

Secretariat of the Commission for Environmental Cooperation

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

Submitter:	[Confidential name pursuant to NAAEC Article 11(8)(a)]
Party:	United Mexican States
Submission received on:	3 October 2018
Date of the determination:	15 November 2018
Submission No.:	SEM-18-003 (<i>Hydraulic Fracturing in Nuevo Leon</i>)

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 nongovernmental organization residing or established in the territory of 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 (the “submissions on enforcement matters” or “SEM” process). The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”)¹ initially considers submissions to determine whether they meet the requirements of NAAEC Article 14(1). Where the Secretariat finds that a submission meets these requirements, it then determines, pursuant to NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, it then proceeds no further with the submission.²
2. On 3 October 2018, a resident of Mexico, who requested the confidentiality of his personal data (the “Submitter”), filed a submission with the CEC Secretariat pursuant to NAAEC Article 14(1).³ The submission was made through the CEC's online submission platform, at: <www.cec.org/peticiones>. The Submitter asserts that the Government of Mexico is failing to effectively enforce the law with respect to the site restoration and subsequent abandonment of hydraulic fracturing activities carried out in the community of Hacienda El Carrizo, in the Municipality of Los Ramones, Nuevo Leon.
3. The Submitter asserts that, during the second half of 2013, the company Petróleos Mexicanos (Pemex) allegedly engaged in deep boring for purposes of shale gas

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, Mexico, and the United States (the “Parties”). The constituent bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee.

² 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/peticiones>.

³See: SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*), Article 14(1) submission (3 October 2018).

exploration and extraction, using the technique known as “hydraulic fracturing” or “fracking” in violation of Mexican environmental laws.⁴

4. Having reviewed submission SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*), the Secretariat finds that it does not meet all eligibility requirements of NAAEC Article 14(1), and hereby so notifies the Submitter in accordance with paragraph 6.1 of the Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (“Guidelines”).
5. In accordance with paragraph 6.2 of the Guidelines, the Submitter has 60 working days from the date of this determination to make a revised submission. If the Secretariat does not receive a revised submission by **27 February 2019**, it will stop the processing of submission SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*). The Secretariat’s reasoning is set out below.

II. ANALYSIS

6. The opening paragraph of NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or nongovernmental 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.⁵ The Secretariat examined the present submission with this perspective in mind.

A Opening paragraph of Article 14(1)

7. The Secretariat determines that the submission contains sufficient information to contact the Submitter, that he is a North American resident, and that the submission does not have any information to conclude that the Submitter is part of the government of his country or under its direction.
8. Regarding whether the submission raises matters that are presently occurring, the Secretariat believes that the submission’s assertions meet the requirement that the matter at issue concerns a current situation.⁶ The alleged enforcement failures raised by the Submitter continue to occur, since—he claims—the effects of the hydraulic fracturing activities in his community remain. While such activities are no longer performed, homes in his community—he maintains—still have structural damage and the quality of water in the wells used for human consumption has been impaired.
9. Concerning whether the legal provisions cited in the submission qualify as environmental law in the terms of NAAEC Article 45(2) and whether the submission’s assertions refer to enforcement failures subject to examination under the submissions process, the Secretariat’s analysis follows below.

⁴ *Ibid.*, p. 1.

⁵ 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.

⁶ NAAEC Article 14(1):

The Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...] (emphasis added).

1) The environmental law at issue

10. The concept of “environmental law,” as defined in Article 45(2) of the Agreement, must be considered in totality in analyzing the admissibility of the present submission.⁷
11. In examining submission SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*) in light of said definition, the Secretariat finds that in certain cases the provisions cited by the Submitter qualify as environmental law, but in other cases the laws do not. Moreover, in relation to some of the other provisions cited in the submission, more specific assertions and information are required before said provisions can qualify as environmental law and be considered in the submissions process.
12. The Submitter asserts that when the hydraulic fracturing activities were carried out, there was no regulatory framework setting conditions;⁸ however, the Secretariat believes that a revised submission could still cite the applicable environmental law.

