

**Secretariat of the Commission for Environmental Cooperation**

**Determination of the Secretariat in accordance with Article 14(1)(2)  
of the North American Agreement on Environmental Cooperation**

<b>Submitters:</b>	Movimiento Ambientalista del Noreste
<b>Party:</b>	United Mexican States
<b>Date of original submission:</b>	11 July 2016
<b>Date of revised submission:</b>	26 September 2016
<b>Date of the determination:</b>	19 December 2016
<b>Submission no.:</b>	SEM-16-002 ( <i>Monterrey VI Aqueduct</i> )

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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 allowing any person or non-governmental organization residing or established in Canada, Mexico or the United States to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. As an initial step, the Commission’s Secretariat (“the Secretariat” of the “CEC”)<sup>1</sup> considers such submissions in accordance with the requirements specified in NAAEC Article 14(1). Should the Secretariat deem that a submission satisfies said requirements, it then determines whether, under the provisions of NAAEC Article 14(2), it is warranted to request a response from the Party concerned. In light of said Party’s response—if any—and in accordance with the NAAEC, the Secretariat determines whether the matter warrants the preparation of a factual record. If so, it then notifies the CEC Council and explains the reasoning for its recommendation in adherence with Article 15(1); should the Secretariat determine instead that the preparation of a factual record is not warranted, it shall proceed no further with the submission.<sup>2</sup>
2. On 11 July 2016, Movimiento Ambientalista del Noreste (the “Submitter”)<sup>3</sup> filed submission SEM-16-002 (*Monterrey VI Aqueduct*) with the CEC Secretariat pursuant to NAAEC Article 14(1). The Submitter asserts that federal and state governmental authorities are failing to effectively enforce environmental law with respect to protecting ecological balance and biodiversity in northeastern Mexico.
3. On 22 August 2016, the Secretariat determined that the submission did not satisfy the requirements under Article 14(1) of the Agreement as it was necessary to clarify assertions regarding the failure to effectively enforce certain provisions cited in the submission. Moreover, it was also necessary for the Submitter to include sufficient

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<sup>1</sup> The Commission for Environmental Cooperation (CEC) was established in 1994 via the North American Agreement on Environmental Cooperation (NAAEC), which was signed 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, Secretariat and 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, please consult the page on submissions concerning effective enforcement of environmental law, at the CEC website: <<http://www.cec.org/submissions>>.

<sup>3</sup> Initially, Movimiento Ambientalista del Noreste requested that the Secretariat safeguard the confidentiality of its personal data, in accordance with NAAEC Article 11(8). On 17 August 2016, the Submitter authorized the Secretariat to divulge its identity.

information in its submission to enable the Secretariat to continue its analysis and include documentation on communications raising the matter with the relevant authorities of the Government of Mexico. In accordance with paragraphs 6.1 and 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”),<sup>4</sup> the Secretariat notified the Submitter that it had 60 working days to file a revised submission satisfying all of the requirements established under NAAEC Article 14(1).<sup>5</sup>

4. On 26 September 2016, the Submitter filed a revised submission with clarifications concerning its assertions, as well as additional information addressing the issues raised by the Secretariat.<sup>6</sup>
5. The Submitter asserts that the project known as Monterrey VI (hereafter “the Project” or “Monterrey VI”) is being promoted by the state government of Nuevo León. The Project comprises the construction of an aqueduct for the supply of water to the Monterrey Metropolitan Area. The aqueduct will take water from the Pánuco River in Veracruz, which entails water transfers through three water basins and crossing the states of San Luis Potosí and Tamaulipas, before delivering water in the state of Nuevo León.<sup>7</sup>
6. The Submitter asserts that the construction of Monterrey VI will cause irremediable environmental harm to ecosystems and biodiversity<sup>8</sup> and will dispossess numerous peasant and indigenous communities, as well as future generations, of water on which they depend.<sup>9</sup> Furthermore, the Submitter asserts that the Pánuco River basin, the source of the planned water transfers, is one of the most polluted basins in Mexico;<sup>10</sup> that the complaints and petitions filed with the federal and state authorities have been ignored;<sup>11</sup> that there have been no opportunities created for public consultations enabling participation in water resources management;<sup>12</sup> that the authorization granted by the National Water Commission (*Comisión Nacional del Agua*—Conagua) to Monterrey Water and Drainage Services (*Servicios de Agua y Drenaje de Monterrey*—SADM), the water supply utility in Nuevo León, is not valid as it lacks the endorsement of the basin councils;<sup>13</sup> and that the Project’s environmental impact statement (“Monterrey VI EIS”), lacks sufficient technical and scientific information and minimizes the effects on ecosystems and populations.<sup>14</sup>
7. The Submitter asserts that Mexico is failing to effectively enforce the following provisions: Articles 1, 4, 8, 14, 16, 17 and 133 of the Political Constitution of the United Mexican States; Articles 28 and 54 of the Federal Environmental Liability

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<sup>4</sup> See: *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, <[www.ccc.org/guidelines](http://www.ccc.org/guidelines)> (viewed 1 November 2016) [the “Guidelines”].

