

- Industrial and service use (39, A, A, Ei).
- Restoration for conservation, natural space without oak woodlands or semi-evergreen seasonal forest (*selva mediana*) (47 R, Rc, Ent2).
- Conservation, natural coastal space with limited activities and low-impact ecotourism (41 C, C EncLe).[80]

As a result of its analysis of these provisions, the DGIRA stated in the conditional environmental impact authorization for the Manzanillo LNG Project that "these criteria do not prohibit the performance of works and/or activities related to the Project; on the contrary, criteria IN4 and IN5 allow the construction of fuel storage infrastructure and gas pipelines in accordance with the applicable provisions…."[81]

Finally, further to the analysis of the information submitted in the Manzanillo LNG Project EIS and the additional information submitted by the CFE, the DGIRA concluded as follows:

> Consequently, it must be stated that while the PROETSLC is an environmental policy instrument for the sustainable development of the area, … said instrument also sets out the permissible types of economic activities, as well as the basis for the development of proposed programs and projects, based on an analysis of deterioration and the potential for the use thereof.
>
> …
>
> In this regard, it should be considered that while the object of the PROETSLC is to prevent any significant alteration of the Laguna de Cuyutlán, this does not mean that activities may not be carried out or that various types of infrastructure may not be built; on the contrary, as a regulatory instrument it mentions that assessment of possible changes to the Project site is subject to environmental assessment presented in the form of an environmental impact statement in accordance with the applicable environmental law; thus, the developer availed itself of its right to submit the relevant EIS-R and ERA-ADR for the Project to the PEIA under LGEEPA Article 28 paragraph I, with the corresponding risk study as prescribed by LGEEPA Article 30 paragraph II.
>
> Moreover, it must be stated that the Project and its alternatives are assessed based on the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed, published by executive order of 3 May 2007, whose third transitory article expressly repealed the separate program published in the Official Gazette of the State of Colima on 5 July 2003.[82]

In regard to LGEEPA Article 35 paragraph III, requiring assessment of the possible impacts of works and activities on the ecosystems in question, considering the sum total of the elements making up those ecosystems and not only those resources potentially

[80] Doc. no. S.G.P.S./DGIRA.DG.0465.08, at 32.
[81] Doc. no. S.G.P.S./DGIRA.DG.0465.08, at 37.
[82] S.G.P.S./DGIRA.DG.0465.08, at 38-39.

subject to use or impact, as is observed in Recital 9 of authorization S.G.P.S./DGIRA.DG.0465.08, the environmental impact assessment for the Manzanillo LNG Project considered these factors:

> In view of the foregoing arguments, and since the PEIA requires the DGIRA to consider that the use of natural resources is consistent with the functional integrity of the ecosystems of which such resources form a part, and since the concept of "integrity" alludes to the attribute of completeness, i.e., not lacking any of its parts, and since "functional" concerns that which pertains or relates to functions, the phrase "functional integrity," in the environmental sense, was used in the PEIA to indicate the fact that a natural system (ecosystem), a combination of its functions and its physical, chemical, and biological components, forms a whole that functions for its own development, and therefore the assessment focused on ascertaining whether the Project can be considered compatible with the functioning of the environmental system.
>
> Based on this understanding of the concept of ecological integrity, the possible interactions of the ecosystems (terrestrial and marine) with the Project works and activities were assessed, concluding with the following points:
>
> 1. Considering the extent of the two ecosystems identified (terrestrial and marine), … it is foreseen that the Project will have an impact on ecosystem biodiversity, since the species located on the site are not unique or exceptional species typical of a pristine ecosystem. [Note to the reader: This may be a misquote, since the rest of the paragraph seems to be saying that there will not be such an impact.]
>
> 2. Another of the components analyzed relates to the capacity of the ecosystem to remain productive, … for the case of the marine ecosystem, no loss of productivity is foreseen.
>
> 3. In addition, an assessment was made of the Project's impact on the development potential of the ecosystems; that is, the possible consequences of the works and activities for the homeostasis and resiliency of the marine and terrestrial ecosystems.…
>
> In all cases, the Project does not involve works or activities that generate waste, emissions or discharges in excess of the system's capacity to assimilate them; it does not require the use of natural resources in excess of the capacity for renewal thereof, since there are measures that can mitigate and compensate for the immediate loss of resources that will be used.
>
> In conclusion, for the reasons stated, it is evident that Project Alternative 2 (Omega) not only allows for total conservation of the development potential of the ecosystems in that it does not involve impacts that would affect ecosystem attributes such as homeostasis and resiliency, but also this alternative does not jeopardize functional integrity, as is evident from recital no. 8 of this decision.
>
> In addition, it would contribute to the rehabilitation of the Laguna de Cuyutlán, because the water balance with the adjacent ocean will be kept constant and standardized, thus improving its functional integrity, since the hydrodynamics of the lagoon fundamentally depend on human action, deriving from maintaining the operation of the Manzanillo thermal power plant, using the free flow of water in the Ventanas canal, as well as ensuring that the Tepalcates Canal stays open, as is evident from recital no. 7 of this decision.
>
> On this premise, the works involved in Alternative 2 (Omega) of the Project will have a positive impact on the recovery of the Cuyutlán lagoon system, since the closing of the Tepalcates Canal would speed the lagoon's deterioration.

…

> Consequently, it is expected that the regional environmental system as delimited will have a structure that will keep it functioning as it did before the silting of the Tepalcates Canal. The benefits to the functional integrity of the regional environmental system will be noted in the short and medium term, while the social benefits due to the Project will exceed any adverse impacts that may occur due to its development, since all the possible significant negative impacts can be fully mitigated. The opening of the access canal to the Laguna de Cuyutlán, through Tepalcates, will lead to conditions that can be considered optimal for the environmental quality of the Laguna de Cuyutlán, since they will favor conditions for the recovery and stability of protected species populations.[83]

In regard to the effective enforcement of REIA Article 4 paragraph IV in the case of the Manzanillo LNG Project, and irrespective of the Party's argument to the effect that as a jurisdictional provision it cannot be considered environmental law in the sense of the NAAEC, as the Submitters themselves state, the environmental authority held a public consultation process whose substantiation was described in Recitals I to XXII of the authorization in question. From this, the following statements may be derived:

- As indicated in Recital I, on 8 November 2006 the DGIRA made the documentation submitted for the Project available to the public at the relevant documentation center.[84]

- On 9 November 2006, offprint no. DGIRA/044/06 was published in the Environmental Gazette, being the submission of the Project EIS (Appendix 15).