i. Political Constitution of the United Mexican States

13. The submission cites Constitutional Article 4 and, while not alluding to the paragraphs enshrining the right to a healthy environment and the right to water and sanitation, the submission's language makes it clear that it is referring to water quality and the right to a healthy environment.⁹ In this regard, the Secretariat has already determined that said constitutional provisions intended to acknowledge the human right to a healthy environment are environmental laws and may guide its analysis.¹⁰

⁷ NAAEC Article 45(2) defines the term “environmental law” as follows:

For purposes of Article 14(l) and Part Five:

- (a) “**environmental law**” means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areasin the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term ‘environmental law’ does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part..

⁸ Submission, p. 3.

⁹ On this matter, the Submitter asserts: “...we found that hydraulic fracturing for gas extraction purposes may cause damage to soil, water and air as well as human health” (Submission, at 1); “...we found that although water was apparently clean, it had a high salt content and other substances” (Submission, at 2); “we want [Pemex] and authorities to be questioned for activities that clearly damaged the land, subsoil and water” (Submission at 2); “it is clear that gas exploration and exploitation through hydraulic fracturing does not protect and improves the environment” (Submission at 4).

¹⁰ See: SEM-15-002 (*Management of Analog TV Waste*), Article 14(1) Determination, 22 September 2015, § 14.

ii. The General Ecological Balance and Environmental Protection Act

14. The submission cites Articles 1, sections I, V and VI, and 15, sections II, III, IV and XII, of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA). The cited provisions establish the right to a healthy environment,¹¹ the sustainable use, preservation and restoration of the soil, water and natural elements compatible with the economic benefits,¹² and the prevention and control of water and soil pollution.¹³ In this regard, as the Secretariat has stated in previous determinations prepared pursuant to NAAEC Article 14(1),¹⁴ the provisions establishing the general bases for enforcement, while primarily intended to protect the environment, lack the specificity necessary to be considered environmental law under Article 14. A revised submission must cite the specific provisions applicable to the current situation and assert that Mexico has failed to enforce those provisions.

iii. The Federal Environmental Liability Act

15. The submission cites Articles 1, 2, 28 and 54 of the Federal Environmental Liability Act (*Ley Federal de Responsabilidad Ambiental*—LFRA). Regarding Articles 1 and 2 of said Act, the Secretariat concludes that those provisions which refer to the criteria governing this law's enforcement,¹⁵ its object¹⁶ and the definitions thereto,¹⁷ although they serve to orient the Secretariat when examining a submission, may not themselves be considered as environmental law, as they do not prescribe specific obligations which can be effectively enforced. Accordingly, they may not be subject to analysis under the NAAEC submissions process.

¹¹ LGEEPA, Article 1, section I.

¹² LGEEPA, Article 1, section V.

¹³ LGEEPA, Article 1, section VI.

¹⁴ See: SEM-06-001 (*Ex Hacienda El Hospital*), Article 14(1)(2) Determination, 17 May 2006.

¹⁵ LFRA Article 1 reads as follows:

This Law regulates environmental liability arising from damages to the environment, as well as reparations and compensation thereto, when required, adjudicated through the federal judicial proceedings established under Article 17 of the Constitution, alternative dispute resolution mechanisms, administrative proceedings and proceedings applicable to the commission of crimes against the environment and environmental management. The provisions of this legislation derive from the regulations of Article 4 of the Constitution and concern for public order and the social interest. They have as their object the protection, preservation and restoration of the environment and ecological balance, the guaranteeing of the human right to a healthy environment for the development and well-being of all persons, as well as the liability arising from environmental damage and degradation. The environmental liability regime recognizes that damage caused to the environment is distinct from property damage suffered by the owners of goods and natural resources. It recognizes that sustainable national development must consider economic, social and environmental values. The purpose of the judicial proceeding established in this Title is to determine environmental liability, without prejudice to proceedings for determining other forms of liability, such as property damage, and administrative or criminal liability.

