

Party Response by the Government of the United Mexican States

Submission SEM-15-001

(Bosque La Primavera)

Filed with the Secretariat of the Commission for
Environmental Cooperation pursuant to Article
14(3) of the North American Agreement on
Environmental Cooperation



I. INTRODUCTION

On 20 July 2015, a submitter designating his name and identification data as confidential in accordance with Article 11(8) of the North American Agreement on Environmental Cooperation (“NAAEC”), and Juana Pérez, representing the group “Salvemos Unidos El Bosque de la Primavera” (the “Submitters”), filed a submission on enforcement matters with the Secretariat of the Commission for Environmental Cooperation (“Secretariat”) in accordance with NAAEC Article 14, asserting that Mexico is failing to effectively enforce its environmental law in connection with the real estate development known as “Santa Anita Hills” (the “Project”), located in the municipality of Tlajomulco de Zúñiga, in the state of Jalisco, 2.5 kilometers from Bosque La Primavera Wildlife Protection Area (the “La Primavera PNA”).

On 7 August 2015, the Secretariat found that submission SEM-15-001 did not meet all the eligibility requirements of NAAEC Article 14(1) and, pursuant to section 6.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), notified the Submitters that they had 60 working days in which to file a revised submission, which was filed by the Submitters on 2 November 2015.

On 21 January 2016, the Secretariat issued a second determination (the “Article 14(1)(2) Determination”) finding that submission SEM-15-001 meets all the requirements of NAAEC Article 14(1) and 14(2) and requesting a response from the Government of Mexico in regard to the effective enforcement of the following provisions of environmental law in connection with the Project:

- a) Articles 7, 8, 9 paragraphs I, IV and XXI, 10 paragraph I, 63, and 70 of the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS), in regard to wildlife;
- b) LGVS Article 107, Article 189 of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), and Articles 144 paragraphs I and III, 170, 172, and 174 of the Jalisco State Environmental Protection Act (*Ley Estatal del Equilibrio Ecológico y la Protección al Ambiente de Jalisco*—LEEEPA-Jalisco), in regard to public complaints, safety measures, and sanctions;
- c) Article 117 of the Mexican Sustainable Forestry Act (*Ley General de Desarrollo Forestal Sustentable*—LGDFS), LGEEPA Articles 34 paragraphs IV and V and 35 paragraph III, and LEEEPJA-Jalisco Articles 8 paragraph I, 28 paragraph III, 29 paragraph II, and 31 paragraph II, in regard to environmental impact assessment and forested land use change;
- d) LEEEPJA-Jalisco Articles 5 paragraphs XXII and XXIII, 6 paragraph XV, and 23 paragraph II, in regard to sustainable land use.

The Government of the United Mexican States hereby issues this Party Response pursuant to NAAEC Article 14(3) and the Guidelines, providing information requested by the Secretariat in its Article 14(1)(2) Determination and addressing each and every assertion made by the Submitters in their Revised Submission, including information concerning the measures completed or currently

being taken by the Party to address the issues raised by the Submitters in the Revised Submission.

The Party hereby informs the Secretariat that this Party Response contains information considered confidential under Articles 13 paragraph V and 14 paragraphs IV and VI of the Federal Access to Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*), in particular the information contained in Section II of this Response, “Notification of Pending Proceedings.” Therefore, the Party asks the Secretariat to treat said information, as well as any other information noted as confidential in the Party Response, in accordance with NAAEC Article 39(1)(b) and 39(2) and sections 17.2 and 17.4 of the Guidelines.

II. NOTIFICATION OF PENDING PROCEEDINGS

Where a Party notifies the Secretariat of the existence of pending judicial or administrative proceedings in the sense of the NAAEC and the Guidelines, and if the matters covered by these proceedings were then to be addressed in a factual record, the result could be to interfere with national enforcement of the Party’s environmental law or to duplicate the review of matters raised simultaneously in the submissions on enforcement matters (SEM) process and before national administrative or judicial bodies. Furthermore, the existence of pending proceedings means that the efforts of a Party, in this case Mexico, to effectively enforce its environmental law in connection with the matters raised by the Submission have not yet concluded, so that it is impossible to make a comprehensive assessment of the matters raised in the Submission. The pending proceedings detailed in this section constitute governmental measures aimed at achieving high levels of environmental protection and compliance, in accordance with NAAEC Article 5(1)(b), (j), and (l).

What is more, NAAEC Article 14(2)(c) provides that in determining whether to request a Party Response, the Secretariat must be guided by “whether private remedies available under the Party’s law have been pursued.” On this score, section 7.5(a) of the Guidelines provides that in considering whether private remedies available under the Party’s law have been pursued by the Submitter, the Secretariat will be guided by whether “continuing with the submission process could duplicate or interfere with private remedies *being pursued* or that have been pursued, *in particular those that involve the Party*, and in such cases the Secretariat should consider terminating the process in whole or in part.”

In the specific case of the submission at hand, there are private remedies currently being pursued that meet the NAAEC Article 45(3) definition of “judicial or administrative proceeding.” These proceedings were initiated by the Submitters themselves, they concern the same matters as those raised by the Submitters, and they relate to the core assertions contained in the Revised Submission.

Notwithstanding the foregoing, with a view to advancing the goals of the NAAEC, this Party Response, concerning each and every one of the matters raised in the Submission, is provided to the Submitters. However, the Government of Mexico is of the view that the processing of SEM-15-001 should not continue, since environmental law enforcement efforts in relation thereto are still in progress, and a recommendation for the preparation of a factual record would necessarily give the public an incomplete vision of the matters raised in the Submission, or the preparation of a factual record could interfere with the processing of these proceedings, which are in the Submitters’ own interest. Therefore, the Party requests that the submission process be terminated pursuant to section 7.5(a) of Guidelines.

1. Pending proceedings before the Profepa office

CONFIDENTIAL INFORMATION. Pending administrative file no.
PFPA/21.5/2C.28.2/0147-15

[Information confidential at Party's request]

2. Pending proceedings initiated by the city council of the municipality of Tlajomulco de Zúñiga

CONFIDENTIAL INFORMATION. Judicial review action against the forested land use change approval

[Information confidential at Party's request]

III. PARTY RESPONSE CONCERNING WILDLIFE

A) Submitter's assertions and Secretariat's determination

Concerning the effective enforcement of the environmental law covered by this section, the Submitters assert the following:

- That the Project site is contiguous to Bosque La Primavera and that it constitutes a transition zone deserving protection because the execution of the real estate project, with its proximity to La Primavera PNA, threatens the existence of biological corridors and will exponentially increase the impacts of human activity on the ecosystem and its components.
- That the Government of Mexico must declare the area as critical habitat in accordance with the legally established criteria, being of the view that the Project activities are critically harming the movement and survival of various species inhabiting the area in question.

