

## Secretariat of the Commission for Environmental Cooperation

### Secretariat Determination in accordance with Article 15(1) that preparation of a factual record is not warranted

**Submitter:** Movimiento Ambientalista del Noreste  
**Party:** United Mexican States  
**Original submission:** 11 July 2016  
**Revised submission:** 26 September 2016  
**Date of the Determination:** 14 July 2017  
**Submission no.:** SEM-16-002 (*Monterrey VI Aqueduct*)

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#### I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (“NAAEC” or the “Agreement”) provide for a process (known as the “submissions on enforcement matters” or “SEM” mechanism) allowing any nongovernmental organization or person in North America 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”)<sup>1</sup> initially considers submissions to determine whether they meet the requirements in NAAEC Article 14(1). Where the submission meets these requirements, the Secretariat 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 Party and in accordance with the NAAEC, the Secretariat determines whether the matter warrants the preparation of a factual record. and notifies the CEC Council of its recommendation, including an explanation of its reasoning underlying its recommendation, in accordance with Article 15(1).<sup>2</sup> By a two-thirds vote of its members, the Council may instruct the Secretariat to prepare a factual record.<sup>3</sup>
2. On 11 July 2016, the organization Movimiento Ambientalista del Noreste (the Submitter)<sup>4</sup> filed an NAAEC Article 14(1) Submission with the CEC Secretariat.<sup>5</sup> The Submitter

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<sup>1</sup> The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC) signed on 13 September 1993 by Canada, Mexico, and the United States (the “Parties”) and published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 21 December 1993. The constituent bodies of the CEC are its Council, the Secretariat and the Joint Public Advisory Committee (JPAC).

<sup>2</sup> For detailed information on the various stages of the submission process, as well as on the Secretariat’s determinations and factual records, visit the submissions on enforcement matters page of the CEC website at <[www.cec.org/submissions](http://www.cec.org/submissions)>.

<sup>3</sup> NAAEC Article 15(2), note 1 *supra* [NAAEC].

<sup>4</sup> Initially, Movimiento Ambientalista del Noreste asked the Secretariat to keep its identity confidential under NAAEC Article 11(8). On 17 August 2016, the Submitter sent the Secretariat’s legal officer an email authorizing the disclosure of its name.

asserts that authorities of the federal government and the state of Nuevo León are failing to effectively enforce the environmental law concerning the protection of ecological stability and biodiversity in northeastern Mexico in connection with a project to build a water supply system for the Monterrey metropolitan area.

3. On 22 August 2016, the Secretariat found that Submission SEM-16-002 (*Monterrey VI Aqueduct*) did not meet the requirements of Article 14(1) of the Agreement since it did not cite provisions defined as “environmental law” under the NAAEC.<sup>6</sup> 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”),<sup>7</sup> the Secretariat notified the Submitter that it had 60 working days in which to file a submission that meets all the Article 14(1) requirements.
4. On 26 September 2016, the Submitter filed a revised submission clarifying its assertions and presenting additional information in response to the Secretariat’s request (hereinafter, “Revised Submission”).<sup>8</sup>
5. On 19 December 2016, the Secretariat found that the Revised Submission met all the eligibility requirements of NAAEC Article 14(1) and requested a response from Mexico in accordance with Article 14(2).<sup>9</sup> On 13 February 2017, Mexico submitted a response in which it argues that the Submitter’s assertions were insufficient for the Submission to be found eligible. In addition, the Party maintains that the Submission does not cite environmental law in the sense of the NAAEC and that there are no concrete juridical acts that indicate or represent a failure of enforcement.<sup>10</sup>
6. Having reviewed the Revised Submission in the light of Mexico’s response, the Secretariat finds that Submission SEM-16-002 (*Monterrey VI Aqueduct*) does not warrant the preparation of factual record. Mexico’s response makes it clear that the project does not yet have any material or legal existence and it is therefore impossible to identify any acts from which a failure to effectively enforce the environmental law may derive. The Secretariat’s reasoning follows.

## II. ANALYSIS

7. The Submitter asserts that the project called “Monterrey VI” (or “the project” , which is being developed by the Nuevo León state government, involves the construction of a water supply system for the Monterrey metropolitan area. The system will supply water from the Pánuco River in Veracruz, which means transferring water between three watersheds as

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<sup>5</sup> See SEM-16-002 (*Monterrey VI Aqueduct*), Article 14(1) Submission (11 July 2016).

<sup>6</sup> See SEM-16-002 (*Monterrey VI Aqueduct*), Article 14(1) Determination (22 September 2015) [Article 14(1) Determination].

<sup>7</sup> *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, online at <[www.cec.org/Guidelines](http://www.cec.org/Guidelines)> (viewed 2 May 2017) [Guidelines].