¹⁶ *Ibid.*

¹⁷ LFRA Article 2: "For the purposes of this Law, the following definitions shall apply, in addition to those established in the General Ecological Balance and Environmental Protection Act, and other environmental laws and international treaties to which Mexico is a Party. The following definitions apply: [list of definitions under the Act]"

16. Concerning Article 28 of the LFRA,¹⁸ which establishes who has legal standing to bring an environmental liability suit, while its main purpose may be the protection of the environment via reparation and compensation for environmental damages, this is a purely procedural provision which cannot be enforced per se, by the government.
17. With respect to Article 54, first paragraph of the LFRA,¹⁹ which establishes the right of any person to file a complaint with the Public Prosecutor (*Ministerio Público*) concerning a crime against the environment, the Secretariat considers that as is, it does not fit the definition of environmental law as it stands as a procedural norm that needs to be articulated with other provisions cited in a submission.
18. The Secretariat finds that LFRA Article 28 relates to legal standing to bring an environmental liability suit while LFRA Article 54 provides the right to file a complaint of an environmental offense before the public prosecutor. The cited provisions have a procedural character which are brought through the remedies allowed in Mexico and are not considered for analysis.

iv. Other instruments cited as environmental law

19. The submission cites the following international instruments:
 - Rio Declaration;
 - World Summit on Sustainable Development (Johannesburg, South Africa), and
 - Sustainable Development Goals (Goals 7 and 13).
20. The Secretariat notes that the instruments cited by the Submitter, while they may be primarily intended to protect the environment by proposing a strategy to ensure sustainable development (Rio Declaration and World Summit on Sustainable Development) and establishing global affordable energy and climate action targets (the aforesaid Goals 7 and 13), cannot be construed as “environmental laws” because they are not binding upon the signatories and therefore are not normative instruments.
21. The Secretariat determines that the Rio Declaration on Environment, the World Summit on Sustainable Development (Johannesburg, South Africa) and Sustainable

¹⁸ Article 28 of the LFRA provides as follows:

The legal prerogative and legitimate interest to act and bring legal proceedings on environmental liability, reparations and compensation for damages to the environment and the payment of fines, as well as concerning the benefits specified in the present Title, shall be recognized in respect of the following parties: I. Natural persons residing in communities adjacent to damages done to the environment; II. Non-profit Mexican private legal persons whose corporate purpose is environmental protection in general or protection of specific elements of the environment when acting on behalf of an inhabitant of the communities specified in section I; III. The Federation acting through the Public Prosecutor's Office; and IV. The public prosecutors or institutions exercising environmental protection functions in the states and the Federal District within their respective territorial jurisdictions, in conjunction with the Public Prosecutor's Office. The legal persons cited in section II of the present article shall accredit their status as legally constituted bodies with at least three years standing prior to bringing a suit for environmental damages. In addition, they must satisfy the requirements of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*). Furthermore, the parties specified in sections I and II shall enjoy the legal prerogative and legitimate interest to demand payment of costs incurred during actions brought to establish environmental liability.

¹⁹ Under LFRA Article 54, paragraph one: “Any person who learns of the commission of a crime against the environment may make a direct complaint to the Public Prosecutor.”

Development Goals (Goals 7 and 13) do not constitute environmental laws, as defined in NAAEC Article 45(2)(a).

B The six requirements of NAAEC Article 14(1)

