
Secretariat of the Commission for Environmental Cooperation

**Secretariat Determination pursuant to Articles 14(1) and (2)
of the North American Agreement on Environmental Cooperation**

Submitter: Comité Pro-Mejoras de la Ribera Cahuaré
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Party: United Mexican States
Date of original submission: 29 November 2011
Date of revised submission: 11 June 2012
Date of determination: 6 September 2012
Submission no.: SEM-11-002 (*Sumidero Canyon II*)

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances obtain, it then proceeds no further with the submission.¹
2. On 25 February 2010, Comité Pro-Mejoras de la Ribera Cahuaré (the “Submitter”) filed submission SEM-10-001 (*Cañón del Sumidero*) with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the “Agreement”).² After reviewing the submission in question, on 14 June 2010 the Secretariat notified the Submitter of its determination that the submission did not meet all the eligibility

¹ Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC’s Submissions on Enforcement Matters website at <http://www.cec.org/submissions> (viewed 7 May 2012).

² SEM-10-001 (*Cañón del Sumidero*) Article 14(1) Submission (25 February 2010), <http://goo.gl/Zi3xw> (viewed 11 July 2012).

requirements.³ When it did not receive a revised submission within the prescribed term, the Secretariat gave notice that processing of submission SEM-10-001 had concluded.⁴

3. On 29 November 2011, the Submitter filed a new NAAEC Article 14(1) submission with the CEC Secretariat.⁵ The Submitter asserts that Mexico is failing to effectively enforce its environmental law in connection with the operation of a quarry from which rock is being mined and which is allegedly causing harm to Cañón del Sumidero National Park, in Chiapas, Mexico.
4. On 10 May 2012, the Secretariat found that the submission in question did not meet all the eligibility requirements of NAAEC Article 14(1).⁶ In particular, the Secretariat found that certain provisions cited in the submission did not fit the NAAEC definition of “environmental law” and that, for other provisions which did qualify as environmental law, clarification from the Submitter was warranted in regard to its assertion of lack of effective enforcement.
5. On 11 June 2012, the Submitter filed a revised submission⁷ with the Secretariat pursuant to section 6.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”) in force at that time.
6. On 11 July 2012, the Council of the CEC by means of Council Resolution 12-06, adopted various amendments to the Guidelines. Considering that the 11 July 2012 Guidelines contain improvements to the timeliness and efficiency of the process, and that the process regarding this Submission will continue to the next stage, the Secretariat is issuing this determination in accordance with the 11 July 2012 Guidelines.⁸
7. The Secretariat finds that revised submission SEM-11-002 (*Cañón del Sumidero II*) meets all the eligibility requirements of Article 14(1) and, pursuant to the criteria of Article 14(2), merits requesting a response from the government of Mexico, for the reasons set out below.

³ SEM-10-001 (*Cañón del Sumidero*) Article 14(1) Determination (14 June 2010) <<http://goo.gl/tfnf8>> (viewed 11 July 2012).

⁴ CEC Secretariat, A14/SEM/10-001/11/COM (15 July 2010). On the *Cañón del Sumidero* submission processed in 2010, see the record of that submission on the CEC website at <<http://goo.gl/NfwuH>> (viewed 11 July 2012).

⁵ SEM-11-002 (*Cañón del Sumidero II*) Article 14(1) Submission (29 November 2011), <<http://goo.gl/Gjifw>> (viewed 12 January 2012) [Original Submission], at 1.

⁶ SEM-11-002 (*Cañón del Sumidero II*) Article 14(1) Determination (10 May 2012) <<http://goo.gl/ICRfx>> (viewed 11 July 2012) [Article 14(1) Determination].

⁷ SEM-11-002 (*Cañón del Sumidero II*) Revised Article 14(1) Submission (11 June 2012) [Revised Submission].

⁸ *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* in force as from 11 July 2012 [Guidelines], section 19.1:

The Secretariat should issue its determination under Article 14(1) normally within 30 working days of receiving the submission. If the Secretariat determines that the submission meets the Article 14(1) criteria, the Secretariat should issue its Article 14(2) determination normally within 30 working days thereafter....

II. SUMMARY OF THE SUBMISSION

5. This section presents a summary of those assertions made in the original submission that were also included in the revised submission.⁹ In addition, it contains a summary of the clarifications and other information requested by the Secretariat in its 10 May 2012 Article 14(1) determination.
6. The Submitter asserts that Mexico is failing to effectively enforce its environmental law in regard to the alleged irregular operation of a quarry that is allegedly causing harm to the Cañón del Sumidero National Park protected natural area.¹⁰ The Submitter asserts that Mexico is failing to effectively enforce Articles 28 paragraphs X, XI and XIII, 47 *bis* paragraph II subparagraph h), 50, 64, 65, 111 *bis*, 155, 156, and 170 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*);¹¹ Articles 17 and 17 *bis* paragraph G) subparagraph II of the Regulation to the LGEEPA respecting Air Pollution Prevention and Control (*Reglamento de la LGEEPA en materia de Prevención y Control de la Contaminación de la Atmósfera—RPCCA*);¹² Article 18 of the Regulation to the LGEEPA respecting the Pollutant Release and Transfer Register (*Reglamento de la LGEEPA en materia del Registro de Emisiones y Transferencia de Contaminantes—RRETC*);¹³ Articles 80, 81, 88 paragraph XIII, and 94 of the Regulation to the LGEEPA respecting Protected Natural Areas (*Reglamento de la LGEEPA en materia de Áreas Naturales Protegidas—RANP*);¹⁴ section 5.4.2 of Mexican Official Standard NOM-025-SSA1-1993 (“**NOM-025**”),¹⁵ and Mexican Official Standard NOM-081-SEMARNAT-1994 (“**NOM-081**”).¹⁶
7. The Submitter states that since 1963, the company Cales y Morteros del Grijalva S.A. de C.V. (the “Company”) has been operating a quarry from which materials are mined and processed “into slaked lime, caliche, gravel, screenings, and other materials used in construction.” The Submitter asserts that the quarry is located within Cañón del Sumidero National Park, which was declared a protected natural area (PNA) by executive order published in the Official Gazette of the Federation (*Diario Oficial de la Federación—DOF*) on 8 December 1980.¹⁷

⁹ The references included in this section correspond to the assertions made in the revised submission.

