

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission no.:	SEM-98-007
Submitter(s):	Environmental Health Coalition Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C.
Party:	United Mexican States
Date of the Submission:	23 October 1998
Date of this notification:	6 March 2000

I – EXECUTIVE SUMMARY

In accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), the Environmental Health Coalition and the Comité Ciudadano Pro Restauración del Cañón del Padre y Servicios Comunitarios, A.C., presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a Submission asserting that there has been a failure to effectively enforce Mexican environmental law in the case of an abandoned lead smelter in Tijuana, Baja California, Mexico (Metales y Derivados). The Submitters allege that the site represents a major risk for the health of the neighboring communities and the environment, that Mexico has failed to extradite the persons responsible for the contamination, and that the measures that have been taken at the site are not sufficient to protect the neighboring population and avoid ecological imbalance. The Submitters believe that there has been a failure to effectively enforce the Federal Criminal Code (*Código Penal Federal*), the Law on International Extradition (*Ley de Extradición Internacional*), and the Extradition Treaty between the United Mexican States and the United States of America. They also assert that Mexico has failed to effectively enforce the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA).

In light of the Party's Response, the contents of which have been designated as confidential, the Secretariat hereby notifies the Council that certain allegations in the Submission warrant the development of a factual record and others do not warrant further review under the submissions

on enforcement matters process. With regard to the assertions that Mexico is failing to effectively enforce its environmental law by failing to pursue extradition of the owners of Metales y Derivados, the Secretariat has determined that no further review is warranted. With respect to the allegations of a failure to effectively enforce LGEEPA Articles 170 and 134, the Secretariat considers that the development of a factual record is warranted to understand Mexico's enforcement efforts to prevent an imminent risk to the environment and dangerous repercussions to public health, and to prevent and control soil contamination, including by restoration, at the Metales y Derivados site, in accordance with those provisions. The Secretariat hereby, and in accordance with Article 15(1) of the NAAEC, provides the reasons for its determinations, within the limitations arising from the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

II - PROCEDURAL BACKGROUND

On 23 October 1998, the Secretariat of the CEC received a Submission from the Environmental Health Coalition and the Comité Ciudadano Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C.. The Submitters assert that there has been a failure to effectively enforce Mexican environmental law in the case of an abandoned lead smelter in Tijuana, Baja California, Mexico, that they claim poses a high risk to the health of the surrounding communities and to the environment. The Submitters request that the Submission be studied for the development of a factual record in accordance with Articles 14 and 15 of the NAAEC; they also request that the Secretariat make a report to Council in accordance with Article 13 of the Agreement. On 30 October 1998, the Secretariat acknowledged receipt of the Submission, informing the Submitters that it would be reviewed in accordance with Article 14 of the NAAEC, and also informing them that in accordance with Article 13 of NAAEC, the possibility of making a Secretariat report would be considered after the conclusion of the Article 14 process.

On 5 March 1999, the Secretariat notified Mexico that it had reviewed the Submission and determined that it met the criteria set forth in Article 14(1) of the NAAEC. The Secretariat considered the factors set forth in Article 14(2) of the NAAEC, and decided that the Submission merited a response from the Party. In that same Determination of 5 March 1999, the Secretariat requested a Response from Mexico.

Mexico submitted a Response to the Secretariat on 1 June 1999 and designated that Response as confidential. On 14 June 1999, the Secretariat acknowledged receipt of the Response and requested an explanation from Mexico for the designation of confidentiality, as well as a summary of the confidential information for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters. Mexico informed the Secretariat on 20 July 1999 that in accordance with Article 39(1) of the NAAEC and Article 16 of the Federal Code of Criminal

Procedure (*Código Federal de Procedimientos Penales*), the designation of confidentiality encompassed the totality of the information contained in the Response. On 13 September 1999, the Secretariat requested certain clarifications from the Government of Mexico regarding its request for confidentiality. On 13 October 1999, the Secretariat referred the matter to Council for its consideration. Pending a decision by Council on this matter, this Notification does not provide information from the Response because of the assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

III - SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico has failed to effectively enforce its environmental laws in the case of the abandoned lead smelter Metales y Derivados in Tijuana, Baja California. The Submitters assert that the site poses a major risk to the health of the neighboring communities and the environment. They state that the company New Frontier Trading Corporation, through its subsidiary, Metales y Derivados, has not returned the hazardous wastes it generated to the United States, as required by Mexican law and the La Paz Agreement. According to the Submitters, the owner and operators abandoned the facility when it was shut down and they returned to the United States, leaving behind some 6,000 metric tons of lead slag, waste piles of by-products, sulfuric acid and heavy metals such as antimony, arsenic, cadmium and copper from the battery recycling operations¹.