- Via doc. no. S.G.P.A/DGIRA/DG/1421/06 of 14 November 2006, the DGIRA relayed the EIS to the Semarnat office in the State of Colima, in order for the Project to be made available to the public at its offices (Appendix 16).

- On 16 and 17 November 2006, the DGIRA received various documents requesting a public consultation for the Project, submitted by several community members of the municipality of Manzanillo, including the Submitters.

- The DGIRA states in Recital VI of the authorization that via doc. no. S.G.P.A/DGIRA.DDT.2325.06 of 22 November 2006, the DGIRA notified Esperanza Salazar Zenil that even though her request for a public consultation did not meet the requirements of the applicable legal provisions, the requested public consultation would take place (Appendix 17).[85]

- Recital XIII of the authorization states that on 27 November 2006, via doc. no. 2243/06, the Semarnat office in the State of Colima issued the Official Record

[83] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 9, at 115–18.
[84] Authorization S.G.P.A./DGIRA.DG.0465.08, at 1.
[85] Authorization S.G.P.A./DGIRA.DG.0465.08, at 5–6.

making available the Project EIS for consultation by any interested party.[86]

 In addition, the Civic Participation and Transparency Coordinating Unit (*Unidad Coordinadora de Participación Social y Transparencia*), via various documents of 12 December 2006, informed various authorities, the representatives of community organizations, academics and researchers, and social and business sectors that on 19 December 2006 a public information meeting would be held on the Project, taking place from 8:30 a.m. to 7:00 p.m. (Appendix 18).

 Recital XVII states that on 13 December 2006, the invitation to the public meeting was published in the *Diario de Colima* newspaper. On 14 December 2006, the DGIRA published the invitation to the meeting in offprint no. DGIRA/049/06 of the Environmental Gazette and on the www.semarnat.gob.mx website.

 On 19 December 2006, the public information meeting for the Manzanillo LNG Project was held and the corresponding Official Record was drawn up, indicating, *inter alia,* the number of persons who registered to speak and the number of questions per participant, including Esperanza Salazar Zenil with 27 questions, Gabriel Martínez Campos with 19, and Margarita Bataz with 9 (Appendix 19).[87] At the conclusion of the meeting, a deadline of 12 January 2007 was set for submission of comments and observations. The DGIRA received no new comments before the deadline.

Continuing the process, the DGIRA reviewed the information collected through the public consultation process for the Manzanillo LNG Project and concluded as follows:

Concerning environmental observations:

> The developer was asked for additional information on each and every point raised at the public information meeting; it was asked to demonstrate the Project's compatibility with the applicable land use-related regulatory instruments; to show that the Project will not alter the integrity of the lagoon system, mangrove communities, and species with protected status such as turtles and crocodiles; and to assess the cumulative impacts due to the existence of other projects in the region.

Concerning legal observations:

> The review of the Project's compatibility with the programs indicated during the public consultation is presented in recital 5 of this decision.
>
> The Project's relationship to Mexican Official Standards NOM-022-SEMARNAT-2003 and NOM-059-SEMARNAT-2001 is discussed in recitals 8 and 5 of this decision.
>
> As regards the alleged violation of the Convention on Biological Diversity (CBD), it must be said that those provisions of the CBD considered to be violated as a result of the submission of the

[86] Authorization S.G.P.A./DGIRA.DG.0465.08, at 5–6.
[87] Authorization S.G.P.A./DGIRA.DG.0465.08, Recitals II–XXII, at 2–8, and Official Record of 19 December 2006.

> EIS were never specified during the public consultation process, making it impossible to study the possibility of violations having occurred. However, it should be noted that Article 3 of the CBD reads: "Principle. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."
>
> In this regard, since there are legal provisions regulating works and/or activities that may cause ecological instability or exceed the limits and conditions set out in the applicable provisions for the protection of the environment and for the preservation and restoration of ecosystems, such as the LGEEPA and the REIA (LGEEPA Articles 5 paragraphs II and X, 28 paragraphs I and II, and 30; [REIA, Articles] 5, paragraphs C) and D), it is found that there is no violation at all of the CBD provisions, especially since the developer submitted its Project to the DGIRA for environmental impact assessment in the form of an environmental impact statement (regional modality) and a risk study, requesting environmental impact authorization for works and activities connected with the project.[88]

IV.8 Effective enforcement of LGVS Article 60 ter and of NOM-059 and NOM-022 in respect of the environmental impact authorization for the Manzanillo LPG Project[89]

In its Second Determination and in relation to the Manzanillo LPG Project,[90] the Secretariat requested Mexico to include information in its Party Response on the alleged failure to effectively enforce NOM-059 and NOM-022 as well as LGVS Article 60 ter.

It must be noted that the section titled "Facts related to environmental impact on the part of Semarnat" in both the original and the revised submissions numbered SEM-09-002 does not refer, in connection with this Project, to LGVS Article 60 ter or to NOM-059-SEMARNAT-2001 and NOM-022-SEMARNAT-2003, only to the first paragraph of LGEEPA Article 30 and to LADSEC Article 40.

In regard to LGVS Article 60 ter, this provision was included in the Act on 1 February 2007. Thus, since the environmental impact decision for the Manzanillo LPG Project was issued on 23 June 2004, this provision was not applicable to the assessment of the Project.

In regard to the Mexican Official Standards in question, as found in the decision granting conditional authorization to the Manzanillo LPG Project, the enforcement of NOM-059-SEMARNAT-2001 was contemplated during assessment of the Project in the following manner:

1. Further to the review of the Manzanillo LPG Project and to the additional information submitted, the DGIRA identified in the environmental characterization that the beaches

[88] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 4, at 25–6.
[89] Second Determination at 22, para. 71(f).
[90] Second Determination at 22.

where the Project is to be carried out are sporadically used for nesting by sea turtles of the species *Lepidochelys olivacea* (olive Ridley sea turtle), *Dermochelys coriacea* (leatherback sea turtle), and *Chelonia agassizi* (black sea turtle), all considered endangered under NOM-059-SEMARNAT-2001; however, Project works and activities will not directly affect these nesting areas.[91]

2. The DGIRA assessed the mitigation measures proposed by the Developer in regard to possible direct or indirect impact on species listed in NOM-059-SEMARNAT-2001, concluding as follows:

