

**Secretariat of the Commission for Environmental Cooperation**

**Article 15(1) notification that preparation of a factual record is warranted**

<b>Submitter:</b>	<b>Asociación Colectiva Socioambiental, A.C.</b>
<b>Represented by:</b>	Carlos Gustavo Lozano Guerrero
<b>Party:</b>	United Mexican States
<b>Date of receipt:</b>	16 April 2019
<b>Date of the notification:</b>	10 August 2020
<b>Submission no.:</b>	SEM-19-002 ( <i>City Park Project</i> )

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**Executive summary**

On 16 April 2019, the Secretariat of the Commission for Environmental Cooperation (CEC) received submission SEM-19-002, asserting that Mexico is failing to effectively enforce its environmental law in connection with the environmental impact approval of the “City Park” project situated in the city of León, Guanajuato, Mexico.

Asociación Colectiva Socioambiental, A.C. (the “Submitter”) contends that the City Park project was approved by the environmental authority of the municipality of León, Guanajuato, even though it did not have jurisdiction to hear and rule on the environmental impact assessment procedure; that the federal and state authorities are, in any case, the ones with the authority to grant environmental impact approval; that the modality of the environmental impact statement (EIS) does not correspond to the degree of impact on the environment that the project would cause; that the environmental impact file is deficient in several respects; and that the species management plan produced for the project was not duly approved by the federal authorities.

In relation to certain of the Submitter’s assertions, Mexico gave notice in its response of the existence of pending domestic proceedings relating to the matters raised by the submission, on which grounds it contends that the process should be terminated with respect to some of the matters raised in the submission concerning the environmental impact assessment procedure (“EIA procedure”) and the jurisdiction of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) in this regard.

Mexico further stated its position regarding failures to enforce the environmental law by the municipality of León, Guanajuato and presented an analysis, which agreed, in part, with some of the Submitter’s contentions, concluding that the municipal authority was not competent to receive, assess, and approve the project application; that the modality of the EIS did not correspond to the anticipated environmental impacts; and that there are significant deficiencies in the environmental impact assessment file of the project.

Based on the submission and Mexico’s response, the Secretariat determined that there are central issues unresolved with respect to the EIA procedure for the City Park project, and finds that submission SEM-19-002 warrants the preparation of a factual record on certain issues.

In accordance with Article 15(1) of the North American Agreement on Environmental Cooperation (NAAEC), the Secretariat hereby presents its reasoning to the Council.

## 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”)<sup>1</sup> initially considers submissions with reference to 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—if there is one—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.<sup>2</sup>
2. On 16 April 2019 the organization Acción Colectiva Socioambiental, A.C. (the “Submitter”) filed a submission with the Secretariat in accordance with NAAEC Article 14(1).<sup>3</sup> The Submitter asserts that Mexico is failing to effectively enforce its environmental law with respect to the environmental impact approval of the “City Park” project situated in the city of León, Guanajuato, Mexico.<sup>4</sup>
3. The Submitter contends that the municipal authorities of León, Guanajuato are failing to effectively enforce the relevant environmental impact-related provisions; that the Environmental Management Department (*Dirección General de Gestión Ambiental—DGGA*) of the municipality of León “was not the authority competent to receive, process, and rule on the EIA procedure”;<sup>5</sup> that the modality of the environmental impact statement (EIS) determined by the Environmental Regulation Division (*Dirección de Regulación Ambiental—DRA*) of the municipality of León “does not correspond to the environmental impact that the project’s works or activities may potentially cause”;<sup>6</sup> that the DRA “acted outside of the procedure” established by the environmental impact legislation,<sup>7</sup> and that

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

<sup>2</sup> For detailed information on the various stages of the submission process, as well as on the Secretariat’s determinations and factual records, visit the submissions on enforcement matters page of the CEC website at <[www.cec.org/submissions](http://www.cec.org/submissions)>.

<sup>3</sup> SEM-19-002 (*City Park Project*), Article 14(1) Submission (16 April 2019) [“Submission”]. The public record of the submission is available at <<http://www.cec.org/sem-submissions/city-park-project>>.

<sup>4</sup> The City Park project is a mixed-use project made up of business, entertainment services, restaurants, offices, residences, and hotels. The project is classified as “high-density service and business coupled with indeterminate-density residential (hotel, residential, commercial, and services).” See: Environmental Impact Statement for the City Park Project – First Phase, MRP León (August 2017), at 2.