For its part, the Secretariat, in its Article 14(1)(2) Determination, without making reference to specific assertions by the Submitters, requested a response from the Party in regard to the following wildlife-related provisions:

- LGVS Articles 7, 8, 9 paragraphs I, IV and XXI, 10 paragraph I, 63, and 70.

B) Party response

Party response in relation to LGVS Articles 7, 8, 9, and 10

Concerning LGVS Article 7, the Government of Mexico emphasizes that the goal of this provision is to *explain the objectives* of the LGVS by establishing a cooperative relationship among the municipalities, the state governments, and the federal government in the area of wildlife. In addition to the declarative nature of these provisions, there is no specific assertion evident in either the Submission or the Article 14(1)(2) Determination concerning the alleged failure to effectively enforce this provision, nor is a response requested from the Party in relation to any of its components. Consequently, the Government of Mexico is not in a position to elaborate further on this provision.

Concerning LGVS Article 8, which provides that “the municipalities, the state governments and Federal District, and the federal government shall exercise their powers as regards the conservation and sustainable use of wildlife, in accordance with the following articles,” the Submitters assert that the city council of the municipality of Tlajomulco de Zúñiga is not exercising its powers thereunder, since it granted an urbanization permit for the Project in a purportedly illegal fashion. However, it is

evident from a reading of LGVS Article 8 that this provision is a mere enunciation of the manner in which the different orders of government must exercise the powers invested in them by LGVS Title III, which refers to the distribution of wildlife-related jurisdictions among the authorities of the three levels of government, but that neither the article in question nor any part of LGVS Title III has any bearing on the assertions made in this regard by the Submitters.

LGVS Articles 9 paragraphs I, IV and XXI and 10 paragraph I establish the jurisdictions of the federal government and the states as regards wildlife. Concerning LGVS Article 9 paragraphs I, IV, and XXI, the Submission asserts that the federal government failed to exercise its powers, since it granted land use change approval and the Profepa office definitively suspended a project that should not have been approved. From the foregoing it can be concluded that the Submission does not contain specific assertions concerning alleged failures to enforce LGVS Article 9 paragraphs I, IV, and XXI; rather, it makes assertions concerning legal powers exercised by the federal authorities in relation to the matters raised by the Submission, to which the corresponding sections of this Party Response (forested land use change, inspection and surveillance, etc.) refer. Moreover, the Submission does not contain specific assertions concerning any failure to enforce the powers of the states (in this case those of Jalisco) pursuant to LGVS Article 10 paragraph I. In view of the foregoing, the Government of Mexico is not in a position to provide the Submitters with information concerning the effective enforcement of that article.

Party response in relation to LGVS Article 63

Concerning LGVS Article 63, the Submitters state that “it is necessary to establish the zone as critical habitat in accordance with the legally established criteria, since the tree felling or transplanting, habitat modification, and delimitation that have continued to take place at that site in recent weeks are critically harming the movement and survival of various wildlife species inhabiting the area in question.”

For its part, LGVS Article 63 provides that the conservation of natural habitat for wildlife is in the public interest and that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) may establish critical habitat for wildlife conservation in the following cases:

- a) In the case of specific areas within the distribution of a species or population at risk at the time of its being listed, in which biological processes essential for its conservation are taking place.*
- b) In the case of specific areas whose extent has drastically decreased due to processes of deterioration, yet which still harbor a significant concentration of biodiversity.*
- c) In the case of specific areas harboring an ecosystem at risk of disappearing, if the factors that caused the reduction of its historical area are still operating.*
- d) In the case of specific areas harboring essential biological processes and containing species susceptible to specific risks, such as certain types of pollution, be it physical, chemical, or acoustic, or at risk of colliding with land or water vehicles that may have an impact on their populations.*

From the foregoing it may be inferred that Semarnat has the discretionary power to declare certain areas as critical wildlife habitat where they possess certain characteristics. When LGVS Article 63 is applied to the Project area, it is found that the latter contains no species or populations at risk; that there has been no drastic decrease in the size of the area in question, nor does it harbor any ecosystem at risk of disappearing. On the contrary, the area already has special protection by virtue

of Bosque La Primavera having been declared a protected natural area of the wildlife protection type, with a view to preserving the wildlife species inhabiting the area, protecting the ecosystem and the biological processes taking place therein. Moreover, it should be noted that the Project is located outside the area protected by La Primavera PNA. The Government of Mexico thus determined that the ideal environmental regulatory instrument for protection of the area's wildlife is a protected natural area under federal jurisdiction, and not a declaration of critical wildlife habitat, which has no technical justification in an area such as the one occupied by the Project, which is outside the boundaries of La Primavera PNA and is largely urbanized. In this regard, the management plan for La Primavera PNA (the "Management Plan") acknowledges that the purpose of this protected natural area is as "*critical habitat for wildlife species representative of the region, a genetic reservoir, and a biological corridor between the region's natural systems, by maintaining biological diversity and genetic heritage and promoting the continuity of evolutionary processes, making it a living laboratory for the conduct of scientific research and environmental education.*"

In accordance with the foregoing, Semarnat, acting by its Wildlife Branch (*Dirección General de Vida Silvestre*), reports that no critical wildlife habitat has been declared in the Project area (Appendix E); however, it also states that the area occupied by La Primavera PNA, its vicinity, and its zone of influence does comprise wildlife conservation management units (UMA), and that various scientific collection projects have been approved with a view to assessing the status of the species inhabiting this area and promoting the sustainable use thereof.

