

[UNOFFICIAL TRANSLATION]

Party Response by the Government of the United Mexican States

Submission SEM-18-001 (Transboundary Agricultural Burning)

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

SEMARNAT
SECRETARÍA DE
MEDIO AMBIENTE
Y RECURSOS NATURALES



I. INTRODUCTION

On 10 January 2018, a resident of the community located within the reserve of the Tohono O’odham indigenous nation at Menagers Dam, Arizona, United States of America, whose name and identifying information are designated as confidential pursuant to Article 11(8) of the North American Agreement on Environmental Cooperation (NAAEC) (the “Submitter”), filed an NAAEC Article 14 submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) asserting that “[e]very few months we have unannounced episodes of smoke drift from Mexico (agricultural burns) that causes community members to have itchy throats, headaches, nausea, irritated eyes, itchy skin, etc. We know that symptoms such as these are a result of pesticides and or unknown agrichemicals that are being over used in the production of these crops that are being burned. These symptoms continue for days after these episodes. It is a human violation not to inform the surrounding communities that such burns will take place, as well as to what chemicals are being used by these farmers in the production of their crops.” The Submitter asserts that Mexico is failing to effectively implement various provisions of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), the Sonora State Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente del Estado de Sonora*—LEEPAS), and the Environmental Protection Bylaw of the municipality of Caborca (*Reglamento de Equilibrio Ecológico y Protección al Medio Ambiente*—REEPMA).

On 19 February 2018, the Secretariat found (“Article 14(1)(2) Determination”) that submission SEM-18-001 (*Transboundary Agricultural Burning*) meets all the requirements of NAAEC Article 14(1) and 14(2) and requested a response from the Government of Mexico as regards the effective enforcement of the following provisions of environmental law in connection with air pollution arising from the crop residue burning adduced by the Submitter:

- a) LGEEPA Article 5 paragraph IV in relation to measures taken by the federal authorities to correct the alleged pollutant emissions;
- b) LEEPAS Article 126 in regard to burning on agricultural land in Sonora;
- c) REEPMA Articles 144, 146, 151, 167, 169, 170, and 172, in view of the place where agricultural burning adduced by the Submitter was occurring.

The Government of the United Mexican States presents this Party Response pursuant to NAAEC Article 14(3) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”), providing information requested by the Secretariat in its Article 14(1)(2) Determination in relation to the Submitter’s assertions.

II. GENERAL CONSIDERATIONS IN RELATION TO THE FACTS ADDUCED IN THE SUBMISSION AND NAAEC ARTICLE 14(1)

In establishing that “the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party *is failing* to effectively enforce its

environmental law” (emphasis added), NAAEC Article 14(1) establishes a currency requirement; that is, that the alleged enforcement failure must be related to facts that are current or occurring, or whose effects continue to be felt, at the time the submission is filed with the Secretariat.

Without offering further details or information, the Submitter states that the facts adduced in the submission — transboundary air pollution caused by crop residue burning — are ongoing. Yet the documentation accompanying the submission in fulfillment of the NAAEC Article 14(1)(e) requirements consists of correspondence with the Sonora State Environmental Attorney’s Office (*Procuraduría Ambiental del Estado de Sonora*—Proaes) in October 2016, fifteen months prior to the filing of the submission. In that letter, the representative of the Tohono O’odham Nation, Rubén Cu:k Ba’ak, refers to specific incidents of transboundary air pollution occurred 18–19 June 2016 that are alleged to have arisen from agricultural burning in Mexico. In addition, the Incident Report filed with the Environmental Protection Office of the Department of Public Safety of the Tohono O’odham Nation is dated 18 January 2017, nearly twelve months prior to the filing of the submission.