<sup>5</sup> Submission at 4.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

the DGGA “did not follow the proper process in relation to the conduct of the environmental impact assessment procedure.”<sup>8</sup>

**Figure 1. Reservoir of Los Cárcamos Ecological Park**



Source: Photo courtesy of the Submitter

4. The Submitter asserts that Mexico is failing to effectively enforce federal provisions of the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*); the Environmental Impact Regulation to the LGEEPA (*Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental—REIA*); the Mexican Wildlife Act (*Ley General de Vida Silvestre—LGVS*); the Internal Regulation of Semarnat (RI-Semarnat); and Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection—Mexican native species of wild flora and fauna—Risk classes and specifications for inclusion, exclusion, or change—List of species at risk* (“NOM-059”).<sup>9</sup>
5. In addition, the Submitter asserts that Mexico is failing to effectively enforce the following state and municipal instruments: the Guanajuato State Environmental Protection Act (*Ley para la Protección y Preservación del Ambiente del Estado de Guanajuato—LPPAEG*); the Environmental Assessment Regulation to the LPPAEG (REIA-Guanajuato); and the

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<sup>8</sup> *Ibid.*

<sup>9</sup> Submission at 13–14.

Environmental Management Bylaw of the municipality of León, Guanajuato (*Reglamento de Gestión Ambiental de León–RGA-León*).<sup>10</sup>

6. The Submitter asserts that the City Park project abuts Los Cárcamos Ecological Park,<sup>11</sup> which has an area of 11 hectares and comprises the reservoir of the same name, and that it is a few metres from Metropolitan Park, comprising the El Palote reservoir. It further contends that both bodies of water [the Los Cárcamos and El Palote reservoirs] are stopping grounds for migratory birds listed in NOM-059;<sup>12</sup> that the technical documentation attached to the submission shows that the site composed of the park and the reservoir “corresponds to an ecosystem island within the duality: El Palote Reservoir-Los Cárcamos Park, under the heading of ‘archipelago reserves’ ... with wetland characteristics”;<sup>13</sup> that the the body of water known as “Los Cárcamos” is fed by groundwater flows from the El Palote reservoir;<sup>14</sup> that Los Cárcamos Ecological Park “is a habitat typical of the water runoff areas found in the Laja River’s upper basin” and “should have been preserved on the basis of the precautionary principle”;<sup>15</sup> that the species recorded move between the two parks;<sup>16</sup> that the project in question represents a collision risk for the birds due to their movement between the two bodies of water;<sup>17</sup> and that, in sum, both the Metropolitan Park Master Plan and the “Comprehensive Study for the Conservation of Los Cárcamos Park (*Estudio Integral para la Conservación del Parque Los Cárcamos*) attest to the interrelationship between these ecological areas.<sup>18</sup>
7. On 5 July 2019, the Secretariat found that the submission met the requirements of Article 14(1) and requested a response from Mexico in accordance with NAAEC Article 14(2) in regard to the effective enforcement of the following provisions cited in the submission:<sup>19</sup>
  - a) LGEEPA Articles 4, 5 paragraph X, 6, 7 paragraph XVI, and 8 paragraph XVI, and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I in relation to the DGGa’s jurisdiction over approval of environmental impact for the City Park project.
  - b) LGEEPA Article 30, REIA Articles 10 and 11 paragraph IV, and LPPAEG Article 31, and REIA-Guanajuato Articles 19, 20, 21, 25, and 27, with respect to the modality applicable to the EIS for the City Park project.
  - c) RGA-León Articles 104, 105, and 120 as regards the process followed during the EIA procedure for the City Park project.

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 8.

<sup>12</sup> Submission at 10, *Estudio Integral para la Conservación del Parque Los Cárcamos*.

<sup>13</sup> *Ibid.* (underscored in original; footnotes omitted).

<sup>14</sup> *Ibid.* at 11.

<sup>15</sup> *Ibid.*

<sup>16</sup> Submission at 12, *Estudio de Aves*.

<sup>17</sup> *Ibid.*

<sup>18</sup> Submission at 12.

<sup>19</sup> SEM-19-002 (*City Park Project*), Article 14(1) and (2) Determination (5 July 2019) [“Determination”], §46.