> In regard to the wildlife salvage and relocation plan: "The stated measure is consistent with the impact; however, the developer's description refers only to sea turtles, and the same process must be followed for each individual species whether or not it is listed in NOM-059-SEMARNAT-2001…. Therefore, it is in order that, prior to the plan, the developer carry out a prospective study to determine accurately whether or not other species covered by the standard are present."[92]

> In regard to the endangered species protection plan: "The protection plan for turtle species must be drawn up in the form of an agreement with a competent body in the region, such as the Universidad de Colima or the turtle watch camps operating under the auspices of the Wildlife Branch [*Dirección General de Vida Silvestre*]."[93]

Additionally, the DGIRA imposed Condition 2 on the Developer, calling for a wildlife salvage, protection, and conservation plan to be drawn up with special attention to the species listed in NOM-059-SEMARNAT-2001, which must minimally contain the following:

> a. Objectives.
> b. Methodology.
> c. Techniques to be applied (flora management).
> d. Timeline of activities.
> e. Criteria for determining the efficiency and effectiveness of each activity included in the plan.
> f. Estimate of costs involved in developing and implementing the plan, with line items for each activity as well as direct and indirect costs.

Also required was a plan or agreement to support sea turtle conservation, and a coastal dune restoration and monitoring plan, including the following aspects:

> a. Objectives.
> b. Methodology.

[91] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 20.
[92] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 22.
[93] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 22.

c. Techniques to be applied.
d. Timeline of activities.
e. Outcomes and their interpretation, including criteria for determining the efficiency and effectiveness of each activity included in the plan.
f. Assessment of possible unforeseen residual impacts with a view to determining additional mitigation or compensation measures to be implemented by the Developer at the conclusion of the plan.
g. Estimate of costs involved in developing and implementing the plan, with line items for each activity as well as direct and indirect costs.

In regard to the effective enforcement of NOM-022-SEMARNAT-2003 in respect of the environmental impact authorization for the Manzanillo LPG Project, since there is no mention of the existence of coastal wetlands in the area where the Project is to be carried out, this standard is not applicable. The foregoing is evident from the environmental characterization section of the authorization in question:

> The site where the Project is to be carried out is located at kilometer 3.5 of the Manzanillo-Colima state highway on the sandbar separating the Laguna de Cuyutlán from the Pacific Ocean; which sandbar is approximately 1300 m wide and has been altered by various anthropogenic pressures (agriculture, services, infrastructure, etc.). The width of the site ranges from 430 to 520 m, with coconut palm and mango plantations and an irregular configuration of coastal dunes reaching a height of 15 m above sea level.
>
> …
>
> The Project infrastructure, both in the marine environment and on land, will not affect any declared protected natural area, be it federal, state or municipal; however, it is located within Priority Marine Region no. 28, Cuyutlán-Chupadero, and Priority Hydrological Region no. 25, Ríos Purificación-Armería, defined by Conabio due to the ecological importance, in terms of biodiversity, of the Laguna de Cuyutlán and the adjacent marine area.[94]

IV.9 Effective enforcement of LGVS Article 60 ter, as well as NOM-059 and NOM-022, in respect of the environmental impact authorization for the Manzanillo LNG Project[95]

Recital 6(i) of Authorization S.G.P.A./DGIRA.DG.0465.08 expressly discusses the relationship of the Manzanillo LNG Project to NOM-059-SEMARNAT-2010.[96] In fact, based on the assessment and analysis of the information submitted by the CFE in the description of the regional environmental system, the DGIRA found that the main environmental impacts and risks to wildlife at the site where the "Alternative 2 Omega" Project works and/or activities are intended to be carried out would be the following:

 Coastal dune vegetation. The CFE stated that there would be impacts on 6.09 hectares of coastal dunes. The impact would be permanent, localized, and would cause impacts to the coastline, as well as loss of habitat for species using the dunes as a

[94] Authorization S.G.P.A./DGIRA.DEI.-1443.04, Recital 7, at 19.
[95] Second Determination at 22, para. 71(f).
[96] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 6(i), at 44.

feeding and nesting area, etc.

 Amphibians. The Developer conducted a census in the Project area and did not detect the presence of any amphibians amid the vegetation found in the area.

 Birds. A total of 92 bird species were found in the Project's regional environmental system. However, due to the behavior and mobility characteristics of the bird species observed on or in the vicinity of the Project site, it is believed that Project works and activities will not affect bird populations in the area and even less with respect to the regional environmental system, since these species were also observed elsewhere in the regional environmental system. No bird species included in NOM-059-SEMARNAT-2001 were found on the Project site.

 Sea turtles. Due to the characteristics of the works to be carried out, the potential environmental impacts on sea turtles reaching the area will be less than those described in the base scenario. The base scenario estimated that the impact on the beach would be equivalent to a reduction in the nesting area of approximately 14.4 nests annually, which could be averted or mitigated with protection and preservation measures for the turtle nesting areas.

Concerning the leatherback sea turtle *(Dermochelys coriacea)*, the site is identified as an occasional or rare nesting beach, with maximum recorded values of 0.88 nests/km. Concerning the black sea turtle *(Chelonia agassizi)*, the turtle watch camps at Cuyutlán, El Chupadero, El Real, and Golfinas del Real together recorded only 20 nests of this species from 1992 to date.

As for the hawksbill sea turtle *(Eretmochelys imbricata)*, there are no records of this species for Colima.

Concerning the environmental impacts deriving from light given off by the facilities, there is no predicted direct impact on nesting areas since the lights will be directed towards the interior of the facilities, i.e., towards the Laguna de Cuyutlán.

 Crocodiles. Alternative Omega does not represent any impact on this species *(Cocodrylus acutus)* given that most crocodile activity is found in basins III and IV. Furthermore, this alternative is predicted to favor the entry of marine organisms, probably leading to greater food abundance and thus benefiting the population of this species, considered to have special protection status.[97]

In addition, in the section devoted to a description of the regional environmental system in which the Manzanillo LNG Project is to take place, the CFE specifically stated the prevention and mitigation measures that would be applicable to each of the identified impacts arising from the Project works and/or activities, the following being prominent among them due to their relationship to NOM-059-SEMARNAT-2001:

[97] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 8(f), at 84–9.

 In regard to the impact on coastal dune vegetation, revegetation and forestation are planned, with slopes to be established and jetties to be designed.

The DGIRA stated that the measures were consistent with the environmental impact. However, in view of the importance of the coastal dunes as a protective barrier against hurricanes and waves, it asked the Developer to perform periodic monitoring of the dunes and implement a coastal dune vegetation restoration plan.