<sup>8</sup> SEM-16-002 (*Monterrey VI Aqueduct*), Revised Article 14(1) Submission, 26 September 2016 [Revised Submission].

<sup>9</sup> SEM-16-002 (*Monterrey VI Aqueduct*), NAAEC Article 14(1) and (2) Determination (19 December 2016) [Article 14(1) and (2) Determination].

<sup>10</sup> SEM-16-002 (*Monterrey VI Aqueduct*), Article 14(3) Party Response (13 February 2017) [Response].

well as crossing the states of San Luis Potosí and Tamaulipas before reaching Nuevo León.<sup>11</sup>

8. The Submitter asserts that if built, Monterrey VI will cause irremediable environmental damage to ecosystems and biodiversity<sup>12</sup> and that it will deprive numerous peasant and indigenous communities, as well as future generations, of the water on which they depend.<sup>13</sup> It further contends that the Pánuco River watershed, from which the water will be taken, is one of Mexico's most contaminated watersheds;<sup>14</sup> that the federal and state authorities have ignored complaints and petitions about the matter;<sup>15</sup> that no arrangements have been made to hold a public consultation on the project;<sup>16</sup> that the approval granted by the National Water Commission (*Comisión Nacional del Agua*) to Servicios de Agua y Drenaje de Monterrey — the entity operating Nuevo León's water supply system — is invalid since it lacks the endorsement of the watershed councils,<sup>17</sup> and that the environmental impact statement produced as part of the project approval process lacks sufficient technical and scientific information, in addition to minimizing the possible impacts on ecosystems and populations.<sup>18</sup>
9. The Submitter asserts that Mexico is failing to effectively enforce Articles 1, 4, 8, 14, 16, 17, and 133 of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*); Articles 28 and 54 of the Federal Environmental Responsibility Act (*Ley Federal de Responsabilidad Ambiental*);<sup>19</sup> Articles 15 paragraphs I, II, III, V, and XIII, 19, and 21 of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*),<sup>20</sup> and Articles 5 paragraphs I and II, 7 *bis* paragraph X, and 14 *bis* paragraphs I to V of the National Waters Act (*Ley de Aguas Nacionales—LAN*).<sup>21</sup> The Submitter further cites two international instruments: the *Convention on Biological Diversity* (CBD)<sup>22</sup> and paragraphs 18.8 and 18.9 of the Rio Declaration on Environment and Development.<sup>23</sup>

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<sup>11</sup> Revised Submission, §4.

<sup>12</sup> *Ibid.*, §2 (“would irremediably cause ecological instability”) and §3 (“changes in species abundance and diversity”).

<sup>13</sup> *Ibid.*, §2.

<sup>14</sup> *Ibid.*, §§2-3.

<sup>15</sup> *Ibid.*, §7.

<sup>16</sup> *Ibid.*, §8.

<sup>17</sup> *Ibid.*, §9.

<sup>18</sup> *Ibid.*, §§3, 10.

<sup>19</sup> Federal Environmental Responsibility Act, DOF, 7 June 2013.

<sup>20</sup> Mexican Environmental Protection Act (LGEEPA), DOF, 28 January 1988.

<sup>21</sup> National Waters Act, DOF, 1 December 1992. It should be noted that the Submission makes reference to the General Waters Act, which is not the name of any Mexican legal instrument that is currently in force. A reading of the provisions and the transcription of the act provided in the Submission makes clear that the cited act is in fact the National Waters Act (LAN). The Submitter confirmed this via email on 15 December 2016.

<sup>22</sup> *Convention on Biological Diversity*, opened for signature in Rio de Janeiro, Brazil on 5 June 1992, ratified by Mexico on 24 February 1993, and published in the DOF on 7 May 1993.

<sup>23</sup> United Nations General Assembly, *Declaration of the United Nations Conference on Environment and Development*, Rio de Janeiro, Brazil, 13 June 1992, in *Report of the United Nations Conference on Environment and Development*, Annex I, doc. no. A/CONF.151/26, vol. I.

10. The Secretariat found that the Revised Submission merited a response in regard to the assertions concerning the effective enforcement of LGEEPA Article 15 paragraph XIII in relation to the right of communities to the protection and preservation of water and other natural resources, including flora and fauna, as well as the protection and use of biodiversity, and also in regard to the assertion concerning the effective enforcement of LAN Articles 5 paragraph II and 14 *bis* paragraph III in relation to the participation of citizens, communities, and specialists in decision-making on the management of the Pánuco River and the planning and approval of the Monterrey VI project. The remainder of the provisions cited by the Submitter, and summarized above, did not qualify for a response.
11. In addition, the Secretariat noted in its Article 14(1) and (2) determination that Mexico could also provide information on the current status of the Monterrey VI Aqueduct project.<sup>24</sup>

