

Secretariat of the Commission for Environmental Cooperation

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

Submitter: [Name confidential pursuant to Article 11(8)(a)]
Party: United Mexican States
Date of receipt: 9 November 2018
Date of determination: 19 September 2019
Submission no.: SEM-18-004 (*Chileno Bay Club*)

Executive summary

On 9 November 2018, the Secretariat of the Commission for Environmental Cooperation received submission SEM-18-004, which asserts that Mexico is failing to effectively enforce its environmental law in allowing the construction and operation of the “Chileno Bay Club” tourism development. The Secretariat found that the submission merited a response from the Party, and Mexico submitted its response on 18 April 2019, containing information relating to the enforcement of the provisions cited by the author of the submission (hereinafter, the “Submitter”).

In addition to including a notification of pending proceedings—that is, ongoing proceedings bearing a relationship to one or more of the Submitter’s assertions—Mexico’s response states its objections as to the eligibility of the submission and, as well, to the categorization of some of the cited provisions as “environmental law.” It also presents information that the Party classified as confidential concerning enforcement measures taken by the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) in relation to the Chileno Bay Club project.

Having reviewed the submission in light of the response provided by the Government of Mexico, the Secretariat concludes that the preparation of a factual record is not warranted. Not only does the information provided in the response suggest that enforcement measures corresponding to situations or omissions to which the Submitter refers may be ongoing, but it also reflects the technical assessment produced by the National Water Commission (*Comisión Nacional del Agua*—Conagua) in regard to intermittent streams on the project site.

In accordance with Articles 14(3) and 15(1) of the North American Agreement on Environmental Cooperation and paragraph 9.8 of the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat hereby presents the reasons for its determination.

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide for a process allowing any person or non-governmental organization residing in Canada, the United States, or Mexico to file a submission asserting that a party to the Agreement is failing to effectively enforce its environmental law (the “SEM” process). The Secretariat of the Commission for Environmental Cooperation (CEC)¹ initially reviews submissions to determine whether they meet the requirements of NAAEC Article 14(1). When the Secretariat finds that a submission meets these requirements, it then determines, pursuant to Article 14(2), whether the submission merits a response from the Party in question. In light of any response provided by the Party, and in accordance with the NAAEC, the Secretariat may notify the Council that the matter warrants the preparation of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with the submission.²
2. On 9 November 2018, a person who requested that his personal information be kept confidential under NAAEC Article 11(8)(a) (hereinafter, the “Submitter”) filed a submission with the Secretariat through the online submissions platform (www.cec.org/submissions) in accordance with NAAEC Article 14(1).³ The Submitter asserts that Mexico is failing to effectively enforce its environmental law by allowing the construction and operation of the “Chileno Bay Club” tourism development in Los Cabos, Baja California Sur. The Submitter contends that the alteration of streams or streambeds caused by construction of the project took place without environmental impact approval.
3. On 22 January 2019, the Secretariat found that the submission met the criteria of NAAEC Article 14(1) and, in accordance with Article 14(2), requested a response from Mexico in regard to the effective enforcement of the following provisions cited in the submission:⁴
 - a. Concerning the environmental impact assessment of the Chileno Bay Club project, the consideration of impacts on watercourses, and the modifications made to the project: Articles 28 paragraphs IX and X, 30, 88, 91, 98, and 101 *bis* of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*), and Articles 5(Q)(a), (b) and (c) and (R)(I) and (II), 16, and 28 of the Environmental Impact Regulation to the LGEEPA (*Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental—REIA*).
 - b. Concerning the implementation of safety measures in relation to the work and activities associated with the Chileno Bay Club project and the alleged violations relating to risks

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/submissions>.

³ SEM-18-004 (*Chileno Bay Club*), NAAEC Article 14(1) Submission (9 November 2018) [Submission]. The record of the Submission is available at <www.cec.org/es/sem-peticiones/chileno-bay-club>.

⁴ SEM-18-004 (*Chileno Bay Club*), Article 14(1) and (2) Determination (22 January 2019), §69.