 Concerning possible direct or indirect impact on species listed in NOM-059-SEMARNAT-2001, a wildlife salvage and relocation plan is proposed.

The DGIRA found the measure proposed by the CFE to be consistent. However, it stated that the Developer had to conduct a prior prospective wildlife study, “not only for distribution, richness, fragility, and/or ecological importance of the avifauna and crocodiles present in the regional environmental system, but also for any species, … regardless of whether the species is or is not listed in NOM-059-SEMARNAT-2001.”

 Concerning possible direct or indirect impact on species listed in NOM-059-SEMARNAT-2001, such as endangered sea turtles identified in the area, the CFE planned to carry out construction activities outside the nesting season and to devise an endangered species protection plan (sea turtles).

The DGIRA specified the need to implement this plan by means of an agreement with a body responsible for this work in the region, such as the Universidad de Colima or the Semarnat turtle watch camps.

 In regard to impacts on sea turtle and bird behavior caused by light from the facilities and tankers, the Developer proposed to employ a lighting system that would not cast light on the beach, and to keep high-illumination lights from the tankers turned off when the crew is not on board.

The DGIRA mentioned the need to conduct bird population monitoring, particularly for birds listed in NOM-059-SEMARNAT-2001, with a view to confirming the absence of impact on their breeding behavior and, where necessary, to apply additional mitigation measures.

 The CFE mentioned the low likelihood of impact on marine fauna due to noise in the pier area and to operation of the LNG terminal, in regard to which it intends to implement: (i) a protection plan for vulnerable species listed in NOM-059-SEMARNAT-2001 and the CITES 2005 appendices, along the maritime shipping route and around the pier, which will include monitoring to detect the presence of species vulnerable to noise from LNG tankers, so as to apply, where necessary, suitable preventive and mitigation measures; and (ii) a protection plan for vulnerable species listed in NOM-059-SEMARNAT-2001 and the CITES 2005 appendices, along the shipping route and around the pier, which will include monitoring to detect the presence of vulnerable species of mammals or other marine fauna (including birds and sea turtles) on the

periphery of the pier construction area.

The DGIRA found that the stated measure is consistent with the type of impact identified.[98]

In addition, the DGIRA identified that the ecosystem to be impacted by the gas pipeline has been altered by industrial and agricultural activities, stressing that the Project area was intended to house gas pipeline infrastructure as provided by the PROETSLC. Furthermore, the DGIRA noted that the Developer stated that there is no forest vegetation in the area, and therefore there were no identified habitats that are of ecological importance for the presence of wildlife which, in terms of ecological diversity and abundance, could be altered by the Project works and/or activities, especially those species of flora and format enjoying legal protection status under NOM-059-SEMARNAT-2001.[99]

Having considered the foregoing, the DGIRA decided to grant conditional authorization to the Manzanillo LNG Project, as per Alternative 2 Omega, including various conditions related to NOM-059-SEMARNAT-2001, such as the following:

1. Devise an environmental quality monitoring plan which shall contain, at a minimum, the following environmental components:

> b) *A report on existing marine biota* once the proposed site for the marine facilities of the Project has been defined, which report shall identify the habitat conditions, the distribution of species, and their ecological relevance in terms of fragility and interactions, determining the existence or nonexistence of species with protected status *under NOM-059-SEMARNAT-2001*, stating the actions, measures, and indicators to be used to evidence the assertion that the construction procedure to be used for this infrastructure will not cause relevant impacts different from those assessed in the documentation submitted and, as applicable, *shall take additional measures to prevent and mitigate these impacts.*
>
> c) State and described the indicators, actions, and measures to be considered with a view to preventing collision impacts on marine mammals and turtles which, depending on their seasonality, may be found along the shipping route and the coastal zone of the Project….[100]

2. Conduct a prospective biodiversity protection and conservation study, which shall contain the following:

> Objectives.
> Methodology.
> Techniques to be applied.
> Timeline of activities.
> A description of the ecological importance of the fauna species identified and the environmental services provided by these species in the regional environmental system and the Project's area of influence.
> A list of the sites of occurrence of the fauna species identified and their feeding, breeding,

[98] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 9, at 112-114.
[99] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 9, at 115.
[100] Authorization S.G.P.A./DGIRA.DG.0465.08, at 130.

and/or feeding [sic] areas.

 A description of the possible impacts on the fauna species identified during the various phases of the Project, stating the magnitude of the impacts and the indicators that would be used to ascertain whether each impact is significant or not, including measures to be taken to prevent or minimize the impacts; the developer must include the scientific-technical evidence demonstrating that there will be no significant impact on these species or, if there is such impact, the developer must present a description of the measures to be used to prevent or minimize the impacts identified.

 The scientific-technical analysis supporting the statement that there will be no impact on the fauna species identified, in regard to their patterns of distribution, behavior, or feeding habits.

 Estimate of costs involved in developing and implementing the plan, with line items for each activity it includes, as well as direct and indirect costs of its development and implementation.[101]

As regards the effective enforcement of NOM-022-SEMARNAT-2003, the Submitters state as follows:

> 2.14. In conformity to this same precept, Semarnat should have denied authorization because:
>
> a) *it contravened the LGEEPA, its environmental impact regulation, and Mexican Official Standards NOM-059-SEMARNAT-2001 and NOM-022-SEMARNAT-2003, specifically sections 4.0, 4.1, 4.3, 4.12, 4.23, 4.28, 4.29, 4.37, 4.38, and 4.40*;
>
> b) …
>
> 2.15 *Nor were the necessary studies presented,* showing that the Project *will not affect the integrity of the mangrove ecosystem* or *cause fragmentation of the coastal wetland,* in accordance with sections 4.0, 4.1, 4.2, 4.3, 4.12, 4.33, and 4.42 of NOM-022-SEMARNAT-2003 (Appendix 14).
>
> It is important to point out to the Secretariat that in the decision of 11 February 2008 (Appendix 13), the DGIRA granted conditional approval to the LNG Project and, on pages 140–3, *in Condition 3, again requested a water balance study* "comprehensively demonstrating the manner in which water flow from the opening of Tepalcates Canal will impact on the four basins of the lagoon." *It is therefore clear that the competent authority never had in its possession the studies necessary to conduct its assessment, nor even to ensure the absence of impact on this important coastal wetland, which is gravely and irreversibly harming the ecosystem as a whole.*[102]

As appears in the environmental impact assessment filed for the Manzanillo LNG Project, the water balance study mentioned by the Submitters was not required of the Developer prior to the granting of environmental impact authorization but as Condition no. 3, and it is therefore incorrect to assert that the DGIRA *"should have denied"* authorization. To back up this reasoning, it is relevant to note that no legal provision establishes the submission of a water balance study as a requirement in an environmental impact statement. In particular, specification 4.0 of NOM-022-SEMARNAT-2003 states only that in matters of environmental impact authorization, water flow must be given a comprehensive analysis.