Party response in relation to LGVS Article 70

LGVS Article 70 provides that "Where problems involving the destruction, contamination, degradation, desertification, or disequilibrium of wildlife habitat occur, the Ministry shall, without delay, formulate and implement prevention, emergency response, and restoration plans for the recovery and re-establishment of conditions conducive to the evolution and continuity of natural wildlife processes." As described in the section of the Response concerning LGVS Article 63, the situations to which LGVS Article 70 refers do not obtain in the Project area, which, as indicated in the CUSF and on the maps provided by the Submitters themselves, exhibits a high degree of anthropogenic activity and urbanization, being surrounded by various subdivisions such as El Palomar (to the north), Los Gavilanes (to the south), Santa Isabel (to the east), San José del Tajo (to the northeast), and the Santa Anita Golf Club (to the southwest). Thus, the development of the Project does not involve the destruction, contamination, degradation, or desertification of wildlife habitat, since the Project will be developed in a highly urbanized area outside La Primavera PNA, which, as noted above, has the purpose of serving as critical habitat for the representative wildlife species of the region.

In this regard, the executive order declaring La Primavera PNA acknowledges the importance of this area, which, due to its topography, constitutes a natural refuge for the wild fauna freely subsisting in this region, establishing as one of the objectives motivating its protection that of "preserving the region's fragile habitats and ecosystems, ensuring the ecological stability and the continuity of evolutionary and ecological processes, and protecting the existing biological diversity so as to achieve sustained natural resource use," establishing that the demographic pressure in the area has not reduced faunal diversity.

For its part, and specifically concerning the Project, in its technical opinion on the CUSF, the State Forest Council (*Consejo Estatal Forestal*) recommended that a fauna salvage plan be developed, indicating the sites designated as holding and rehabilitation areas as well as sites to which the salvaged fauna will be permanently transferred.

The CUSF states that the development of the Project will not compromise the biological diversity of the area, since the flora species present on the Project site are very well represented in the area and

none of them is at risk. It stresses that the Project site does not harbor wildlife species classified as being at risk under NOM-059-SEMARNAT-2010 *Environmental protection-Mexican native species of flora and fauna-Risk categories and specifications for inclusion, exclusion or change-List of species at risk* (NOM-059). In addition, the CUSF states that the fieldwork produced various records of mammals, birds, and herpetofauna that are widely distributed and abundant in La Primavera PNA, and that the developers must implement the following measures in order to carry out the Project:

- The best conserved areas of the Project site (which exhibits a degree of disturbance) correspond to the streams, hence these must be conserved along with a 10-m strip of vegetation along their banks, so that wild fauna can continue to use these places and move towards green spaces.
- Prior to the commencement of work on the Project, the developers must implement measures to drive away wild fauna and, as applicable, to salvage and/or relocate the specimens present on the site.
- The Project developers must take all measures necessary to prevent hunting, trapping, sale, and/or trafficking of wild fauna species, as well as the collection, sale, and/or trafficking of wild flora species found on the Project site, with trapping and collection, respectively, being exclusively used for purposes of salvage and/or relocation.

IV. PARTY RESPONSE IN RELATION TO PUBLIC COMPLAINTS, SAFETY MEASURES, AND SANCTIONS

A) Submitter's assertions and Secretariat's determination

The Submitters assert that more than 5,000 public complaints concerning the Project have been filed with the Profepa office and have not been addressed.

In addition, the Submitters assert that they have filed various complaints with the Office of the State Attorney for Environmental Protection (*Procuraduría Estatal de Protección al Ambiente*—Proepa), the Jalisco State Ministry of Environment and Territorial Development (*Secretaría del Medio Ambiente y Desarrollo Territorial*—Semadet), Semarnat, the Jalisco State Civil Protection and Firefighting Unit (*Unidad Estatal de Protección Civil y Bomberos*), and the Office of the Attorney General of the Republic (*Procuraduría General de la República*), yet no authority reported the alleged offenses to the Office of the Public Prosecutor (*Ministerio Público*) pursuant to LEEPA-Jalisco Article 170.

For its part, the Secretariat, in its Article 14(1)(2) Determination, though it does not refer to specific assertions by the Submitters, requested a response from the Party in regard to the following provisions related to public complaints, safety measures, and sanctions:

- LGVS Article 107;
- LGEEPA Article 189;
- LEEPA-Jalisco Articles 144 paragraphs I and III, 170, 172, and 174.

B) Party Response

Concerning the effective enforcement of LGVS Article 107 and LGEEPA Article 189, as stated by the Submitters, in 2015 the Profepa office received 6,304 public complaints relating to the matter raised in the Submission. These were consolidated in file no. PFPA/21.5/2C.28.2/0147-15, *which is being processed as of the date of this Party Response, as discussed in chapter II of this Party Response.*

However, contrary to the Submitters' assertions, the Profepa office, in addition to acting in the above-mentioned file, undertook various measures following from the aforementioned public complaints, including the following administrative proceedings opened against the company Inmobiliaria Rincón del Palomar, S.A. de C.V., which have been resolved and closed:

- a) File no. PFPA/21.3/2C.27.5/00031-15, containing an environmental impact-related administrative decision of 17 September 2015 that did not impose any sanctions because the aforementioned company had not yet commenced any work or activities relating to the forested land use change associated with the Project.
- b) File no. PFPA/21.3/2C.27.2/00059-15, containing a forest-related administrative decision of 22 October 2015 voiding the safety measure consisting of a temporary total suspension of the approval granted in file no. SGPARN.014.02.01.01.638/15, issued by the Semarnat office because no violations of environmental and/or forest law had been found.
- c) File no. PFPA/21.3/2C.27.5/00066-15, containing an environmental impact-related administrative decision of 17 November 2015 that did not impose any sanctions because the aforementioned company had not yet commenced any work or activities relating to the forested land use change associated with the Project, and concluding that no punishable violations of environmental law had taken place.

For its part, in relation to the effective enforcement of LEEPA-Jalisco Articles 170, 172, and 174, Proepa, which is, pursuant to LEEPA-Jalisco Articles 3 paragraph XXXII and 113, the deconcentrated body of Semadet responsible for inspection and surveillance in matters under state jurisdiction and for addressing complaints of noncompliance, referred these complaints to the Profepa office by means of file no. 497/446/15 (Appendix F), holding that the latter agency is competent to address the matter since the lands in question are under federal jurisdiction, pursuant to LGDFS Articles 158, 160, and 161 and Article 45 paragraphs I, II, and X of the Internal Regulation of Semarnat. In addition, given that the proposed Project area is comprised within the territory of the municipality of Tlajomulco, and pursuant to Article 115 paragraph V(d) and (f) of the Political Constitution of the United Mexican States in relation to approval, control, and surveillance of land use, Proepa, by means of file no. 496/445/15 of 1 June 2015 (Appendix G), referred the facts complained of in relation to the construction of the Project to the Municipal President of Tlajomulco for his attention to the matter within the scope of his powers. Because this matter is under federal jurisdiction, Proepa did not act under the articles mentioned by the Submitters; instead, it is the Profepa office which, in the exercise of its powers, is addressing the complaints filed under the above-mentioned articles of the LEEPA-Jalisco, as governmental measures for the enforcement of environmental laws and regulations under NAAEC Article 5.