The Submitter does not appear to recount any ongoing concrete incidents of transboundary air pollution apart from those observable in the documentation accompanying the submission, nor any specific and recurrent periods in which the community at Menagers Dam is affected by these episodes of alleged transboundary pollution. This suggests that these air pollution incidents are isolated and do not systematically or recurrently occur; therefore, if they are indeed occurring on the territory of the United Mexican States, they could be due to activities bearing no relationship to agricultural burning in Caborca, Sonora and regulated under the REEPMA, which, as is evident from the file for submission SEM-16-001 (*Agricultural Waste Burning in Sonora*), recur during specific periods of the cropping cycle (generally in the months of December and January of each year).

Therefore, due to the nature of the Submitter’s assertions, which relate to past incidents, the Government of Mexico has doubts as to the very object of the submission: that is, as to whether the pollution episodes suffered at Menagers Dam could have been a consequence of agricultural burning in Caborca, and whether the submission in fact meets the currency requirement of NAAEC Article 14(1).

III. PARTY RESPONSE IN RELATION TO THE MUNICIPALITY OF PLUTARCO ELÍAS CALLES, SONORA

The Submitter makes no mention of any alleged agricultural burning taking place in the municipality of Plutarco Elías Calles, Sonora, nor is there any suggestion by the Submitter that the municipal authorities of Plutarco Elías Calles are failing to effectively enforce that jurisdiction’s environmental law. The Submitter makes reference to LEEPAS Article 126 as it relates to REEPMA Articles 144, 146, 151, 167, 169, 170, and 172 as the environmental law that is the object of Mexico’s alleged enforcement failures, the inference being that the Submitter is asserting that the pollution that has affected the community originates in the municipality of Caborca, Sonora and is a consequence of open-air crop residue burning.

Nevertheless, the Secretariat found that “the REEPMA may not be applicable to the matters raised by the Submitter,” since “[t]he area in Mexican territory south [of] the location indicated in the submission corresponds to the municipality of Plutarco Elías Calles ... while the regulations referenced in the submission are in force only with respect to the municipality of Caborca.” The Secretariat goes on to state that in view of the distance between Caborca, Sonora and Menagers Dam, Arizona, “a perusal” of the submission “suggests” that the smoke from the burning in question may originate inside the municipality of Plutarco Elías Calles, Sonora, south of Menagers Dam, and that the Submitters may not be able to determine the exact origin of the emissions.

The Government of Mexico is of the view that one core requirement of the SEM process is that submitters must state the environmental law that the NAAEC Parties are allegedly failing to enforce. NAAEC Article 14 requires that the submitters make a causal link between the ongoing facts and the failure to effectively enforce the environmental law by an NAAEC Party as a *sine qua non* for the eligibility of a submission. Moreover, nothing in the NAAEC or the Guidelines authorizes the Secretariat to *make up for any deficiencies in a submission* under the SEM process, where the submission has errors or does not meet the NAAEC requirements. In such cases, the Guidelines allow the Secretariat to ask submitters to provide additional information or to elaborate on their assertions in a revised submission.

The Government of Mexico is of the view that NAAEC Article 14 requires submitters’ assertions to relate to ongoing matters and to posit a causal link between an alleged enforcement failure and the matter causing the submitters to make use of the SEM process, and that the purpose of the Article 14(1)(c) requirements is to ensure that the two in fact coincide. The Secretariat is therefore obligated to conduct a strict analysis of compliance with this requirement in order to ensure that the submission is clear and consistent and that it advances the goals of the NAAEC, failing which, it must ask the submitters to clarify or elaborate on the information presented in their submission, pursuant to sections 6.1 and 6.2 of the Guidelines.

The Government of Mexico is of the view that, if this action had been taken, the submission would not be marred by ambiguities and imprecisions that go to the core of the Submitter’s assertions. Although SEM is a process offering a degree of flexibility, whose purpose is not to set up an insurmountable procedural barrier to its use by residents of North America, it remains a process governed by strict rules requiring that certain minimal formalities be observed, so that the nature, objet, and source of a submission and its relationship to a body of law eligible for review thereunder can be accurately determined.