- to the public caused by the project: LGEEPA Article 170 and Article 84 of the Mexican Civil Protection Act (*Ley General de Protección Civil—LGPC*).
- c. Concerning the determination of national waters under the jurisdiction of the National Water Commission (*Comisión Nacional del Agua—Conagua*): Article 113 of the National Waters Act (*Ley de Aguas Nacionales—LAN*).
 - d. Concerning the handling of complaints filed by members of the public: LGEEPA Articles 189 and 190 and LAN Article 124 *bis*.
4. On 17 April 2019, the Secretariat received a response from the government of Mexico⁵ giving notice of the existence of an administrative proceeding opened by the Baja California Sur office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*; hereinafter, the “Profepa office”); a judicial review proceeding filed with the Baja California Peninsula watershed body of Conagua, and another proceeding opened by the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos—CNDH*). The response also presents various considerations regarding the submission’s eligibility.
 5. In addition, Mexico’s response contains information about measures taken in regard to the matter raised in the submission, including site inspections made, administrative proceedings opened, and application of the measures contemplated in the environmental law cited by the Submitter.
 6. Having reviewed the submission in light of the response, in accordance with Article 15(1) of the Agreement and guided by the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat finds that submission SEM-18-004 (*Chileno Bay Club*) does not warrant the preparation of a factual record, for the reasons set out below.

II. ANALYSIS

A) Preliminary issues

7. Mexico presents various arguments in support of its contention that the submission was not eligible for review under the submissions mechanism. The Secretariat, respectfully disagrees with Mexico’s contention.
8. The Party contends that the submission “appears to be aimed at harassing an industry, the tourism and hotels industry in Los Cabos, Baja California Sur, and in particular the ‘Chileno Bay Club’ tourism development”, because despite numerous complaints filed against the project, the alleged violations have never been proved.⁶ In order to determine whether a submission is indeed aimed at harassing industry, the Secretariat must consider the factors mentioned in paragraph 5.4 of the Guidelines. While the submission does make reference to the environmental impact approval for the Chileno Bay Club project, it does not, in reality, center around compliance by the developer; rather, the assertions focus on alleged enforcement failures by the government of Mexico. It can therefore be concluded that the submission

⁵ SEM-18-004 (*Chileno Bay Club*), Article 14(3) Response (17 April 2019) [Response].

⁶ Response at [page] 4.

appears to be “aimed at promoting enforcement.”⁷ As to whether the Submitter is a competitor who could benefit from the submission economically, the Secretariat finds—based on the information in its possession and also pursuant to paragraph 5.4 of the Guidelines—that the Submitter is not a competitor of the Chileno Bay Club project, nor could he derive any economic benefit from filing the submission.⁸

9. Mexico further contends in its response that submission SEM-18-004 does not meet the eligibility criteria of NAAEC Article 14(2)(a) and (c) since it does not allege harm to the person or organization making the submission, nor does it provide sufficient information to allow the Secretariat to review it. In the Party’s opinion, “[the Submission] does not provide evidence to substantiate the causation of environmental harm as a consequence [of] the works and activities associated with the project.”⁹
10. In this regard, paragraph 7.4 of the Guidelines states that in determining whether the person or organization making the submission suffered harm, two factors must be considered: a) whether the alleged harm is due to the asserted failure to effectively enforce environmental law, and b) whether the alleged harm relates to the protection of the environment. The text of the paragraph in question refers to “alleged harm” because the Secretariat’s role is not to verify directly whether the harm in fact materialized (where applicable, this is the responsibility of the Mexican authorities). As regards submission SEM-18-004, the information presented in the submission and its appendices suggests, at least at first glance, that there is alleged of harm arising from the development of the project, due to violation of the conditions of the environmental impact approval for the Chileno Bay Club project. This situation was, in principle, corroborated by the measures taken by Profepa further to the filing of a complaint.¹⁰ The Secretariat finds that, in any case, the information in Mexico’s response corroborates the possible existence of harm to the environment, and therefore decides not to modify its original determination.
11. Mexico further challenges the Secretariat’s determination that the following laws cited by the Submitter qualify as environmental law under NAAEC Article 45(2). It contends that LGEEPA Articles 88, 91, 98, and 101 *bis* “merely establish generic obligations concerning environmental management by the environmental authorities of Mexico, which are only fulfilled in conjunction with other concrete powers.”
12. In this regard, the Secretariat clarified, in its determination of 22 January 2019, that these provisions are given consideration insofar as the law requires their application to a specific case.¹¹ In this case, Mexico’s response provides information about how these provisions are

⁷ *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* at paragraph 5.4, online at <www.cec.org/guidelines>.