For due consideration of NOM-022-SEMARNAT-2003, the federal environmental

[101] Authorization S.G.P.A./DGIRA.DG.0465.08, at 138–9.
[102] Revised Submission at 10, 12.

authority requested the following information from the CFE:

1. […].

2. […]..

Additionally, the DGIRA imposed Condition 3 on the Developer, requiring the production of a water balance study in order to prevent, mitigate, or compensate for environmental impacts arising from Project works and activities, in order to guarantee the integrity of the mangrove ecosystem and to prevent the fragmentation of the coastal wetland, as prescribed by sections 4.0, 4.1, 4.3, 4.12, 4.23, 4.28, 4.29, 4.37, 4.38, and 4.40 of NOM-022-SEMARNAT-2003.

Additionally, the Submitters state that the effective enforcement of LGVS Article 60 ter entailed the prohibition of the works and activities making up the Manzanillo LNG Project since:

> 2.19. On 2 February 2007, an amendment to the chapter on species and populations at risk and having conservation priority of the General Wildlife Act was made to include Article 60 Ter, which prohibits "removal, filling, transplanting, cutting, or any work or activity that affects the integrity of water flow in a mangrove zone; the ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; any nesting, breeding, refuge, feeding, and spawning grounds; or interactions between the mangrove zone, rivers, dunes, the adjacent coastal zone, and corals or that cause changes to ecological characteristics and services."
>
> 2.20. However, the Environmental Impact and Risk Branch did not consider this new provision, which *prohibited the development of a Project like the Manzanillo LNG Project* in a mangrove zone, whose implementation significantly alters water flow in the mangrove ecosystem of the Laguna de Cuyutlán.[103] (Emphasis added.)

The Secretariat shares the Submitters' erroneous interpretation of Article 60 Ter of the LGVS in its First Determination:

> **v. LGVS Article 60 ter**
>
> 19. This provision entered into force on February 12 2007, prior to DGIRA issued the environmental impact authorization for the LNG Manzanillo Project on February 11 2008 and falls under the environmental law definition *because it prohibits activities affecting the ecosystem formed by mangrove zones,* clearly intended to protect this aspect of the environment. (Emphasis added.).

The Government of Mexico does not share the Secretariat's and the Submitters' interpretation as to the prohibitive nature and the scope of LGVS Article 60 ter, since this provision *does not establish an absolute prohibition but rather an obligation for the administrative authority to ensure that any work or activity intended to be carried out in mangrove zones does not affect the integrity of the ecosystem, i.e., its functional*

[103] At 11-13.

structure. To this end, it prohibits impact on the integrity of water flow in the mangrove zone; the ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; any nesting, breeding, refuge, feeding, and spawning grounds; or interactions between the mangrove zone, rivers, dunes, the adjacent coastal zone, and corals, or that cause changes to ecological characteristics and services.

This means that only works and activities that do not affect the elements set out in Article 60 Ter are permitted, and the only way to know whether such impact exists or not is through environmental impact assessment. That is, LGVS Article 60 ter does not impose a ban but rather a restriction on activities that may be carried out in a mangrove ecosystem. This interpretation has been upheld by the Federal Judiciary in the decision on amparo case 438/2007-II in the Third District Court of the State of Quintana Roo, which clearly establishes that the mechanism by which the federal environmental authority is to assess the criteria of LGVS Article 60 ter is precisely the environmental impact assessment procedure prescribed by LGEEPA Article 28 (Appendix 20):

> Clearly, the fact that Article 60 ter and the second paragraph of Article 99 of the General Wildlife Act set forth, *inter alia,* the following prohibitions: on removal, filling, transplanting, cutting, or any work or activity that affects the integrity of water flow in the mangrove zone; the ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; any nesting, breeding, refuge, feeding, and spawning grounds; or interactions between the mangrove zone, rivers, dunes, the adjacent coastal zone, and corals or that cause changes to ecological characteristics and services, does not mean that the application of these provisions is a matter of course, since they do not constitute abstract, general prohibitions but rather establish certain exceptions to the obligations to refrain from doing certain things that are set out in the legal provisions, to wit: excepted from the prohibition are works whose object is to protect, restore, research, or conserve mangrove zones; as well as the condition that non-extractive works and activities carried out in mangrove ecosystems must adhere to the provisions of LGEEPA Article 28.

Thus, the Submitters' biased reading, which the CEC Secretariat also adopts, is contrary to the text of the Act and to its systematic interpretation, which has been previously established by the Federal Judiciary.

Following the correct interpretation of LGVS Article 60 ter, in Recital 8 of authorization S.G.P.A/DGIRA.DG.0465.08, the DGIRA assessed whether the Manzanillo LNG Project triggered the prohibition contained in this legal provision based on the information provided by the CFE and other documentation contained in the file […].[104] The DGIRA concluded that Alternative 2 Omega did not trigger the impact provisions of LGVS Article 60 ter, based on the following considerations:

 Integrity of water flow in the mangrove zone, the ecosystem, and its area of influence:

> Having reviewed the general characteristics of Alternative 2 Omega … the conclusion is that the direct impact on 0.8 hectares of mangrove ecosystem located on both banks of the Tepalcates Canal does not affect the integrity of the water flow in the mangrove ecosystem forming a part of

[104] S.G.P.A./DGIRA.DG.0465.08, Recital 8, p. 93.

this lagoon system.

This is so because the alternative under review, by broadening the Tepalcates Canal, increases water flow from the ocean towards the Laguna de Cuyutlán, pushing the currents into the center thereof, thus favoring circulation towards basins II, III, and IV, and will minimize the physiological stress currently exhibited by the mangrove ecosystem in the Cuyutlán lagoon system due to the lack of water movement, the low rate of water exchange, and the accumulation of sediments and alteration of the hydroperiod.