The Submission states that there is a community of approximately 1,000 inhabitants (Colonia Chilpancingo) located within approximately 150 yards of Metales y Derivados and asserts that the conditions at this site represent a constant health risk for the inhabitants of that community. The Submission describes the various health problems reported by its members, which the Submitters consider to be attributable to exposure to the toxic substances abandoned at the site.

The Submitters also state that in May of 1993, the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente* -Profepa) recommended that the Attorney General (*Procuraduría General de la República*) initiate a prosecution against the owners and operators of the company. According to the Submission, a federal judge issued arrest warrants for José Kahn and other persons involved in the operations of Metales y Derivados in August 1995, but those people fled to the United States to evade prosecution. The Submission claims that Mexico has been unable or unwilling to resume the prosecution of Mr. Kahn or other parties responsible for the contamination caused by Metales y Derivados, while New Frontier Corporation continues to operate as an active company with its head office in San Diego, California, and with annual business estimated at between US\$700,000 and

¹ P. 3 of the Submission.

\$1,000,000². The Submission cites Article 415 of the Federal Criminal Code which establishes environmental crimes related to hazardous wastes and other contaminants. The Submitters argue that Article 3 of the Law on International Extradition and Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States obligate Mexico to request the extradition of the persons responsible for Metales y Derivados. The Submitters assert that the failure to pursue the criminal proceeding instituted against the owner of Metales y Derivados by requesting his formal extradition from the United States is a failure to effectively enforce environmental law on Mexico's part.

In addition, the Submitters assert a failure by Mexico to effectively enforce the LGEEPA. The Submission alleges a failure to effectively enforce Article 170 of the LGEEPA by failing to order adequate measures to properly confine or secure the hazardous materials and wastes from Metales y Derivados to prevent an imminent risk to the ecological balance and dangerous repercussions to public health, and Article 134 of the LGEEPA by failing to take the actions necessary to control or prevent soil contamination at the site and its environs, or to restore the site. The Submitters allege that the measures Mexico has taken (i.e. the shutdown of the plant, the repair of a wall and the installation of a plastic cover over the slag) are not sufficient to protect the community and prevent ecological imbalance, and that this situation represents a failure to effectively enforce the LGEEPA.

IV – SUMMARY OF THE RESPONSE

As mentioned above, Mexico designated its Response as confidential and informed the Secretariat on 20 July 1999 that the designation of confidentiality encompassed the totality of the information contained in the Response. Pending a decision by Council on this matter, the Secretariat does not include in this Notification information from the Response, because of the assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

V - ANALYSIS OF THE SUBMISSION IN ACCORDANCE WITH ARTICLES 14(1) AND 14(2) OF THE NAAEC

On 5 March 1999 the Secretariat notified Mexico that it had reviewed the Submission and determined that it met the criteria set forth in Article 14(1) of the NAAEC.

Article 14(1) of the Agreement states that:

² P. 7 and Appendix 6-a of the Submission.

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

Article 14(1) is not intended to place a heavy burden on submitters, although some initial screening is required at this stage³. The Secretariat reviewed this Submission with that perspective in mind.

The first issue is whether the Submission involves the required assertion of a failure to effectively enforce environmental law. The Secretariat determined that the Submission met these requirements for the following reasons.

The Submission “asserts” that Mexico is failing to effectively enforce Article 3 of the Law on International Extradition, Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States, Article 415 of the Federal Criminal Code, and Articles 170 and 134 of the LGEEPA. To meet the Article 14(1) threshold, the legal provisions cited in a submission must satisfy the definition of “environmental law” contained in Article 45(2) of the NAAEC⁴, which refers to the principal purpose of such provisions⁵.

³ See SEM-97-005/ Animal Alliance of Canada, et al, Article 14(1) Determination; and SEM-98-003/Department of the Planet Earth, et al, Article 14(1)&(2) Determination concerning the revised submission.

⁴ Article 45(2) of the NAAEC states:

For purposes of Article 14(1) and Part Five:

The Secretariat found that it was appropriate to review these allegations under Articles 14 and 15 of the NAAEC, with a focus on Articles 415 of the Federal Criminal Code and 170 and 134 of LGEEPA. The Secretariat considered that the allegation that Mexico is failing to enforce its environmental law effectively by the failure to extradite met this threshold. The Submission argues that the failure to enforce these provisions is a failure to enforce Article 415 of the Federal Criminal Code, which establishes criminal penalties for environmental offenses, directed to protecting human health and the environment⁶. Although the provisions from the extradition law and treaty cited in the Submission are not in and of themselves “environmental law”, the Submission connects these to Article 415 of the Federal Criminal Code, which clearly meets the definition of environmental law.