⁸ In contrast, the Secretariat has found in other cases that a submission should be dismissed by virtue of the two factors mentioned in paragraph 5.4 of the Guidelines. See SEM-05-001 (*Crushed Gravel in Puerto Peñasco*), Article 15(1) Determination (24 October 2005): “[T]he Submitter is a competitor of Diamond and of Israel León, and therefore ... is seeking a benefit and not promoting the effective enforcement of environmental law as such”; SEM-11-001 (*PCB Treatment in Grandes-Piles, Quebec*), Article 14(1) Determination (11 February 2011): “[I]t appears that the Submission is concerned with a particular company that is a competitor of the submitter, as per Guideline 5.4(a).”

⁹ Response at 5.

¹⁰ Article 14(1) and (2) Determination, §§61–4.

¹¹ *Ibid.*, §§15–18.

applied “in conjunction with other concrete powers to act under the LGEEPA,” so that the Secretariat’s determination was correct that they should not be dismissed in the initial review of the submission.

13. With respect to LAN Article 124 *bis*, Mexico contends that is a provision that “merely imposes generic obligations concerning environmental management on the environmental authorities of Mexico, which are only enforced in conjunction with other concrete powers to act under the LAN and therefore does not fit the definition of *environmental law*.”¹²
14. LAN Article 124 *bis* establishes the right of every person to file a citizen complaint pursuant to the mechanism established in LGEEPA Articles 189 and 190. In its Article 14(1) and (2) determination, the Secretariat found that the provisions establishing the public complaint mechanism “have environmental protection and human health as their primary purpose.” The Secretariat has consistently reached the same conclusion in various determinations in which it has analyzed whether provisions establishing a public complaint mechanism qualify as environmental law;¹³ indeed, in one such case, a factual record was prepared for the submission in question.¹⁴
15. The Secretariat does not find sufficient grounds in Mexico’s response for amending its determination as to the status of LAN Article 124 *bis* as environmental law in the sense of NAAEC Article 45(2).

B) Notification of pending proceedings

16. Pursuant to NAAEC Article 14(3), the submissions mechanism allows for an NAAEC Party to give notice “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.” In addition, the submissions process provides that the Party may state in its response “whether the matter was previously the subject of a judicial or administrative proceeding,” or “whether private remedies in connection with the matter are available to the person or organization making the submission.”¹⁵ In this section of the determination, the Secretariat performs the corresponding analysis, guided by the definition of “judicial or administrative proceeding” given in NAAEC Article 45(3).
17. NAAEC Article 45(3)(a) defines a judicial or administrative proceeding as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an

¹² *Ibid.* at 23.

¹³ See, e.g., SEM-98-002 (*Ortiz Martínez*), Article 14(1) Determination (23 June 1998), at 4: “In the opinion of the Secretariat, it is evident that the provisions of the LGEEPA establishing the *denuncia popular* proceeding qualify as ‘environmental law’ as defined in the above-mentioned Article 45(2)”;
SEM-00-006 (*Tarahumara*), Article 14(1) and (2) Determination (6 November 2001), at 7: “As noted in conjunction with the review of other submissions relating to the public complaint mechanism, it is clear that the provisions of the LGEEPA establishing the mechanism qualify as ‘environmental law’ in the sense of NAAEC Article 45(2), since they are provisions whose primary purpose is the protection of the environment.”

¹⁴ SEM-00-006 (*Tarahumara*), Final Factual Record (9 January 2006), at
<http://www.cec.org/sites/default/files/submissions/1995_2000/6424_tarahumaraf_r_en.pdf>.