Concerning the effective enforcement of LEEPA-Jalisco Article 144 paragraphs I and III in connection with the application of safety measures to the Project, Semadet-Proepa found that the provision does not apply to the case covered by the Submission, since LGDFS Articles 12

paragraphs XXIII and XXVI and 16 paragraphs XVII and XXI provide that the federal government is responsible for inspection visits and forest-related surveillance, as well as for applying safety measures and sanctions corresponding to forest-related offenses. Article 13 paragraph XXIX only obligates the states and the Federal District to notify the federal authorities of forest-related offenses, which Semadet did in this case, as established in the preceding paragraph.

Furthermore, the city council of Tlajomulco emphasizes that no urbanization work of any kind has been done on the Project, so that the ecological instability contemplated in LEEPA-Jalisco Article 144 has not materialized, since, in application thereof, it has taken the following measures to conserve and preserve the habitat and the environment, before any ecological instability has been caused by the granting of permits and approvals for the Project:

- Closing the urbanization worksite known as “San José del Tajo-Trailer Park,” whose purpose is to build the access road to the Project, as appears in Closing Order no. DGOT-008/2015 of 4 November 2015.

However, the company GVA Desarrollos Integrales, S.A. de C.V. appealed the city council act by filing an *amparo indirecto* (judicial review) motion, which is currently being heard by the Second District Administrative and Labor Affairs Court of the Third Circuit under file no. 2512/2015. As of this writing, the complainant has obtained a definitive stay of the act and the matter is being processed as a complaint under appeal file (*toca*) no. 36/2016.

B) PARTY RESPONSE IN RELATION TO ENVIRONMENTAL IMPACT ASSESSMENT AND FORESTED LAND USE CHANGE

A) Submitter’s assertions and Secretariat’s determination

Concerning the effective enforcement of the environmental law covered by this section, the Submitters assert the following in their Revised Submission:

- That the land use change from forested to urban is neither proper, valid, nor legal since the planned project area is located 2.4 km from Bosque La Primavera PNA and, as such, is within its buffer zone, according to the Management Plan for the protected natural area.
- That according to the consolidated technical report on forested land use changes containing the environmental impact statement (local modality) for the urbanization of the lot and the development of the Project, along with the technical study filed by the developer to justify the land use change from forested to urban, thousands of trees are to be felled and transplanted in order to carry out the Project.
- That the proposed Project area was recently (in March 2014) affected by a forest fire covering some 10 hectares, whose effects on the cortices of the trees on the Project site are still visible, and that it was therefore invalid, pursuant to LGDFS Article 117, to approve the forested land use change.
- That no public consultation was held on the environmental impact statement required for approval of the Project.

- That the forested land use change approval for the Project was granted fifteen years after the issuance of the urbanization permit, and that during this period the site underwent modifications that were not considered in this approval.
- That the development of the Project compromises rainwater collection.

For its part, the Secretariat, in its Article 14(1)(2) Determination, without making reference to specific assertions by the Submitters, requested a response from the Party in relation to the following articles concerning environmental impact assessment and forested land use change:

- LGDFS Article 117;
- LGEEPA Articles 34 paragraphs IV and V and 35 paragraph III;
- LEEPPA-Jalisco Articles 8 paragraph I, 28 paragraph III, 29 paragraph II, and 31 paragraph II.

B) Party Response

1. Considerations concerning LGDFS Article 117

Response in relation to the assertions concerning the location of the Project within the buffer zone of La Primavera PNA

The Submitters assert that the land use change from forested to urban is neither proper, valid, nor legal, “since the planned project area is located 2.4 km from Bosque La Primavera PNA and, as such, is within its buffer zone, according to the Management Plan for the protected natural area.”

On this point, it should be noted that the LGEEPA articles relating to protected natural areas do not form a part of the Article 14(1)(2) Determination. Notwithstanding the foregoing, the Submitters are reminded that the “buffer zone” is a zoning criterion of protected natural areas, whose main purpose, pursuant to LGEEPA Article 47 Bis paragraph II, is to “ensure that uses taking place therein conduce to sustainable development, simultaneously creating the conditions necessary for achieving the long-term conservation of the ecosystems comprised within it,” and that it may be composed of preservation subzones for traditional use, sustainable natural resource use, sustainable ecosystem use, special use, public use, human settlements, and recovery, each of which has a purpose and a different set of rules suited to that purpose.

From the foregoing it is evident that the buffer zones of protected natural areas under federal jurisdiction are of necessity within the boundaries established by the declaration thereof in order for them to be an object of regulation in the declaration itself or in the Management Plan. As is acknowledged in the Submission, the Project and the area covered by the CUSF are outside the boundaries of La Primavera PNA; therefore, the assertions to the effect that the land use change was illegal because the Project is located within the buffer zone of this PNA have no basis in the applicable legislation. It is probable, however, that the concept to which the Submitters refer is that of the “zone of influence” and not the “buffer zone,” which is defined in Article 3 paragraph III of the Protected Natural Areas Regulation to the LGEEPA as “those areas in the vicinity of a protected natural area that are in close social, economic, and/or ecological interaction with the protected natural area.”

For its part, the Management Plan for La Primavera PNA (Appendix H) identifies the whole city of Guadalajara as the zone of immediate influence of La Primavera PNA, stressing the intense pressure exerted by the city on the protected natural area. In addition, the Management Plan indicates that the zone of influence of La Primavera PNA comprises two hydrological regions, Lerma-Chapala-Santiago and Ameca; three hydrological basins, Vega-Cocula, Lago de Chapala, and Río Santiago-Guadalajara; and four sub-basins, Río Verde-Bolaños, Río Salado, Laguna San Marcos, and Corona-Río Verde, supplying aquifers in the Atemajac-Tesistán, Toluquilla, and Etzatlán-Ahualulco valleys, and indirectly the Ameca valley; in which there are 1,158 wells, 57 springs, and 452 water wheels of vital importance for the inhabitants of the area and certain industrial facilities such as the Tala, Ameca, and Bella Vista sugar refineries. That is, the zone of influence of La Primavera PNA is vast. It encompasses various regions harboring a range of economic activities, and the restrictions applicable to the protected natural area cannot be construed to apply to this whole zone.