¹⁰ Revised Submission, *supra* note 7 at 1-3, 5, 11-12.

¹¹ *Ibid.* at 3-4, 6, 8, 11, 13.

¹² *Ibid.* at 8.

¹³ *Ibid.* at 8, 11.

¹⁴ *Ibid.* at 4-5.

¹⁵ NOM-025-SSA1-1993, *Environmental Health. Criterion for assessing ambient air quality, with respect to particles smaller than 10 microns (PM10). Permissible value for concentration of particles smaller than 10 microns (PM10) in ambient air, as a public health protection measure.* Diario Oficial de la Federación (DOF), 26 September 2005. Revised Submission, *supra* note 7 at 9.

¹⁶ NOM-081-SEMARNAT-1994 *que establece los límites máximos permisibles de emisión de ruido de las fuentes fijas y su método de medición*, DOF, 13 January 1995. Revised Submission, *supra* note 7 at 12.

¹⁷ Revised Submission, *supra* note 7 at 1. See also *Order declaring a National Park with the name of Cañón del Sumidero in the area described in the Fifth Cause of the Preamble, and expropriating to the Federal Government an area of 217,894.190 m² located in the state of Chiapas*, DOF, 8 December 1980, available at <<http://goo.gl/1iocT>> (viewed 12 January 2012), cited in Revised Submission, *supra* note 7.

8. Concerning the El Sumidero National Park PNA, the Submitter asserts that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) did not publish a management plan for the Park, “nor did it invite either the residents of Cahuaré or Comité Promejoras [the Submitter]” to a meeting for the purpose of formulating such a plan pursuant to LGEEPA Article 65;¹⁸ that the Company’s activities within the PNA in question do not adhere to those allowed by LGEEPA Article 50;¹⁹ that pursuant to LGEEPA Article 64, the Company “must demonstrate ... its technical and economic capacity to carry on its operations without causing environmental degradation”; that economic activities are subject to sustainable resource use provisions under RANP Articles 80 and 81,²⁰ and that pursuant to RANP Article 88 paragraph XIII, prior Semarnat authorization is necessary in order to carry on mining activities, the requirements for which are described in Article 94 of this regulation.
9. In relation to the authorizations and licenses which the Company is required to hold, the Submitter asserts that since 2003 Semarnat has not received any application to renew the Company’s operating license, and that the Company consequently does not validly hold the license in question.²¹ The Submitter maintains that as from the entry into force of the LGEEPA, the Company was required to conform to the environmental impact provisions of LGEEPA Article 28 paragraphs X, XI, and XIII.²²
10. In relation to environmental contamination caused by air and noise emissions and their impact on public health, the Submitter asserts that Semarnat is not conducting air quality monitoring, nor is there a register of the Company’s emissions as a source under federal jurisdiction pursuant to LGEEPA Article 111 *bis* and RPCCA Articles 17 and 17 *bis* paragraph G subparagraph II.²³ The Submitter further maintains that the Ministry of the Environment and Housing of the state of Chiapas (*Secretaría del Medio Ambiente y Vivienda*—Semavi) is not carrying out air quality monitoring pursuant to NOM-025,²⁴ and that Semarnat is failing to effectively enforce LGEEPA Articles 155 and 156²⁵ and NOM-081 in relation to noise emissions detected in the vicinity of the Company.²⁶
11. The Submitter asserts that “the destruction of this area is irreversibly altering the habitat for fauna and flora [in the PNA in question] [and] the health of the population” of Ribera Cahuaré.²⁷ The Submitter cites LGEEPA Article 170, which authorizes Semarnat to apply safety measures where there is an imminent risk of ecological instability or of serious harm to or deterioration of natural resources, or in cases of contamination with dangerous consequences for ecosystems, their components, or public health.²⁸

¹⁸ Revised Submission, *supra* note 7 at 3.

¹⁹ *Ibid.* at 4.

²⁰ *Idem.*

²¹ *Ibid.* at 5.

²² *Ibid.* at 6.

²³ *Ibid.* at 8.

²⁴ *Ibid.* at 9.

²⁵ *Ibid.* at 11.

²⁶ *Ibid.* at 12.

²⁷ *Idem.*

²⁸ *Ibid.* at 10-11.

III. ANALYSIS

12. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or nongovernmental organization asserting that a NAAEC Party is failing to effectively enforce its environmental law. As the Secretariat has stated in previous Article 14(1) determinations,²⁹ Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat interprets each submission in accordance with the Guidelines and the Agreement, without making an unreasonably narrow interpretation and application of the Article 14(1) requirements.³⁰ The Secretariat reviewed the submission with the latter perspective in mind.