<sup>5</sup> See: SEM-16-002 (*Monterrey VI Aqueduct*), Article 14(1) Determination, 22 August 2016 [Article 14(1) Determination].

<sup>6</sup> See: SEM-16-002 (*Monterrey VI Aqueduct*), Article 14(1) submission, 26 September 2016 [Revised submission].

<sup>7</sup> *Ibid.* §4.

<sup>8</sup> Revised submission §2 (“will inexorably result in an ecological imbalance”) and §3 (“changes in the abundance and diversity of species”).

<sup>9</sup> *Ibid.* at §2.

<sup>10</sup> *Ibid.* at §2-3.

<sup>11</sup> *Ibid.* at §7.

<sup>12</sup> *Ibid.* at §8.

<sup>13</sup> *Ibid.* at §9.

<sup>14</sup> *Ibid.* at §3, 10.

Act (*Ley Federal de Responsabilidad Ambiental*—LFRA);<sup>15</sup> Articles 15 sections I, II, III, V and XIII, 19 and 21 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA)<sup>16</sup>; and Articles 5 sections I and II, 7 *bis* section X, and 14 *bis* sections I-V, of the National Waters Act (*Ley de Aguas Nacionales*—LAN).<sup>17</sup> In addition, the Submitter cites two international instruments: the Convention on Biological Diversity<sup>18</sup> and paragraphs 18.8 and 18.9 of the Rio Declaration on Environment and Development (the “Rio Declaration”).<sup>19</sup>

8. Upon review of the revised submission, the Secretariat determines that it satisfies all requirements under Article 14(1) of the Agreement and that, in accordance with the criteria established under Article 14(2), it warrants requesting a response from the Government of Mexico concerning some, but not all, of the Submitter’s assertions, for the reasons detailed below.

## II. ANALYSIS

9. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or non-governmental organization asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. As the Secretariat has stated in previous Article 14(1) determinations, Article 14 is not intended to be an “insurmountable screening device” to Submitters.<sup>20</sup> The Secretariat examined the present submission based on this perspective.

### A. Opening paragraph of Article 14(1)

10. On 22 August 2016, the Secretariat verified that the submission included the Submitter’s name, address and contact information and that no information in the submission would lead the Secretariat to conclude that the Submitter is part of the government or under its control.<sup>21</sup> In this regard, the revised submission contains no information that would require the Secretariat to change its determination.
11. Regarding whether the submission raises matters that are actually occurring, the Secretariat considers that the Submitter’s assertions comply with the requirement that the matter raised must concern to an ongoing situation. The alleged enforcement failures raised by the Submitter relate to the threat to ecological balance, biodiversity and water availability in the states of Veracruz, San Luis Potosí, Tamaulipas and Nuevo León posed by the future execution of the Project. The Submitter asserts that although “the project’s promoters have been obliged to postpone its startup” and that “although the governor of Nuevo León has spoken of changing the Monterrey IV project, the governor is determined to maintain the Pánuco River concession and

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<sup>15</sup> LFRA, DOF, 7 June 2013.

<sup>16</sup> LGEEPA, DOF, 28 January 1988.

<sup>17</sup> LAN, DOF, 1 December 1992. The submission refers repeatedly to the *Ley General de Aguas*, which is not a legal binding instrument in force in Mexico. From reading of the provisions in question and upon verifying the textual citation of the law, it is clear that the submission refers to the LAN. The Submitter confirmed so in an email dated 15 December 2016.

<sup>18</sup> Convention on Biological Diversity, adopted in Rio de Janeiro, Brazil, 5 June 1992, ratified in Mexico on 24 February 1993 and published in DOF on 7 May 1993.

<sup>19</sup> *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 13 June 1992 in: *Report of the United Nations Conference on Environment and Development*, Annex I, U.N. Doc. No. A/CONF.151/26 (Vol. I) [Rio Declaration].

<sup>20</sup> See: SEM-97-005 (*Biodiversity*), Article 14(1) Determination, 26 May 1998, and SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination, 8 September 1999.

<sup>21</sup> Article 14(1) Determination, §9.

carry out a similar project, which he has not wished to make public.”<sup>22</sup>

12. Concerning whether the legal provisions cited in the submission qualify as environmental law in terms of NAAEC Article 45(2) and whether the submission includes assertions on environmental law enforcement failures in accordance with the submissions process, the Secretariat’s analysis is below.