- d) LGVS Article 9 paragraph XIII and RI-Semarnat Article 32 paragraph VI, as well as NOM-059, in connection with the approval of the “Management Plan for Four Priority Species Listed in NOM-059-Semarnat-2010 ensuing from the City Park Project.”
8. On 26 March 2020, the Secretariat received a response from the government of Mexico stating the Party’s view that no further consideration should be given to those of the Submitter’s assertions relating to: i) the powers of the federal government to assess the environmental impact of the project, since these relate to various pending administrative proceedings,<sup>20</sup> and ii) the effective enforcement of the LPPAEG provisions, arguing that either these are general in nature and their object is to regulate certain obligations of applicants for environmental impact approval,<sup>21</sup> or they are not applicable to the matter raised in the submission, as is the case for the provisions relating to the priority species management plan.<sup>22</sup>
9. Mexico does, however, agree that the municipality of León, Guanajuato, violated federal, state, and municipal legal provisions relating to environmental impact assessment and approval of the City Park project, since these acts went beyond the scope of the powers legally vested in it.<sup>23</sup> In addition, the Party’s view is that the modality of the EIS submitted for review did not correspond to the anticipated impacts of the project<sup>24</sup> and it contends that the documentation submitted by the project developer was insufficient to create the environmental impact assessment file.<sup>25</sup>
10. Having reviewed the submission in the light of the response, in accordance with Article 15(1) of the Agreement and based on 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 submission SEM-19-002 (*City Park Project*) warrants the preparation of a factual record on the issues identified below. The Secretariat’s reasoning follows.

## II. ANALYSIS

### A) NAAEC Article 14(3)(a) notification

11. The SEM process set out in NAAEC Article 14(3)(a) provides that the Party named in a submission may 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 process provides that the Party may state in its response whether the matter was previously the subject of a judicial or administrative proceeding, and whether private remedies in connection with the matter are available to the person or organization making the submission.<sup>26</sup> In this section, the Secretariat performs the corresponding analysis, guided by the definition of “judicial or administrative proceeding” given in NAAEC Article 45(3).

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<sup>20</sup> SEM-19-002 (*City Park Project*), Article 14(3) Party Response (5 July 2019) [“Response”], at 6–11.

<sup>21</sup> *Ibid.* at 31.

<sup>22</sup> *Ibid.* at 40–3.

<sup>23</sup> *Ibid.* at 12–27.

<sup>24</sup> *Ibid.* at 28–33.

<sup>25</sup> *Ibid.* at 34–9.

<sup>26</sup> NAAEC Article 14(3)(b).

12. 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 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...

13. Mexico notified the Secretariat of the existence of administrative proceedings initiated further to the proceedings summarized below:

[Information declared confidential by the Party in accordance with NAAEC Article 39(2)]

**i) Citizen complaint**

14. On 29 August 2019, the Submitter's legal representative filed a citizen complaint with the Profepa office in the state of Guanajuato ("Profepa Guanajuato") asserting that the works and activities ensuing from the project were commenced without "environmental impact approval by the competent authority."<sup>27</sup>

15. On 10 September 2019, Profepa Guanajuato allowed the complaint, opened file no. PFPA/18.7/2C.28.2/001105-19, and commenced the corresponding investigations. Subsequently, various judicial proceedings were brought that had effects on the allowableness and assessment of the citizen complaint (see paragraphs 22–3 *infra*).

16. The information provided by Mexico indicates that the complaint file "has now been closed."<sup>28</sup>

**ii) Amparo motion**

17. On 4 October 2019, CI Banco, Sociedad Anónima, Institución de Banca Múltiple (the "amparo petitioner"), in its capacity as trustee of trust no. MRP León CIB/2467—which is, as a matter of fact, the developer of the City Park project—filed an amparo motion in file no. 790/2019 before the Eleventh District Court in Guanajuato (hereinafter, the "amparo motion").

18. The amparo petitioner stated that on 17 December 2016, the National Waters Commission (*Comisión Nacional del Agua*—Conagua) issued file no. BOO.910.04.1 containing a finding that the land occupied by Los Cárcamos park was not national property under the responsibility of Conagua (the "first Conagua document").<sup>29</sup>

19. The amparo petitioner adduced as the acts it was challenging, among others, the contents of Conagua file no. BOO.7.05-670, dated 19 August 2019, which established that the body of water called Los Cárcamos—contiguous to the project site—is considered a wetland

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<sup>27</sup> Response at 7.

<sup>28</sup> *Ibid.* at 6.

<sup>29</sup> *Ibid.* at 8.

pursuant to Article 3 of the National Waters Act (*Ley de Aguas Nacionales*—LAN); that this body of water is fed by groundwater probably flowing from the El Palote reservoir, and that the water in Los Cárcamos was considered national property (“second Conagua document”).