Response in relation to the expansion of La Primavera PNA

In regard to the Submitters' concern about the idea of expanding the existing boundaries of La Primavera PNA, be it noted that the Government of Mexico has no plans to modify it in any manner. This is because there is no technical justification for a process of this nature, since, given the urban pressure exerted by the city of Guadalajara, there are no areas eligible for protection as a PNA, and the protection goals for this protected natural area are fully achieved within the existing boundaries thereof.

Response in relation to the assertions concerning transplanting of trees

The Submitters assert that according to the land use change application filed by the Project developers in the form of the Consolidated Technical Document, Form A (*Documento Técnico Unificado*—DTU-A) for the urbanization of the site and the construction of the Project, thousands of trees are to be felled and transplanted.

As the Submitters assert, a consequence of the CUSF was the granting of approval for the transplanting of the total volume of trees detailed in the following paragraph. However, it is unclear what failure of effective environmental law enforcement is being alleged, since a forested land use change approval necessarily involves the transplanting and/or removal of forest vegetation, which must be done as prescribed by the corresponding approval. The Submission does not assert any non-compliance with the terms of the CUSF, or that the land use change and/or removal of forest vegetation was effected without the applicable approval; it only asserts that forest vegetation will be removed and transplanted, which is a logical and legal consequence of approval.

The CUSF authorizes the removal of the following volumes de forest raw material:

Species	Specimens/ha	Volume	Unit of measure
<i>Pinus oocarpa</i>	5	29.581	cubic metres
<i>Quercus resinosa</i>	267	2063.18	cubic metres
<i>Quercus magnoliafolia</i>	189	1559.58	cubic metres

The CUSF specifies that the forest vegetation in the Project area has been degraded by human use of the area, and finds that one method of mitigating the impacts caused by the corresponding land use change is the salvage of forest species through the implementation of the flora relocation and salvage plan proposed in the DTU-A (the “Salvage Plan”), whose objective is to salvage the largest possible number of young and adult specimens, as well as seedlings of the flora species present in the Project area, putting an emphasis on the recovery of species of ecological importance.

The CUSF states that the following species were identified as potentially eligible for protection and conservation in the area subject to the land use change: 58 specimens of *Pinus Oocarpa*; 2,284 specimens of *Quercus magnolifolia*, and 3,500 specimens of *Quercus resinosa*. With the goal of effecting the transplanting of specimens in a manner that does not harm the surrounding environment, it was decided to establish the following dendrometric criteria for trees to be transplanted to conservation areas: tree specimens with diameter at breast height (dbh) less than or equal to 15 cm, since larger specimens are considered to have low probabilities of survival. In order to obtain a survival rate of at least 80% of the transplanted specimens, the following measures are under consideration: auxiliary irrigation, fungicide application, maintenance measures, weekly monitoring during the first three months and monthly follow-up for each salvaged specimen for the remainder of the first year after transplanting.

In addition, the CUSF imposed the following obligations on the Project developers in regard to the removal of forest vegetation:

- That forest vegetation located outside the boundaries comprised by the CUSF may not be affected by the work corresponding to the land use change, where this is located on the lot occupied by the Project, clarifying that in the event this should become necessary, a new forested land use change approval will be required.
- Prior to the commencement of forest clearing in the area covered by the CUSF, the Project developer must implement the Salvage Plan. Progress on and compliance with this condition must be noted in the reports to which condition XIV of the CUSF refers.
- Vegetation removal must be accomplished using mechanical and manual methods; chemicals and/or fire may not be used for that purpose. In addition, the vegetation removal must be gradual to avoid leaving bare, erosion-prone soil for long periods of time. Progress on and compliance with this condition must be noted in the reports to which condition XIV of the CUSF refers.
- Tree felling must be done using the directional technique, so that the tree falls towards the areas subject to land use change as per the CUSF and does not disturb the existing vegetation and the renewal of the adjacent areas. Progress on and compliance with this condition must be noted in the reports to which condition XIV of the CUSF refers.
- Unused debris resulting from forest clearing must be chipped and used to cover and promote regrowth, with a view to facilitating the establishment and growth of the natural vegetation, protecting the soil from the action of wind and rain, and thus preventing erosion. The residual material must be deposited in an unforested area near the work area. Progress on and compliance with this condition must be noted in the reports to which condition XIV of the CUSF refers.

Response in relation to the assertions concerning a forest fire

The Submitters assert that the Project area suffered a forest fire in March 2014, affecting nearly 10 hectares, whose effects on the cortices of the trees on the Project site are still visible, and that it was therefore invalid, pursuant to LGDFS Article 117, to approve the forested land use change.

Contrary to the Submitters' assertion, the CUSF (Appendix I) shows that during a technical visit by Semarnat office personnel on 20 March 2015, one year after the date of the alleged fire, "no evidence was found that the existing forest vegetation had been affected by any forest fire."

In addition, concerning the fire to which the Submitters refer, it should be noted that the National Forests Commission (*Comisión Nacional Forestal*—Conafor) drew up fire report no. 14-14-0067 (Appendix J), which states that the fire occurred on private property; that the site of the fire and its immediate vicinity is not an area of ecotourism, industrial, agricultural, real estate, or other interest; that the fire was caused by smokers; that the fire lasted four hours; that it was detected fifteen minutes after it began and that the firefighters arrived fifteen minutes after that; that it was fought with a truck belonging to Conafor using 6,000 litres of water; that *the fire affected 9.5 hectares of herbaceous vegetation and 1 hectare of tree vegetation.*

Thus, concerning the forest fire to which the Submitters refer in connection with the land use change approval, the following may be concluded:

- The fire to which the Submitters refer occurred one year before the date the CUSF was issued.
- There is no evidence that the fire to which the Submitters refer was deliberately set; on the contrary, it appears to have been an accidental fire that was quickly reported and fought.
- The area affected by the March 2014 fire is 10 hectares, including only 1 hectare of treed land, while the area covered by the CUSF is 20.2181 hectares.
- The Submission does not prove by careful comparison that the burned area is coincident with the Project area. Indeed, the technical visit made in connection with the issuance of the CUSF found that the area covered by the approval had not, on the date of the visit, been affected by a forest fire.