### **1) Environmental law in question**

13. On 22 August 2016, the Secretariat determined that Articles 8, 14, 16, 17 and 133 of the Constitution —cited again in the revised submission— do not qualify for further analysis because they are not consistent with the definition of environmental law.<sup>23</sup> The Secretariat also stated that Article 1 of the Constitution serves to guide the Secretariat’s analysis, in accordance with NAAEC Article 14, and that although Article 4 paragraphs 4 and 5 of the Constitution do qualify as environmental law, these provisions shall only be considered to complement the analysis of other provisions.<sup>24</sup> The Secretariat finds no reasons to change its determination regarding admissibility of the above noted provisions.
14. The revised submission cites —as in the original submission— LFRA Articles 28 and 54, which respectively enshrine the right to bring legal proceedings in matters of environmental liability and the right of any person to file a complaint with the Public Prosecutor’s Office concerning any crime against the environment. In this regard, the Secretariat observed in its Determination dated 22 August 2016 that it is only when damages actually occur that the actions provided for under said provisions may take effect.<sup>25</sup> In this case, the revised submission asserts that “the Monterrey VI Aqueduct remains a project to be implemented [and that] as of yet there are no damages to repair.”<sup>26</sup> The Secretariat therefore reiterates that said provisions shall not be considered for further analysis.
15. The revised submission cites other legal provisions which, the Submitter asserts, have not been effectively enforced. Analysis of admissibility of these provisions under NAAEC Article 14(1) is included in the following paragraphs.

### **i. The General Ecological Balance and Environmental Protection Act**

16. The revised submission cites LGEEPA Articles 15 sections I, II, III, V and XIII, 19 section II, and 21 section I.
17. The Secretariat has determined that although provisions which refer to general principles —such as the ones recognized in LGEEPA Article 15— do qualify as environmental law, in practice such provisions sometimes require concrete enabling provisions.<sup>27</sup> Accordingly, the principles included in LGEEPA Article 15 sections I, II, III and V shall serve to guide the Secretariat’s analysis of concrete provisions.<sup>28</sup>

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<sup>22</sup> Revised submission, §2 and 12.

<sup>23</sup> Article 14(1) Determination, §17.

<sup>24</sup> *Ibid.*, §15 and 16.

<sup>25</sup> *Ibid.*, §21.

<sup>26</sup> Revised submission, §2.

<sup>27</sup> See: SEM-15-002 (*Management of Analog TV Waste*), Article 14(1)(2) Determination, 1 March 2016.

<sup>28</sup> LGEEPA Article 15 states:

In respect of the formulation and conduct of environmental policy and the issuance of Official Mexican Standards, as well as other instruments provided for in this law in relation to the preservation and restoration of ecological balance and environmental protection, the Federal Executive shall observe the following principles:

However, section XIII of the same Article which reads “guaranteeing the right of communities, including indigenous communities, to the protection, preservation, use and sustainable exploitation of natural resources, as well as the safeguarding and use of biodiversity, in accordance with the provisions of this law and other applicable ordinances” is sufficiently concrete to be considered in the submissions process.<sup>29</sup> In the Secretariat’s view, however, the elements of LGEEPA Article 15, section XIII provision concerning specifically the use and exploitation of natural resources do not qualify as environmental law because their primary purpose is “the administration [...] of natural resources [...] by indigenous populations,” which is a matter excluded from the Secretariat’s analysis under NAAEC Article 45(2)(b).<sup>30</sup>

18. Regarding LGEEPA Article 19 section II which prescribes the criteria for formulating ecological land-use management,<sup>31</sup> the Secretariat considers that its primary purpose is the protection of the environment, however, said provision would only be applicable if the submission included assertions concerning the area’s ecological management, which is not the case. Consequently, it does not qualify for further analysis.
19. LGEEPA Article 21 section I<sup>32</sup> establishes the obligation of the Federation and the states to design, develop and implement economic instruments to support the environmental policy through the promoting of changes in practices among parties engaged in industrial activities to ensure their compatibility with the public interest in environmental protection. The primary purpose of this provision is the protection of the environment; however, as the submission makes no concrete assertions in

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I.- Ecosystems are the common heritage of society; moreover, life and the country’s economic potential depend upon ecosystems in balance;

II.- Ecosystems and their constituent elements must be employed in a manner which ensures optimal and sustained productivity, compatible with their equilibrium and integrity;

III.- The authorities and individuals must assume responsibility for the protection of ecological balance;

[...]

V.- With respect to ecological balance, responsibility encompasses both present conditions as well as the future conditions that will determine the quality of life of future generations.

<sup>29</sup> On this matter water management activities include ensuring the preservation and sustainability of water resources in terms of quantity and quality LAN, Article 3 section XXVIII.

<sup>30</sup> See: SEM-95-002 (*Logging Rider*) Article 14(1)(2) Determination (8 December 1995 (“Although the Logging Rider clearly addresses the harvesting of natural resources (timber), the Secretariat reads the submission as alleging a failure to enforce the environmental laws enumerated in the Logging Rider”), at 3. The Secretariat has also excluded from analysis harvesting of natural resources from a submission, but keeping issues related to environmental protection on: SEM-11-002 (*Sumidero Canyon II*) Article 14(1)(2) Determination (6 September 2012) at §30 (“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”).

<sup>31</sup> LGEEPA Article 19 states:

In formulating ecological land-use management, the following criteria shall be considered:

[...]

