

**Secretariat of the Commission for Environmental Cooperation
Determination in accordance with Articles 14(1) and 14(2) of the North American
Agreement on Environmental Cooperation**

Submitter: [name confidential pursuant to NAAEC Article 11(8)(a)]
Party: United Mexican States
Date of receipt: 9 November 2018
Date of determination: 22 January 2019
Submission no.: **SEM-18-004 (*Chileno Bay Club*)**

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, the United States, or Mexico to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law (the “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 9 November 2018, a person who requested that his information be kept confidential under NAAEC Article 11(8)(a) (the “Submitter”) filed an Article 14(1) submission with the Secretariat through the online submissions platform (www.cec.org/submissions).³ The Submitter asserts that Mexico is failing to effectively enforce its environmental law by permitting the construction and operation of the “Chileno Bay Club” tourism development in Los Cabos, Baja California Sur, in particular given that the project gave rise to the unauthorized modification of streams and/or watercourses.
3. The Submitter maintains that in October 2016 he noticed the existence of works associated with the Chileno Bay Club project in which “modifications were observed to

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 (JPAC). The NAAEC remains in effective despite the Parties recent renegotiations concerning NAFTA resulting in a revised trade agreement and a new Environmental Cooperation Agreement, neither of which has yet to be implemented.

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). Details of this submission are available at <www.cec.org/sem-submissions/chileno-bay-club>.

streams or channels that may cause irreparable disasters with serious consequences”.⁴ The Submitter asserts that the works are posing a risk to the life of the people of the community, the property of the Submitter and the people in the properties adjacent to the project.⁵ Allegedly, these works were not included in the environmental impact statement prepared by the project promoter⁶ and were carried out in violation of the authorization in terms of environmental impact of the project issued by the authorities.⁷ The Submitter indicates that he has filed several complaints with federal, state and municipal authorities, without them having enforced the environmental law.⁸

4. Submission SEM-18-004 (*Chileno Bay Club*) asserts that Mexico is failing to effectively enforce provisions of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); the National Waters Act (*Ley de Aguas Nacionales*—LAN); the Mexican Civil Protection Act (*Ley General de Protección Civil*—LGPC); the Federal Environmental Responsibility Act (*Ley de Responsabilidad Ambiental*—LFRA); the National Human Rights Commission Act (*Ley de la Comisión Nacional de Derechos Humanos*—LCNDH); international treaties signed by Mexico; the Environmental Impact Assessment Regulation to the LGEEPA (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental*—REIA); Baja California Sur state laws, state regulations applicable to civil protection and construction, and civil protection provisions of the municipality of Los Cabos.
5. Having reviewed the submission with reference to Article 14 of the Agreement and to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat finds that some of the assertions in submission SEM-18-004 (*Chileno Bay Club*) meet all the eligibility requirements of Article 14(1) and, pursuant to the criteria of Article 14(2), merits a response from the government of Mexico, for the reasons set out below.

II. ANALYSIS

6. NAAEC Article 14 authorizes the Secretariat to consider submissions asserting that a Party to the Agreement is failing to effectively enforce its environmental law. As the Secretariat has stated in previous Article 14(1) determinations, this article is not intended to be an insurmountable screening device⁹ and must be given a broad interpretation in keeping with the goals of the NAAEC.¹⁰ The Secretariat reviewed the submission with this perspective in mind.

⁴ Submission at 2.

⁵ *Ibid.*, at 4.

⁶ *Ibid.*, at 5.

⁷ *Ibid.*, at 2.

⁸ *Ibid.*, at 5.

⁹ SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

¹⁰ SEM-01-002 (*AAA Packaging*), Article 14(1) Determination (24 April 2001), at 2: “Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.”

A Eligibility requirements of Article 14(1)

7. Article 14(1) authorizes the Secretariat to “consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law,” if the submission meets certain conditions. Submission SEM-18-004 (*Chileno Bay Club*) includes the Submitter’s name and sufficient information to establish contact. The information indicates that the Submitter lives in Mexico City, and there is no information in the submission to suggest that the Submitter is part of the government or under its direction.