20. The amparo petitioner argues that the second Conagua document caused prejudice to it in connection with the environmental impact approval of the project obtained from the municipal authorities and that, in addition, the document did not take account of the considerations contained in the first Conagua document.

**a. Stay**

21. Mexico gave notice that a stay was issued during the hearing of the amparo motion in which the judicial authority held in favor of:<sup>30</sup>

- i) the persistence of the effects of the first Conagua document, whereby it was found that the land occupied by Los Cárcamos park was not national property under the responsibility of Conagua;
- ii) a stay of the effects and consequences of the second Conagua document, and
- iii) the continuation of the procedure implemented by Profepa in relation to the citizen complaint, but with the obligation on the part of the authority to refrain from issuing a decision that would terminate the process prior to definitive resolution of the amparo motion.

**b. Current status of the judicial proceeding**

22. Mexico noted that a holding on the amparo motion was issued on 3 January 2020 granting protection to the amparo petitioner from the act contained in the second Conagua document and striking down the decision by Profepa to receive and allow the citizen complaint.

23. This decision restored rights to the amparo petitioner in relation to the City Park project and voided the second Conagua document. Also voided was the decision to receive and allow the citizen complaint processed by Profepa, with the understanding that Profepa can issue another decision in which the first Conagua document is not adduced as evidence.<sup>31</sup>

24. Subsequent to the decision on the amparo motion, on 27 January 2020, Conagua filed a judicial review motion with the collegiate courts, which remains pending.<sup>32</sup>

25. Mexico gave notice that the subject of the pending proceedings relates solely to the possible jurisdiction of Semarnat over the assessment and approval of the project EIS and that these proceedings have no bearing whatsoever on the assertion concerning the alleged lack of jurisdiction of the municipality of León, Guanajuato over the processing and issuance of environmental impact approval for the project.<sup>33</sup>

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<sup>30</sup> *Ibid.* at 9.

<sup>31</sup> *Ibid.* at 9–10.

<sup>32</sup> *Ibid.* at 10.

<sup>33</sup> *Ibid.*

26. Mexico concludes that, in any event, the only effect of the pending proceedings would be to ascertain whether the states or the federal government are competent to issue environmental impact approvals, whereas the central issue raised by the Submitter is, at base, to “demonstrate whether the municipality held the powers necessary to issue that environmental impact approval.” For this reason, it agrees that it is valid to continue with the process as it relates to this matter raised in the submission.<sup>34</sup>
27. In the light of Mexico’s response, the Secretariat finds that the citizen complaint proceeding and the effects of the amparo motion, to which a judicial review motion has been counterpoised, in fact address the jurisdiction of the federal authorities in relation to the EIA procedure for the City Park project.

[End of confidential section]

28. As Mexico states in its response, the effect of the resolution of the proceedings of which the Party gives notice will be to determine whether environmental impact approval of the project falls under the jurisdiction of the federal or the state authority, but it has no bearing on the alleged lack of jurisdiction of the municipality of León in this regard, nor on other central aspects raised in submission SEM-19-002.
29. Therefore, the Secretariat finds, in accordance with NAAEC Article 14(3)(a), that it should proceed no further with its review of those aspects of the submission relating to the effective enforcement of LGEEPA Articles 5 paragraph X, 6, and 30 as they bear on the jurisdiction of the federal authorities to assess and approve the EIS for the City Park project, as well as on REIA Articles 10 and 11 paragraph IV as they bear on the modalities in which environmental impact statements under federal jurisdiction must be filed.

**B) The assertions of submission SEM-19-002**

30. The Secretariat proceeds to consider whether the preparation of a factual record is warranted on other issues raised in the submission, in the light of Mexico’s response.

**i) Alleged lack of jurisdiction of the municipality of León, Guanajuato to implement the EIA procedure**

31. The Submitter contends that “the Environmental Management Department [DGGGA] of the municipality of León was not the authority competent to receive, process, and rule on the EIA procedure.”<sup>35</sup> It adds that “the power to conduct [environmental impact] assessments rests solely with the federal government and the states”<sup>36</sup> and that, in any event, the municipality can only participate in the EIA procedure. In addition, the Submitter argues that the legal provisions on which environmental impact approval of the City Park project was based all correspond to the RGA-León and not to the LGEEPA or the LPPAEG.<sup>37</sup>
32. The Secretariat retained for review LGEEPA<sup>38</sup> Article 8 paragraph XIV<sup>39</sup> and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I, which establish that the

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<sup>34</sup> *Ibid* at 11.