II. The vocation of each area or region, as a function of its natural resources, population distribution and predominant economic activities.

<sup>32</sup> LGEEPA Article 21 states:

The Federation, States and Federal District, within the purview of their respective jurisdictions, shall design, develop and implement economic instruments that incentivize compliance with the objectives of environmental policy, in order to:

I.- Promote changes in the practices of persons engaged in industrial, commercial and services activities, such that their interests are compatible with the public interest in environmental protection and sustainable development.

relation to said provision, the Secretariat will not further analyze it.

**ii. The National Waters Act (LAN)**

20. The Submitter cites LAN Articles 5 sections I and II, 7 *bis* section X, and 14 *bis* sections I, II, III, IV and V.
21. Regarding LAN Article 5 sections I and II, which concern the coordination of water management by the federal executive, in conjunction with other authorities, users and civil society, through basin councils (section I), as well as the participation of users and individuals in the execution and administration of water works and services (section II),<sup>33</sup> the Secretariat considers that the primary purpose of said provisions is the protection of the environment since they endeavor to ensure water management through proper coordination and social participation. As such, they may be considered in the analysis of provisions in relation to LAN enforcement. That said, the Secretariat will restrict its analysis to LAN **Article 5 section II**, since it is the only provision directly relevant to the submission's assertions regarding the participation of water users and private individuals.
22. In relation to **LAN Article 7 *bis* section X**, which declares in the public interest to organize the participation of water users, water utilities and civil society in Basin Councils,<sup>34</sup> the Secretariat notes that this provision contains general criteria for enforcing the law instead of a specific obligation that could be applied to a concrete situation. Therefore, although the purpose of this provision qualifies as environmental law for purposes of the Agreement, it is only considered in connection with analysis of other provisions.
23. With respect to LAN Article 14 *bis* sections I, II, III, IV and V, regarding Conagua's obligation to promote social participation in water management and planning,<sup>35</sup> this

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<sup>33</sup> LAN Article 5 sections I and II states the following:

To ensure compliance with this Law and the enforcement thereof, the Federal Executive:

I. Shall promote coordination of actions with state and municipal governments, without prejudice to their powers in this area and within the purview of their corresponding responsibilities. The coordination of planning, execution and administration of water resources management activities per water basin or hydrological region shall be effected through Basin Councils, with the participation of the three orders of government, as well as that of users, private individuals and civil society organizations who shall also participate and undertake commitments, in accordance with the provisions contained in this Law and the regulations thereto;

II. Shall encourage the participation of water users and private individuals in the execution and administration of waterworks and water services; and

<sup>34</sup> Article 7 *bis* section X states:

The following is in the public interest:

[...]

X. The organizing of users, civil society associations and other public and private systems and water utilities in rural and urban areas, in conjunction with developing their linkages with the three levels of government, to consolidate their participation in the Basin Councils;

<sup>35</sup> Article 14 *bis* sections I-V states the following:

"The Commission," in conjunction with the state governments, the Federal District, the municipal governments, basin organizations, Basin Councils and the Water Advisory Board, shall promote and facilitate public participation in national water policy planning, decision-making, execution, evaluation and monitoring.

Support shall be provided to civic or non-governmental organizations with objectives, interests or involvement in specific activities related to water resources and their integrated management so that they may participate in Basin Councils, as well as in Basin Commissions and Committees and Groundwater Technical Committees. The participation of professional colleges, specialized academic groups and other civic organizations whose participation would

provision qualifies as environmental law because its primary purpose is the protection of the environment. However, the Secretariat's analysis of submission SEM-16-002 is restricted to **section III**, which concerns measures and actions that Conagua is required to take to ensure that opinions of the public and experts are taken into account in water management (where the latter is understood to include the conservation, preservation, restoration and efficient use of water resources).

24. In summary, regarding enforcement of LAN, the Secretariat considers that Articles 5, section II, 7 *bis* section X and 14 *bis* section III qualify for further analysis.

**iii. International instruments**

25. The revised submission cites paragraphs 18.8 and 18.9 of the Rio Declaration, in relation to the integrated management of water resources. The Secretariat notes that the provisions cited by the Submitter are not from the Rio Declaration, but rather from Agenda 21, a different instrument also adopted at the 1992 Rio Conference on Environment and Development, held in Rio de Janeiro, Brazil.<sup>36</sup> Although the paragraphs cited from Agenda 21 may have environmental protection as their primary purpose because it recognizes the importance of protecting water as an integral part of the ecosystem, these cannot, however, constitute "environmental law" because they are contained in a non-binding instrument rather than in a binding international treaty. Nevertheless, paragraphs 18.8 and 18.9 of Agenda 21 shall serve to guide the Secretariat's analysis of provisions on water management in the applicable environmental law.
26. Regarding the Convention on Biological Diversity, the Secretariat will not consider it in further analysis, as the Submitter does not identify which provisions in the Convention are applicable to the matter raised in its submission.