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

⁵ Although the Secretariat is not governed by the principle of *stare decisis*, it has previously, in other determinations, noted that provisions cited in a submission must meet the definition of environmental law. See the determinations of the Secretariat pursuant to Article 14(1) of the NAAEC for the following submissions: SEM-98-001/Instituto de Derecho Ambiental et al. (13 September 1999), SEM-98-002/Hector Gregorio Ortiz Martínez (18 March 1999) and SEM-97-005/Animal Alliance of Canada, et al. (26 May 1998)].

⁶ Article 415 of the Federal Criminal code provides:

“There will be a penalty of between three months and six years in prison, as well as a fine equivalent to between 1,000 and 20,000 days of minimum wage as established in the Federal District at the moment the crime was committed, for those who:

I. Without authorization from the appropriate federal authority or in violation of the terms in which it were granted, carry out any activity involving hazardous wastes or materials that cause or can cause harm to public health, natural resources, fauna, flora, or ecosystems;

II. In violation of established legal guidelines or relevant official Mexican standards, emits, releases, or discharges into the atmosphere--or authorizes or orders such activities--gases, smoke, or dust that cause harm to public health, natural resources, flora, fauna, or ecosystems; or

III. In violation of established legal guidelines or relevant official Mexican standards, generates noise, vibrations, or thermal or luminous energy that cause harm to public health, natural resources, flora, fauna, or ecosystems.” (Free translation)

Articles 170 and 134 of the LGEEPA also clearly qualify as environmental law. These Articles set out criteria and measures for the protection of the environment and the prevention of risks to human life or health associated with hazardous substances and with soil contamination, satisfying Article 14(1) of the NAAEC and the definition of environmental law the effective enforcement of which is the subject of this process.

The Secretariat also determined in March 1999, that the Submission satisfied the six listed criteria in Article 14(1). The Submission was filed in writing in English⁷, and the Secretariat translated it to Spanish, because this is the official language of the Party concerned⁸. The Submitters identified themselves as the Comité Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C., established in Tijuana, Baja California, Mexico and the Environmental Health Coalition, established in San Diego, California, United States. Both are non-governmental organizations, representing the community allegedly affected by the site⁹. The Submission contains sufficient information to allow the Secretariat to review it. For example, it includes information about the American company New Frontier Trading Corporation and its subsidiary Metales y Derivados, S.A. de C.V., it describes the activities carried out at the site while it was in operation, and includes photographs of the site taken in 1998. The Submission contains information about the toxic characteristics of the wastes abandoned at the site, descriptions of the ailments potentially caused by exposure to the toxic substances allegedly at the site (from skin irritations to babies born with hydrocephaly), information about the human health risks associated with lead and technical information about options for remediation of lead-contaminated sites¹⁰. The Submission does not appear to be aimed at harassing industry, but rather, at promoting enforcement for the protection of the health of the community living near the site and of the environment¹¹. The Submission includes copies of various letters sent to the authorities before the plant was closed down¹², as well as a letter of 13 February 1998 to Profepa requesting information about the status of the criminal proceeding against the plant owners and other information about the conditions at the site¹³. No reference is made in the submission to any response from the government to the letters sent prior to plant closure, but the Submitters refer to and attach a letter from Profepa, Baja California, dated 12 March 1998, by which the information requested on 13 February 1998 was denied¹⁴.

⁷ See Article 14(1)(a) of the NAAEC and section 3.2 of the Guidelines.

⁸ However, where the Submission is cited in this document, the reference is to the original version filed by the Submitters in English.

⁹ See Article (14)(1)(b) and (f) of the NAAEC.

¹⁰ See Article (14)(1)(c) of the NAAEC.

¹¹ See Article 14(1)(d) of the NAAEC.

¹² See Appendices 1-b through 1-e of the Submission.

¹³ See Appendix 1-a of the Submission.

¹⁴ See Article 14(1)(e) of the NAAEC and Appendix 2-a of the Submission.

Having reviewed the Submission in accordance with Article 14(1) and found that it meets the requirements established therein, the Secretariat decided that the Submission merited a response from Mexico. The Secretariat's decision was guided by Article 14(2) of the NAAEC, which provides that:

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:
 - (a) the submission alleges harm to the person or organization making the submission;
 - (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
 - (c) private remedies available under the Party's law have been pursued; and
 - (d) the submission is drawn exclusively from mass media reports.

The Secretariat reviewed the Submission with these factors in mind. The Submitters claim that the community of Colonia Chilpancingo, which the Submitters represent, is exposed to grave risks from the toxic substances at the abandoned and allegedly inadequately secured site¹⁵. In the opinion of the Secretariat, the types of grave risks to human health and the environment allegedly ensuing from the Party's asserted failure to effectively enforce its environmental law are a matter whose further study in this process will contribute to achieving the goals of the NAAEC, especially Articles 1 and 5 thereof¹⁶.

The Secretariat also considered whether private remedies have been pursued. The Submission states that members of the allegedly affected communities appealed to the environmental authorities while the plant was operating to demand control of the toxic emissions and the illegal

¹⁵ Pp. 3–7 and Appendices 1-b, 1-c, 1-d, 3 and 4-b of the Submission.