B Environmental law in question

8. The provisions cited by the Submitter are as follows:

Table 1. Legal instruments cited in submission SEM-18-004

Title	Acronym or abbreviation	Provisions cited
International treaties		
International Covenant on Economic, Social and Cultural Rights ¹¹	ICESCR	
Rio Declaration on Environment and Development ¹²	Río Declaration	
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ¹³	San Salvador Protocol	No specific provisions cited
Convention concerning Indigenous and Tribal Peoples in Independent Countries ¹⁴	Convention 169	
Convention on the Rights of the Child ¹⁵		
General and federal laws		
Mexican Environmental Protection Act ¹⁶	LGEEPA	Articles 3 paragraphs X, XX and XXI; 28 paragraphs IX and X; 30; 88; 91; 98; 101 <i>bis</i> ; 160; 161; 162; 163; 164; 165; 170; 180; 189, and 190 Article 2 paragraph XXXI subparagraph a) [<i>sic</i>]*
National Waters Act	LAN	Articles 3 paragraph XI; 9; 113, and 124 <i>bis</i>

¹¹ Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF), 12 May 1981.

¹² Rio Declaration on Environment and Development, online at <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>> (viewed 20 December 2018).

¹³ DOF, 27 December 1995.

¹⁴ DOF, 7 May 1993.

¹⁵ DOF, 25 January 1991.

¹⁶ DOF, 28 January 1988.

Mexican Civil Protection Act	LGPC	Articles 4 paragraph VII; 17; 73; 75; 81; 84; and 85 paragraph V
National Human Rights Commission Act	LCNDH	Articles 3; 4; 6 paragraphs I, II, VII, VIII, and XIII; 25; 27, and 40
Federal Environmental Responsibility Act	LFRA	Articles 52; 54; 55, and 56

Regulations to general laws

Environmental Impact Assessment Regulation to the LGEEPA	REIA	Articles 3 paragraphs VI and VII; 5 paragraph Q) subparagraphs a), b), and c) and paragraph R) subparagraphs I and II; 16, and 28
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Baja California Sur state laws

Urban Development Act for the state of Baja California Sur		Articles 3 paragraph VIII; 4 paragraphs X and XVI; 9 paragraph II; 13 paragraphs I, XII, XIII, and XXII; 61 paragraphs I, III, and IV; 72; 114; 115; 116; 117; 118, and 119
Civil Protection and Risk Management Act for the state and municipalities of Baja California Sur		Articles 5; 23; 24; 47; 48; 49; 50, and 51

Regulations to Baja California Sur state laws; bylaws of municipality of Los Cabos

Construction Regulation for the state of Baja California Sur		Articles 4 paragraph II subparagraphs a), f), h), and i); 14 paragraph III; 67 paragraph VI; 136; 229, and 231
Civil Protection Bylaw of the municipality of Los Cabos, state of Baja California Sur		Articles 63, 64, and 65

* *N.B.*: The Submitter also cites LGEEPA Article 2 paragraph XXXI subparagraph c); however, no such provision was found in the text of the act.

9. The Submitter further contends that the project in question contravenes the environmental criteria established in the Environmental Zoning Plan (*Programa de Ordenamiento Ecológico para el Desarrollo Urbano y Turístico*) for the municipality of Los Cabos. In addition, he states that the project contradicts the environmental impact statement for the Chileno Bay Club project (“Chileno Bay EIS”)¹⁷ and the environmental impact approval S.G.P.A./DGIRA.DEI.1321.06 (“Chileno Bay EIA”), issued 12 July 2006 in relation to the project.¹⁸ Although not environmental law per se, both legal instruments — the

¹⁷ Chileno Bay Club, S. de R.L. de C.V., Environmental impact statement for the Chileno Bay Club integrated tourism project (no date).

¹⁸ Semarnat, Environmental Impact and Risk Branch, file no. S.G.P.A./DGIRA.DEI.1321.06 (12 July 2006), which contains the environmental impact approval for the Chileno Bay Club integrated tourism project.

Chileno Bay EIS and the Chileno Bay EIA — relate to the enforcement of the environmental law in question; the two were cited in the submission in support of the assertion that Mexico is failing to effectively enforce its environmental law with respect to the Chileno Bay Club project.

