

Reasons for Council Instructions Regarding Submission SEM-11-002 (*Sumidero Canyon II*)

Pursuant to its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation responsible for overseeing the implementation of the North American Agreement on Environmental Cooperation (“NAAEC”), the Council of the Commission of Environmental Cooperation (the “Council”), hereby makes public its reasons for the instructions to the Secretariat for the preparation of a factual record regarding submission SEM-11-002 (*Sumidero Canyon II*).

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

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

- (i) Article 111 *bis* of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) with respect to air emissions permitting;
- (ii) Article 155 of LGEEPA and Mexican Official Standard (*Norma Oficial Mexicana*) NOM-081-SEMARNAT-1994 (“NOM-081”) in relation to the noise emissions caused by the activities of the company Cales y Morteros del Grijalva, S.A. de C.V.;
- (iii) Article 28, section XI, of LGEEPA in relation to the requirement to file an environmental impact assessment and obtain an environmental impact authorization for the alleged modifications to, and expansions of, sources of environmental pollution between 1999 and 2002;
- (iv) Article 170 of the LGEEPA respecting the issuance of emergency measures, specifically those related to the prevention of damage to natural resources, air pollution and public health;
- (v) Articles 50 and 64 of LGEEPA in relation to the activities permitted in the Sumidero Canyon National Park and the setting of limits or acceptable rates of change or carrying capacities;
- (vi) Articles 80 and 81, section II, paragraphs b) and c), of the Regulation to LGEEPA respecting Protected Natural Areas (*Reglamento de la LGEEPA en Materia de Áreas Naturales Protegidas*—RANP), in relation to establishing restrictions on the Company’s natural resources use and enjoyment activities; and
- (vii) Article 65 of LGEEPA respecting the issuance of a management program for Sumidero Canyon National Park.

2. The Council's Instruction to the Secretariat

In the attached Council Resolution 14-05, the Council unanimously instructs the Secretariat to prepare a draft factual record exclusively in connection with the asserted failure to enforce the following:

- a) Article 155 of the LGEEPA and NOM-081 in connection with noise emissions derived from the operation of the company Cales y Morteros del Grijalva, S.A. de C.V., pursuant to the Article 15(1) Notification;
- b) Article 80 of the RANP, exclusively in connection with the definition of acceptable rates, limits of change or carrying capacities of the Sumidero Canyon National Park, related to the use and enjoyment of natural resources within the same; and
- c) The *chapeau* of Article 81 of the RANP, exclusively in connection with the extent to which the productive activities of the company Cales y Morteros del Grijalva, S.A. de C.V. generate benefits for the local inhabitants and whether these are compatible with the ANP declaration, the ANP management program, land use programs, NOMs and other applicable legal instruments.

Reasons of Canada and Mexico

1. Explanation Regarding whether the Party "is" failing to effectively enforce Environmental Laws according to Article 14(1) of the NAAEC

Article 14(1) of the NAAEC states that, "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party *is* failing to effectively enforce its environmental law." In its response, Mexico indicated the current enforcement actions being taken with respect to Article 28 section XI and Article 111 *bis* of the LGEEPA (see Party Response, sections VI.B, pages 36-42, and III.B.4, pages 18-24, respectively). Being aware of these current enforcement actions by the Government of Mexico, Canada and Mexico are of the view that a factual record on enforcement actions with respect to Article 111 *bis* of the LGEEPA between 2002 and 2009; Article 28 section XI of the LGEEPA between 1999 and 2002, is not warranted.

2. Explanation Regarding Pending Judicial and Administrative Proceedings Pursuant to Article 14(3)(a) of the NAAEC

Article 14(3)(a) of the NAAEC clearly states that "the Party shall advise the Secretariat...whether the matter is the subject of a pending judicial or administrative proceeding, *in which case the Secretariat shall proceed no further.*" Accordingly, Canada and Mexico are of the view that when Mexico advised the Secretariat in its response that matters in the submission relating to Article 28 section XI, Article 111 *bis*, and Article 170 of the LGEEPA were the subject of pending judicial and administrative proceedings as set forth in Article 45(3)(a) of the NAAEC, the Secretariat ought to have proceeded no further.

3. Explanation Regarding the Secretariat's Request for New Information

In its 6 September 2012 Article 14(1) and (2) Determination, the Secretariat asked the Party for “only information relating to the criteria for preservation of ecological stability in the Park at the time of issuance of the authorization” with respect to Articles 50 and 64 of the LGEEPA. Mexico provided this information in its response. However, in its Article 15(1) Notification, the Secretariat states that central questions of fact remain open on issues which were not previously identified by the Secretariat, including:

- (i) how the use of limestone resources in Sumidero Canyon National Park is in compliance with LGEEPA Article 50, second paragraph (§106); and
- (ii) if indeed the company Cales y Morteros del Grijalva, S.A. de C.V., did not demonstrate the technical and financial capacity to conduct natural resources exploration, exploitation and use activities in the Sumidero Canyon National Park without causing environmental deterioration (§107).

Canada and Mexico are of that view that it is beyond the Secretariat's mandate within the Submissions on Enforcement Matters (SEM) process to shift or alter its analysis with respect to issues that are central to the submission, particularly where the Party has not had an opportunity to provide information as part of its Party response.

4. Explanation regarding the Secretariat's Request for Redundant Information

Canada and Mexico are of the view that in its Party Response, the Government of Mexico provided all of the relevant information regarding its current actions concerning the effective enforcement of Article 65 of the LGEEPA, including working towards the development of a management program for the Sumidero Canyon National Park. The Council, therefore, considers that the development of a factual record with respect to this issue would be unnecessary.

Reasons of the United States

The United States agrees with Canada and Mexico that the specific issues mentioned in the instructions to the Secretariat in Council Resolution 14-05 should be included in the factual record. However, the United States would have also supported a broader scope for the factual record.

In taking this position, the United States wishes to stress that its views in this case do not reflect a judgment on the part of the United States as to whether Mexico is failing to effectively enforce its environmental law or a judgment as to whether the matters raised by the government of Mexico in its response to the SEM are judicial or administrative proceedings within the meaning of Article 14(3)(a) of the NAAEC. The position of the U.S. in this case is based on a long-standing policy in favor of promoting openness and transparency in the SEM process. This policy is reflected in Executive Order 12915 of May 13, 1994, which requires the United States, to the greatest extent practicable, to vote in favor of a factual record being prepared when recommended by the CEC Secretariat.