As discussed above, the Submitter of submission SEM-18-001 makes no mention whatsoever of the municipal authorities of Plutarco Elías Calles, nor any assertion regarding any alleged failure to effectively enforce that municipality’s environmental law. The Submitter goes no further than to adduce Mexico’s failure to effectively enforce LEEPAS Article 126 in relation to various provisions of the REEPMA. That is, what the Submitter actually contends is that the pollution affecting the community comes from the municipality of Caborca and is a consequence of that municipality’s failure to effectively enforce its environmental law.

In view of the foregoing, the Government of Mexico is unable to provide information in

relation to any crop residue burning activities that may or may not be occurring in the municipality of Plutarco Elías Calles, Sonora. It therefore goes no further in this Party Response than to provide information addressing and relating to the assertions actually made by the Submitter in the submission, without prejudice to stating that in the information provided in the section corresponding to the measures taken by the federal authorities in matters relating to the submission, the Party takes note of the publication of the Sonora State Air Quality Management Plan 2017–2026 (ProAire Sonora), whose inventory of air pollutant emissions by municipality does not mention agricultural burning as a source of pollutant emissions in the municipality of Plutarco Elías Calles.

IV. PARTY RESPONSE IN RELATION TO MEASURES TAKEN BY THE FEDERAL AND STATE AUTHORITIES UNDER LEEPAS ARTICLE 126 AND LGEEPA ARTICLE 5 PARAGRAPH IV

A) Submitter's assertions and Secretariat's Determination

The Submitter cites LGEEPA Article 5 paragraph IV and LEEPAS Article 126 as environmental law that, in being the object of an enforcement failure, has caused the environmental issues in her community, these being alleged episodes of transboundary air pollution from Mexico that allegedly result from agricultural burning.

For its part, the Secretariat, in paragraph 32 of its Article 14(1)(2) Determination, requests a response from the Government of Mexico in regard to the effective enforcement of LEEPAS Article 126 in connection with the burning of cropland in Mexico (sic), and in regard to the measures taken by the federal authorities under LGEEPA Article 5 paragraph IV to correct the alleged pollutant emissions.

B) Party Response

LEEPAS Article 126 provides as follows:

Article 126 bis. It is strictly prohibited to burn plant matter and matter growing on agricultural land, except where the applicable controlled burning permit has been obtained from the competent municipality.

On another note, LEEPAS Article 126 *ter*, not cited in the submission, provides as follows:

Article 126 ter. The municipalities, acting by their environment departments, shall issue licenses to anyone who, having submitted a controlled burning plan, meets the requirements established by the same municipalities for mitigation of the impact on natural resources and adjacent properties.

It is evident from these provisions of the LEEPAS that Sonora state environmental law establishes that the regulation of matters relating to agricultural burning is under municipal

and not state jurisdiction. That is, the Sonora state government is not involved in the regulation of the agricultural burning carried out in the state's municipalities. The purpose of LEEPAS Article 126 (along with Article 126 *ter*, not cited in the submission) is to lay down minimal guidelines for municipal regulation; these provisions are not the object of direct enforcement by the federal, state, or municipal authorities. The municipality of Caborca regulates agricultural burning through the REEPMA, in consonance with the distribution of jurisdictions set out in the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*), the LGEEPA, and the LEEPAS.

Nevertheless, the Sonora State Environment and Sustainable Development Commission (*Comisión de Ecología y Desarrollo Sustentable del Estado de Sonora*—CEDES) and Proaes, taking note of the foregoing observations concerning municipal jurisdiction over agricultural burning, offer an accounting of various measures and steps taken in relation to the matters raised by the Submitter in the documents attached as **Appendix A** to this Party Response.

In relation to measures taken by the federal authorities under LGEEPA Article 5 paragraph IV, the Secretariat itself acknowledges that the power vested in the federal government by that article to “address matters affecting ecological stability in the nation’s territory or in areas under the sovereignty and jurisdiction of the nation; or originating in the territory of, or in areas under the sovereignty or jurisdiction of other states, or in areas beyond the jurisdiction of any state” does not give “direct enforcement authority to the federal government with respect to such pollution, so the Secretariat reads this provision with others cited in the submission.” Yet in requesting a response from Mexico in relation to this article, the Secretariat did not specify the provision with respect to which Mexico’s response should be provided.