…

However, the analysis of the environmental impacts of Alternative 2 Omega demonstrates that the development of the Project will improve not only water flow and salinity but also the environmental services of the mangrove ecosystem by allowing for the increase of nutrients and oxygenation as well as the alteration of the physicochemical conditions of the system.[105]

 Integrity of the natural productivity of the mangrove ecosystem and of nesting, breeding, refuge, feeding, and spawning grounds:

Coverage and density of the mangrove ecosystem located within geographical coordinates of 19º 01' 09.87'' north latitude and 104º 15' 19.31'' west longitude in the Laguna de Cuyutlán. …

…

In this regard, the development of Alternative 2 Omega will promote the recovery of the water balance and hence the mangrove vegetation along with the environmental services it offers to the entirety of the Cuyutlán lagoon system.

…

Presence of birds as indicators of the health of the mangrove ecosystem.

…

For the foregoing reasons, the mangrove zone impacted by the alternative under review is not nesting, breeding, refuge, feeding, or spawning grounds for fauna present at the site; therefore, the development of the Project will have no impact on birds

Presence of birds as indicators of the health of the mangrove ecosystem.

…

Thus, even though the impacts of the alternative will be felt on 0.8 hectares of mangrove swampland, this impact will favor the development of trophic chains in the mangrove ecosystem that are present in the rest of the Cuyutlán lagoon system, what with rehabilitation of the water balance in the mangrove ecosystem.[106]

 Integrity of interactions between the mangrove zone, rivers, dunes, the adjacent

[105] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 8, at 93–5.
[106] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 8, at 95–7.

coastal zone, and corals. The DGIRA found that "the development of the Project will have no impact on interactions between the mangrove zone, rivers, dunes, the adjacent coastal zone, and corals, especially these last, since there are none on the site."[107]

 Changes in ecological characteristics and services of the mangrove ecosystem:

> while the Project has impacts on 0.8 hectares of mangrove swampland out of a total of 436.09, it will not cause changes to the ecological characteristics and services of the existing mangrove ecosystem in the Cuyutlán lagoon system; on the contrary, it will lead to the recovery of the regional environmental system and its environmental benefits by ensuring its carrying capacity, which will generate recovery of the mangrove ecosystem.[108]

IV. 10. Effective enforcement of LGEEPA Article 35 Bis and REIA Articles 22 and 46 in respect of the alleged expiration of the environmental impact assessment procedure[109]

The Submitters state that the environmental impact authorization for the Manzanillo LNG Project was not granted within the legally prescribed time period, thus violating LGEEPA Article 35 Bis, REIA Articles 22 and 46, and Article 60 of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo*—LFPA), asserting as follows:

> 2.23. On 21 May 2007, via doc. no. S.G.P.A./DGIRA/DESEI/0712/07 (Appendix 16), the DGIRA informed the CFE of its decision to extend the deadline by 60 days, one single time, due to the complexity of the Manzanillo LNG Project, pursuant to LGEEPA Article 35 BIS, last paragraph, and Article 46 of the Regulation to the LGEEPA respecting Environmental Impact. However, the authorization was granted six months after the legally prescribed time period, on 11 February 2008. This is a violation of the LGEEPA, the Regulation to the LGEEPA respecting Environmental Impact Assessment, and the Federal Administrative Procedure Act (Article 60).[110]

In this regard, the Secretariat, in its First Determination, found it relevant to devote further study to the provisions cited by the Submitters, since, in its judgment, these provisions have environmental protection as their primary purpose:

> iv. LGEEPA Articles 30, 35 and 35 BIS; Articles 4 section IV, 13 section III, 22 and 46 of the Environmental Impact Assessment Regulations; and LFPA Article 60
>
> 18. The cited provisions of the LGEEPA and the Environmental Impact Assessment Regulations are considered for analysis *because their primary purpose is the protection of the environment,* and they establish requirements to be met by the persons responsible for a project or infrastructure works to obtain an environmental impact authorization, determine the criteria for Semarnat to consider during the environmental impact assessment and authorization procedure, provide the possibility of holding a public consultation during the procedure, *and establish the deadlines for the environmental impact procedure. As regards the cited LFPA provision, establishing the revocation of procedures for causes attributable to the interested party, the Secretariat considers it for analysis insofar as it relates to the effective enforcement of the terms*

[107] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 8, at 99.
[108] Authorization S.G.P.A./DGIRA.DG.0465.08, Recital 8, at 100.
[109] Second Determination at 22, para. 71(g).
[110] Original Submission at 12–13; Revised Submission at 12–13.

and deadlines provided in the Environmental Impact Assessment Regulations.[111]

In its Second Determination, the Secretariat requested a response from the Party in regard to REIA Articles 22 and 46, LGEEPA Article 35 Bis, and LFPA Article 60 in respect of the alleged expiration of the environmental impact assessment procedure for the Manzanillo LNG Project.[112]

The Government of Mexico does not share the Secretariat's interpretation as to the nature of these provisions as environmental law, since REIA Articles 22 and 46, LGEEPA Article 35 Bis, and LFPA Article 60 do not have environmental protection or the prevention of a danger to human life or health as their primary purpose. Rather, their purpose is to establish the procedure whereby Semarnat is empowered to request additional information for the assessment of a Project; to establish deadlines for the issuance of environmental impact decisions; to empower Semarnat to declare the procedure to have expired pursuant to LFPA Article 60, and to regulate the expiration procedure.

Notwithstanding the foregoing, the Party finds unfounded the assertions in submission SEM-09-002 to the effect that the CFE did not meet the requirement imposed by the DGIRA in document […] on time and that therefore, in accordance with the environmental impact assessment procedure and given the applicability of LFPA Article 60, it was obligated to declare the procedure to have expired.

On this point, it should be noted that the legal basis for requesting clarification, rectification, or elaboration on an EIS is found in LGEEPA Article 35 Bis and REIA Article 22, which provide as follows:

> **ARTICLE 35 BIS.-** The Ministry shall, within the 60 days following receipt of the environmental impact statement, issue the corresponding decision.
>
> The Ministry may request clarification, rectification, or elaboration on the content of the environmental impact statement submitted to it, and in such case the time period for conclusion of the procedure is suspended. The suspension may not in any case exceed sixty days as from the time it is declared by the Ministry, and always provided that the required information is submitted to it.
>
> In exceptional cases where, due to the complexity and dimensions of a work or activity, the Ministry needs additional time to carry out its assessment, the time period may be extended for up to sixty additional days, provided that this is justified pursuant to the regulation to the Act.
>
> **ARTICLE 22.** In cases where the environmental impact statement exhibits insufficiencies that hinder the assessment of the project, the Ministry may, a single time and within the forty days following the opening of the file, request clarification, correction, or elaboration from the developer on the content thereof and, in such case, the period of sixty days to which Article 35 Bis of the Act refers shall be suspended.