10. The Secretariat has held that the term “environmental law,” as defined in NAAEC Article 45(2)(a), should be interpreted expansively, since to adopt a restrictive vision of what constitutes a law or regulation whose primary purpose is the protection of the environment or human health would be inconsistent with the NAAEC.¹⁹ Having reviewed the provisions and instruments cited in the submission, the Secretariat finds that some but not all of the provisions to which the submission refers qualify as environmental law for the purposes of the submission process. The Secretariat’s reasons are set out below.
11. The submission cites the ICESCR, the Río Declaration, the San Salvador Protocol, and Convention 169. However, the Submitter does not specify which articles of these international instruments Mexico is allegedly failing to enforce, such that it is impossible to conduct an enforcement review. For this reason, the Secretariat finds that it should not consider them for review.
12. Neither did the Secretariat retain for enforcement review those provisions cited by the Submitter that establish definitions.²⁰ While it is true that these may be taken into consideration to help clarify the assertions made in the submission, the following provisions also do not warrant further review: LGEEPA Article 3 paragraphs X, XX and XXI;²¹ LAN Article 3 paragraph XI,²² and REIA Article 3 paragraphs VI and VII.²³ The Secretariat proceeds to consider the remaining provisions cited by the Submitter.

a) Mexican Environmental Protection Act

13. **LGEEPA Article 28 paragraphs IX and X** provide that the environmental impact assessment procedure applies to persons endeavoring to carry out real estate development that affects coastal ecosystems, or where the proposed work or activity includes construction work and activities in wetlands, mangrove ecosystems, lagoons, rivers, lakes, and/or tidal flats. These provisions qualify as environmental law.
14. **LGEEPA Article 30** provides that an environmental impact statement must be submitted in order to obtain an environmental impact approval; this document must contain, at the least, a description of the effects on the environment arising from the proposed work or activity, as well as the proposed mitigation measures. This provision qualifies as environmental law.
15. **LGEEPA Article 88** provides that for the sustainable use of water and aquatic ecosystems, the criteria listed in paragraphs I to IV of this article must be observed. The

¹⁹ 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.

²⁰ The Secretariat has performed a similar analysis in other cases. See, e.g., SEM-03-003 (*Lake Chapala II*), Article 14(1) Determination (19 December 2013), at 6.

²¹ Definitions of “ecological criteria,” “environmental impact,” and “environmental impact statement.”

²² Definition of “bed of a watercourse.”

²³ Definitions of “ecological disequilibrium” and “cumulative environmental impact.”

- provision in question is environmental law, but it is retained for review only insofar as the law requires the application of these criteria to a specific case.
16. **LGEEPA Article 91** provides that the granting of approvals that may affect the beds of watercourses is subject to the environmental criteria set forth in the LGEEPA (see preceding paragraph). This provision qualifies as environmental law.
 17. **LGEEPA Article 98** provides that for the preservation and sustainable use of soil, the criteria listed in paragraphs I to VI of this article must be observed. This article qualifies as environmental law, but it is retained for review only insofar as the law requires the application of these criteria to a specific case.
 18. As to **LGEEPA Article 101 bis**, it provides that where activities are carried out in arid zones, the criteria established by law for soil preservation and sustainable use must be observed (see preceding paragraph).
 19. The submission cites various provisions contained in the LGEEPA title devoted to the safety measures and sanctions that may be imposed in the course of acts of inspection and surveillance, the implementation of safety measures, and the determination of administrative violations, *inter alia*, where the matters in question are under federal jurisdiction (**Article 160**). Such measures include the performance of inspection visits to verify legal compliance (**Article 161**); the accreditation and identification of inspectors (**Articles 162 and 163**); the drawing up of inspection reports (**Article 164**), and inspectors' access to the place subject to inspection (**Article 165**). These are procedural provisions whose purpose resides in guaranteeing the legality of the inspection and surveillance procedure. However, the Secretariat finds that they have no specific application to submission SEM-18-004, and are therefore excluded from further review.
 20. **Article 170** establishes the safety measures applicable in cases of imminent risk of ecological disequilibrium, grave harm to or degradation of natural resources, or contamination with dangerous repercussions for ecosystems, their components, or public health. The Secretariat considers the provision to be environmental law in that it is aimed at protecting the environment and public health; in addition, it relates to the submission's assertion regarding a lack of safety measures in respect of the Chileno Bay Club project.
 21. **Articles 189 and 190** establish the right of any person to denounce, by filing a citizen complaint with the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), any facts, acts, or omissions that cause or may cause ecological disequilibrium or harm to the environment, or that contravene the LGEEPA. In this regard, one of the Submitter's central assertions is that despite having filed a complaint with Profepa concerning facts relating to the Chileno Bay Club project, the authorities allowed the project to proceed without mitigation of its negative effects.²⁴ The provisions in question have environmental protection and human health as their primary purpose, so they qualify as environmental law and are retained for review.

b) National Waters Act

²⁴ Submission at 5: "the abovementioned authorities have ignored our submission, thus allowing the project to be developed without mitigation of its negative effects."