A. Opening paragraph of Article 14(1)

13. The opening sentence of Article 14(1) allows the Secretariat to consider submissions “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law.” In its determination of 10 May 2012, the Secretariat found that the Submitters are non-governmental organizations or persons and that the submission meets the time requirement in that it deals with an ongoing situation. The Secretariat also found that for certain provisions that do qualify as environmental law under NAAEC Article 45(2), additional information concerning the assertions made in the submission was necessary.³¹

14. With the information provided in the revised submission, the Secretariat now proceeds to determine whether the following provisions qualify as environmental law: LGEEPA Articles 47 *bis* paragraph II subparagraph h), 50, 111 *bis*, and 155; RPCCA Articles 17 and 17 *bis* paragraph G) subparagraph II; RRETC Articles 18 and 19; and RANP Articles 80, 81, 88 paragraph XIII, and 94.

15. LGEEPA Article 50 refers to the characteristics of sites constituting national parks and states that in these, “only activities related to the protection of their natural resources, the increase of their flora and fauna and, in general, the preservation of ecosystems and their components may be permitted...”³² The Secretariat finds that this provision clearly fits the NAAEC definition of “environmental law” since its purpose is environmental protection that is accomplished by means of the protection of protected natural areas in the territory of the Party in question.³³

16. In regard to LGEEPA Article 47 *bis* paragraph II subparagraph h), included in the submission, the Submitter cites it solely for the purpose of explaining the formulation of the prior study in support of the amendment to the order creating the PNA in question and states that the site occupied by the Company would be zoned as a recovery

²⁹ See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

³⁰ See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998).

³¹ The Secretariat requested more information on assertions regarding effective enforcement of LGEEPA Article 28 (§18 and §37); Article artículo 28 section XXVIII of the Environmental Law for the State of Chiapas (§27 and §28); NOM-081 (§29 and §40), and LGEEPA Article 65 (§22 and §31-3).

³² General Ecological Balance and Environmental Protection Act, DOF, 28 January 1988 [LGEEPA], Article 50.

³³ Article 45(2)(a)(iii).

subzone.³⁴ Thus, no review of issues of effective enforcement of this provision is performed and, yet it serves to inform the Secretariat's review.

17. The first paragraph of LGEEPA Article 155 establishes a prohibition on emissions of noise (among other pollutants) in excess of the limits set by Mexican Official Standard [*Normas Oficiales Mexicanas* or "NOM"]. This provision fits the NAAEC definition of "environmental law" in that it aims to prevent emissions of pollutants into the environment over and above the limits set in the applicable NOMs.³⁵ In relation to LGEEPA Article 156,³⁶ this provides that the NOMs shall establish procedures and limits for the control of various pollutants, including noise; enumerates the powers possessed by the Ministry of Health (*Secretaría de Salud*) for determining harm to health caused by emissions, and provides for the participation of other agencies in the control thereof. The provision can be considered "environmental law" in accordance with NAAEC Article 45(2); however, the Secretariat is not reviewing its effective enforcement since the Secretariat cannot address issues relating to alleged deficiencies in the law itself, i.e. the setting of Mexican official standards.
18. LGEEPA Article 111 *bis* provides that Semarnat authorization is required for the operation and functioning of fixed sources under federal jurisdiction; it specifies the industrial sectors subject to this jurisdiction, and provides that only the specific subsectors determined by regulation — the RPCCA — shall be subject to federal air emission provisions. As to RPCCA Article 17, it establishes the obligations of those responsible for fixed sources under federal jurisdiction, while RPCCA Article 17 *bis* enumerates the industrial subsectors referred to in LGEEPA Article 111 *bis*, including "limestone production" under subparagraph II of paragraph G) ("CEMENT AND LIMESTONE INDUSTRY"). The Secretariat finds that the provisions determining jurisdictional aspects, although they do constitute environmental law, serve only to inform the Secretariat's further study of the Submission. However, as to the provisions setting out specific obligations,³⁷ these qualify as environmental law in that their primary purpose is environmental protection that is accomplished by means of "the prevention, abatement, or control of ... emission of ... environmental contaminants,"³⁸ and they establish requirements for the operation and functioning of pollutant sources with a view to protecting the environment in the spirit of NAAEC Article 5(1)(i).³⁹
19. RRETC Article 18 provides that reportable substances under federal jurisdiction, reporting thresholds, and technical criteria and procedures shall be determined by the applicable NOMs; as to RRETC Article 19, it provides that reportable substances under

³⁴ Revised Submission, at 3.

³⁵ Cf. North American Agreement on Environmental Cooperation, DOF, 21 December 1993 [NAAEC], Article 45(2)(a)(i).

³⁶ It should be noted that the Submitter notified the Secretariat of and corrected an error of form on 22 July 2012; namely, a correction of the citation of the law in question on page 11 of the revised submission.

³⁷ That is, LGEEPA Article 111 *bis* and RPCCA Article 17.

³⁸ NAAEC, *supra* note 35, Article 45(2)(a)(i).

³⁹ NAAEC, *supra* note 35, Article 5(1):

With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as:

...

(i) using licenses, permits or authorizations;

federal jurisdiction shall be measured in accordance with the procedures and techniques set out in the applicable NOMs. In principle, both provisions fit the definition of “environmental law”; however, the submission does not relate to deficiencies in Mexico’s establishment and operation of the Pollutant Release and Transfer Register (PRTR). The PRTR is a national database containing information on pollutants emitted into the air, water, soil, and/or subsoil or transferred in wastewater and/or hazardous waste.⁴⁰ The implementation of the PRTR is unrelated to the assertions made in the submission, and therefore the enforcement of RRETC Article 18 is not considered for further review.