¹⁵ NAAEC Article 14(3)(a) and (b), at <<http://www.cec.org/about-us/NAAEC>>.

assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order...

i) Administrative proceedings before the Profepa office

18. Mexico notified the Secretariat of the existence of an administrative proceeding before the Profepa office under file number PFPA/10.3/2C.27.5/0044-17, opened in response to a complaint filed by a member of the public on 20 April 2017. Based on this complaint, the Profepa office ordered an inspection (conducted 22 May 2017) in which instances of noncompliance relating to land use changes in forested areas were detected, since activities had been carried out without prior authorization.¹⁶
19. On this basis, the Profepa office issued administrative order PFPA/10.1/2C.27.5/242/2017 on 13 December 2017, whereby the developer of the Chileno Bay Club project was fined but it was also found that no environmental damage had occurred.¹⁷ In this regard, it should be noted that within the framework of the administrative proceeding in question (closed 18 December 2017), Conagua found that the streams or watercourses allegedly affected by the work on the project did not constitute “beds of watercourses”¹⁸ (see the corresponding analysis in paragraphs 30–31 *infra*).
20. On 8 June 2018, a member of the public requested the intervention of the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental—DGIRA*) of the federal Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales—Semarnat*), claiming that alterations had been made to the principal streams in the area of the Chileno Bay Club project. As a result of this, the DGIRA requested information from the Profepa office about measures taken within the scope of its jurisdiction. The Profepa office sent a report about the administrative proceeding closed on 18 December 2017.¹⁹
21. On 24 August 2018, a member of the public requested the intervention of Profepa’s Environmental Complaints and Participation Branch (*Dirección General de Denuncias Ambientales, Quejas y Participación*) in the matter. Further to this request, the body in question suggested to the Profepa office that a site inspection be conducted. The Profepa office responded, stating that the complaint had been addressed properly and that the file had been closed on 18 December 2017.

[Paragraph 22 is confidential since it addresses information classified by Mexico according to NAAEC Article 39(2)]

22. Further to correspondence and complaints filed by a member of the public, the Profepa office made another site inspection of the Chileno Bay Club project on 17 December 2018. However, the proceeding in question was terminated early, on 7 January 2019, due to irregularities in the inspection order detected by the authority. On that same date, the Profepa office decided to issue another inspection order, which took place on 10 January 2019. However, it was again

¹⁶ Response at 13.

¹⁷ *Ibid.* at 15.

¹⁸ *Ibid.* at 14.

¹⁹ Profepa Office in Baja California Sur, file no. PFPA/10.1/8C.17.4/1219-2018 (13 August 2018).

decided to terminate the administrative proceeding due to irregularities in the inspection order.²⁰ Mexico's response does not clarify what defects or irregularities had the inspection order that originated the closing of the administrative proceeding.

23. As a result of a new complaint, Mexico provided notice to the Secretariat that it had opened an administrative proceeding from which some sort of enforcement measures ensued; this information was labeled confidential by Mexico and are presumably ongoing.²¹ Mexico did not provide any further public details about this pending proceeding, including its current status or any follow-up actions by Mexico. Because of this lack of information, the Secretariat is unable to conclude that the proceeding remains pending, or indeed whether there exists any judicial or administrative proceeding under NAAEC Article 45(3).
24. The Secretariat further notes that that much of Mexico's response presents substantive information relating to enforcement of the provisions to which the Submitter refers; therefore, the Secretariat analyzes this information in the context of Article 15(1) in paragraph (C) below.

ii) Complaint to the National Human Rights Commission

25. Mexico notified the Secretariat of the existence of a proceeding before the CNDH, stating that it "fulfils the requirements of NAAEC Article 14(3)(a) for the automatic termination of the submission."²² The information attached to the response contends that "there exists a complaint that was filed with the [CNDH]"²³ and that, as a result of the complaint, the Director-General of the Sixth Office (*Visitaduría*) of the CNDH requested information in that regard.²⁴
26. The Secretariat considers that a complaint processed by the CNDH does not meet the definition of a judicial or administrative proceeding under NAAEC Article 45(3). As the Secretariat has found in previous occasions a CNDH complaint is not a "judicial or administrative proceeding" since not only is the CNDH not responsible for environmental law enforcement, but there is also no reasonable expectation that it could potentially resolve the matter raised in a submission.²⁵
27. For the foregoing reasons, the Secretariat concludes that it cannot terminate its review of the submission in accordance with NAAEC Article 14(3) by virtue of the complaint to the CNDH.