¹⁶ See Article 14(2)(a) and (b) of the NAAEC. The Submitters claim that between 1990 and 1994, when the plant was still operating, 35 children and at least 4 adults died of illnesses allegedly caused by the exposure to the toxic releases of the Metales y Derivados plant, and that the community has also suffered other allegedly related illnesses (see Appendix 4-c to the Submission). The submission includes 4 letters sent to the government between 1990 and 1992 concerning these health problems and requesting that the situation be resolved. The Submitters also argue that the risks to health in Colonia Chilpancingo and other nearby communities continue to grow each year because the hazardous wastes at the site continue to be exposed to the environment and the toxic substances in them do not break down. (See page 7 of the Submission).

disposal of hazardous waste. It states that those communications resulted in certain actions by Profepa regarding the plant, including filing a formal criminal complaint and ordering the shutdown of the smelter. As mentioned above, on 13 February 1998, the Submitters requested information about the status of the criminal proceeding initiated in 1993 against the owners of the plant, and on the conditions at the site and the measures for its remediation. This information was denied to them on the grounds that a judicial proceeding was in course. The Submitters do not indicate whether they have pursued other remedies contemplated in the law, for example, a citizen complaint. The Submitters made concerted efforts to obtain information on the situation at the site and to have the government take action. The government refused to provide this information on the basis that it was taking an enforcement action, so it is not reasonable to expect the Submitters to have done much more¹⁷.

Based on the 12 March 1998 response from Profepa to the Submitters mentioning a prosecution concerning the site, the Secretariat took note of the possibility that in its response to the Submission under Article 14(3), the Party might indicate that review of the allegations should not proceed because of a pending judicial proceeding initiated by a Party. However, the Party did not make that claim in its Response¹⁸. As a final matter in the Article 14(2) stage, the Secretariat was satisfied that the Submission was not based exclusively on media reports, although copies of certain reports were appended to it¹⁹. Considering all these factors, the Secretariat determined that it was appropriate to request a response from the Party to this Submission under Article 14(2) of the NAAEC, and requested such a response on 5 March 1999. Mexico's Response, which the Party designated as confidential, was received on 1 June 1999.

¹⁷ See Article 14(2)(c) of the NAAEC. Section 7.5 of the Guidelines, adopted after the Submission was made, provides that the Secretariat "[i]n considering whether private remedies available under the Party's law have been pursued [...] will be guided by whether [...] (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases." The Secretariat made the following considerations, based on this guiding factor of Article 14(2). In repeated occasions the Submitters communicated the matter to the government and requested that it take the appropriate action. The Submission includes 4 letters sent to the government between 1990 and 1992. In addition, prior to making its submission, the Submitters requested information from Profepa on the criminal prosecution against the owners of the abandoned site, requesting also that any other responsible parties be identified (See Appendix 1-a to the Submission). Given the terms of Profepa's response of 12 March 1998, it seems reasonable for the Submitters to assume that there was no further remedy they could pursue (See Appendix 2-a to the Submission). Bearing in mind these circumstances, the Secretariat believed that it was appropriate to request a response, considering this and the other Article 14(2) factors.

¹⁸ Further explanation of this point may not be provided without disclosing the content of the Party's Response. As noted before, because of the asserted confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, and pending a decision by Council on that matter, this Notification does not provide information from the Response.

¹⁹ See Article 14(2)(d) of the NAAEC and Appendix 4 of the Submission.

VI - ANALYSIS OF THE SUBMISSION IN LIGHT OF THE RESPONSE FROM THE PARTY, IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

Article 15(1) of the NAAEC provides that:

If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

As explained in section V above, in its Determination dated 5 March 1999 the Secretariat determined that the Submission merited requesting a response from Mexico and requested such response. The Secretariat has received the Response of the Party and reviewed the Submission in light of the Response. With respect to the allegations that Mexico has failed to effectively enforce the Federal Criminal Code and the law and treaty on extradition, the Secretariat has determined in light of the Party's Response, that those specific allegations do not warrant further review under the Articles 14 and 15 process. On the allegations of a failure to effectively enforce Articles 170 and 134 of the LGEEPA, the Secretariat considers the development of a factual record to be warranted. The Secretariat's reasons for both determinations are set out below. Because of the assertion of confidentiality on Mexico's Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's reasons are explained only to the extent that doing so is possible without disclosing information from the Response.