<sup>35</sup> Submission at 4.

<sup>36</sup> *Ibid.* at 5.

<sup>37</sup> *Ibid.*

<sup>38</sup> LGEEPA Articles 4, 5 paragraph X, 6, and 7 paragraph XVI are not retained for review in view of the pending proceedings of which Mexico gave notice.

municipalities are competent to participate in environmental impact assessment under state jurisdiction,<sup>40</sup> that the power to assess environmental impact rests with the state of Guanajuato where it is not expressly reserved to the federal government,<sup>41</sup> and that where environmental impact assessment is under Guanajuato's jurisdiction, the corresponding authority rests with the Guanajuato State Environment Institute (*Instituto de Ecología del Estado de Guanajuato*—IEE-Guanajuato).<sup>42</sup>

33. In its response, Mexico presents an analysis of the jurisdiction of the municipal authorities in the state of Guanajuato and concludes that the municipality of León does have powers to issue environmental impact approvals pursuant to LPPAEG Article 7 paragraph XVII, but that in the case of the City Park project, it lacks specific powers in the light of the provisions of LPPAEG Article 44.<sup>43</sup> The Party notes that “the municipality’s jurisdiction over the EIA procedure is not unlimited, and only applies to the activities contemplated in the article in question.”<sup>44</sup> Mexico further cites RGA-León Article 87, which provides that the municipality of León may issue environmental impact approvals in respect of the works and activities listed in the article, provided that “approval by the federal authorities or the states is not required.”<sup>45</sup>

34. The Party’s view is that:

a review with reference to RGA-León Article 87 of the works and activities to be carried out as part of the City Park project does not show that the DGGA has the specific power to assess and approve the environmental impacts of the project...<sup>46</sup>

35. This becomes relevant when it is considered that the components of the City Park project include: a shopping center with six movie theaters, boutiques, supermarkets, a 20-story residential tower with 156 apartments, a 16-story office tower, and a 16-story five-star hotel.<sup>47</sup> The works projected for City Park would occupy an area of over 27,449 m<sup>2</sup> and, in Mexico’s opinion, IEE-Guanajuato had jurisdiction over the project and its environmental impact approval due to its dimensions and various components.<sup>48</sup> In addition, Mexico notes that it did not identify any coordination agreement with the state that would allow the municipal authority to exercise any of the powers held by IEE-Guanajuato pursuant to LPPAEG Articles 8 and 9.<sup>49</sup>

36. The Secretariat agrees with Mexico and finds that this issue is appropriate for a factual record, which could present information on the decisions of the León municipal authorities

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<sup>39</sup> Mexico noted an erratum in paragraph 46 of the Article 14(1)(2) determination: The Secretariat cited LGEEPA Article 8 paragraph XVI whereas the correct citation is to paragraph XIV. Cf. Response at 12–13.

<sup>40</sup> LGEEPA Article 8 paragraph XIV; LPPAEG Article 7 paragraph XVII.

<sup>41</sup> LPPAEG Article 6 paragraph XVI.

<sup>42</sup> LPPAEG Article 8 paragraph I.

<sup>43</sup> Response at 14.

<sup>44</sup> *Ibid.* at 15.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at 19.

<sup>47</sup> *Ibid.* at 23.

<sup>48</sup> *Ibid.* at 24.

<sup>49</sup> *Ibid.* at 25–6.

with respect to the consideration, analysis, and issuance of environmental impact approval for the City Park project. In addition, it could yield information indicating how municipal jurisdiction is determined, so that the public can draw its own conclusions as to the effective enforcement of LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV as well as LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I.

**ii) The EIS modality applicable to the project**

37. The Submitter asserts that the environmental impact approval granted to the project is illegal because the modality in which the City Park EIS was submitted does not correspond to the anticipated environmental impacts resulting from the commissioning of the project.<sup>50</sup>
38. The Secretariat found that LPPAEG Article 31 and REIA-Guanajuato Articles 19, 20, 21, 25, and 27, cited by the Submitter, are environmental law.<sup>51</sup>
39. In this regard, Mexico pointed out in its response that LPPAEG Article 31 is not applicable to the alleged facts since, instead of addressing matters relating to the EIS modality, it establishes a period of ten working days from the filing of an application for environmental impact approval in which the competent state authority must determine whether the project in question is subject to EIA. However, the Secretariat observes that the second paragraph of this article reads as follows:

Article 31....