22. The Submitter cites **LAN Article 9**, which provides that the National Waters Commission (*Comisión Nacional del Agua*—Conagua), in its capacity as a deconcentrated body, is the body having supreme authority over water-related matters. This article lists the powers of Conagua. For the purposes of the review of submission SEM-18-004, the Secretariat decided to consider only paragraphs I (to act as the authority in respect of the quantity and quality of national waters), XVII (to administer and steward national waters and their inherent public property), and XXII (to study and resolve conflicts arising from the exploitation, use, enjoyment, or conservation of national waters).
23. **LAN Article 113**, for its part, establishes the national property for which Conagua is responsible, which includes federal beaches and zones, land occupied by lake beds, lagoons, tidal flats or natural reservoirs, and beds of watercourses, among others. The provision qualifies as environmental law because it is aimed at the protection of water quality through the stewardship of certain national property by Conagua.
24. As to **LAN Article 124 bis**, it establishes the right of any person to file a citizen complaint with Conagua in regard to acts that cause or may cause environmental disequilibrium or harm to water resources. As stated above (see paragraph 20 *supra*), one of the Submitter's central assertions is that despite having complained about facts relating to the project, the authorities allowed the project to proceed without mitigation of its negative effects.²⁵ The provision in question has environmental protection and human health as its primary purpose, so it qualifies as environmental law and is retained for review.

c. General Civil Protection Act

25. The Submitter cites **LGPC Article 4**, which provides that public policies in the area of civil protection must take account of knowledge about climate change and adaptation to the phenomenon, its consequences and effects. In this regard, the Secretariat finds that, while the provision refers to an aspect relating to an environmental issue, it does not qualify as environmental law *per se*; therefore, there are no grounds for reviewing this provision under the submission mechanism.
26. Concerning **LGPC Article 17**, it provides that state governors and municipal presidents or mayors (among other governmental authorities) have the implementation of civil protection systems among their responsibilities. This provision does not coincide with the NAAEC Article 45(2)(a) definition, so it is not considered environmental law.
27. **LGPC Article 73** provides that, in cases of imminent risk, the states and municipalities may implement safety measures within the scope of their jurisdictions so as to protect people's lives and property. For its part, Article 75 stipulates the safety measures that the states may apply. Both provisions are aimed at the protection of life through the implementation of the relevant safety measures in situations of risk; however, they do not correspond to any of items listed in NAAEC Article 45(2)(a) and are not considered environmental law.
28. **LGPC Article 81** establishes the duty of persons to inform the competent authorities of the existence of a risk, accident, or disaster that occurs or may occur. Since it is not

²⁵ Ibid.

evident from the submission that the Submitter is asserting a failure to enforce this provision, the Secretariat finds that it should not be retained for review.

29. **LGPC Article 84** provides that it is a serious offense to carry out infrastructure construction work without prior production of a risk analysis and, as applicable, without determining the relevant measures in accordance with the applicable legal provisions and without obtaining the required approval. The Secretariat finds that the provision is eligible for review because it is aimed at protecting human life through the prevention of risks caused, in the case of SEM-18-004, by the alleged alteration of watercourses.
30. **LGPC Article 85** establishes the authorities competent to enforce the provisions relating to the detection of high-risk zones. As such, the provision in question cannot be applied directly and therefore does not warrant an enforcement review.

d. National Human Rights Commission Act

31. **Article 3 of the National Human Rights Commission Act** (*Ley de la Comisión Nacional de los Derechos Humanos—LCNDH*) establishes the scope of jurisdiction of the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos—CNDH*). This provision does not qualify as environmental law and is therefore not retained for review.
32. **LCNDH Article 4** provides that, for the defence and promotion of human rights, as well as in the procedures implemented by the CNDH, the principles of universality, interdependence, indivisibility, and progressiveness shall be observed. The provision does not have the protection of human life or health as its primary purpose, and is therefore excluded from further review.
33. Concerning **LCNDH Article 6**, this provision establishes the powers of the CNDH. However, the submission does not assert a failure to effectively enforce this provision, so that the article in question is not retained for further review.
34. **LCNDH Articles 25, 27, and 40**, respectively, establish the right of any person to denounce human rights violations; they determine the body with which human rights-related complaints must be filed, and they establish the power of the Human Rights Ombudsman (*Visitador General*) to apply precautionary or injunctive measures to prevent human rights from being violated. Since the submission does not assert a failure to effectively enforce these provisions, they are not retained for review.