22. After considering the submission in light of the opening sentence of NAAEC Article 14(1), the Secretariat determines that while submission SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*) meets five of six requirements of this article, it does not meet the requirement to communicate the matter in writing to Mexico. The Secretariat's reasoning is explained below.
 - a) *is in writing in a language designated by that Party in a notification to the Secretariat*
23. The submission complies with requirement (a) of Article 14(1), as it was filed in writing in one of the languages designated by the Parties for this purpose (in Spanish, in this particular case).
 - b) *clearly identifies the person or organization making the submission*
24. The submission satisfies Article 14(1)(b). In effect, the Submitter provided his name, address and other contact information, which was sufficient for the Secretariat to clearly identify and communicate with the Submitter.
 - c) *provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based*
25. Regarding Article 14(1)(c), the submission attached, through the Secretariat's online submissions platform, photographs of what he refers to as a water extraction well, land that appears to form a holding pit and various buildings showing visible damage. It also included a water quality analysis based on samples taken at Los Ramones, Nuevo León.
26. The information supports the assertion that supposedly extractive activities were carried out in Los Ramones and land was used as a waste pit.
27. While the submission does not contain any other information providing further data on the alleged hydraulic fracturing activities in Los Ramones, the information accompanying the submission is sufficient to consider it in light of Articles 14 and 15 of the NAAEC.
 - d) *appears to be aimed at promoting enforcement rather than at harassing industry*
28. The submission complies with NAAEC Article 14(1)(d), as it appears to be aimed at promoting enforcement of the law rather than at harassing an industry. Paragraph 5.4 of the Guidelines states that, in making such a determination, the Secretariat will consider whether or not: (i) “the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission”; and (ii) “the submission appears frivolous.”
29. In reading the submission it is apparent that while the Submitter refers to Pemex and the activities that the company supposedly carried out on the land in 2013, the submission appears to be aimed at promoting the enforcement environmental law—in particular,

water quality and environmental impact—in the municipality of Los Ramones, Nuevo Leon.

- 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*

30. The submission does not satisfy the requirement prescribed by NAAEC Article 14(1)(e), since the matter has not been communicated in writing to the relevant authorities in Mexico.
31. An enclosure to the submission states that “there has not been any written communication” and that when there is any problem, residents go directly to the municipal seat to request an interview with the mayor. He further states that on January 14, 2014, a meeting was held with the municipal authorities and representatives of Pemex, but there was no subsequent follow-up on the matter then raised. The Submitter sustains that this is a rural community far removed from the state capital and electronic media.
32. El Secretariat notes that the Article 14(1)(e) requirement can be met through a written communication addressed to the relevant state or federal authorities, which could help ensure that his concern regarding the environmental effects of the hydraulic fracturing activities are attended to.
33. A revised submission should include information evidencing that the matter was communicated in writing to the relevant authorities, along with the replies, if any.
- f) *is filed by a person or organization residing or established in the territory of a Party*
34. The submission is in compliance with Article 14(1)(f), as it was filed by a person who is established in the territory of an NAAEC Party and has no ties to the government.

III. DETERMINATION

35. For the reasons detailed herein, the Secretariat considers submission SEM-18-003 (*Hydraulic Fracturing in Nuevo Leon*) to not be in full compliance with the admissibility requirements specified in NAAEC Article 14(1). Consequently, the Submitter is invited to provide a revised submission that addresses the following matters:
- i) Citation of the environmental laws in effect, applicable to hydraulic fracturing activities, which have not been enforced by Mexico, and
- ii) Copy of the communications with the relevant authorities concerning the issue in question.
36. In accordance with paragraphs 6.1 and 6.2 of the Guidelines, the Secretariat hereby notifies the Submitter that the latter shall have 60 working days to provide a submission that conforms to all of the criteria specified in NAAEC Article 14(1). If such a revised submission is not received by **27 February 2019** at the latest, the Secretariat will terminate the process with respect to submission SEM-18-003 (*Hydraulic Fracturing in*

Nuevo Leon). If a revised submission is received, the Secretariat will proceed to consider whether it satisfies the eligibility criteria of NAAEC Article 14(1).

37. The Submitter may provide a revised version of his submission, as well as any additional information in electronic form, to the following email address: <sem@cec.org>. The Submitter need not include the documents already enclosed with the original submission.

Secretariat of the Commission for Environmental Cooperation

(signed in the original)

By: Robert Moyer
Head, SEM Legal Unit

(signed in the original)

By: Paolo Solano
Legal Officer, SEM Legal Unit

CC: Enrique Lendo, Alternate Representative, Mexico
Jane Nishida, Interim Alternate Representative, United States
Isabelle Bérard, Alternate Representative, Canada
César Rafael Chávez, Executive Director, CEC Secretariat