Where the decision refers to the necessity of environmental impact assessment, it shall establish the corresponding modality, which may be **general, intermediate, or specific**, as prescribed by the regulation to this Act.<sup>52</sup>

40. The Secretariat finds that while the first paragraph of LPPAEG Article 31 is not applicable, the second paragraph prescribes the possible modalities of the EIS under state law and coincides with one of the Submitter's central assertions.
41. Concerning REIA-Guanajuato Articles 19, 21, 25, and 27, Mexico states in its response that the review of these provisions is not relevant because they are provisions of a general nature governing various obligations of applicants for environmental impact approval but have no bearing on the matter raised in the submission.<sup>53</sup>
42. The Party's view is that, in any case, the modality applicable to the project EIS is the one contemplated in REIA-Guanajuato Article 20, which provides as follows:<sup>54</sup>

**Article 20.** The "**General B**" modality of the environmental impact statement shall be filed in the case of works or activities which, due to their nature,

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<sup>50</sup> Submission at 7.

<sup>51</sup> Excluded from this analysis are LGEEPA Article 30 and REIA Articles 10 and 11 paragraph IV, since they relate to pending proceedings of which Mexico gave notice.

<sup>52</sup> LPPAEG Article 31 (emphasis added).

<sup>53</sup> Response at 30.

<sup>54</sup> *Ibid.*

location, dimensions, amplitude, and/or characteristics are anticipated to cause environmental impacts that may extend beyond the boundaries of the site.<sup>55</sup>

43. However, the Secretariat observes that REIA-Guanajuato Articles 19, 21, 25, and 27 establish the cases in which a project is to be assessed according to the general A,<sup>56</sup> general C,<sup>57</sup> intermediate,<sup>58</sup> and specific modalities.<sup>59</sup> While it is true that the City Park project can only correspond to one of the modalities contemplated in the REIA-Guanajuato, a factual record would not present conclusions about the applicable modality and would, in any case, present the relevant facts so that the public could draw its own conclusions and the authorities could take any enforcement measures they deem relevant.
44. Even though Mexico's conclusion about the EIS modality applicable to the City Park project—the general B modality set out in REIA-Guanajuato Article 20—is reasonable and throws light on the applicable scope of environmental assessment, the Secretariat is not presenting a conclusion as to the Party's legal analysis. A factual record may provide information on the different EIS modalities applicable to the City Park project, including Mexico's legal considerations, so that the public can draw its own conclusions.
45. Therefore, the Secretariat finds that the preparation of a factual record is warranted in regard to the effective enforcement of LPPAEG Article 31 second paragraph and REIA-Guanajuato Articles 19, 20, 21, 25, and 27 with respect to the modality applicable to the City Park project EIS.

**iii) Preparation of environmental impact assessment file and public consultation procedure**

46. The Submitter asserts that the authorities of the municipality of León are failing to enforce provisions governing the preparation of an environmental impact file, and states that there was no consultation process surrounding the project as prescribed by the environmental law. The Secretariat considered the following provisions of the RGA-León that were cited by the Submitter:

**Article 104.** For the environmental impact assessment of any work or activity contemplated in this chapter, the applicant shall file the corresponding application with the DGGGA prior to the commencement of the work or activity in question, accompanied by:

- I. the documentation demonstrating ownership or possession of the premises on which the work or activity is to be carried out;
- II. the land use permit for the real property where the work or activity is intended to be carried out, issued by the competent municipal authority;
- III. the applicable modality of the environmental impact statement, and a digital copy thereof;

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<sup>55</sup> REIA-Guanajuato Article 20 (emphasis added).

<sup>56</sup> REIA-Guanajuato Article 19.

<sup>57</sup> REIA-Guanajuato Article 21.

<sup>58</sup> REIA-Guanajuato Article 25.

<sup>59</sup> REIA-Guanajuato Article 27.

- IV. the summary of the project to which Article 121 of this regulation refers, and a digital copy thereof;
- V. uncertified copies of the permits, licenses, approvals, and concessions obtained for the purposes of carrying out the work or activity.