e. Federal Environmental Responsibility Act

35. **LFRA Articles 52, 54, 55, and 56** establish that: the provisions of the third title of the act are applicable to penal conflicts and proceedings arising from the commission of environmental offences (**Article 52**); any person has the right to denounce environmental offences to the public prosecutor (**Article 54**); Profepa assists the public prosecutor (**Article 55**), and any person living in a community possibly affected by an illegal act shall be considered a victim of environmental offences (**Article 56**). These provisions serve to guide the Secretariat in its review of the assertions concerning the Chileno Bay Club project and the rights of the neighboring community, and in particular the rights of the Submitter; these provisions, however, are not retained for further review because they

do not concretely establish a duty of care or a right subject to protection by the environmental authorities.

f. Environmental Impact Assessment Regulation to the LGEEPA

36. The Submitter cites **REIA Article 5 paragraph Q) subparagraphs a), b), and c), and paragraph R) subparagraphs I and II**. The provisions in question stipulate that anyone endeavoring to carry out real estate development that affects coastal ecosystems, or construction work and activities in wetlands, mangrove ecosystems, lagoons, rivers, lakes, and/or tidal flats, requires the prior approval of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat). The Secretariat finds that these provisions qualify as environmental law since they are aimed at environmental protection through the prevention of environmental harm or disequilibrium as a result of the environmental impact assessment procedure, and also at the implementation of mechanisms to address environmental impacts not identified in a timely manner.
37. **REIA Article 16** provides that where Semarnat takes cognizance of an intent to carry out work or where work has already begun — and where the execution of this work may cause grave and irreparable ecological disequilibrium, harm to ecosystems or public health ensuing from environmental problems, or may cause the limits and conditions prescribed by law to be exceeded — Semarnat shall immediately notify the interested party that its activities are subject to an environmental impact assessment procedure. In addition, **REIA Article 28** provides that where the developer of a work or activity wishes to make modifications to the work during the environmental impact assessment process, it shall notify the authority of its intentions. The provisions in question indeed qualify as environmental law in the sense of the Agreement, since they are aimed at protecting the environment by means of the environmental impact assessment procedure.

g. Urban Development Act for the state of Baja California Sur

38. The Submitter cites provisions of the Urban Development Act for the state of Baja California establishing that the preservation of ecological equilibrium and the protection of the environment of population centers are matters of public utility (**Article 3 paragraph VIII**); that the zoning of human settlements, regulation, and urban development shall seek to improve the living conditions of the urban and rural population by means of civic participation and the conservation and improvement of the environment in human settlements (**Article 4 paragraphs X and XVI**); providing that zoning and urban development powers relating to population centers shall be exercised jointly by the state executive branch, the municipal authorities, and the municipal councils (**Article 9 paragraph II**); establishing the urban development-related powers of the municipal councils (**Article 13**); setting out the characteristics of the zones intended for conservation in the municipal order (**Article 61**); affirming that the approval of subdivisions, condominiums, and areas of habitation is contingent upon a feasibility study in relation to water supply, drainage, and electrical power (**Article 72**); listing the acts or omissions that constitute violations of the law (**Article 116**); establishing the type of applicable administrative sanctions (**Article 117**); affirming that the cases and procedures for the implementation of safety measures shall be determined by means of the corresponding regulations (**Article 118**), and providing that the competent authorities

may simultaneously apply sanctions and safety measures without prejudice to any penal or civil liability that may be incurred (**Article 119**).

39. The Secretariat finds that, while they may be aimed at environmental protection in population centers, the provisions in question fundamentally fall within the purview of urban development and do not correspond to any of the paragraphs of NAAEC Article 45(2)(a); therefore, they are not retained for review.

h. Civil Protection and Risk Management Act for the state and municipalities of Baja California Sur

40. The Submitter cites provisions of the Civil Protection and Risk Management Act for the state and municipalities of Baja California Sur establishing who shall assist with civil protection in the state (**Article 5**); setting out the powers of the Municipal Civil Protection Council (*Consejo Municipal de Protección Civil*) (**Articles 23 and 24**), and establishing the right of any person to denounce situations of danger and the procedure that must be followed (**Articles 47, 48, 49, 50, and 51**).