[111] First Determination at 7.
[112] Second Determination at 22.

> The suspension may not exceed 60 days as from the day it is declared. Once this time has elapsed without the information being submitted by the developer, the Ministry may declare the procedure to have expired pursuant to LFPA Article 60.

It may be observed from the legal provisions invoked that the Federal Legislative Branch established that when the Federal Public Administration, in this case represented by the DGIRA, finds that an EIS is deficient, it may request the developer, a single time, to clarify, rectify, or elaborate on the information.

In the matter at issue, there is evidence in the corresponding file attesting to the fact that the administrative authority made the request to the Developer via doc. no. […], of February 2 of the same year, and that the request was complied with in a timely manner and in due form on May 4, with the Developer submitting the requested additional information.[113]

In addition, the Submitters assert that the authority should have declared the procedure to have expired because, in their estimation, the additional information was submitted after the legal deadline, basing their assertion on LFPA Article 60, which, as may be seen, was not the case.

In order to determine whether the procedure invoked by the Submitters took place pursuant to law, one must consider the scope and content of LFPA Article 60:

> ARTICLE 60. In *procedures initiated by the interested party, where the file is inactive for reasons attributable to the interested party, the Federal Public Administration shall notify it that after three months have elapsed, the procedure will expire.* Where said period elapses without the interested party taking the steps necessary to renew the procedure, the Federal Public Administration shall archive the proceedings, giving notice thereof to the interested party. The remedy provided by this Act may be taken against the decision declaring expiration.
>
> …
>
> In the case of procedures initiated as of right, these shall be construed to have expired, and the proceedings shall be archived, at the request of the interested party or as of right, within the thirty days following the expiration of the time period in which to issue a decision.

From the legal provision invoked it may be observed that the Federal Legislative Branch established that the Federal Public Administration, in this case, acting by the DGIRA, may only cause administrative procedures to expire where the following conditions hold:

> i) where a procedure has been initiated by an applicant and it is inactive for causes due to the applicant.
>
> ii) where the authority notifies the applicant that expiration will occur after three months have elapsed.

[113] In the determination of deadlines, it should be realized that in Mexico, February 5, March 21, April 5 and 6, and May 1 were not working days.

In the matter at hand, there is no evidence in the file that the administrative authority notified the Developer that the procedure would expire after three months have elapsed, and *the reason why there is no such evidence is that the additional information was submitted in a timely manner and in due form.*

Since this is a procedure carried out at the initiative of an applicant, for which expiration may occur due to procedural inactivity, which did not occur in this case, the authority would have to notify the applicant that expiration would result from the procedure being inactive for a period of three months, and in that way a decision could be made to archive and declare the expiration of the application, a situation that did not occur; therefore, the declaration of expiration to which the Submitters refer could not have been issued by the DGIRA in the case of the Manzanillo LNG Project.

IV.11. Effective enforcement of REIA Article 47 in relation to the alleged violation of conditions set out in the environmental impact authorization for the Manzanillo LNG Project[114]

[…][115][116]

IV.12. Article 4 of the Political Constitution of the United Mexican States and LOAPF Article 32 Bis (paragraph 72 of the Second Determination)[117]

The fourth paragraph of Article 4 of the Constitution enshrines the right of any person to live in an environment that is adequate for his or her development and well-being.

Concerning its inclusion in submission SEM/09-002, the Secretariat noted the following in its First Determination:

> The Secretariat has previously determined that the fourth paragraph of Article 4 of the Mexican Constitution falls under the definition of environmental law, as its primary purpose is the protection of the environment or the prevention of a risk to life or human health, and that such provision may be included in its analysis provided that it is complemented by the analysis of the environmental laws in question.[118]

This Party agrees with the Secretariat's interpretation, in the sense that the guarantee contained in Article 4 cannot be enforced in isolation, but rather through secondary legislation enacted by the Congress of the Union by virtue of the powers vested in it by paragraph XXIX-G of the Constitution to promulgate laws establishing the concurrence of the authorities of the three orders of government, within the scope of their respective jurisdictions, in matters of environmental protection and the preservation and restoration of ecological stability.

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[114] Second Determination at 22, para. 71(h).
[115] […]
[116] […]
[117] Second Determination at 22.
[118] First Determination at 6.

This interpretation is also supported by the preamble to the constitutional reform initiative to include the fourth paragraph of Article 4, where it is explained that:

> the enshrinement of this right in the constitutional corpus will provide a clear and unquestionable basis for its regulation, *by means of secondary legislation,* as well as the jurisdiction of the Federation, the federative entities, and the municipalities in matters of environmental protection and preservation of ecological stability, which must be exercised by the administrative authorities for the benefit of holders of rights to protection from arbitrary exercise of state power [*titulares del derecho público subjetivo*].[119] (Emphasis added.)

Thus, it is a matter for the relevant secondary laws to establish the mechanisms necessary to make the constitutional right in question effective, by means of regulation of the principles, policy instruments, criteria, remedies, and other legal concepts for making the constitutional right in question effective, as has been clearly stated by the Federal Judiciary in decisions such as the following:

> **ADEQUATE ENVIRONMENT FOR DEVELOPMENT AND WELL-BEING. CONCEPT, REGULATION, AND REALIZATION OF THIS GUARANTEE.[120]**
>
> Article 4, fifth paragraph, of the Political Constitution of the United Mexican States, added 28 June 1999, enshrines the right of every individual to an *adequate environment* for his development and well-being. Thus the preservation and restoration of ecological stability and the protection of the *environment* in Mexico are directly governed by the Constitution, in view of the great relevance of this matter. Indeed, protection of the environment and natural resources is of such great importance that it is integral to the "social interest" of Mexican society and entails and justifies, to the extent that they should prove unavailable, all those strictly necessary restrictions conducive to preserving and upholding this interest, specifically *in the laws establishing public order.* Thus, for example, sections 5.8.7 and 5.8.7.1 of Emergency Mexican Official Standard NOM-EM-136-ECOL-2002, Environmental protection–Specifications for conservation of marine mammals in captivity, prohibit the temporary or traveling exhibition of cetaceans. *Now, a systematic, causal, purposive, and principled interpretation of Articles 4 fourth paragraph, 25 sixth paragraph, and 73 paragraph XXIX-G of the Federal Constitution indicates that they protect the right of persons to an adequate environment for their development and well-being, to the adequate use and enjoyment of natural resources, to the preservation and restoration of ecological stability, and to sustainable development. The protection of an adequate environment for development and well-being, as well as the need to protect natural resources and to preserve and restore ecological stability, are fundamental principles that the Constitutional Convention sought to protect, and while it does not concretely and specifically delineate how this protection is to be effected, its content must indeed be defined based on a systematic, coordinated, and complementary interpretation of those legal provisions intended to identify, clarify, and promote the fundamental principles and values that inspired the Constitutional Convention.* FOURTH COLLEGIAL ADMINISTRATIVE TRIBUNAL OF THE FIRST CIRCUIT. (Emphasis added.)