Nevertheless, the following information is offered in regard to measures taken by various federal authorities of the Government of Mexico to effectively enforce the applicable environmental law:

- A) On 7 January 2014, doc. no. PFPA/32.7/2C.28.4.2/0001-14 was opened in response to an anonymous complaint (no. 2602574) arising from asparagus crop residue burning in the municipality of Caborca.

The Sonora office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) took cognizance of the matter and decided to refer it to Proaes, since it was not a matter under Profepa’s jurisdiction, declaring the file to be closed for the purposes of Profepa. The complaint was registered with Proaes under doc. no. OSA-QD-007/14.

In doc. no. OSA-058/14 of 4 August 2014, the Deputy Attorney for Environmental Affairs (*Subprocurador Ambiental*) of Proaes informed Profepa that an inspection of the area of Caborca under asparagus cultivation had found no evidence of activities such as the one mentioned in the complaint but that such activities would presumably reoccur during the 2014–2015 growing season. He therefore requested Profepa’s support in communicating the situation to the Ministry of Agriculture,

Livestock Production, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación—Sagarpa*) in order for the latter to issue a reminder to the farmers of District 139 of Caborca that they must refrain from engaging in burning “since that is the authority which approves such activities.”

In doc. no. PFPA-32.7-8C.17.4-2C.28.4.2-0454-14, Profepa urged the Sonora state representative of Sagarpa to act as recommended by Proaes, to which the latter authority responded with doc. no. 146.00.020.-1133 of 11 September 2014, stating that in doc. no. 146.00.020.-4916, the general counsel of the Sonora office of Sagarpa had asked the director of rural development district 139 of Caborca to make representations to the area’s farmers in an effort to dissuade them from carrying out the burning complained of, but clarifying to Profepa and Proaes that the Sonora office of Sagarpa “neither authorizes nor approves the activities of the region’s farmers.”

A copy of doc. no. PFPA/32.7/2C.28.4.2/0001-14 is attached to this Party Response as **Appendix B** and the Secretariat is asked to treat this document as confidential pursuant to Article 39(1)(b), since the document is considered classified under the applicable law of the United Mexican States.

- B) On 2 December 2015, doc. no. PFPA/32.7/2C.28.4.1/0016-15 was opened further to a complaint filed by David Silva Bonales in regard to asparagus crop residue burning in the municipality of Caborca.

Profepa took cognizance of the matter but found that it fell under the jurisdiction of Proaes and the municipal authorities of Caborca rather than its own jurisdiction, declaring the file to be closed for the purposes of Profepa. The matter was referred to Proaes in doc. no. PFPA-32.7-2C.28.4.1- 0492-15 and to the Municipal President of Caborca in doc. no. PFPA-32.7- 2C.28.4.1-0493-15. The complaint was registered by Proaes under doc. no. OSA-QD-004/16.

The Profepa file relating to this complaint also contains doc. no. F00.RBPGDA/005/16 of 12 January 2016, whereby the Director of the El Pinacate and Gran Desierto de Altar Biosphere Reserve, managed by the National Protected Natural Areas Commission (*Comisión Nacional de Áreas Naturales Protegidas*), filed a complaint with Profepa in regard to crop residue burning in an asparagus field at the entrance to the Schuk Toak Visitor Center of the biosphere reserve, of which Profepa took cognizance in doc. no. PFPA-32.7-2C.28.2-0017-16.

A copy of doc. no. PFPA/32.7/2C.28.4.1/0016-15 is attached to this Party Response as **Appendix C** with a request to the Secretariat that it be treated as confidential under Article 39(1)(b), since this file is considered classified under the applicable law of the United Mexican States.