1. Allegations of a failure to effectively enforce Article 415 of the Federal Criminal Code by failure to extradite

The Submission asserts that Mexico is failing to enforce Article 415 of the Federal Criminal Code by failing to extradite the owners of Metales y Derivados under Article 3 of the Law on International Extradition and Articles 1 and 2 of the Extradition Treaty between the United States of America and the United Mexican States. In March 1999, the Secretariat determined that it was appropriate to review this allegation, among other reasons, because Article 415 of the Criminal Code meets the definition of environmental law, although the other provisions involved in this allegation do not in and of themselves meet that definition. However, in light of the Response provided by the Party, the Secretariat does not consider further in this Notification the allegations that Mexico is failing to effectively enforce its environmental law by failing to pursue extradition. Because of the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines, the Secretariat does not explain its reasons for this determination, since it is unable to do so without providing information from the Party's Response.

2. *Allegations of a failure to effectively enforce Articles 170 and 134 of the LGEEPA*

The Submission also asserts that Mexico is failing to effectively enforce LGEEPA Articles 170 and 134. The Secretariat determined in March 1999 that it was appropriate to review these allegations and to request a response from the Party, under Articles 14(1) and (2) of the NAAEC. In light of the Party's Response, the Secretariat reviewed whether Articles 170 and 134 are applicable to the matters raised in the Submission and confirmed that these provisions are indeed applicable for the following reasons.

The fact that Metales y Derivados operated until March 1994 and the enforcement measures in regard to the site were taken mainly between 1993 and 1995 raises the question of whether the version of Articles 170 and 134 of the LGEEPA cited in the Submission is applicable to the facts on which the Submitters base their assertions, because that version of Articles 170 and 134 entered into force on 14 December 1996.

Article 170 of the LGEEPA, as cited in the Submission, states:

When an imminent risk to the ecological balance exists, or a harm or serious deterioration of natural resources, cases of contamination posing dangerous repercussions to the ecosystems, [their] components or to public health, the Secretary, with probable cause, could order one or more of the following safety measures:

- I. The temporary, partial or total closure of the sources of contamination, as well as the facilities that handle or store wild flora or fauna species, forestry resources, or activities that create what is described in the first paragraph of this Article,
- II. The precautionary securement of hazardous materials and wastes, as well as wild flora or fauna specimens, products or byproducts or their genetic material, forestry resources, as well as the assets, vehicles, equipment and instruments that are directly associated with the activity that gives rise to the imposition of the safety measure, or
- III. The process of neutralizing or other analogous action that prevents the materials or hazardous wastes from creating the effects named in the first paragraph of this Article.

Likewise, the Secretary may promote before the competent authority, the implementation of one or some of the safety measures found in other regulations.

From Article 134 of the LGEEPA, the Submission cites the following:

For the prevention and control of soil contamination, the following criteria will be considered:

- I. It is the responsibility of the State and society to prevent soil contamination;
- II. Wastes must be controlled since they constitute the principal source of soil pollution...[...]
- V. Proper actions shall be taken to restore or reestablish the quality of soil that is contaminated by the presence of hazardous materials or waste, in such a manner that it can be used or restored in whatever type of activity contemplated in the appropriate urban development program or ecological regulation.

In terms of content, the current text increases and specifies the government's authority to prevent and control soil contamination and an imminent risk to public health, although both this and the previous text provide that authority²⁰. Both versions of Articles 170 and 134 empower environmental authorities to take safety measures to respond to cases of imminent risk to the environment or contamination with dangerous repercussions to the environment or public health, and provide that certain criteria must be considered for the prevention and control of soil contamination. Articles 170 and 134 focus on the existence of risk and on prevention and

²⁰ Articles 170 and 134 of the LGEEPA, prior to the amendment of 1996, stated (free translation):

Article 170.- Where there exists an imminent risk of ecological imbalance or cases of contamination with hazardous consequences for ecosystems, their components or public health, the Ministry, as a safety measure, may order the seizure of contaminant materials or substances, the temporary, partial or total shutdown of the corresponding sources of contamination, and initiate, before the competent authority under the terms of the relevant laws, any of the safety measures established by said provisions.

Article 134.- For the prevention and control of soil contamination, the following criteria shall be considered:

- I. It is the responsibility of the state and society to prevent soil contamination;
- II. Wastes must be controlled, as they constitute the principal source of soil contamination;
- III. It is necessary to rationalize the generation of solid municipal and industrial wastes and to incorporate techniques and procedures for their reuse and recycling, and
- IV. The use of pesticides, fertilizers and toxic substances must be compatible with the stability of ecosystems.

control of soil contamination, not on risky or contaminating activities or facility operations themselves.

The Submission asserts that wastes and soil contamination at the abandoned site continue to represent a public health risk, even though the plant is no longer operating. The allegations in the Submission focus on the contamination and risk allegedly caused by the operations at Metales y Derivados, but that allegedly continued to exist at the time the Submission was made in October 1998. The causes of this contamination according to the Submitters, include the alleged inadequacy of the enforcement measures taken in regard to the site until 1995, and the lack of any further steps to remediate the site to the date of the Submission²¹. The Submitters' allegations focus on the second alleged cause. The provisions cited in the Submission are applicable because the assertions concern allegedly existing soil contamination and risks to public health, as do Articles 170 and 134, not the plant operations that allegedly caused the soil contamination.