41. The Secretariat finds that the provisions in question are aimed at prevention, risk management, and protection of the civilian population in the state of Baja California Sur, but do not fall within the scope of NAAEC Article 45(2)(a); therefore, they are not retained for review.

i. Construction Regulation for the state of Baja California Sur

42. The provisions of the Construction Regulation for the state of Baja California Sur cited by the Submitter cover the granting of powers to oversee construction and urbanization activities in the state (**Article 4 paragraph II subparagraphs a), f), h), and i)**); authorization to use public roads for transportation of liquids (**Article 14 paragraph III**); the requirements for obtaining a construction permit (**Article 67 paragraph VI**); the required characteristics of drains and septic systems (**Article 136**); the provision of first aid on the work site (**Article 229**); the prohibition on carrying out activities without the prior approval of the authority (**Article 230**), and the applicable sanctions in cases of violations (**Article 231**).

43. The Secretariat finds that the cited provisions do not have environmental protection as their primary purpose in any of the senses found in NAAEC Article 45(2)(a); therefore, they are not retained for review.

j. Civil Protection Bylaw of the municipality of Los Cabos, state of Baja California Sur

44. The provisions of the Civil Protection Bylaw of Los Cabos cited by the Submitter comprise the right and the obligation to denounce acts or situations of risk for the population and nature, as well as the scope and the minimum criteria for the filing of the corresponding complaint (**Articles 63, 64, and 65**).

45. The Secretariat finds that the cited provisions do not have environmental protection as their primary purpose in any of the senses found in NAAEC Article 45(2)(a); therefore, they are not retained for review.

k. Other legal instruments

46. The Submitter also cites the following legal instruments:

- Environmental Zoning Plan (*Programa de Ordenamiento Ecológico para el Desarrollo Urbano y Turístico*) for the municipality of Los Cabos;
- Environmental impact statement for the Chileno Bay Club project (regional form), and
- Environmental impact approval no. S.G.P.A./DGIRA.DEI.1321.06, issued 12 July 2006.

47. The above-cited instruments are not legislation in and of themselves, but rather documents relating to the enforcement of the environmental provisions in question as they apply to the construction of the Chileno Bay Club project. These legal instruments are attached to the submission in support of the assertion that Mexico is failing to effectively enforce its environmental law.

C The six requirements of NAEEC Article 14(1)

48. The Secretariat reviewed submission SEM-18-004 (*Chileno Bay Club*) with reference to the six requirements of NAEEC Article 14(1) and finds that it meets all of these. The Secretariat's reasoning follows.

a) [Whether the submission] is in writing in a language designated by that Party in a notification to the Secretariat

49. The submission is written in Spanish, one of the languages designated by the Parties for the filing of submissions, pursuant to paragraph 3.2 of the Guidelines.²⁶ Therefore, the Secretariat finds that the submission meets the requirement of Article 14(1)(a).

b) [Whether the submission] clearly identifies the person or organization making the submission

50. The submission provides a name, address, and other contact information for the purposes of identifying and communicating with the Submitter; therefore, it satisfies Article 14(1)(b).²⁷

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

51. The submission contains sufficient information to allow for review, since it includes information and links to documents supporting the Submitter's assertions.

52. The information cited in the submission includes the environmental impact-related documents relating to the project: the Chileno Bay EIS and the Chileno Bay EIA.

²⁶ Guidelines, paragraph 3.2: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."

²⁷ Submission at 1–2.

53. In addition, the submission includes as attachments the various citizen complaints and actions undertaken to inform the authorities of the alleged violations caused by the project in connection with the alteration of watercourses, including: citizen complaint of 20 April 2017, filed with Profepa;²⁸ document of 8 June 2018 containing statements against the project, delivered to the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*) of Semarnat;²⁹ complaint filed 8 June 2018 with Conagua;³⁰ citizen complaint filed 8 June 2018 with the municipality of Los Cabos;³¹ citizen complaint of 16 July 2018 filed with the Civil Protection Branch (*Subsecretaría de Protección Civil*) of the state of Baja California Sur;³² complaint of 3 August 2018 filed with the CNDH;³³ complaint of 16 August 2018 filed with the National Civil Protection Unit (*Coordinación Nacional de Protección Civil*) of the Ministry of Government (*Secretaría de Gobernación*);³⁴ request for intervention of 24 August 2018 filed with the Federal Attorney for Environmental Protection (Profepa);³⁵ request for intervention of 27 September 2018 filed with the President of the Republic;³⁶ complaint filed 23 October 2018 with the Environmental Impact Branch (*Dirección General de Impacto Ambiental*), Federal Coastal Zone (*Zona Federal Marítimo Terrestre*), of Semarnat;³⁷ complaint of 7 November 2018 filed with the Urban Development Department (*Dirección General de Desarrollo Urbano*) of the municipality of Los Cabos;³⁸ and statements filed 25 October 2018 with Profepa.³⁹
54. In addition, the Submitter attaches the responses that have been received from the authorities: Profepa decision of 18 December 2017⁴⁰ and Profepa responses of 7 September⁴¹ and 19 October 2018.⁴²
55. The Secretariat finds that the submission contains sufficient information to be reviewed, as per Article 14(1)(c).