20. As regards RANP Articles 80, 81, 88 paragraph XIII, and 94, all cited in the revised submission, the Secretariat finds that they must be considered with reference to LGEEPA Article 64, which is cited in the submission.⁴¹ These provisions establish the power of Semarnat to determine rates of use by means of proportions, acceptable alternate limits, or carrying capacities in regard to economic activities in PNAs;⁴² they establish the types of uses that may be granted authorization, stating that these may be authorized where “they generate benefits for the public”;⁴³ and provide that Semarnat authorization “with adherence to the established zones” is required in order to engage in mining activities.⁴⁴ As to Article 94 of the regulation in question, it determines the requirements governing applications for permits to carry on mining exploration and exploitation in PNAs and states that the authority shall verify the compatibility of activities with the PNA in question.
21. NAAEC Article 45(2)(b) stipulates that the term “environmental law” does not include provisions “the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.” In this connection, the Secretariat has previously found that while provisions may exist which, under certain circumstances, apply to the administration of natural resources, the determination of whether such provisions constitute “environmental law” must consider their “primary purpose” and the assertions made in a submission.⁴⁵
22. The term “environmental law” includes any provision whose primary purpose is environmental protection by means of “the protection of ... protected natural areas in the Party’s territory...”⁴⁶ The second paragraph of LGEEPA Article 64, which is cited by the Submitter, provides that in the granting of authorization for mining activities, the “technical and economic capacity to carry on the exploration, exploitation, or use in question, without impairing ecological stability,” must be demonstrated.⁴⁷ The legislation in question provides that anyone wishing to carry on extractive activities in a PNA must adhere to the “proportions, acceptable alternate limits, or carrying

⁴⁰ See Semarnat, *Registro de emisiones y transferencia de contaminantes (RETC)* <<http://goo.gl/ORjtn>> (viewed 25 July 2012)

⁴¹ Revised Submission, *supra* note 7 at 4.

⁴² Regulation to the LGEEPA respecting Protected Natural Areas, DOF, 30 November 2000 [RANP], Article 80.

⁴³ *Ibid.*, Article 81.

⁴⁴ *Ibid.*, Article 88 paragraph XIII.

⁴⁵ SEM-09-005 (*Skeena River Fishery*) Article 14(1) and (2) Determination (18 May 2010) <<http://goo.gl/pl9UO>> (viewed 25 July 2012). See also the analysis of the Submitter’s assertion in paragraph 29 *infra* of this determination on submission SEM-11-002.

⁴⁶ NAAEC Article 45(2)(a)(iii).

⁴⁷ LGEEPA, *supra* note 32, Article 64. Emphasis added.

capacities”;⁴⁸ that the activities must be “consistent with the sustainable development schemes [and] the applicable declaration”;⁴⁹ that the development of “mining” projects must maintain “the plant cover, the forest structure and composition, and biodiversity,”⁵⁰ and that “the ecosystems of relevance for the protected area” must not be affected significantly,⁵¹ among other conditions. The “primary purpose” of these provisions is clearly that of protecting the flora, fauna, and habitat of a PNA, by making economic activity subject to the declaration that created the park and by setting conditions for the maintenance of plant cover, forest structure and composition, and biodiversity without significantly affecting the ecosystems of relevance to a PNA.

23. The RANP provisions cited by the Submitter are thus consistent with the NAAEC definition of environmental law, and the Secretariat therefore finds that RANP Articles 80, 88 paragraph XIII, and 94 may be further reviewed. In addition, in regard to RANP Article 81, the Secretariat finds that only paragraph II subparagraphs b) and c) should be considered for further study since the remainder of this provision does not relate to the assertions made in the submission.⁵²
24. In the following sections, the Secretariat considers whether the revised submission contains assertions that qualify under the NAAEC submission mechanism.

i) The alleged failures of enforcement related to air pollution and noise caused by the Company’s activities

25. The Submitter asserts that Semarnat is failing to take action to control air pollution caused by the Company, pursuant to LGEEPA Article 111 *bis* and RPCCA Articles 17 and 17 *bis* paragraph G) subparagraph II.⁵³ Furthermore, it maintains that Semavi is not performing air quality monitoring as prescribed by NOM-025.⁵⁴ The provisions in question establish that operations of fixed sources under federal jurisdiction require

⁴⁸ RANP, *supra* note 42, Article 80, first paragraph.

⁴⁹ *Ibid.* Article 81, first paragraph. *Cf.* also RANP Article 94: “The Commission shall verify that the aforementioned activities are compatible with the declaration ... of the protected natural area where such activities are intended to be carried out...”

⁵⁰ RANP, *supra* note 42, Article 81 paragraph II subparagraph b).

⁵¹ *Ibid.*, Article 81 paragraph II subparagraph c).

⁵² RANP, *supra* note 42, Article 81 paragraph II subparagraphs b) and c):

In protected natural areas, only uses of natural resources that generate benefits for the residents living there and that are consistent with the sustainable development schemes, the applicable declaration, the management program, the environmental land use plans, the Mexican official standards, and any other applicable legal provisions shall be carried on.

The uses must fall within one of the following categories:

...

II. Development of activities and projects for the management and sustainable use of wildlife, as well as in the areas of agriculture, livestock production, agroforestry, fishing, aquaculture, or mining, provided that:

...

b) Biodiversity and the plant cover, structure, and composition of the forest are maintained;

c) The water balance of the area or of ecosystems of relevance to the protected area or constituting the habitat of native species is not significantly affected;

⁵³ Submission, *supra* note 7 at 8.

⁵⁴ *Ibid.* at 9.