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enrich the planning and management of water resources shall also be facilitated.

For the aforementioned purposes, "the Commission," through the Basin Organizations and with the support of the Basin Councils:

I. Shall convoke, within the framework of the Democratic Planning system, local, regional or sectoral water users organizations, *ejidos* and communities, educational institutions, civic or non-governmental organizations and interested persons, to consult them on their opinions and proposals regarding water and water management planning, priority and strategic water-related issues, as well as to evaluate water sources, based on a sustainable development perspective;

II. Shall support organizations and initiatives arising from public participation, which aim to improve the allocation of tasks between the State – understood as the Federation, the states, the Federal District and municipalities – and society, in order to contribute to integrated water resources management;

III. Shall provide spaces and mechanisms to enable users and the public to:

- a. Participate in the decision-making processes in relation to water and water management;
- b. Assume explicit commitments arising from decisions about water and water management;

and

- c. Assume direct responsibilities in the implementation, execution, monitoring and evaluation of specific measures contributing to solving the water issue and improving the management of water resources;

IV. Shall conclude coordination agreements to improve and promote a culture of water awareness at the national level with the sectors of the population identified in preceding paragraphs, as well as in the mass media, in accordance with the provisions of Chapter V, Title Six of this Law; and

V. Shall coordinate actions and conclude agreements with water users to promote the conservation, preservation, restoration and efficient use of water.

<sup>36</sup> See: *Report of the United Nations Conference on Environment and Development*, Annex II, U.N. Doc. No. A/CONF.151/26 (Vol. I-III), 12 August 1992 [Agenda 21].

## **2) Assertions on failures to effectively enforce environmental law**

### **i. The alleged risk of harm to ecological balance and biodiversity**

27. The Submitter asserts that the project would have a negative impact on ecological balance and biodiversity in northeastern Mexico and that even if the aqueduct's planned route does not cross any natural protected areas, it will run close to the Abra-Tanchipa Sanctuary and the Huastecan Parrot (*loro huasteco*) Sanctuary in Tamián, San Luis Potosí and Pánuco Veracruz, respectively and that it will go through municipalities in three states with a diversity of communities and ecosystems that will be adversely affected by the impacts from the Project.<sup>37</sup> The Submitter asserts that modifications in watercourses would affect the biodiversity of ecosystems, species and genes and that the project would indisputably affect the flora and fauna swept away in its path.<sup>38</sup>
28. The submission cites LGEEPA Article 15 section XIII (see §17).<sup>39</sup> A response from Mexico could address the question of whether Monterrey VI observes and guarantees the right of communities, including indigenous communities, to the protection of natural resources, including the flora and fauna in the Project zone, and the safeguarding of biodiversity.

### **ii. The alleged environmental damage from water transfers between basins**

29. The Submitter asserts that the transfer of water from one river basin to another would cause irremediable ecological imbalance because it would damage the ecosystems that depend on water. Furthermore, there would be implications in terms of habitat fragmentation and pollution, given that water use should be carried out at the level of the catchment basin or sub-basin.<sup>40</sup>
30. According to the Submitter, water transfers between basins would entail violating international agreements, to which Mexico is a signatory, on climate change, desertification and biological diversity which, although they do not expressly forbid such transfers, do prohibit "damaging ecosystems with signatories undertaking to protect them by endeavoring to minimize environmental impact in any actions effected and by using water at the level of the catchment basin or sub-basin."<sup>41</sup> The Submitter is referring to Articles 18.8 and 18.9 of Agenda 21 which establish, among other things, that integrated water resource management should be carried out at the level of the catchment basin or sub-basin. However, as has been pointed out, Agenda 21 does not qualify as environmental law. Nevertheless, the Submitter does cite LGEEPA Article 15 section XIII as applicable "environmental law" in relation to the ecological imbalance that Monterrey VI would allegedly cause and its negative effects on the quality and quantity of water available to communities, including indigenous communities.<sup>42</sup>
31. In this matter, a response from Mexico could address how the project to transfer water between basins would guarantee the right of communities, including indigenous communities, to the protection and preservation of water resources.

### **iii. The alleged harm to indigenous and farming communities**

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<sup>37</sup> Revised submission, §4.

<sup>38</sup> *Ibid.* at §§4 and 5.

<sup>39</sup> *Ibid.* at §2.

<sup>40</sup> Revised submission, §2 and 5.

<sup>41</sup> *Ibid.*, §5.

<sup>42</sup> *Ibid.*, §2.



32. The Submitter asserts that water transfers will affect water availability in 388 Nahuas, Teenek and Xi'oi communities in the Huasteca Potosina region. These indigenous communities depend on the Pánuco River to carry out their farming activities.<sup>43</sup>
33. The submission cites LGEEPA Article 15 section XIII, which establishes the right of communities, including indigenous communities, to the protection and preservation of natural resources. The Submitter asserts that Monterrey VI goes against said provision as it entails “channeling the water that they [villages and communities] use for daily lives and sustenance.”<sup>44</sup> A response from Mexico could address how the Project respects, protects, promotes and guarantees the right of Pánuco River communities, including indigenous communities, to the protection and preservation of water resources, without, however, discussing administrative issues related to water management as such, which are not considered “environmental law” in the terms of the NAAEC (see § *supra* 17).