²⁸ Submitter, Citizen complaint filed with Profepa (20 April 2017).

²⁹ Submitter, Document filed with the Environmental Impact and Risk Branch of Semarnat (8 June 2018).

³⁰ Submitter, Complaint filed with the National Waters Commission (8 June 2018).

³¹ Submitter, Citizen complaint filed with the municipal council of Los Cabos (8 June 2018).

³² Submitter, Citizen complaint filed with the Civil Protection Branch of the state of Baja California Sur (16 July 2018).

³³ Submitter, Complaint filed with the CNDH (3 August 2018).

³⁴ Submitter, Complaint filed with the National Civil Protection Unit of the Ministry of Government (16 August 2018).

³⁵ Submitter, Request for intervention filed with Profepa (24 August 2018).

³⁶ Submitter, Request for intervention filed with the office of the President of the Republic (27 September 2018).

³⁷ Submitter, Complaint filed with the Environmental Impact Branch, Federal Coastal Zone, Semarnat (23 October 2018).

³⁸ Submitter, Complaint filed with the Urban Development Department of the municipality of Los Cabos (7 November 2018).

³⁹ Submitter, Document filed with the Environmental Complaints and Social Participation Branch of Profepa (25 October 2018).

⁴⁰ Profepa, Administrative decision no. PFPA-10.1/SC.28.2/1757/2017 (28 December 2017).

⁴¹ Profepa, file no. PFPA/5.3/2C.28.5.2/08327 (7 September 2018).

⁴² Profepa, file no. PFPA/5.3/2C.28.5.2/09812 (19 October 2018).

d) [Whether the submission] appears to be aimed at promoting enforcement rather than at harassing industry

56. The Secretariat finds that the submission satisfies Article 14(1)(d), since it appears to be aimed at promoting enforcement rather than at harassing industry. Paragraph 5.4 of the Guidelines guides the Secretariat in making this determination: the submission clearly focuses on the enforcement of the environmental impact legislation, in particular as regards the alteration of watercourses without having obtained the corresponding approval.

e) [Whether the submission] indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any

57. The information attached to the submission confirms that the matter raised by the Submitter has been communicated to the Environmental Impact and Risk Branch of Semarnat as well as to Profepa, Conagua, the municipal council of Los Cabos, the Civil Protection Branch of the state of Baja California Sur, the CNDH, the National Civil Protection Unit, and the office of the President of the Republic (see paragraph 52 *supra*). Furthermore, the responses from the authorities, where obtained, are attached to the submission (see paragraph 53 *supra*).

58. The Secretariat finds that the matter has been communicated in writing to the authorities responsible for the enforcement of the environmental law in question, and therefore meets the requirement of Article 14(1)(e).

f) [Whether the submission] is filed by a person or organization residing or established in the territory of a Party

59. Since the Submitter resides in Los Cabos, Baja California Sur, Mexico, the requirement of Article 14(1)(f) is met.

D NAAEC Article 14(2)

60. Having determined that the submission satisfies all the requirements of NAAEC Article 14(1), the Secretariat proceeded to determine whether it merits a response from the Party under NAAEC Article 14(2).

a) Whether the submission alleges harm to the person or organization making the submission

61. The Submitter alleges that the construction work and activities relating to the Chileno Bay Club project have caused alterations to the streams and watercourses in the project area, without there having been any assessment of the project's impact on the environment and ecosystems, nor the required approval having been obtained from the competent authorities. The Submitter contends that this constitutes a failure to effectively enforce the environmental law and has entailed violations of the human right to a healthy environment, since the project has given rise to the "movement of large quantities of earth, the construction of platforms, and excavations, which are directly affecting the

natural dynamics of the watercourses, streams, and drainages in the area,”⁴³ thus causing “harm to the environment and natural resources as well as ecological disequilibrium in the region.”⁴⁴

62. The Submitter contends that the project’s developer stated on various occasions that “in carrying out the master plan for the project, it was planned to conserve without impact the principal streams [on the] lot, thus allowing for the conservation of the natural storm water runoff patterns.”⁴⁵ However, this is not what happened. According to the Submitter, “the construction work on the project was carried out without any technical justification indicating the viability of obstructing and channeling storm water, without considering the threat of heavy rainfall ... causing severe impacts on the environmental conditions of the region.”⁴⁶
63. In sum, the Submitter contends that the project violates the developer’s commitment not to “build any element of the project in the principal streams present on the lot, so as to preserve storm runoff patterns,”⁴⁷ and that the construction work in question was not properly assessed or given prior approval.
64. The Secretariat finds that the harm asserted in the submission is a consequence of the alleged failure to effectively enforce the environmental law and, pursuant to paragraph 7.4 of the Guidelines, finds that the submission meets this criterion.