Semarnat authorization,⁵⁵ and that the limestone industry subsector is under the jurisdiction of Semarnat.⁵⁶

26. Furthermore, the environmental law in question provides that the persons responsible for fixed sources under federal jurisdiction shall employ emission control equipment and systems; create an emissions inventory; install sampling platforms; measure their emissions; conduct perimeter monitoring, particularly of sources bordering a PNA; keep an operating and maintenance logbook for control equipment, and give prior notice to Semarnat of process startups, planned downtime, and failures that could occur in the control equipment.⁵⁷ All these are asserted by the Submitter to be obligations with which the Company must comply, and which Semarnat must effectively enforce.⁵⁸
27. In relation to the alleged noise pollution caused by the Company's activities, the Submitter maintains that Mexico is failing to effectively enforce LGEEPA Article 155⁵⁹ and NOM-081,⁶⁰ which prohibit emissions of noise (among other pollutants) in excess of the limits set by Mexican Official Standard. The Secretariat finds that the citation of LGEEPA Article 155 is sufficient to respond to the Secretariat's determination with regard to that provision of 10 May 2012.⁶¹
28. With respect to the alleged deficiencies in the operation of ambient air monitoring stations and the effective enforcement of NOM-025, the Submitter did not include in its revised submission Article 7: Section XXVIII of the Environmental Law for the State of Chiapas (*Ley Ambiental para el Estado de Chiapas*— the "State Environmental Law") that was indeed cited in the original submission. This provision refers to the Municipal authority to operate state ambient air monitoring stations. The Secretariat's determination as to whether Article 7: Section XXVIII of the State Environmental Law is "environmental law", was pending the filing of further information in a revised submission.
29. The Secretariat finds that with the revised submission, the assertion concerning alleged failures of enforcement relating to air pollution and noise caused by the Company's activities qualify for further review.

ii) The alleged lack of authorization to carry on mining exploration and exploitation within protected natural areas

30. The Submitter asserts that "no license renewal of any kind should be authorized" for the Company's mining activities and maintains that the RANP provisions are applicable to assertions in the submission in accordance with the Fifth Transitory Article of the RANP.⁶² LGEEPA Articles 50 and 64, and RANP Articles 80, 81 paragraph II

⁵⁵ LGEEPA, *supra* note 32, Article 111 *bis* first paragraph.

⁵⁶ LGEEPA Article 111 *bis* second and third paragraphs, and Article 17 *bis* paragraph G) subparagraph II of the Regulation to the LGEEPA respecting Air Pollution Prevention and Control [RPCCA], DOF, 25 November 1988.

⁵⁷ RPCCA, *supra* note 56, Article 17.

⁵⁸ Revised Submission, *supra* note 7 at 8.

⁵⁹ *Ibid.* at 11.

⁶⁰ *Ibid.* at 12.

⁶¹ Article 14(1) Determination, *supra* note 6, §40.

⁶² Revised Submission, *supra* note 7 at 5.

subparagraphs b) and c), 88 paragraph XIII, and 94 — all provisions cited in SEM-11-002 — set out the requirements and conditions for Semarnat, acting by the National Protected Natural Areas Commission (*Comisión Nacional de Áreas Naturales Protegidas*—Conanp), to grant authorization for mining activities in a PNA. As stated in paragraphs 20, 22, and 23 above, these cited provisions qualify as “environmental law” since they primarily refer to “the protection of ... protected natural areas in the Party’s territory” in the sense of NAAEC Article 45(2)(iii), and the Secretariat thus finds that the assertion concerning their effective enforcement merits further consideration.⁶³ Such further consideration is not to address issues relating to natural resource use, but only regarding the ecological stability of the Cañón del Sumidero National Park PNA, with regard to which the Company’s allegedly unauthorized activities are allegedly having negative environmental impacts.

iii) The Company’s alleged lack of environmental impact authorization

31. In its determination of 10 May 2012, the Secretariat found that the Submitter had to submit further information concerning its contention that LGEEPA Article 28 paragraphs X, XI and XIII, establishing the environmental impact assessment procedure, should apply retroactively.⁶⁴ In this regard, the Submitter maintains that these provisions should apply to the Company as from the entry into force of the act in question.⁶⁵ The Party has previously stated in response to another submission that the environmental impact authorization is only required for the performance of works or activities as from the entry into force of the act, and therefore:

... any claim that environmental impact assessment should apply to existing industrial activities which neither required it at the time they began operating, nor were obligated to obtain any such authorization whatsoever, is contrary to the inherently preventive nature of said instrument and, what is more, violates the guarantee of non-retroactivity enshrined in the Political Constitution of the United Mexican States.⁶⁶

32. The preventive nature of environmental impact assessment is such that it cannot be applied to works and activities initiated prior to the entry into force of the act.⁶⁷ Nevertheless, the Submitter maintains that this provision should be enforced with respect to works and/or activities carried on as from its entry into force;⁶⁸ that is, with respect to works and activities taking place subsequent to the entry into force of LGEEPA Article 28 paragraphs X, XI, and XIII. In this regard, the Submitter maintains that the Company’s recent activities are having negative impacts on the PNA in question.⁶⁹ The Secretariat finds that the assertion concerning the enforcement of the

⁶³ See, in this regard, the Article 14(1) determination, *supra* note 6, §34-36, which comments to the Submitter on deficiencies in the assertion concerning the alleged lack of effective enforcement of LGEEPA Article 64.

⁶⁴ Article 14(1) Determination, *supra* note 6, §17.

⁶⁵ Revised Submission, *supra* note 7 at 6.

⁶⁶ SEM-00-005 (*Molymex II*) Party Response under Article 14(3) (18 January 2001), <<http://goo.gl/YRezA>> (viewed 15 July 2012), at 4.

⁶⁷ *Idem*.