C) The assertions in submission SEM-18-004

²⁰ Response at 16–17.

²¹ *Ibid.* at 18.

²² *Ibid.* at 3.

²³ Response, Appendix A: National Water Commission, file no. 02311 (25 February 2019).

²⁴ Response, Appendix B: Federal Attorney for Environmental Protection, file no. PFPA/5.3/2C.28.5.2/1197 (14 December 2018).

²⁵ SEM-04-002 (*Environmental Pollution in Hermosillo*), Article 14(1) Determination (30 August 2004): "The Secretariat finds that for the purposes of this submission, the Sonora State Human Rights Commission and the National Human Rights Commission are not subject to review within this process because they are not among the government bodies responsible, according to the Party's law, for the enforcement of the environmental law in question"; SEM-01-001 (*Cytrar II*), Article 15(1) Notification (13 June 2001): "there must be a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission."

28. The Secretariat proceeded to consider whether the matter warrants the preparation of a factual record in light of Mexico's response.

i) Environmental impact assessment of the Chileno Bay Club project, consideration of impacts on watercourses, and modifications made to the project: LGEEPA Articles 28 paragraphs IX and X, 30, 88, 91, 98, and 101 bis, and REIA Articles 5(Q)(a), (b), and (c) and (R)(I) and (II), 16, and 28

29. Mexico notes that, according to the environmental impact statement (EIS) for the Chileno Bay Club project, in the project area:

there are no important watercourses, [only] a number of small streams that are dry for most of the year, generally ill-defined streams originating in the mountains, running down to the ocean, and at times contain small amounts of runoff.

...

The study area contains five dry streambeds ... these are abandoned streambeds...

Significant runoff in the study area occurs approximately every seven years...

30. However, the EIS identified two natural streams located in the vicinity of the project, in which no activities were to be carried out in order to allow for the "conservation of the natural runoff dynamic during rainy periods."²⁶ In this regard, Mexico contends that "the preservation of stormwater runoff does not rule out the possibility of building gabions and stormwater drains that do not interrupt the flow of runoff." In addition, according to the response, on 22 August 2017 the Profepa office requested from Conagua—the competent authority for the administration, control, and protection of national waters and their inherent property—a determination as to whether the streambeds located on the site of the Chileno Bay Club project possessed the characteristics set out in LAN Article 3 paragraph XI, which defines the term "bed of a watercourse,"²⁷ since this is essential for determining the company's responsibility with respect to environmental impact.

31. In response to Profepa's request, Conagua found that the intermittent streams generated by the topography of the site are associated with watersheds measuring 0.529 km² and 0.4 km² in area, which disqualifies them as "beds of watercourses" under the provision in question.²⁸

[Paragraph 32 is confidential because it addresses information classified by Mexico under NAAEC Article 39(2).]

32. On 11 and 21 January 2019, site inspections were made and recorded in the administrative file of the Profepa office. During these inspections, work was detected that was not included in the environmental impact approval for the Chileno Bay Club project.²⁹ Consequently, and as a

²⁶ Environmental Impact Statement (EIS), chapter II, at 72.

²⁷ Response at 14.

²⁸ *Ibid.* The term "bed of a watercourse" is defined in LAN Article 3 paragraph XI as:

The natural or artificial channel having the capacity necessary for the waters of the ordinary maximum high-water level to run off without overflowing. Where a watercourse is subject to overflow, the natural channel shall be considered the bed, as long as no channeling structures are built; at the source of any watercourse, it shall be considered a bed for the purposes of this definition where the runoff is concentrated towards a topographic depression and this forms a gully or channel, as a result of the action of the water flowing over the ground. For the purposes of the enforcement of this act, such an incipient gully or channel must be at least 2.0 metres wide by 0.75 metres deep.