In this Notification, the Secretariat focuses mainly on the current text of Articles 170 and 134, which governs the alleged failures by Mexico to effectively enforce its environmental law that are the focus of this Submission. However, with respect to enforcement action taken before the amendment of 1996, the applicable text is the text prior to the amendment. Finally, it should also be noted that the Secretariat focused mainly on events that occurred after the entry into force of the NAAEC in January of 1994, although events that occurred before may potentially be relevant²².

The Secretariat now explains its reasons for considering that a factual record is warranted with respect to the assertions that Articles 170 and 134 of LGGEPA have not been effectively enforced.

²¹ Pp. 10 and 11 of the Submission.

²² On this subject, the Secretariat observed in regard to submission SEM-96-001: "Article 47 of the NAAEC indicates the Parties intended the agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC. Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law. The Vienna Convention on the Law of Treaties provides in Article 28 that *unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party.*" (cited in SEM-96-001, Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 7 June 1997. See also SEM-97-001, Notification of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 27 April 1998).

The Submission asserts that Mexico is failing to effectively enforce Article 170 of the LGEEPA, which empowers the Mexican environmental authorities to order safety measures where there exists an imminent risk to the ecological balance, or cases of contamination posing dangerous repercussions to the ecosystems, their components or to public health. As mentioned before, the focus of the allegations is on the current version of Article 170, which provides in paragraphs II and III that Profepa has the ability to order the precautionary securement of hazardous materials and wastes, and “the neutralization or other analogous action that prevents the materials or hazardous wastes from creating the effects named in the first paragraph of this Article”, that is, that prevents an imminent risk to the environment or dangerous repercussions to the ecosystems, their components or to public health.

The Submission argues that the site is a case of contamination by hazardous materials and wastes that poses a risk to the environment and dangerous consequences for public health, and that Mexico has not taken measures to prevent the hazardous materials and wastes from creating those effects. The Submission describes the types of hazardous materials and wastes allegedly found at the site, including lead, sulfuric acid, cadmium and arsenic, and the potentially hazardous consequences for public health from the exposure to those substances²³. The Submission asserts that the inhabitants of Colonia Chilpancingo, located approximately 150 yards downhill from the Metales y Derivados site, have suffered health problems which may have been caused and/or exacerbated by the exposure to the toxic site. The health problems described range from nausea to infants affected with asthma, chronic skin irritations and fatal birth defects such as hydrocephaly²⁴. The Submitters also argue that the risks to health in Colonia Chilpancingo and other nearby communities continue to grow each year because the hazardous wastes at the site continue to be exposed to the environment and the toxic substances in them do not break down²⁵. The Submitters indicate that part of the wall that was repaired in 1995 by Profepa has corroded or is cracked, and that the plastic cover Profepa installed over the piles of lead slag has deteriorated and the lead slag is again exposed. The Submission also claims that the authorities have failed to post warnings about the potential risks to human health represented by the waste site, and that people have made openings in the wall to enter the premises and remove debris, and others regularly take a path adjacent to the site to get to and from work, potentially exposing themselves to particles and runoff from the Metales y Derivados site²⁶. According to the Submitters, Mexico has failed to effectively enforce Article 170 of the LGEEPA in that, although the facility was shut down in 1995, Mexico has not taken the appropriate actions to contain and secure the hazardous wastes at the site, nor to neutralize them and prevent them from causing contamination with hazardous consequences for public health, despite numerous requests from the Submitters²⁷.

²³ Pp. 4-6 of the Submission.

²⁴ P. 4 and Appendix 4-d of the Submission.

²⁵ P. 7 of the Submission.

²⁶ P. 6 and 10 of the Submission and Appendix 3.

²⁷ P. 10 of the Submission.