⁶⁸ Revised Submission, *supra* note 7 at 6.

⁶⁹ Revised Submission, *supra* note 7 at 12 (emphasis added):

... If we make a comparative analysis, the number of impacted hectares corresponds to the size of the extraction area, which means that even if the Park zone did not exist, they [the Company]

environmental impact assessment procedure in connection with works or activities of the Company carried out after 1 March 1988⁷⁰ qualifies for the Secretariat's further review pursuant to NAAEC Articles 14 and 15.

iv) The alleged failure to issue the management program for Cañón del Sumidero National Park

33. The Submitter asserts that Semarnat did not publish a management program for the Park, nor did it hold a public meeting for the purposes of producing such a program pursuant to LGEEPA Article 65.⁷¹ The Secretariat has previously found that the application of the time period for the formulation of such a program was clarified by Mexico in a response to another submission, and determined in that case not to proceed with the review of the provision.⁷² In its revised submission, the Submitter repeats its assertion that the provision in question is applicable.⁷³ From a review of available public information, the Secretariat finds that there have indeed been cases in which management programs were issued for PNAs created prior to the publication of the LGEEPA.⁷⁴ That is, Mexico has implemented management programs without, as the Party has stated in response to other submissions, being obligated to do so.⁷⁵ Said obligation was only incorporated into the LGEEPA on 28 January 1988, and without having to observe the one-year period added to the act by the amendment of LGEEPA Article 65 in 1996.⁷⁶ Under NAAEC Article 14(3)(b), Mexico may present further information in a response concerning the status of the preparation of a management program for the site in question.⁷⁷

34. Finally, it is hereby noted that the Secretariat's determination of 10 May 2012 found it appropriate to proceed with the review of the assertion concerning the alleged lack of effective enforcement of LGEEPA Article 170.⁷⁸

B. The six requirements of NAAEC Article 14(1)

35. In its determination of 10 May 2012, the Secretariat found that subject to the provision of additional information by the Submitter in accordance with NAAEC Article 14(1)(c),⁷⁹ the submission meets all the other submission requirements stipulated by

have already exhausted the resource on their property and, in point of fact, are now encroaching into the park area....

⁷⁰ LGEEPA, First Transitory Article, published in the DOF on 28 January 1988.

⁷¹ Revised Submission, *supra* note 7 at 3.

⁷² Article 14(1) Determination, *supra* note 6, §31-3.

⁷³ Revised Submission, *supra* note 7 at 3.

⁷⁴ For example, the Sian Ka'an Biosphere Reserve, created 20 January 1986, is covered by a management program, available at <<http://goo.gl/6LNhB>>; or similarly in the case of the Sierra de Manatlán Biosphere Reserve, created 23 March 1987, whose management program was published by a notice in the DOF on 17 November 2000, available at <<http://goo.gl/qgmAz>>.

⁷⁵ See: SEM-09-003 (*Parque Nacional Los Remedios II*) Response pursuant to Article 14(3) (21 December 2010), pp. 22-34.

⁷⁶ DOF, 13 December 1996.

⁷⁷ NAAEC, Article 14(3)(b): "The Party shall advise the Secretariat ... (b) of any other information that the Party wishes to submit...."

⁷⁸ Article 14(1) Determination, *supra* note 6, §38.

⁷⁹ *Ibid.*, §45.

NAAEC Article 14(1)(a)-(f).⁸⁰ Having reviewed the revised submission with reference to the environmental law in question and the assertions in SEM-11-002, the Secretariat proceeds to determine whether the submission merits requesting a response from the Party pursuant to Article 14(2) of the Agreement.⁸¹

C. NAAEC Article 14(2)

a. Whether the submission alleges harm to the person or organization making the submission

36. In regard to whether the submission alleges harm to the person or organization making the submission pursuant to Article 14(2)(a),⁸² the submission alleges harm to the Cañón del Sumidero PNA,⁸³ the ecosystem of which it is composed,⁸⁴ the health of the population of Ribera Cahuaré,⁸⁵ and the property of the residents of that locality.⁸⁶ The Secretariat finds that the submission alleges that the harm asserted is due to the alleged failure by Mexico to effectively enforce the environmental law in question and that this is related primarily to environmental protection. In addition, the Secretariat finds that: i) the submission alleges harm to the PNA in question and to the flora, fauna, and ecosystems of which it is composed, and ii) the harm asserted is related to the prevention of a danger to human health, in particular due to pollution caused by noise and air emissions.

37. The Secretariat concludes that the criterion of NAAEC Article 45(2)(a) is met.

b. Whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement

38. The Secretariat finds that further study of submission SEM-11-002 would advance the goals of the Agreement to foster the protection and improvement of the environment in

⁸⁰ See, in this regard, Article 14(1) Determination, *supra* note 6, §42-57.

⁸¹ Guidelines, *supra* note 8, section 7.1:

Where the Secretariat determines that the submission meets the criteria set out in Article 14(1) of the Agreement, the Secretariat will determine whether the submission merits requesting a response from the Party concerned. The Secretariat will accordingly notify the Council and the Submitter.

⁸² See also Guidelines, *supra* note 8, section 7.4:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

- (a) the alleged harm is due to the asserted failure to effectively enforce environmental law;
- (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.

⁸³ “The east face of the wall of Cañón del Sumidero National Park ... is severely damaged by cracking”; Revised Submission, *supra* note 7 at 12.

⁸⁴ “The destruction of this area is irreversibly altering the habitat for fauna and flora...” Revised Submission, *supra* note 7 at 12.