²⁹ *Ibid.* at 17.

result of various instances of noncompliance detected during the site inspections, the Profepa office ordered a temporary cessation of the work on 27 February 2019. In relation to the masonry work relating to intermittent streams, the environmental authority found that:

The work and activities being carried out have caused serious harm and deterioration to the natural dynamics of the intermittent streams in a coastal ecosystem, through the installation of non-natural components such as the structures in question, thereby doing the opposite of what the above-mentioned environmental impact approval establishes, by failing to preserve the principal streams present on the lot, which will impede reforestation of the beds of the principal streams in the sections where the work is taking place; and, considering that the inspected party has given no proof of holding the corresponding environmental impact approval ... the authority hereby orders:

THE TEMPORARY TOTAL CESSATION of the work and activities ... consisting in:

[the covering] with masonry tile of an intermittent stream that gives out onto the beach known as El Chileno, where stormwater is collected by means of a culvert...

...

the construction of the stormwater sewer along a length of approximately 200 m... It is noted that the stormwater sewer is being built within a coastal ecosystem ... [and] that this work is taking place within [a] forest ecosystem... In addition, it is observed that the stormwater sewer is being built on top of the intermittent stream coming from upstream of two streams arising within the “Proyecto Turístico Integral Chileno Bay Club” property, which are collected by means of culverts running along the modified road segment.³⁰

33. The Secretariat finds that the enforcement measures taken by the Profepa office correspond to efforts to enforce provisions relating to environmental impact assessment. Accordingly, the Secretariat finds that there is no unresolved issue warranting the preparation of a factual record.
34. Moreover, while it is true that the project EIS did not include work and activities performed on intermittent streams at the site, the term “bed of a watercourse” is defined under the applicable law and, at the express request of Profepa, Conagua found that the intermittent streams at the site do not correspond to beds of watercourses. The Secretariat notes that the competent authority was consulted and issued the relevant finding justifying the actions of the Profepa office. Without offering opinion as to the substance of the issue, the Secretariat finds that a factual record in regard to this issue is not warranted, since it is a question of a technical judgment, the responsibility for which rests with the water authority in Mexico. A factual record addressing a technical task that was in fact directly carried out by Conagua would not provide any information additional to what Mexico’s response already contains.
35. Therefore, the Secretariat finds that the preparation of a factual record is not warranted in relation to the effective enforcement of LGEEPA Articles 28 paragraphs IX and X, 30, 88, 91, 98, and 101 *bis*, and REIA Articles 5(Q)(a), (b), and (c) and (R)(I) and (II), 16, and 28.

³⁰ Response, Appendix 38: Environmental Impact and Risk Branch, file no. SGPA/DGIRA/DG/1175 (13 February 2019), at 29–30.

ii) Implementation of safety measures in relation to the work and activities associated with the Chileno Bay Club project and alleged infractions relating to the risks to the public arising from the project: LGEEPA Article 170 and LGPC Article 84

36. Concerning the enforcement of LGEEPA Article 170, which provides for the taking of safety measures that may include the temporary partial or total closing of a site at which activities are taking place that cause an imminent risk of ecological disequilibrium or serious harm or deterioration to natural resources, Mexico submitted confidential information about acts of enforcement. This information, summarized in paragraph 32 of this determination, cannot be made public since it has been designated as confidential.
37. The Party also submitted relevant information in regard to the enforcement of LGPC Article 84, even though it contends that this provision does not qualify as environmental law under the NAAEC. In particular, Mexico asserts that the master plan for the Chileno Bay Club project, included in the EIS filed with Semarnat, covers the use of gabions to protect the principal intermittent streams, so as to increase water infiltration into the water table.³¹ It further states that the EIS for the project includes information about extreme climatological phenomena such as hurricanes, as well as relevant information for the purposes of following civil protection-related recommendations:³²

The study area exhibits some impacts caused by climatic conditions, so that on most of the property, the rock has disintegrated, giving rise to the formation of coarse-to-medium-grained sand... Some slopes exhibit instability...