Response in relation to the urbanization permit

The Submitters assert that the forested land use change approval for the Project was granted fifteen years after the urbanization permit, and that the site underwent alterations during this time that were not considered in this approval.

On this point, any urbanization permit that the Project developers may have obtained would have had to be processed pursuant to Articles 12 and 196, *inter alia*, of the Jalisco State Urban Development Act (*Ley de Desarrollo Urbano*), which, even if they did qualify as environmental law under the NAAEC and hence eligible for consideration in an Article 14 submission, are not asserted in the Submission to be the subject of failures of effective enforcement by the Government of Mexico. Therefore, the Government of Mexico declines to comment on these provisions.

Notwithstanding the foregoing, the Submitters are reminded that an urbanization permit and a forested land use change approval are different and independent legal instruments under the jurisdiction of different authorities (the municipal authorities and the federal authorities, respectively). Forested land use change approvals (such as the one addressed by the Submission) are governed by the LGDFS, its regulation, and the *Order establishing the guidelines and procedures for consolidated applications for the indicated environmental impact and forest-related approvals to the Ministry of Environment and Natural Resources and assigning the corresponding powers to certain public servants* (the “Order”), which do not establish any requirement relating to the issuance of an urbanization permit. Therefore, the CUSF does not refer to the urbanization permit for the site, which is in this case under the jurisdiction of the city council of the municipality of Tlajomulco de Zúñiga. Since the legislation under which the permit was issued is not covered by the Submission, it is not addressed in this Party Response.

Response in relation to rainwater collection

Concerning the Submitters’ assertion that the development of the Project jeopardizes rainwater collection, it should be noted that the State Forest Council issued a technical opinion concerning the application for a forested land use change for the development of the Project, asserting that “it is necessary to establish rainwater management measures throughout the project in order to reduce the impacts on the natural water cycle, favoring infiltration and evapotranspiration, and helping reduce surface runoff. It is necessary to incorporate artificial measures favoring aquifer recharge, including porous pavement, green roofs, rainwater collection, etc. There must be no interruption or alteration of the morphology of the natural watercourses within the boundaries, so as to ensure the continuous provision of environmental services on the Project site.”

For its part, the CUSF, as regards LGDFS Article 117 paragraph 1, which provides that land use changes on forested land may be approved where it is proved that this will not degrade water quality or diminish the quantity of water collected, relates the content of the DTU-A to the fact that the Jalisco State Water Commission (*Comisión Estatal del Agua—CEA*) identified the Project as being located in the Lerma-Santiago hydrological region and in the Río Santiago-Guadalajara basin and in two micro-basins called “Santa Anita” and “San Sebastián El Grande.” It stressed that many of the watercourses draining these micro-basins have turned into open-air sewers carrying wastewater from the nearby settlements that have occupied the area in the last two decades; and that in the specific case of the Project, the surface hydrology would not be affected, since it is proposed to build and operate a wastewater treatment plant with the capacity necessary to treat all the wastewater generated therein, thereby avoiding increased pollution in the area.

In addition, the CEA stated that there are two intermittent streams on the Project site. One of them crosses the site from northeast to southeast, arising on the hill that is the current site of the “El Palomar” subdivision; the other arises in the eastern part of the Project site, flowing for its first 160 metres within the Project area and then exiting via the south side of it and entering the property of the Santa Anita Golf Club.

Moreover, the CUSF mentions that as per the DTU-A, there will be no deterioration of water quality or decrease in the quantity of water collected, since structures will be built to allow for a volume of water infiltration equivalent to that which will be eliminated by the land use change. It further notes that streams and watercourses will not be affected, nor will the work degrade water quality, since the Project does not require the use of contaminating substances or the generation of hazardous waste.

Resolution 1 paragraph XI, the CUSF obligated the Project developer to comply with all the prevention, mitigation, and compensation measures for impacts on forest resources that are contemplated in the DTU-A, the Mexican Official Standards, and the applicable technical-legal provisions, as well as what other authorities stipulate within the scope of their jurisdiction. Pursuant to condition XIV of the CUSF, reports on the results of these measures must be filed.

From the foregoing it follows that the Government of Mexico took rainwater collection into consideration in connection with the Project, in strict application of LGDFS Article 117, so that this item is not jeopardized as a consequence of the development of the Project.

2. Considerations concerning LGEEPA Articles 34 paragraphs IV and V and 35 paragraph III

Response in relation to public consultation and the enforcement of LGEEPA Article 34 paragraphs IV and V

The Submitters state that no public consultation was held in regard to the environmental impact statement submitted as a requirement for approval for the Project.

As asserted in the Revised Submission, no public consultation was held in relation to the environmental impact approval for the Project, although this does not imply that the Semarnat office did not adhere to LGEEPA Article 34 and to the Order and the Environmental Impact Regulation to the LGEEPA (*Regulación de la LGEEPA en materia de Evaluación del Impacto Ambiental*—REIA) in connection with public consultation.

On 22 January 2015, pursuant to LGEEPA Article 34 paragraph I, the Semarnat office published, in supplement no. DGIRA/003/15 of the Environmental Gazette (*Gaceta Ecológica*) and on the Semarnat website, the list of applications for approval of projects subject to environmental impact and risk assessment and forest-related assessment, among which is the application concerning the Project. In addition, the Semarnat office made the DTU-A for the Project available for consultation by all interested parties at the following links:

<http://sinat.Semarnat.gob.mx/dgiraDocs/documentos/CUSF/14MA06970115.pdf>

<http://tramites.Semarnat.gob.mx/index.php/consulta-tu-tramite>, by entering the registry no. of the Project: 14/MA-0697/01/15.

Furthermore, the Semarnat office notified the Jalisco state government, through Semadet, and the city council of the municipality of Tlajomulco de Zúñiga, of the filing of applications for environmental impact and risk assessment and for a forested land use change for the Project.

During the assessment and the administrative procedures related to approval of the Project, no request for public consultation was received, nor were any observations or proposals submitted concerning the application of additional prevention and mitigation measures under LGEEPA Article 34 paragraph IV, and neither was any response or observation received from the state or municipal authorities.