⁸⁵ “As stated, and as documented in the appendix [i.e., Appendix 20 of the submission], the results of the analysis are highly troubling, concluding that ... the origin of these [respiratory] diseases is directly related [*sic*]”; Revised Submission, *supra* note 7 at 10. See also the citation of Appendix 20 of the revised submission in the Secretariat’s 10 May 2012 Article 14(1) Determination, *supra* note 6, para. 48.

⁸⁶ “For the extraction of limestone and gravel, the Company is using dynamite for purposes of blasting; this is causing earth movements which, with the passage of years, have cracked the walls, ceilings, and floors of the houses”; Revised Submission, *supra* note 7 at 11.

the territory of one of the Parties, for the well-being of present and future generations,⁸⁷ and to increase cooperation among the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna.⁸⁸ In this regard, the information in the submission points to the importance of Cañón del Sumidero National Park, in that it has been declared a protected natural area;⁸⁹ is considered by the National Biodiversity Commission (*Comisión Nacional para el Uso y Conocimiento de la Biodiversidad*—Conabio) to be a priority terrestrial region and an important bird conservation area;⁹⁰ forms a part of the Cañón del Sumidero-Selva El Ocote corridor;⁹¹ and has been declared by Mexico as a wetland of international importance under the *Convention on Wetlands of International Importance, especially as Waterfowl Habitat*.⁹² The Park's importance is further demonstrated, according to the Submitter, by the presence of species listed in NOM-059-SEMARNAT-2001.⁹³

39. The submission is directed at issues of effective enforcement of environmental law in connection with the activities of a company dedicated to the extraction and processing of minerals in a protected natural area, the control of the pollution this is allegedly causing, the reduction of risks to the environment and public health asserted by the Submitter, and the protection of a PNA established under the laws of Mexico.
40. The Secretariat thus finds that the submission raises matters the further study of which would advance the goals of the Agreement in accordance with Article 14(2)(b).

c. Whether private remedies available under the Party's law have been pursued

41. Concerning whether private remedies available under the Party's law have been pursued, as per the Article 14(2)(c) criterion, the Secretariat proceeds to consider whether continuing with the submission process could duplicate or interfere with private remedies being pursued by the Submitter⁹⁴ and whether reasonable actions were taken by the Submitter to pursue private remedies prior to making the submission.⁹⁵ The submission attaches copies of documents related to private remedies available to the Submitter, which are described below.

⁸⁷ NAAEC, *supra* note 35, Article 1(a).

⁸⁸ *Ibid.*, Article 1(c).

⁸⁹ Revised Submission, *supra* note 7 and its reference to the "Order declaring a National Park with the name of Cañón del Sumidero in the area described in the Fifth Cause of the Preamble, and expropriating to the Federal Government an area of 217,894.190 m² located in the state of Chiapas," DOF, 8 December 1980, <<http://goo.gl/liocT>> (viewed 12 January 2012).

⁹⁰ *Ibid.* at 2.

⁹¹ *Idem.*

⁹² *Ibid.* at 2. See also National Protected Natural Areas Commission, "Prior study justifying the amending of the order creating Cañón del Sumidero National Park protected natural area," Chiapas, Mexico 2007, <<http://goo.gl/4N32l>> (viewed 12 January 2012), at 6, in Revised Submission, *supra* note 7, footnote 5.

⁹³ Revised Submission, *supra* note 7 at 3. See Mexican Official Standard NOM-059-SEMARNAT-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, DOF, 6 March 2002, <<http://goo.gl/UFBsm>> (viewed 12 January 2012). This Mexican Official Standard was revised by publication in the DOF on 30 December 2010 and, consequently, its nomenclature changed to NOM-059-SEMARNAT-2010; available at: <<http://goo.gl/UFBsm>> (viewed 12 January 2012).

⁹⁴ Guidelines, *supra* note 8, section 7.5(a).

⁹⁵ *Ibid.*, section 7.5(b).

42. On 12 September 2002, the Profepa office in Chiapas received a complaint in relation to the Company's activities.⁹⁶ In this regard, in addition to identifying fugitive emissions, Profepa found that the Company did not possess an operating license, an emissions inventory, conduits for two air emissions sources, perimeter monitoring, or operating logs for its control and process equipment.⁹⁷ Profepa ordered safety measures, including the partial closing of the facility and a number of urgent measures.⁹⁸ Once these measures were implemented, on 25 November 2007, the Profepa office in Chiapas declared the public complaint proceeding "closed."⁹⁹ The Secretariat considers that the foregoing constitute reasonable actions by the Submitter to pursue the remedies contemplated in NAAEC Article 6(3)(b) and (c), since the public complaint is a mechanism provided by LGEEPA Articles 191 to 204 whereby sanctions or measures of redress were obtained, and whereby measures to enforce environmental laws and regulations were implemented. In addition the Secretariat finds that since the public complaint file is now closed, the submission process could not, in accordance with the information currently before the Secretariat, give rise to any duplication or interference.
43. The "representatives of Ribera Cahuaré" filed a complaint on 3 April 2009 requesting the intervention of the authorities "for the conservation and preservation of natural resources" as well as information concerning "permits granted" and their validity and the "territorial extent of the limestone mine [i.e., the Company] and the environmental protection programs that will be applied."¹⁰⁰ The Semarnat office in Chiapas referred the complaint to Profepa and the request for information to the liaison office (*unidad de enlace*).¹⁰¹ On 18 May 2009, the Profepa office in Chiapas received the complaint¹⁰² and consolidated it with another dating from 28 April 2009.¹⁰³ In this regard, an administrative proceeding was instituted, giving rise, *inter alia* – as regards forestry and environmental impact matters – to a warning, a temporary total suspension of activities, a fine, and an order of corrective measures,¹⁰⁴ and therefore the administrative file in question was declared "closed."¹⁰⁵ The Secretariat finds that the foregoing constitutes reasonable action by the Submitter to pursue the remedies contemplated in NAAEC Article 6(3)(b) and (c) and, in addition, finds that since the public complaint file is now closed, the submission process could not give rise to any duplication or interference.
44. On 9 June 2009, a request for information was filed with the environmental authorities of the state of Chiapas concerning the validity of environmental permits and authorizations issued to the Company, and environmental protection programs

⁹⁶ Revised Submission, *supra* note 7, Appendix 6: Profepa Office in Chiapas, doc. no. D.Q./113/2002 (19 September 2002).