To avoid these impacts, [Conagua] recommends using control dams, whose main function is to control flooding, so as to impede discharges of such material towards coastal zones. Therefore, as part of the work to be performed for the project, it is intended to build gabions ... in addition to fully preserving the principal intermittent streams on the property...

Therefore, the following measures shall be included:

1. Due to the heavy rainfall that may cause ... runoff and landslides, preventive measures [are proposed] in conjunction with civil protection.

...

3. Follow the specific instructions given by the local civil protection authorities...³³

38. According to Mexico's response, Conagua stated in regard to the project that, as regards civil protection, "the necessary precautionary measures (stormwater drainage) must be taken into account and considered to avoid harm to persons, facilities, and the environment,"³⁴ which accords with the control dams recommended by this body and mentioned in the EIS.
39. Having considered the information provided by Mexico in its response, the Secretariat finds that no central issues remain unresolved with respect to the enforcement of LGEEPA Article 170 and LGPC Article 84 that would warrant the preparation of a factual record.

³¹ Response at 20.

³² *Ibid.* at 20-1.

³³ *Ibid.* at 21.

³⁴ *Ibid.* at 22.

iii) Determination of national waters under the jurisdiction of Conagua: LAN Article 113

40. Concerning the effective enforcement of LAN Article 113, Mexico argues that it is impossible to submit relevant information, since this provision merely establishes “the catalogue of national property relating to national waters administered by Conagua, but does not establish concrete obligations and, as a result, does not fit the definition of *environmental law*.”³⁵ In any case, the Party argues that the failure to effectively enforce this provision cannot be reviewed because Conagua “found that the alleged ‘streams or streambeds’ mentioned by the Submitter did not meet the technical definition of the term ‘bed of a watercourse,’ as per LAN Article 3 paragraph XI.”³⁶
41. As discussed in paragraphs 30–31 of this determination, Conagua performed the relevant assessment and found that the intermittent streams at the site do not constitute “beds of a watercourse.” Mexico’s response includes this information, as well as the assessment made by the water authority.³⁷
42. The Secretariat finds that Mexico’s response addresses the Secretariat’s request and is not an unresolved central issue; it therefore does not recommend the preparation of a factual record in regard to the effective enforcement of LAN Article 113.

iv) Processing of complaints by members of the public: LGEEPA Articles 189 and 190 and LAN Article 124 bis

43. In regard to the alleged failure to enforce LGEEPA Articles 189 and 190 and LAN Article 124 *bis*, establishing the right of any person to use the complaint mechanism in cases in which acts are committed that cause or could cause ecological harm or disequilibrium, Mexico provides information on the citizen complaints mechanism under LGEEPA.
44. Mexico contends that the authorities have not obstructed the use of the right to file a complaint under LGEEPA —LAN Article 124 *bis* remits to LGEEPA’s complaint process—, since the complaints related to the Chileno Bay Club project were processed in a timely manner. The Party states that the measures taken by the Profepa office arose from various complaints filed in relation to the Chileno Bay Club project and that, in essence, they relate to the matter raised in the submission.
45. Mexico states that an initial complaint was filed with the Profepa office on 20 April 2017. As a result of this complaint, an administrative proceeding was opened on 2 May 2017 and an inspection order relating to the Chileno Bay Club project was issued on 15 May 2017. The corresponding site inspection detected instances of noncompliance relating to the conditions of the environmental impact approval.³⁸ The complainant submitted additional evidence during the processing of this complaint.³⁹
46. Mexico notes in its response that on 22 August 2017, the Profepa office in the state of Baja California Sur “requested a determination from Conagua as to whether the streambeds located

³⁵ *Ibid.* at 22.

³⁶ *Ibid.* at 22–3.

³⁷ *Ibid.* at 14 and Appendix 8.

³⁸ Response at 23.