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

65. The Secretariat finds that submission SEM-18-004 (*Chileno Bay Club*) raises matters whose further study in this process would advance the goals of the NAAEC, specifically Article 1(a), (b), (c), (f), (g), and (h),⁴⁸ and therefore meets the requirements of Article 14(2)(b) of the Agreement.

c) Whether private remedies available under the Party's law have been pursued

⁴³ Submission, at 4.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 5.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ NAAEC Article 1:

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) 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;...

66. The Submitter has pursued various remedies in order to assert his right to a healthy environment, including the filing of a citizen complaint with Profepa (20 April 2017),⁴⁹ a complaint with Conagua (8 June 2018),⁵⁰ citizen actions with the municipal council of Los Cabos (8 June 2018)⁵¹ and with the Civil Protection Branch of the state of Baja California Sur (16 July 2018),⁵² and a complaint with the National Civil Protection Unit of the Ministry of Government (16 August 2018).⁵³
67. Consequently, the Secretariat finds that the submission satisfies the criterion of NAAEC Article 14(2)(c).

d) Whether the submission is drawn exclusively from mass media reports

68. The Secretariat finds that the submission is not based on media reports, but rather on the facts asserted by the Submitter and on documentary evidence submitted in support of the Submitter's assertions. The Secretariat therefore concludes that that the submission satisfies the criterion of NAAEC Article 14(2)(d).

III. DETERMINATION

69. For the reasons set out above, the Secretariat finds that submission SEM-18-004 (*Chileno Bay Club*) meets the eligibility requirements of NAAEC Article 14(1) and that, in conformity with Article 14(2), merits a response from the government of Mexico in regard to the effective enforcement of the following provisions:
- a. Concerning the environmental impact assessment of the Chileno Bay Club project, consideration of the impacts on watercourses, and the modifications made to the project: LGEEPA Articles 28 paragraphs IX and X; 30; 88; 91; 98, and 101 *bis*, and REIA Articles 5 paragraph (Q) subparagraphs (a), (b), and (c) and paragraph (R) subparagraphs I and II; 16, and 28.
 - b. Concerning the implementation of safety measures in relation to the construction work and activities of the Chileno Bay Club project and the alleged violations relating to the risks to the public arising from the project: LGEEPA Article 170 and LGPC Article 84.
 - c. Concerning the national waters determination within the purview of Conagua: LAN Article 113.
 - d. Concerning the processing of the citizen complaints filed: LGEEPA Articles 189 and 190 and LAN Article 124 *bis*.
70. Pursuant to NAAEC Article 14(3), the Party may provide a response to the determination within the 30 (thirty) working days following the issue of this determination, or **6 March**

⁴⁹ Submitter, Citizen complaint filed with Profepa (20 April 2017).

⁵⁰ Submitter, Complaint filed with the National Waters Commission (8 June 2018).

⁵¹ Submitter, Citizen complaint filed with the municipal council of Los Cabos (8 June 2018).

⁵² Submitter, Citizen complaint filed with the Civil Protection Branch of the state of Baja California Sur (16 July 2018).

⁵³ Submitter, Complaint filed with the National Civil Protection Unit of the Ministry of Government (16 August 2018).

2019. Under exceptional circumstances, the Party may notify the Secretariat in writing of an extension of 60 (sixty) working days from the date of this determination, or **18 April 2019.**

Secretariat of the Commission for Environmental Cooperation

(signature in original)

per: Robert Moyer
SEM and Legal, Head of Unit

(signature in original)

per: Paolo Solano
Legal Officer, SEM Unit

cc: Norma Munguía, alternate representative, Mexico
Isabelle Bérard, alternate representative, Canada
Jane Nishida, alternate representative, United States
César Rafael Chávez, Executive Director, CEC
Submitter

Appendix 1. Legal instruments cited in the submission