Thus, it is to be concluded that in Mexico, the right conferred by the fourth paragraph of the Constitution is to be realized by the laws enacted by the Congress of the Union based on paragraph XXIX-G of Article 73 of the Constitution, for the purpose of *protecting the right of persons to an adequate environment for their development and well-being, the adequate use and exploitation of natural resources, the preservation and*

[119] http://www2.scjn.gob.mx/leyes/Default.htm.
[120] Tesis: I.4o.A.447 A. Location: Novena Época, *Semanario Judicial de la Federación y su Gaceta* XXI, January 2005, p. 1799.

restoration of ecological stability, and sustainable development, such as the LGEEPA, the General Wildlife Act, the General Sustainable Forestry Development Act (Ley General de Desarrollo Forestal Sustentable) *and the General Waste Prevention and Comprehensive Management Act* (Ley General para la Prevención y Gestión Integral de los Residuos) and that therefore, for the purposes of submission SEM/09-002, a study of the effective enforcement of the fourth paragraph of Article 4 of the Constitution must, in any case, be done not in an isolated or abstract fashion, but rather based on a systematic, comprehensive, and complementary interpretation of the applicable secondary law in the terms in which it has been discussed in this Party Response, based on which an environmental impact assessment was performed by Semarnat for the projects mentioned in submission SEM-009-02, making use of the powers vested in Semarnat by LOAPF Article 32 bis, among other provisions, as a jurisdictional provision of the Federal Public Administration.

V. CONCLUSIONS

For all the foregoing reasons, the Government of Mexico contends that this case does not warrant the development of a factual record.

In the first place, Mexico has notified the Secretariat in this Response of the existence of various pending judicial and quasi-judicial administrative proceedings which: i) were initiated in a timely manner by the Party; ii) meet the criteria of NAAEC Article 45(3), and iii) concern the same matters as the assertions contained in submission SEM/09-002 and entail review by the competent domestic bodies of the enforcement of the same legal provisions that the Submitters believe Mexico is failing to effectively enforce. While these proceedings are pending in Mexico, it cannot be asserted that the Party's environmental law has not been effectively enforced since the very purpose of these proceedings is to ascertain whether, as the Submitters assert, the applicable legal provisions have been contravened, which constitutes an additional channel through which to promote the effective enforcement of domestic law for environmental protection in the country. The Party contends that a parallel review by the Secretariat of the CEC would duplicate these efforts and interfere with the resolution of the proceedings in Mexico. This in itself constitutes sufficient grounds for proceeding no further, by the operation of NAAEC Article 14(3)(a).

This Response includes a section discussing various considerations relating to the acceptance of the submission for further study, in light of the two Secretariat determinations. While these considerations do not alter the fact that submission SEM-09-002 is already under study, the Party finds it important to specify the criteria which, pursuant to NAAEC Article 14(1) and (2), must be taken into consideration when deciding upon matters that warrant inclusion in the citizen submission procedure. This is so because the effectiveness of the citizen submission procedure depends in large measure on the careful review of whether these criteria are met, since the purpose is not to place an excessive procedural burden on the Parties but rather to advance the goals of the Agreement and strengthen cooperation among the Parties.

In this spirit, Mexico has shown that in the amending of the land use planning and environmental impact assessment instruments mentioned by the Submitters, the Party's environmental law has been considered and effectively enforced.

This Response also provides the Party's interpretation of those domestic legal provisions which may be considered environmental law because they meet the NAAEC Article 45(2) definition, having environmental protection as their primary purpose. For the Government of Mexico, the identification of provisions qualifying for study within the citizen submission procedure must take place according to strict criteria that are respectful of the scope of cooperation established by the NAAEC Parties. Given that this case involves powers of the authorities of the three orders of government in Mexico, this Response also sets out the Party's interpretation as to the ways in which these authorities are to interact in matters of environmental protection, adhering to a principle of concurrence within the ambit of their respective jurisdictions.

Based on these principles, the Government of Mexico has responded to each of the issues requested in the Secretariat's determinations. This Response explains the reasons and the powers according to which the state and municipal authorities have gone about amending of the land use planning instruments under their jurisdiction. In the case of the Regional Ecological Zoning Program for the Laguna de Cuyutlán Subwatershed, for example, we have shown that, contrary to the Submitters' assertions, the Government of the State of Colima made a comprehensive revision, increasing the area under protection, decreasing the areas covered previously by policies of use, and in fact proposing to declare the lagoon's wetlands as a protected natural area and a Ramsar site.

In the section dedicated to the domestic enforcement of the Ramsar Convention, even though the Laguna de Cuyutlán was not included on the List, it has been demonstrated that Mexico was in fact recognized recently by the Secretariat of this Convention in the form of a certificate, issued for the first time in the world, for excellence in fulfilling the commitments relating to the protection of wetlands in the country, having so far designated 130 Ramsar sites, 56 of which are protected natural areas.

This Response has also explained how, by means of the environmental impact assessment procedure for the Manzanillo LPG and LNG Projects, the Party has seen to the effective enforcement of the legal provisions governing environmental protection. From the information provided it has been clearly shown not only that the Submitters have presented no evidence of any case of failure to effectively enforce Mexican environmental law, but that in fact, further to the assessment of both Projects, the conditions and mitigation measures necessary to carry on the sustainable development of the corresponding works and activities have been established.

Based on the discussion in this Party Response, the United Mexican States contends that submission SEM/09/002 (Wetlands in Manzanillo) should be dismissed on the basis of the disqualifying grounds and the reasons set out in this Response.

Should the Secretariat, despite the disqualifying grounds and other considerations set down in this document, decide to devote further study to this submission, we request consideration of the *ad cautelam* arguments in this Party Response to the effect that this submission should be terminated without recommendation of a factual record.

Sincerely,

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CJM/ARS/LBC