#### **iv. The right to public consultation**

34. The Submitter asserts that the Government of Nuevo León and the federal government have not made effective the right to public participation, which establishes that citizens may participate in water management planning and decision-making, despite the repeated requests to that effect made to the competent authorities.<sup>45</sup> Although water management may concern management decisions, it also includes the water preservation and sustainability activities provided for under LAN.<sup>46</sup>
35. The submission cites LAN Articles 5 section II, 14 *bis* section III, which state that the Federal Executive and Conagua are required to encourage, promote and facilitate public participation.<sup>47</sup> Since the Secretariat finds that this provision qualifies as environmental law under the NAAEC, the Secretariat requests a response from Mexico which could provide information on the actions implemented to provide the individuals and communities who will be affected by the Project in the states of Nuevo León, San Luis Potosí, Tampico and Veracruz with spaces and mechanisms enabling them to participate in decision-making in relation to the execution of the Monterrey VI project.

#### **v. Legality of Conagua's authorization to Monterrey Water and Drainage Services**

36. The Submitter asserts that Conagua issued a project authorization to Monterrey Water and Drainage Services, which considers is not valid as it was not endorsed by the relevant basin councils.<sup>48</sup> Although the revised submission did not enclose a copy of Conagua's authorization, the Secretariat presents its analysis of this matter forthwith.

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<sup>43</sup> *Ibid.*, §6 (“Channeling the water they [Nahuas, Teenek and Xi'oi] use for their daily lives and sustenance would be in violation of [LGEEPA, Article 15 section XIII]”).

<sup>44</sup> *Idem.*

<sup>45</sup> *Ibid.*, §9.

<sup>46</sup> *Cfr.* LAN, Article 3 section XXVIII.

<sup>47</sup> See *supra* note 33.

<sup>48</sup> Revised submission, §9 (“we argue that this is not a valid authorization as it was not endorsed by the Basin Councils”).

37. The submission cites, presumably,<sup>49</sup> LAN Articles 5 section I and 14 *bis* sections I-V, which establish the participation of basin councils in water management and planning. However, the Secretariat does not find that the provisions cited mention endorsement by basin councils as a requirement to be met before Conagua may issue an authorization. Nor does the revised submission clarify the nature of the enforcement failure of said provisions. The Secretariat therefore determines that it will not request a response from Mexico regarding Conagua's authorization to Monterrey Water and Drainage Services.

**vi. Validity of the Monterrey VI environmental impact statement (EIS)**

38. The Submitter asserts that the Monterrey VI EIS "ignores much available technical and scientific information," such as the studies by experts on pollution in the Pánuco River. Furthermore, the Submitter alleges that the Project minimizes the possible damages to the ecosystem and to the Pánuco-Tampacán River's neighboring populations. In effect, "in no place is mention made [in the Monterrey VI EIS] of the severe consequences, which the transfer of basins represents for ecosystem equilibria, as the analysis is limited to the installation of the infrastructure and its consequences, while negligently omitting the effects that the operation of the same infrastructure would entail."<sup>50</sup> The Submitter does not know whether the Monterrey VI EIS has been approved.<sup>51</sup>
39. The revised submission does not cite the relevant provisions of environmental law bearing on the validity of the Monterrey VI EIS. Nor does it clarify in what manner there is a failure to effectively enforce said provisions. Nor does it clarify whether the Project has obtained an environmental impact authorization from the competent authority. The Secretariat has therefore determined that it will not request a response from Mexico regarding the validity of the Monterrey VI EIS. Nevertheless, Mexico's response may provide information on the Project's present status and thereby inform interested individuals on this matter.

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

40. In its Article 14(1) determination, the Secretariat considered the original submission meets subparagraphs (a), (b), (d) and (f). Moreover, the new information presented in the revised submission does not indicate any change in compliance with any of the requirements established in said subparagraphs. However, analysis of subparagraphs (c) and (e) is included below as these were not satisfied in the original submission.

*(c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based*

41. The original submission included the following documentation: the Monterrey VI environmental impact statement (EIS); technical information on the water situation in Nuevo León; an electronic copy of a complaint filed against the Project; various photographic materials; a letter to the president of Mexico; and another letter to the Governor of Nuevo León.<sup>52</sup> The Secretariat requested additional information and documentation, which it required to conclude its analysis in accordance with Article

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<sup>49</sup> The submission refers to the General Water Resources Act (*Ley General de Aguas*), which is not in force in Mexico. The Secretariat offers this analysis as guidance to the Submitter. On this question, see note **Error! Bookmark not defined.** *supra*.