**Article 105.** The environmental impact assessment file is composed of:

- I. the application filed, with all its appendices;
- II. the environmental impact statement, with all its appendices;
- III. any requirements for complementary information as well as any clarifications, elaborations, or rectifications to the content of the environmental impact statement and the information provided by the applicant in this regard;
- IV. the records of any technical visits that may have occurred;
- V. any requests for reports or opinions and the responses to those requests;
- VI. the minutes of the public information meeting, as applicable, and any written comments or observations made by the participants therein;
- VII. any modifications that may have been made to the project;
- VIII. the technical report signed by the competent public servant;
- IX. the definitive decision on the proceeding;
- X. documentation of any guarantees given;
- XI. the notices of commencement of the site preparation phase and of completion of the construction phase;
- XII. any reports issued by the official responsible for the decision or by the supervisor of environmental technical services; and
- XIII. any other documentation submitted to the DGGA that has a direct bearing on the project.

47. For its part, Mexico notes that a review of the project file showed that it lacks the following information required by REIA-León Article 105 paragraphs VI, VII, X, XI, and XII:<sup>60</sup>

- the minutes of the public information meeting and any comments or observations made;
- any modifications that may have been made to the project;
- documentation of any guarantees given;
- the notices of commencement of the site preparation phase and of completion of the construction phase; and

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<sup>60</sup> Response at 37.

- the reports issued by the supplier of technical services in charging of producing the EIS.

48. The Submitter further asserts that pursuant to Article 120 RGA-León, the DGGA should have made public the information on the City Park project through publication in a wide-circulation newspaper of the list of environmental impact statements received for assessment, accompanied by a summary of the project. This article reads as follows:

**Article 120.** The DGGA shall prepare and publish the list of environmental impact statements it receives for assessment as prescribed by this regulation, which shall contain, at a minimum:

- I. the file number assigned by the DGGA;
- II. the filing date of the application;
- III. the name of the project or the identification of its components;
- IV. the modality of the environmental impact statement filed; and
- V. the location of the site where the work or activity is to be carried out.

This list shall be updated each week by including any new environmental impact statements received in the preceding period and removing all those for which the procedures have been completed, as prescribed by this chapter.

49. In this regard, Mexico contends that:

the authorities competent to conduct environmental impact assessments and, as applicable, issue the corresponding approvals within the scope of their respective jurisdictions have the obligation to inform the public of any works or activities intended to be carried out within the territory that may cause ecological instability or exceed the limits and conditions set out in the applicable provisions for the protection of the environment and the preservation and restoration of ecosystems.

This means not merely the fulfillment of the requirements or the accomplishment of the administrative procedures contemplated in the environmental law applicable to the EIA process, but also, since the activities in question may affect the environment, that the list of applications for environmental impact approval must be published in the media so that interested persons can intervene in a timely manner in matters affecting the environment where they believe that their sphere of rights will be directly or indirectly affected as a consequence of the works or activities to be carried out on the territory.<sup>61</sup>

50. The CEC Council has, on previous occasions, instructed the Secretariat to prepare factual records relating to alleged deficiencies in the EIA procedure, particularly where the corresponding EIS lacked information about project components or the environmental impacts were not properly identified<sup>62</sup> by the developer of a work or activity.

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<sup>61</sup> *Ibid.* at 38.

<sup>62</sup> See, e.g., SEM-96-001 (*Cozumel*), Factual Record (25 October 1997) (in relation to the alleged fragmentation of environmental impacts), and SEM-10-004 (*Wetlands in Manzanillo*), Factual Record (7

51. A factual record on this issue would help citizens understand the manner in which the City Park project EIS was prepared and submitted to the authority, as well as the manner in which mechanisms were (or were not) implemented to allow for participation by communities and groups that had an interest in the development of the City Park project.
52. The Secretariat finds that the preparation of a factual record is warranted in regard to the alleged failure by the environmental authorities of the municipality of León, Guanajuato to effectively enforce RGA-León Articles 104, 105, and 120 as they bear on the City Park project.