³⁹ *Ibid.* at 24.

on the site of the Chileno Bay Club project possessed the characteristics set out in LAN Article 3 paragraph XI, which defines the term “bed of a watercourse.”⁴⁰ Conagua found that the “streams or streambeds” mentioned by the complainant did not fit the definition given in the LAN (see paragraphs 30–31 *supra*).⁴¹

47. Further to the administrative proceeding, Profepa fined the developer of the Chileno Bay Club project \$101,911.50 pesos and ordered various safety measures. In its 13 December 2017 decision, Profepa found that the developer “did not perform work that obstructed or altered beds of watercourses, nor did it perform work other than that which was approved in the [environmental impact approval].”⁴² The administrative proceeding file was closed on 18 December 2017.⁴³
48. Mexico notes that a complaint was filed with the DGIRA on June 8 requesting intervention by this body due to alleged alterations made by the Chileno Bay Club project to the principal streams on the site, in violation of the environmental impact approval. In this regard, the DGIRA asked the Profepa office to conduct a site inspection, but Profepa denied the request because it had recently closed an administrative proceeding addressing the matters in question.⁴⁴
49. Another complaint was filed with the DGIRA on 20 September 2018, requesting that the local authorities in Baja California Sur intervene in the case and that they order the applicable safety measures.⁴⁵ In response, the DGIRA informed the complainant on 5 October 2018 that it does not possess powers of inspection and surveillance, and that in any case, such tasks are the responsibility of Profepa, which does have the power to act in response to the filing of a complaint. Another complaint was filed with the DGIRA on 7 September 2018, leading to another request by that authority to the Profepa office, which was also dismissed with a note to the requesting body that the corresponding enforcement measures had already been taken.⁴⁶ Nevertheless, the Profepa office decided to issue a new inspection order.
50. The information corresponding to the remaining measures taken by Profepa was designated as confidential by Mexico in its response. The Secretariat’s review of information contained in the file provided by the Party indicates that measures were taken to enforce LGEEPA Articles 189 and 190. While there is no information concerning the enforcement of LAN Article 124 *bis*, the complaints filed were processed through Profepa, as prescribed by the LGEEPA. The information reflects the measures taken by the competent authority with a view to addressing the facts complained of; these measures included site inspections of the Chileno Bay Club project, administrative proceedings, and a technical opinion issued by the water authority in Mexico.
51. Consequently, the Secretariat finds that the preparation of a factual record in regard to the effective enforcement of LGEEPA Articles 189 and 190 and LAN Article 124 *bis* is not warranted.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 25.

III. DETERMINATION

52. The Secretariat has reviewed submission SEM-18-004 (*Chileno Bay Club*) in light of the response of the United Mexican States.
53. Further to its analysis, the Secretariat finds that the proceedings of which Mexico gives notice do not entail the termination of processing of the submission in accordance with NAAEC Article 14(3).
54. Furthermore, having reviewed the submission in light of Mexico's response, the Secretariat finds that no central issues remain unresolved that would warrant the preparation of a factual record in relation to the enforcement of LGEEPA Articles 28 paragraphs IX and X, 30, 88, 91, 98, 101 bis, 170, 189, and 190; REIA Articles 5(Q)(a), (b), and (c) and (R)(I) and (II), 16, and 28; LAN Articles 113 and 124 *bis*, and LGPC Article 84.
55. For the reasons stated herein and in accordance with NAAEC Article 15(1), the Secretariat hereby notifies the Council of its determination not to recommend the preparation of a factual record in regard to submission SEM-18-004 (*Chileno Bay Club*). Pursuant to paragraph 9.8 of the Guidelines, the Secretariat hereby terminates the processing of the submission.

Secretariat of the Commission for Environmental Cooperation

(original signed)
Per: Richard A. Morgan
Executive Director, Commission for Environmental Cooperation

Prepared by: Robert Moyer, Director
Paolo Solano, Legal Officer
Submissions on Enforcement Matters Unit

cc: Rodolfo Godínez Rosales, Alternate Representative, Mexico
Isabelle Bérard, Alternate Representative, Canada
Chad McIntosh, Alternate Representative, United States
Submitter