- C) One of the most important air quality-related measures taken by the federal

authorities of the Government of Mexico, in conjunction with the state and municipal authorities of Sonora, is the implementation of ProAire Sonora, which document is attached to this Party Response as **Appendix D**.

ProAire Sonora is an environmental public policy instrument that produces an analysis of air quality in Sonora, as well as an inventory of emissions in the state (broken down by source, pollutant, and municipality) and their effects on human health, establishing strategies and measures for the reduction and abatement thereof.

As part of the pollutant emission reduction strategies adopted under ProAire Sonora, the instrument includes an assessment of the contribution of agricultural burning to air pollution in each municipality where such burning occurs, and recommends the regulation of agricultural burning through the promotion of alternative techniques for the use of the biomass resulting from the agricultural harvest as a relevant measure for achieving the reduction of pollutant emissions from this activity (Measure 8 of Strategy 3, “Emission Reductions by Area Source”).

V. PARTY RESPONSE IN RELATION TO MEASURES TAKEN BY THE MUNICIPAL AUTHORITIES UNDER REEPMA ARTICLES 144, 146, 151, 167, 169, 170, AND 172

In relation to those of the Submitter’s assertions that fall under the heading of this section, which constitute the core of those assertions, the Government of Mexico wishes the Submitter to know that these are the subject matter of submission SEM-16-001 (*Agricultural Waste Burning in Sonora*) and that the CEC is currently developing a factual record which, like the submission at hand, addresses the problem of crop residue burning in the municipality of Caborca, Sonora, which derives from an alleged failure to effectively enforce the REEPMA by the authorities of that municipality. Consequently, the Government of Mexico reports that it has no further information to provide about the effective enforcement of the REEPMA, beyond that which it provided in its Party Response to submission SEM-16-001, which is to form a part of the factual record for that submission.

VI. CONCLUSIONS

The following is evident from the Government of Mexico’s response to the assertions made in the submission:

- The Government of Mexico is of the view that the submission is insufficiently clear and does not provide the information nor meet the requirements of NAAEC Article 14, making it impossible to offer any information regarding the Submitter’s environmental concerns in relation to the episodes of air pollution experienced in her community. The Submitter does not provide, as is required under NAAEC Article 14(1)(c), documentary evidence to support the assertion that the alleged incidents of air pollution in her community: (i) come from Mexico; (ii) originate in the municipality of Caborca, Sonora; (iii) ensue from agricultural burning, and (iv) derive from a failure to effectively enforce the REEPMA.

- As established in this Party Response and as the Secretariat itself acknowledges, the Mexican federal and Sonora state authorities lack jurisdiction over the matter raised in the submission; namely, the regulation of agricultural burning. Nevertheless, this Party Response discusses various measures taken by these federal and state authorities in relation to the matter raised in the submission, including law enforcement measures such as those carried out by Profepa and Proaes, management activities such as those carried out by the Sonora state office of the federal Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*) and Sagarpa, and the air quality management measures arising from the publication of ProAire Sonora.
- The Government of Mexico is of the view that because the facts and the environmental law addressed by this submission coincide with those addressed by submission SEM-16-001 (*Agricultural Waste Burning in Sonora*), the Secretariat should have consolidated, and still can consolidate, the two submissions under section 10.3 of the Guidelines, which stipulates that “[t]he Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law.”

Since the two submissions do in fact fully coincide in this way, the Government of Mexico is of the view that they should be consolidated in order to optimize the CEC’s use of resources, since a factual record for this Submission, if one were to be prepared, would provide no new or substantially different information from that which will be afforded by the factual record for submission SEM-16-001, and would therefore not advance any of the goals of the NAAEC.

In this Party Response, the Government of Mexico has given a timely response to the matters raised by the Submitter, as well as those raised in the Article 14(1)(2) Determination, in the hope of giving guidance to the Submitter and the North American public on the manner in which the Party’s environmental law is being applied to the specific facts discussed in the submission.