⁹⁷ *Idem.*

⁹⁸ *Idem.*

⁹⁹ Revised Submission, *supra* note 7, Appendix 8: Profepa Office in Chiapas, Concluding decision in file no. DQ/113/2002 (28 November 2002).

¹⁰⁰ Revised Submission, *supra* note 7, Appendix 5: Semarnat, Federal Office in Chiapas, doc. no. D.F./SGPA/UGA/3194/10 (5 August 2010).

¹⁰¹ *Idem.*

¹⁰² Revised Submission, *supra* note 7, Appendix 10: Profepa Office in Chiapas, Concluding decision in file no. PFPA/14.7/2C.28.2/0388/09 (25 October 2009).

¹⁰³ *Idem.*

¹⁰⁴ *Idem.*

¹⁰⁵ *Idem.*

(including environmental monitoring programs).¹⁰⁶ This request for information was a reasonable action to engage the local authorities of the state of Chiapas, who found that they were not competent to act; still, this request did enable the Submitters to obtain information concerning air quality monitoring in the vicinity of the Company.¹⁰⁷

45. The Secretariat finds that the Submitter did pursue private remedies available under the Party's law and therefore meets the criterion of NAAEC Article 14(2)(c).

d. Whether the submission is drawn exclusively from mass media reports

46. With respect to the criterion of Article 14(2)(d), the Secretariat finds that the submission is not drawn exclusively from mass media reports, but rather from technical and legal information gathered by the Submitter that serves as the basis for the Submission.

IV. DETERMINATION

47. The Secretariat has reviewed submission SEM-11-002 (*Cañón del Sumidero II*) in accordance with NAAEC Article 14(1) and found that it meets the requirements thereof for the reasons stated. Likewise, with reference to the criteria of NAAEC Article 14(2), the Secretariat finds that the submission merits requesting a response from the interested Party, in this case the United Mexican States, to the following matters raised by the Submitter:

- a. The effective enforcement of RPCCA Article 17 in relation to the alleged lack of action to control air pollution caused by the Company's activities, LGEEPA Article 111 *bis* in relation to the possession and validity of the authorizations contemplated therein, which aspects are the responsibility of Semarnat pursuant to LGEEPA Article 111 *bis* and RPCCA Article 17 *bis* paragraph G) subparagraph II;
- b. Control of pollution caused by noise and air emissions pursuant to LGEEPA Article 155 and NOM-081;
- c. The alleged lack of Conanp authorization obtained under LGEEPA Articles 50 and 64 and RANP Articles 80, 81 paragraph II subparagraphs b) and c), 88 paragraph XIII, and 94. In this regard, the Party is requested to provide in a response only information relating to the criteria for preservation of ecological stability in the Park at the time of issuance of the authorization;
- d. The alleged failure to effectively enforce LGEEPA Article 28 paragraphs X, XI, and XIII in regard to the environmental impact authorization for those works or activities of the Company initiated subsequent to the entry into force of said provision;
- e. The application of the measures set out in LGEEPA Article 170 in relation to the matter raised in the submission;
- f. The Party may also present information in any response concerning the status of preparation of a management program for Cañón del Sumidero National Park and the mandatory nature of LGEEPA Article 65 with respect to the site in question - this being a central issue raised in SEM-11-002.

¹⁰⁶ Revised Submission, *supra* note 7, Appendix 4: Semavi Liaison Unit, unnumbered document relating to request for information no. 1422 (29 June 2000).

¹⁰⁷ *Idem.*

48. Pursuant to Article 14(3) of the Agreement, the Party may provide a response to the submission within the 30 working days following the receipt of this determination, or by **19 October 2012**. In exceptional circumstances, the Party may notify the Secretariat of an extension of the deadline for a response to 60 working days;¹⁰⁸ i.e., until **4 December 2012**.
49. Recognizing that a response from the government of Mexico may include confidential information, and given the fact that the Secretariat must make public the reasons for recommending or not recommending a factual record, the Secretariat notes that section 17.3 of the Guidelines invites the Party to provide a summary of any confidential information for public disclosure.¹⁰⁹
50. Attached to this determination are copies of the submission and its appendices.

Respectfully submitted for your consideration this 6 September 2012.

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: Paolo Solano
Legal Officer, Submissions on Enforcement Matters Unit

(original signed)
per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

cc: Mr. Enrique Lendo, Alternate Representative, Mexico
Mr. Dan McDougall, Alternate Representative, Canada
Mr. Michael Stahl, Interim Alternate Representative, United States
Mr. Evan Lloyd, Executive Director, CEC Secretariat
Submitter

¹⁰⁸ Cf. section 9.2 of the Guidelines, *supra* note 8.

¹⁰⁹ Guidelines, *supra* note 8, section 17.3:

Given the fact that confidential or proprietary information provided by a Party ... may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted, contributors are encouraged to furnish a summary of such information....