#### **A) Summary of Mexico's Response**

12. Mexico contends in its response that LGEEPA Article 15 paragraph XIII does not qualify as environmental law because this provision is a statement of principles which purpose is not the protection of natural resources and is rather a statement for the conduct of environmental policy:
13. Mexico also asserts that LAN Articles 5 paragraph II and 14 *bis* paragraph III's primary purpose is water management, and therefore that the two provisions do not qualify as environmental law under the NAAEC.<sup>25</sup>
14. Finally, Mexico states that the Monterrey VI project is still at the design and planning stage, so that it is impossible to identify any acts of environmental law enforcement in this regard. In any event, the only act Mexico contends is eligible for review under the SEM mechanism is the approval issued by the National Water Commission to Servicios de Agua y Drenaje de Monterrey, about which the Secretariat did not request a response.<sup>26</sup> In the Government of Mexico's view, the Revised Submission was filed prematurely and did not merit a response since the juridical acts asserted in the Submission have yet to take place.<sup>27</sup>

#### **B) Secretariat's Reasoning**

15. The Secretariat finds that, given the absence of material facts or juridical acts, it agrees with Mexico that the submission should not proceed to the development of a factual record because it would be impossible to investigate the facts surrounding the Monterrey VI project at this time. However, with a view to addressing Mexico's concerns raised in its response, especially with regards to the processing and eligibility of the Revised Submission,<sup>28</sup> the Secretariat finds it necessary to present an explanation.
16. The Secretariat points out that it acted in good faith when it presumed that concrete acts relating to the Monterrey VI project might have already occurred. While the Revised

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<sup>24</sup> Article 14(1) and (2) Determination, §57.

<sup>25</sup> Response, at 9.

<sup>26</sup> Article 14(1) and (2) Determination, §§36-37.

<sup>27</sup> Response at 4.

<sup>28</sup> Response at 3-4.

Submission did not include the environmental impact statement or the project approval, other documentary evidence was included that suggested the possible existence of a decision by an authority. The permit issued by the National Water Commission to Servicios de Agua y Drenaje de Monterrey suggests, at least in principle, that the Nuevo León state government could have already obtained environment-related approvals for the project. Furthermore, the Secretariat's view was that proceeding to the Response stage would afford Mexico an opportunity to present information on the status of the project, since the Submitter's central concern is the alleged lack of transparent public consultation on the Monterrey VI project.<sup>29</sup>

17. Mexico states that the project has not been carried out and is still in the planning process. Mexico's response centers around the absence of concrete acts of legal nature and the impossibility that such a state of affairs could warrant the request of a response under NAAEC Article 14(3). In any event, Mexico's assertion that there have been no acts or facts subject to review under NAAEC Articles 14 and 15 is consistent with the lack of reference, in the Revised Submission, to such type of information relating to the construction of the Monterrey VI project.
18. The Secretariat therefore finds it impossible, in the absence of specific acts such as a permit or authorization to proceed any further with the processing of the Submission and does not recommend the preparation of a factual record; however, this is without prejudice to the Submitter's right to file a new submission identifying facts or juridical acts that qualify for review under NAAEC Articles 14 and 15.
19. Mexico also raises other concerns in its response which deal with the Secretariat's determination that the legal provisions cited by the Submitter qualify as "environmental law" under the NAAEC. Because the status of the project is determinative of the Secretariat's decision not to proceed further with the submission, the Secretariat does not fully address these other concerns raised by Mexico in its response and notes that it does not fully concur with Mexico's assertions.<sup>30</sup>

### III. DETERMINATION

- 27 The Secretariat has reviewed submission SEM-16-002 (*Monterrey VI Aqueduct*) in the light of the response of the United Mexican States and finds that no central issues remain opened and that the preparation of a factual record in regard to the alleged failure to effectively enforce LGEEPA Article 15 paragraph XIII and LAN Articles 5 paragraph II and 14 *bis* paragraph III is therefore not warranted.

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<sup>29</sup> Article 14(1) and (2) Determination, §57.

<sup>30</sup> With respect to LGEEPA Article 15 paragraph XIII, the Secretariat does not agree that a legal provision such as this one does not qualify for analysis under the NAAEC merely because it consists of principles of environmental policy enforcement. If an articulated principle can be applied to a concrete action, such as the issuance of a permit or the granting of a project approval, it may indeed qualify as an environmental law under the NAAEC. Further, with respect to Articles 5 paragraph II and 14 *bis* paragraph III of the National Water Act (*Ley de Aguas Nacionales*, LAN) cited by the submitter and addressed by Mexico in its response, the Secretariat considers that civic participation provisions oriented to the protection of water quality in water management laws qualifies as environmental law under the NAAEC. The Secretariat notes that previous determinations by the Secretariat and prior Council resolutions confirm that such water quality-related provisions are "environmental law" under the NAAEC.

Respectfully submitted for the consideration of the Council on July 14, 2017.

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

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