**iv) Wildlife-related assertions**

53. The Submitter asserts that Mexico is failing to enforce certain wildlife-related provisions in that the developer of the City Park project did not obtain approval for its proposed plan for the management of four species listed in NOM-059-SEMARNAT-2010,<sup>63</sup> in accordance with LGVS Article 9 paragraph XIII and RI-Semarnat Article 32 paragraph VI.<sup>64</sup>
54. The provisions in question establish that one power of the federation is “the granting, suspension, and revocation of approvals and other administrative acts related to the conservation, transfer, import, export, and transit of wildlife” within Mexico<sup>65</sup> and that the Wildlife Branch (*Dirección General de Vida Silvestre*) of Semarnat is competent to issue, suspend, modify, cancel, nullify, or revoke, in whole or in part, permits concerning the capture, salvage, and/or collection of wildlife specimens.<sup>66</sup>
55. Mexico’s view is that while the wildlife-related provisions cited in the submission qualify as environmental law, the management plan for the species present on the project site “does not call for the conservation, transfer, import, export, or transit” through Mexico of the species covered by the plan.<sup>67</sup> The Party notes that the management plan challenged by the Submitter was developed for the purpose of maintaining the natural populations of the species *Anas platyrhynchos* (Mexican Duck), *Zenaida asiatica* (White-winged Dove), *Z. macroura* (Mourning Dove) and *Amazona autumnalis* (Red-lored Amazon), four species that use the natural corridor between Los Cárcamos park and Metropolitan Park in León and that are considered conservation priorities.<sup>68</sup>
56. Having reviewed the Submitter’s assertion in the light of Mexico’s response, the Secretariat concludes that it is not necessary to prepare a factual record on the effective enforcement of LGVS Articles 9 paragraph XIII, RI-Semarnat Article 32 paragraph VI, and NOM-059-SEMARNAT-2010, since there are no issues left unresolved in this regard.

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September 2016) (addressing the alleged deficiencies in the EIS as regards the water balance studies done in connection with the project).

<sup>63</sup> Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection–Mexican native species of wild flora and fauna–Risk classes and specifications for inclusion, exclusion, or change–List of species at risk*.

<sup>64</sup> Submission at 13.

<sup>65</sup> LGVS Article 9 paragraph XIII.

<sup>66</sup> RI-Semarnat Article 32 paragraph VI.

<sup>67</sup> Response at 41.

<sup>68</sup> *Ibid.*

### III. NOTIFICATION

57. The Secretariat has reviewed submission SEM-19-002 (*City Park Project*) in the light of the response from the United Mexican States.
58. Further to its review, the Secretariat finds that the proceedings of which Mexico gives notice are grounds for termination of review of the submission with respect to the assertion of lack of effective enforcement of LGEEPA Articles 5 paragraph X and 6, since the jurisdiction of the federal authorities over environmental impact assessment and approval is the subject of pending proceedings before Mexico courts. The same is true of LGEEPA Article 30 and REIA Articles 10 and 11 paragraph IV, since these relate to the EIS modalities and the implementation of the EIA procedure within the scope of federal jurisdiction.
59. In addition, the Secretariat finds that there is no need to prepare a factual record in regard to the effective enforcement of LGVS Article 9 paragraph XIII, RI-Semarnat Article 32 paragraph VI, and NOM-059-SEMARNAT-2010, since, in the light of Mexico's response, no outstanding issues remain in this regard.
60. On the other hand, the Secretariat finds that central issues remain unresolved in relation to the alleged deficiencies in the assessment and approval of the environmental impact statement for the City Park project, in light of the Party's response, and recommends a factual record concerning the effective enforcement of the following provisions by the municipal authorities of León, Guanajuato:
- a) LGEEPA Articles 4, 7 paragraph XVI, and 8 paragraph XIV, and LPPAEG Articles 6 paragraph XVI, 7 paragraph XVII, and 8 paragraph I (as construed with reference to LPPAEG Article 44 and REIA-Guanajuato Articles 8 and 9), in relation to the assertion concerning the lack of jurisdiction of the municipal authorities to assess and approve environmental impact for the City Park project.
  - b) LPPAEG Article 31, second paragraph, and REIA-Guanajuato Articles 19, 20, 21, 25, and 27 with respect to the assertion concerning the modality applicable to the City Park project EIS.
  - c) RGA-León Articles 104, 105, and 120 as they bear on the assertions concerning the insufficiency of the documentation required during the EIA process and the failure to implement the public consultation and participation process.
61. For the reasons set out herein, and in accordance with NAAEC Article 15(1), the Secretariat hereby notifies the Council of its determination that, with a view to achieving the goals of the Agreement, the preparation of a factual record is recommended in regard to submission SEM 19-002. Pursuant to section 19.4 of the Guidelines, "[t]he Council should vote on whether to instruct the Secretariat to prepare the factual record normally within 60 working days of receiving the Secretariat's recommendation"; that is, no later than **5 November 2020**.

Respectfully submitted for the consideration of the Council on **10 August 2020**.

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

Per: Richard A. Morgan  
Executive Director, Commission for Environmental Cooperation

cc: Rodolfo Godínez Rosales, Alternate Representative, Mexico  
Catherine Stewart, Alternate Representative, Canada  
Chad McIntosh, Alternate Representative, United States  
Robert Moyer, Director, SEM and Legal Unit  
Submitter