<sup>50</sup> *Ibid.*, §3.

<sup>51</sup> *Ibid.*, §10.

<sup>52</sup> Original submission, Annexes.

- 14(1). The revised submission clarified its assertions, provided more information and enclosed documentary evidence for the Secretariat's analysis.
42. The revised submission enclosed again the environmental impact statement, as well as two studies on the Pánuco River basin, one from Tamaulipas University,<sup>53</sup> the other from the National Ecology Institute, now known as the National Ecology and Climate Change Institute (*Instituto Nacional de Ecología y Cambio Climático*).<sup>54</sup>
43. The revised submission includes the following documentation: copies of a letter raising the matter, which was sent to the governor of Nuevo León by civil society organizations<sup>55</sup> and the reply thereto;<sup>56</sup> an electronic copy of an open letter to the Nuevo León State Congress<sup>57</sup> and the reply thereto from the Congress' Environment Commission (*Comisión del Medio Ambiente*)<sup>58</sup> as well as a request from the Mexican Senate to the Governor of Nuevo León requesting to stop the Monterrey VI Aqueduct.<sup>59</sup> The revised submission also includes copies of news stories from the local press.
44. The Secretariat determines that the revised submission includes sufficient information and documentary evidence in support of the Submitter's assertions to satisfy the requirement stipulated in NAAEC Article 14(1), subparagraph c).
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any*
45. In the original submission, the Submitter stated that, in effect, it had communicated in writing with the relevant authorities about the matter at issue and enclosed copies of the communications sent to various authorities. However, the Secretariat deemed that to satisfy the requirement in Article 14(1)(e) the Submitter needed to submit copies of the communications addressed to the governor and state Congress, along with the respective replies, if any.<sup>60</sup>
46. The revised submission reiterates that "we, the environmentalists of Nuevo León society and the communities threatened by Monterrey VI, have made various appeals in writing to the state and federal authorities,"<sup>61</sup> The documentary evidence enclosed with the original submission and the revised submission corroborate that the matter at issue was communicated in writing to the following authorities:
- a. The Federal Attorney General's Office, through a formal complaint,

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<sup>53</sup> Universidad de Tamaulipas, *Desarrollo Urbano en la Cuenca del Río Pánuco: Riesgo y Vulnerabilidad*, Mexico, 2015, 79 pp.

<sup>54</sup> Instituto Nacional de Ecología, *Evaluación y Control de Sustancias Tóxicas en la Cuenca del Río Pánuco*, c. 1991, 204 pp.

<sup>55</sup> Commission of the Archdiocese on the Environment and others, Letter to the Governor of Nuevo León, 9 March 2016.

<sup>56</sup> Servicios de Agua y Drenaje de Monterrey, doc. no. SADM-DDG-CMS-0007-16, 11 March 2016.

<sup>57</sup> (No author), Exhorto al Poder Legislativo del estado de Nuevo León ("Open letter to the Nuevo León state legislature"), 7 July 2016.

<sup>58</sup> Comisión de Medio Ambiente del Congreso del estado de Nuevo León, administrative ruling in file no. 10174/LXXIV (undated).

<sup>59</sup> Cámara de Senadores, *Dictamen de la proposición que contiene punto de acuerdo que exhorta al Ciudadano Rodrigo Medina de la Cruz a suspender de manera provisional el proyecto hidráulico "Monterrey VI" hasta que el gobierno no tenga una postura clara y concisa sobre los costos que implicarán al estado de Nuevo León* (23 April 2014).

<sup>60</sup> Article 14(1) Determination, §47 and 48.

<sup>61</sup> Revised submission, §7.

- which, asserts the Submitter, has not received any reply.<sup>62</sup>
- b. The governor of Nuevo León, through a letter signed by civil society organizations. The matter was referred to Monterrey Water and Drainage Services, which informed the Submitters that instructions had been issued to include civil society organizations in the planning of water projects.
  - c. The National Senate, via an open letter.
  - d. The Nuevo León state Congress, through an open letter, which received a reply from the Environment Commission of the Congress. In the latter's reply, the governor was asked to address the demands of individuals that no decisions be taken prior to consultations with citizen experts.<sup>63</sup>
47. Based on the new information presented, the Secretariat determines that the matter raised in the submission was communicated to the relevant authorities in Mexico.

### C. NAAEC Article 14(2) criteria

*(a) [whether] the submission alleges harm to the person or organization making the submission*

48. The Submitter asserts that proceeding with Monterrey VI will damage ecosystems, biodiversity, natural resources availability and the water supply to many peasant and indigenous communities. The Submitter presents documentation that supports said alleged effects on the environment and water availability, should the Project be completed.
49. Paragraph 7.4 of the Guidelines states that in determining whether a submission alleges harm, one must consider "whether the alleged harm is due to the asserted failure to effectively enforce environmental law." The Secretariat determines that the submission satisfies this criteria as the Submitter asserts that failure to effectively enforce of the provisions cited in the submission will result in the authorization of a project that puts at risk the protection and preservation of water in communities, including indigenous communities.