On another note, in accordance with LGEEPA Article 34 paragraph V, the CUSF makes reference to adherence to the public consultation-related obligations of the Semarnat office under Article 34. The CUSF does not make further reference to the public consultation process, since no requests for it were received, nor were any comments made on the DTU-A, as discussed above.

From the foregoing it may be concluded that the Government of Mexico, acting by the Semarnat office, strictly adhered to the public consultation-related provisions of LGEEPA Article 34 in connection with the environmental impact approval application for the Project, and that the fact that no public consultation was held (for lack of a request for such consultation under LGEEPA Article 34) does not mean that the Government of Mexico failed to effectively enforce this provision.

Response in relation to LGEEPA Article 35 paragraph III

Concerning the asserted failure to effectively enforce LGEEPA Article 35 paragraph III, establishing the grounds for denial of environmental impact approval by Semarnat, the following conclusions are evident:

- a) It would have been invalid to deny the forested land use change approval since the Project does not contravene any laws, regulations, Mexican Official Standards, or other provision applicable at the time approval was granted.
- b) As noted in the CUSF, the area covered by the approval does not harbor species likely to be declared threatened or endangered, and the species inhabiting the Project area will not be affected.
- c) It is not evident from the inspection performed by the authority on 20 March 2015 that the developers sought to obtain approval by including false information in the DTU-A concerning the environmental impacts of the work or activity to be carried out.

3. Considerations concerning LEEPA-Jalisco Articles 8 paragraph I, 28 paragraph II, and 31 paragraph II

The articles in question are inapplicable to the case at hand, since LEEPA-Jalisco Articles 28 paragraph III and 29 paragraph II establish the power of the state government and the municipalities, respectively, to assess the environmental impact of real estate developments or new population centers having an impact on ecosystems *where the regulation of environmental impact is not under federal jurisdiction*. However, due to the nature of the Project and the forested land use change it entails, it is in fact under federal jurisdiction, as is evident from the CUSF and pursuant to LGEEPA Article 28 paragraph VII and with REIA Article 5(O) paragraph I. Therefore, LEEPA-Jalisco Article 31 paragraph II does not apply to the case at hand.

C) PARTY RESPONSE IN RELATION TO SUSTAINABLE LAND USE

A) Submitter's assertions and Secretariat's determination

Concerning the effective enforcement of the environmental law covered by this section, the Submitters assert the following:

- That no plan is being implemented for restoration of ecological stability in this affected area, which already exhibits serious ecological instability due to the various human

settlements in the vicinity of the Project area, as well as recent fires that have harmed biodiversity.

- That the ecological harm caused by approving the forested land use change from a buffer zone of a protected natural area to urban land use was neither investigated nor considered.
- That a valid technical study of environmental impact was not performed to justify approval of the urbanization plan and to delimit the urban reserve in the area occupied by the Project in the municipality of Tlajomulco de Zúñiga, Jalisco.
- That Semadet did not implement the relevant measures, such as ordering a suspension of activities in the Project area.

For its part, the Secretariat, in its Article 14(1)(2) Determination, without making reference to specific assertions by the Submitters, requested a response from the Party in relation to the following articles on the subject of sustainable land use:

- LEEPA-Jalisco Articles 5 paragraphs XXII and XXIII, 6 paragraph XV, and 23 paragraph II.

B) Party response

Response in relation to LEEPA-Jalisco Article 5 paragraphs XXII and XXIII

LEEPA-Jalisco Article 5 establishes the environmental jurisdiction of the Jalisco state government and the municipalities. Paragraph XXII empowers them, within the scope of their respective jurisdictions, to “participate in the formulation and implementation of any special plans or programs that may be proposed for the restoration of ecological stability in areas of the state exhibiting severe ecological instability.” Paragraph XXIII grants them jurisdiction over “enforcing the observance of any declarations that may be issued to regulate land uses, resource use, and pollution-generating activities.”

Concerning this assertion, Semadet states (Appendix K) that although the area addressed by the Submission is located in the territory of the municipality of Tlajomulco and thus covered by its urban planning, pursuant to Article 115 paragraph V(d) and (f) of the Political Constitution of the United Mexican States; although LEEPA-Jalisco Article 28 paragraph III establishes the state government’s power to regulate the environmental impact of real estate developments or new population centers, and although Article 29 paragraph II empowers the municipalities to assess the environmental impact of real estate developments and new population centers, these powers may be exercised only where regulation is not reserved to the federal government, as is the case of the Project, since it is a case of forestry-related land use change pursuant to LGEEPA Article 28 paragraph VII and REIA Article 5(O) paragraph I. Therefore, those LEEPA-Jalisco provisions concerning ecological stability and sustainable land use asserted to be the subject of failures of effective enforcement are not applicable to the Project.

Furthermore, the city council of Tlajomulco de Zúñiga states (Appendix L) that pursuant to LGEEPA Article 28, Semarnat is competent to establish the conditions applicable to environmental protection and ecosystem preservation and restoration, with a view to preventing or minimizing the negative effects of environmental impact approvals granted under this provision. Notwithstanding

the fact that the matter is under federal jurisdiction, as discussed above, the city council states that it has taken various measures to conserve and preserve habitat and the environment, having noted the imminent risk of environmental deterioration as a consequence of the development of the Project, including the taking of various administrative and judicial measures (discussed in the relevant sections of this Party Response) aimed at conserving and protecting the ecological stability of the areas in the vicinity of La Primavera PNA and its zone of influence. It adds that, further to these measures, no environmental impacts or instability have been noted, since *as of 10 February 2016, no urbanization work or material activity of urbanization has taken place within the boundaries corresponding to the Project.*

Response in relation to LEEPA-Jalisco Article 6 paragraph XV

LEEPA-Jalisco Article 6 paragraph XV gives the holder of state-level executive power — i.e., the Governor — the power to “order the suspension of any activity or measure contravening the legal provisions relating to ecological stability and environmental protection.” Concerning this provision, it is relevant to note that the Submitters do not assert the occurrence of any activities contravening the LEEPA ecological stability and environmental protection provisions; rather, their assertions have to do with activities taking place in accordance with Mexican federal environmental law and covered by all necessary permits, as discussed in this Party Response, and in particular as regards the forested land use change approval for the Project. Therefore, the condition contemplated in LEEPA-Jalisco Article 6 paragraph XV is not applicable to the case addressed by the Submission and the Government of Mexico has not failed to effectively enforce it.