The Secretariat has reviewed these allegations in light of the Party's Response. Because of the Party's assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's discussion of Mexico's Response in this Notification is limited to the following. The Response does not contest the Submitters' assertion that the site is "an imminent risk to the ecological balance or a case of contamination posing dangerous repercussions to the ecosystems, their components or to public health", as contemplated by Article 170 of the LGEEPA. The Party's Response is also consistent with the Submitters' allegations that measures were taken with regard to the Metales y Derivados site up to 1995, and that no other measures have been taken under the current text of Article 170, which entered into force in December of 1996. From both the Submission and the Response it is evident that despite the actions taken by Profepa, the site remains in a state of contamination posing dangerous repercussions to public health. It is clear that Mexico took some actions that are contemplated in the version of Article 170 in force until December 1996, mainly the temporary closure of the plant before 1995 and the repair of the wall and covering of the lead slag in 1995. However, as it reads since the 1996 reform, Article 170 provides for neutralization or other analogous action that prevents risk or dangerous consequences to public health from hazardous contamination. The Response does not claim that the government is not obligated under paragraphs II and III of Article 170 to take action where there is an imminent risk to the environment or dangerous repercussions to public health created by hazardous materials or wastes. Although Mexico's Response does not concede that the Party is failing to effectively enforce Article 170, the information in the Response does not support a claim that the Party has effectively enforced paragraphs II and III of Article 170, or that safety measures have been taken to effectively prevent "an imminent risk to the environment or dangerous repercussions to the ecosystems, their components or to public health" from the allegedly toxic contamination at the site. For these reasons, the Secretariat considers that the development of a factual record is warranted in order to better understand Mexico's enforcement of Article 170 of the LGEEPA and the effectiveness of such enforcement in preventing risks to the environment and public health from the Metales y Derivados site, pursuant to that provision.

As part of the above, the information collected in a factual record about Mexico's efforts to enforce Article 170 effectively, should include more information about the contamination at the site and the health problems allegedly connected with it. As mentioned above, the Party's Response does not contest that the site is contaminated and that it poses a risk to the environment and to public health. However, there is little information from both the Submission and the Response on the specific conditions at the site. The Response does not indicate whether the government has specific data on the degree of contamination and the level of risk. For example, it does not indicate whether a characterization of the wastes now present at the site exists, or that there is any specific assessment of the current concentration of the contaminants in the soil within and outside the site, and on the exposure levels, etc. This information is relevant to the effective enforcement of Article 170 because it is essential to an understanding of the specific contamination problem, that could be addressed with the authority provided under

Paragraph III of Article 170, to prevent such contamination from causing dangerous repercussions to public health and the environment.

Information is also lacking with regard to the reported health problems in the Colonia Chilpancingo, allegedly caused by the hazardous contamination at the Metales y Derivados site. For example, there is no mention in the Response of whether the risks of exposure have been assessed and whether the alleged dangerous repercussions to public health have been investigated. Also lacking is information on whether specific measures necessary to protect the health of the allegedly exposed community from any dangerous repercussions have been considered or identified. This kind of factual information is relevant to the effective enforcement of Article 170 because it provides a basis to identify specific measures that allegedly could be taken under the authority provided by Paragraph III of Article 170, to prevent hazardous contamination or wastes from causing dangerous repercussions to public health.

The Secretariat believes that, in light of the degree of the potential harm in question, a factual record on the effective enforcement of LGEEPA Article 170 with respect to the Metales y Derivados site, would advance the goals of the Agreement²⁸ by shedding light on the effective enforcement of measures for the prevention of risk to public health and the environment in connection with hazardous waste. A factual record prepared in regard to this Submission should obtain the information described in the two preceding paragraphs and other factual information that is relevant to the effective enforcement of Article 170 of LGEEPA, to better understand Mexico's enforcement efforts under that provision. Such information would also be relevant in connection with resource constraints or other obstacles that the Party may have been facing for the effective enforcement of its environmental law with respect to the Metales y Derivados site.

The Submission also asserts that Mexico is failing to effectively enforce Article 134 of LGEEPA, which enumerates the criteria that must be taken into account in the prevention and control of soil contamination, including restoration. In its opening sentence, LGEEPA Article 134 provides that the criteria it enumerates shall be taken into consideration in achieving prevention and control of soil contamination. Preventing soil contamination is an obligation imposed on both the state and society under Paragraph I; controlling wastes because they are the principal source of soil contamination is prescribed by Paragraph II; and Paragraph V provides that where soil contamination from hazardous substances or wastes exists, actions should be taken to restore contaminated soil, based on land use plans or ecological zoning programs. In light of the Party's Response, the Secretariat considered the definitions of "control" and "prevention" in Article 3 of the LGEEPA for a better understanding of the scope of Article 134. "Control" is defined as "inspection, monitoring and enforcement of the measures necessary for compliance with the provisions hereof" and "prevention" is defined as "the set of provisions and measures taken with foresight to prevent the deterioration of the environment." It

²⁸ Articles 1 and 5 of the NAAEC.

is clear in light of these definitions that enforcement of Article 134 where toxic wastes and substances are concerned, should be aimed at preventing soil contamination from occurring by securing compliance, as well as at the remediation of contaminated soil.