*(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*

50. The submission focuses on the effective enforcement of provisions bearing on the following matters: protection and conservation of ecosystems; biodiversity; natural resources; water basin management; public consultations; and citizen participation in the planning and execution of water related projects and works. The Secretariat deems that the revised submission raises matters whose further study in this process would contribute to achieving the Agreement's objectives, specifically those enumerated in Article 1, subparagraphs a, b, c, f, g, h and i.<sup>64</sup>

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<sup>62</sup> National Academy of Architecture and others, Complaint filed with the Office of the Attorney General, 15 September 2014.

<sup>63</sup> Revised submission, §7, 12 and annex.

<sup>64</sup> "The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;

*(c) [whether] private remedies available under the Party's law have been pursued*

51. The revised submission states that private remedies available under the Party's law were pursued, including the filing of complaints with various state and federal authorities. The Submitter mentions a complaint filed with the Federal Attorney General, which allegedly received no response.<sup>65</sup>
52. In addition to the remedies available to private citizens, the Submitter took other actions to assert its right to be consulted. The submission enclosed a letter from civil society organizations to the governor of Nuevo León, as well as Nuevo León's reply, which stated that instructions had been issued to include civil society organizations in the planning of water projects. However, this —allegedly— has not occurred in the case of Monterrey VI. Furthermore, the submission states that two open letters were written, one to the Federal Senate, the other to the Nuevo León State Congress. Regarding the latter, the Submitter also enclosed the reply from the Environment Commission of the Nuevo León Congress, in which the governor is asked to address the citizenry's demands that no decisions be made prior to consultations with citizen experts. However, asserts the Submitter, to date it has not been invited to participate in Monterrey VI planning.<sup>66</sup>
53. Guided by paragraph 7.5 of the Guidelines and in light of NAAEC Article 6(3), subparagraph c), the Secretariat deems that the competent authorities have been requested "to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm." The Secretariat therefore concludes that reasonable actions have been taken to pursue remedies in Mexico with the goals of ensuring public consultations in relation to the authorization of the Monterrey VI Project, fair access to the supply of water resources and avoidance of harm to the environment.

*(d) [whether] the submission is drawn exclusively from mass media reports*

54. Although the Submitter does include mass media reports in connection with some of its assertions, the Secretariat deems that the submission is not based exclusively on said reports. Rather, the submission is based on the facts presented by the Submitter, as is evident when one consults the information presented in the annexes of both the original submission and the revised submission.

### III. DETERMINATION

55. For the reasons set forth herein, the Secretariat considers submission SEM-16-002 (*Monterrey VI Aqueduct*) to be in compliance with the admissibility requirements established in NAAEC Article 14(1) and it further considers, pursuant to Article 14(2), that the submission's assertions warrant a response from the Government of Mexico regarding some of the assertions made in the submission.

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(c) increase cooperation between the Parties to better conserve, protect and enhance the environment, including wild flora and fauna;

[...]

(f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;

(g) enhance compliance with, and enforcement of, environmental laws and regulations;

(h) promote transparency and public participation in the development of environmental laws, regulations and policies;

(i) promote economically efficient and effective environmental measures; [...]

<sup>65</sup> National Academy of Architecture and others, Complaint filed with the Office of the Attorney General, 15 September 2014.

<sup>66</sup> Revised submission, §7 and annex.

56. The Party may, in any response, provide information concerning:
- a. Whether the Monterrey VI project guarantees satisfies LGEEPA Article 15 section XIII, in relation to the right of communities, including indigenous communities, to the protection and preservation of water and other natural resources, including flora and fauna, as well as the safeguarding and use of biodiversity; and
  - b. The actions implemented by Conagua to effectively enforce LAN Article 5 section II and 14 *bis* section III, in relation to the participation of citizens, communities and experts in decision-making concerning management of the Pánuco River and the planning and authorization of the Monterrey VI project.
57. Mexico's response may also provide information on the present status of the Monterrey VI project and, pursuant to NAAEC Article 14(3), notify whether ongoing proceedings exist in relation to the matter raised in the submission.
58. In accordance with NAAEC Article 14(3), the Party may provide a response to the submission within 30 (thirty) days of receipt of this determination, i.e., by 13 February 2017. In exceptional circumstances, the Party may notify the Secretariat in writing that it is extending the deadline to 60 (sixty) days, i.e., until 28 March 2017.

**Secretariat of the Commission for Environmental Cooperation**

*(signature in original)*

Robert Moyer  
Director, Submissions on Enforcement Matters Unit

*(signature in original)*

Paolo Solano  
Legal Officer, Submissions on Enforcement Matters Unit

cc: Enrique Lendo, alternate representative of Mexico  
Louise Métivier, alternate representative of Canada  
Jane Nishida, interim alternate representative of the United States  
César Rafael Chávez, Executive Director, CEC Secretariat  
Submitter