Response in relation to LEEPA-Jalisco Article 23 paragraph II

LEEPA-Jalisco Article 23 paragraph II provides that “for the environmental regulation of human settlements, the agencies and entities of the public administration shall, in addition to observing the provisions relating to urban development, seek the rectification of any instability that may degrade the quality of life of the population and, at the same time, predict and guide the growth patterns of human settlements so as to maintain a sufficient relationship between the existing natural resource base and the population, stewarding the environmental factors that are an integral part of the quality of life, *for which purpose the determination of land uses must be done in accordance with any local environmental provisions issued for such purpose.*”

Concerning this provision, the reader is referred to the earlier discussion in this section of the Party Response: to wit, that on the one hand, no ecological instability has resulted from the development of the Project, and that on the other, due to the nature of the Project and of the land where it is to be developed, the rectification of any instability that may be caused by the Project falls to the federal government, and that measures for that purpose were established in the CUSF.

Moreover, with no concession being made that human settlement-related provisions qualify as *environmental law* under the NAAEC, the Submitters are reminded that LEEPA-Jalisco Article 23 paragraph II provides that, within the state and municipal purview, the rectification of instability causing a deterioration of the quality of life for the population *is to be accomplished through the determination of land uses in accordance with any local environmental provisions issued for such purpose.* In this regard, the CUSF makes reference to the Project’s adherence to the Local Environmental Planning Ordinance (*Ordenamiento Ecológico Local*) of the municipality of Tlajomulco de Zúñiga and to the same municipality’s urban development plan, whose purpose is to

regulate the balanced and sustainable distribution of the population and of economic activities in areas consisting of urbanized zones, areas reserved for urban expansion, and areas considered not urbanizable by reason of ecological preservation, risk prevention, and maintenance of productive activities. The ordinance provides that “one instrument regulating the Project is the ‘Partial Urban Development Plan for El Palomar, Municipality of Tlajomulco de Zúñiga, Jalisco,’ approved by the Plenary of the city council of Tlajomulco on 3 April 2012, which delimits the lot occupied by the Project as a short-term urban reserve area assigned code Ru, subcode CP, zoned for urban land use to accommodate low-density single-family residential development (H2U).”

D) CONCLUSIONS

This Party Response contains sufficient information relating to each and every assertion made by the Submitters in the Revised Submission and as regards the response requested from the Government of the United Mexican States by the Secretariat in its Article 14(1)(2) Determination. The following conclusions may be derived:

- Concerning wildlife: It is neither technically necessary nor justifiable under the applicable legislation to declare the Project area as critical habitat, since the Government of Mexico, in the course of applying its environmental law, found that the best way to protect the region’s wildlife was via the declaration of La Primavera PNA, which serves as critical habitat for the region’s representative wildlife species. In addition, the forested land use change approval for the Project clearly establishes that the area comprised therein does not harbor specimens of wildlife protected under NOM-059, since the Project area is a highly urbanized area and the Project does not involve the destruction, contamination, degradation, or desertification of wildlife habitat.
- Concerning public complaints, safety measures, and sanctions: Since this is a matter under federal jurisdiction, the Profepa office is the authority addressing the more than 6,000 public complaints about the Project filed by the Submitters and others. To date, file no. PFPA/21.5/2C.28.2/0147-15 remains open and is undergoing processing; that is, the Government of Mexico’s efforts to effectively enforce the environmental law in connection with these assertions have yet to conclude, and the Profepa office has processed three more administrative files concerning the Project, concluding that no environmental violations have occurred. For its part, the city council of the municipality of Tlajomulco de Zúñiga shut down urbanization work relating to the Project, a decision currently being appealed by the developer before the federal courts. As of the date of this Party Response, there has been no work done on the Project and, therefore, no ecological instability or environmental harm of any kind has resulted from it.
- Concerning environmental impact assessment and forested land use change: Since this is a matter under federal jurisdiction, the applicable laws as regards environmental impact and forested land use change are the LGDFS and the LGEEPA. The environmental impact and forested land use change approval for the Project was issued with strict adherence to these statutes. The federal authority had no basis on which to deny this application, since it was fully compliant with the applicable law and the area covered by the forested land use change approval was found to have never been affected by a forest fire. On another note, the clearing of forest vegetation and the transplanting of trees adduced by the Submitters are a logical and legal consequence of the forested land use change approval, which establishes the quantity and the manner in which transplanting and clearing must be carried out, including the aspects relating to rainwater collection. In addition, the area occupied by the Project is not inside the buffer zone of La Primavera PNA but rather its zone of influence; it is therefore outside the area protected by the PNA.

Concerning public consultation: If none was held on the subject of the Project, this is because the federal authority in charge of the environmental impact assessment procedure, with strict adherence to the applicable law, received no comments or requests in this regard from citizens, state authorities, or municipal authorities.

- Concerning sustainable land use: This being a matter under federal jurisdiction, the measures relating to sustainable land use in the Project area were set down in the forested land use change approval, which is compliant with the Local Environmental Ordinance of the municipality of Tlajomulco de Zúñiga, the municipality's urban development plan, and the "Partial Urban Development Plan for El Palomar, Municipality of Tlajomulco de Zúñiga, Jalisco." Notwithstanding the foregoing, the city council of Tlajomulco de Zúñiga has taken various measures to conserve and preserve the habitat and the environment, including various administrative and judicial measures, which found no environmental impacts or instability to have occurred since 10 February 2016, because no urbanization work or material activity of urbanization has occurred within the boundaries corresponding to the Project. On another matter, certain LEEPA-Jalisco provisions cited by the Submitters are not applicable because this matter is under federal jurisdiction, and because the work relating to the Project — in addition to none having been done to date — is covered by all applicable permits.

In this Party Response, the Government of Mexico has given a timely response to each of the matters raised in the Revised Submission as well as in the Secretariat's Article 14(1)(2) Determination. It has provided sufficient and relevant information concerning each and every legal provision adduced by the Submitters as being connected with failures of effective enforcement, in the hope of offering guidance to the Submitters and the North American public concerning the manner in which the Party's environmental law is being enforced with respect to the specific facts addressed by the Submission.