The Submitters argue that Mexico has not taken adequate actions to control the hazardous materials found at and near the site of Metales y Derivados nor to prevent soil contamination or have the site restored, as provided by Article 134. They assert that the measures taken do not constitute effective enforcement of Article 134 of the LGEEPA since soil contamination was not in fact prevented and the site has not been restored. As mentioned above, the Submission contains information to support the assertion that the site is contaminated²⁹, and the Party's Response does not contest that a grave situation of contamination exists at the Metales y Derivados site. The Submission mentions a number of measures, including inspections and the final shutdown of the plant, that were taken by the government of Mexico. Arguably, Article 134 contemplates these measures because Article 134 provides for "prevention and control" of soil contamination and those measures fall within the definition of "control" established in the LGEEPA. However, especially in light of the definitions of "control" and "prevention", it is evident that inspections and shutdowns are measures available to the environmental authority (the means) in order to prevent and control soil contamination (the end). It is also clear under that definition of control, that Paragraph II of Article 134 requires that any measures necessary to achieve compliance with other requirements (i.e. hazardous waste management requirements) be taken to prevent soil contamination.

Again, because of the Party's assertion of confidentiality and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters, the Secretariat's discussion of Mexico's Response to these allegations is limited to the following. The Party does not concede that it is failing to effectively enforce Article 134. As regards the actions taken by Profepa with respect to the site, the Party's Response is basically consistent with the information provided in the Submission. The Party's Response does not claim or show that the actions taken by Profepa brought the Metales y Derivados plant into compliance regarding hazardous wastes and the prevention of soil contamination, nor that those actions otherwise prevented soil contamination at the site or produced its remediation, in accordance with Article 134. The Response does not provide information on the way in which the actions taken by Profepa applied Article 134, or whether Profepa monitored the effectiveness of its actions in preventing soil contamination. This kind of information would provide a better understanding of Mexico's enforcement efforts to prevent or control contamination at the Metales y Derivados site and to have the site restored, and of the effectiveness of those efforts. The Secretariat's understanding, in light of both the Submission and the Party's Response, is that Mexican environmental authorities have been aware of the contamination at the Metales y Derivados site and have recorded violations that were serious enough to shut down the plant. The fact that measures were taken at the site is supported by the Response, but no basis was

²⁹ Pp. 3, 6, 7, 10 and 11, and Appendices 3 and 4-b of the Submission.

provided therein to understand how those measures amount to the effective enforcement of LGEEPA Article 134, by preventing and controlling soil contamination. Obstacles that the Party may have been facing in its enforcement efforts related to the site are not specified in the Response either. Given the current situation of soil contamination at the Metales y Derivados site, that allegedly could have been prevented or could be remediated under the authority provided by Article 134, and in light of the limited information on the Party's enforcement efforts, the Secretariat considers that development of a factual record is warranted in regard to the Submitter's assertions of a failure to effectively enforce Article 134 of the LGEEPA. Here again, the Secretariat believes that in light of the degree of the potential soil contamination in question, a factual record on the effective enforcement of LGEEPA Article 134 with respect to the Metales y Derivados site would advance the goals of the Agreement³⁰, by shedding light on the effective enforcement of provisions for the prevention and control of soil contamination from hazardous waste.

In summary, the Secretariat considers that, in light of the Response from the Party, development of a factual record is warranted concerning the alleged failure to effectively enforce LGEEPA Articles 170 and 134 in this Submission. The factual record should provide information on the contamination at the Metales y Derivados site, on the alleged dangerous repercussions to public health and the environment from such contamination, and on the Party's enforcement efforts to prevent an imminent risk to the environment and dangerous repercussions to public health, and to prevent and control soil contamination, including by restoration, with respect to that site, in effective enforcement of LGEEPA Articles 170 and 134.

VII - NOTIFICATION TO COUNCIL IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

This Notification concerns the Submission by Environmental Health Coalition and Comité Ciudadano Pro Restauración del Cañon del Padre y Servicios Comunitarios, A.C.. As noted in this document, the Secretariat has determined in light of the Party's Response that the assertions concerning the alleged failure to extradite the owners of Metales y Derivados, under Article 415 of the Federal Criminal Code and provisions of the Law on International Extradition and the Extradition Treaty between the United Mexican States and the United States of America, do not warrant further review under this process. Because of the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines, this notification does not explain the reasons for such determination, since the Secretariat was unable to do so without providing information from the Party's Response.

³⁰ Articles 1 and 5 of the NAAEC.

Also in light of the Party's Response, the Secretariat considers that the development of a factual record is warranted on the Submitters' assertions that Mexico is failing to effectively enforce LGEEPA Articles 170 and 134, by failing to protect public health and the environment from the risks posed by the allegedly contaminated site in Tijuana, Baja California, Mexico, abandoned by Metales y Derivados, S.A. de C.V, and by failing to prevent and control soil contamination at the site or restore the site. In accordance with Article 15(1) of the NAAEC, the Secretariat so informs the Council and in this document provides its reasons, within the limitations arising from the asserted confidentiality of the Response and absent a summary by the Party for the purposes of Section 17.3 of the Guidelines for Submissions on Enforcement Matters.

Respectfully submitted on this 6th day of March 2000.

(original signed)
Janine Ferretti
Executive Director