Secretariat of the Commission for Environmental Cooperation of North America

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

Submitters:	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendívil
Party:	United Mexican States
Submission Number:	SEM-00-005 (Molymex II)
Date of Receipt:	6 April 2000
Date of this Notification:	20 December 2001

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (the "NAAEC"), the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). If the Secretariat considers that the submission, in light of any response from the Party, warrants developing a factual record, the Secretariat must inform the Council and provide its reasons (Article 15(1)). By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record (Article 15(2)). The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat's Article 15(1) analysis with respect to the submission filed 6 April 2000 by Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendivil (the "Submitters") in accordance with NAAEC Articles 14 and 15.

The submission asserted that Mexico is failing to effectively enforce its environmental law in relation to the operation of a molybdenum plant by the company Molymex, S.A. de C.V. ("Molymex"), located in the municipality of Cumpas, Sonora, Mexico.

On 13 July 2000, the Secretariat determined that the submission did not meet all the requirements of NAAEC Article 14(1). Based on section 6.2 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines"), the Submitters filed a revised submission containing additional information on 26 July 2000.

After consideration of this revised submission, the Secretariat determined on 19 October 2000 that the requirements of NAAEC Article 14(1) were met in respect of the alleged failures to effectively enforce Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112 of the General Law on Ecological Balance and Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), and Mexican Official Standard NOM-022-SSA1/1993, titled *Environmental health. Criterion for the assessment of ambient air quality with respect to sulfur dioxide (SO_2). Standard value for sulfur dioxide (SO_2) concentration in ambient air, as a public health protection measure*. ("NOM-022-SSA1-1993").[1] Furthermore, the Secretariat determined that in light of the criteria set out in Article 14(2), the submission warranted requesting a response from the Party as regards these provisions. On 18 January 2001, the Party filed its response with the Secretariat in accordance with NAAEC Article 14(3).

Having examined the submission in light of the Party's response, in accordance with NAAEC Article 15(1), the Secretariat hereby notifies Council that the submission warrants the development of a factual record with respect to the assertions for which the Secretariat considered the submission to warrant a response from the Party. The submission raises matters relating to the Molymex plant that the response of Mexico does not resolve, concerning the effective enforcement of Mexico's environmental laws governing environmental impact, the definition of zones in which polluting facilities may be sited, and the emission of SO_2 into the ambient air. The Secretariat considers that clarifying and documenting these matters in a factual record would advance the goals of the NAAEC of promoting transparency, public participation, and the effective enforcement of environmental law.

II. SUMMARY OF THE SUBMISSION

The submission refers to the enforcement of environmental law in connection with the Molymex plant, located in the vicinity of Cumpas, Sonora. Molymex, S.A. de C.V., was incorporated on 30 May 1979, and until 1990 operated a roasting furnace fed with ore of approximately 92% purity. The ore was extracted from the Cumobabi mine, which closed in 1991. Starting in 1994, Molymex began to process molybdenum sulfide and unroasted molybdenum concentrate.[2] In

[1] Published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 23 December 1994.
[2] The foregoing information from page 3 of the submission.

1998, the company was authorized to expand the plant, and added a second furnace. The authorized production at the plant increased from 7,500 tons per year in 1994 to 4,200 tons per month (50,400 tons per year) as of the completion of the authorized expansion project in 1999.[3] Since 1994, there have been constant complaints from the residents of Cumpas regarding the pollution generated by Molymex.[4]

The submission asserts that Mexican authorities failed to enforce the following provisions of the LGEEPA: (i) Articles 28 paragraph III, 29 paragraphs IV and VI, and 32, by allowing the Molymex plant to operate without an environmental impact authorization, despite the change in the nature of its operations from 1991 to 1994;[5] (ii) Article 98 paragraph I, by tolerating a land use by the Molymex plant that is incompatible with the appropriate categories of land use thereon;[6] (iii) Article 99 paragraph III, because of the failure to issue an urban development plan for Cumpas, defining the allowed and prohibited land uses;[7] (iv) Article 112 paragraph II, by failing to define the zones in which polluting facilities may be sited;[8] (v) Article 153 paragraph VI, since waste generated during the molybdenum roasting process (allegedly imported into the country under the temporary import regime) was allowed to remain in Mexico;[9] and (vi) Article 153 paragraph VII, by issuing authorizations to Molymex for the importation of allegedly hazardous materials without requiring insurance in the event of non-compliance with the applicable law and to cover harm caused on national territory. [10] The Submitters further assert that Mexico authorized Molymex to violate the SO_2 concentration limits in ambient air established by Mexican Official Standard NOM-022-SSA1-1993, for the protection of public health.[11]

The Secretariat, after reviewing the submission and the additional information filed by the Submitters, requested a response from the Party regarding only the alleged failures to enforce LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112, as well as Mexican Official Standard NOM-022-SSA1/1993, for the reasons discussed in the Determination of 19 October 2000.

III. SUMMARY OF THE RESPONSE OF THE PARTY

[3] The foregoing information from page 8 of the submission.
[4] Page 3 of the submission.
[5] Page 5 of the submission.
[6] Page 8 of the submission.
[7] Page 9 of the submission.
[8] Page 10 of the submission.
[9] Page 11 of the submission.
[10] Page 12 of the submission.
[11] Page 5 of the submission.

The Secretariat received Mexico's response to the submission on 18 January 2001 (the "Response"). The Party argues that Molymex, when it commenced operating in 1979, was not required to obtain an environmental impact authorization, since such an obligation was not prescribed by any legal provision in the Mexican legal system at that time.[12] The Party asserts that obligating the company to submit to an environmental impact assessment procedure at present would amount to retroactive application of a law with prejudice to Molymex. This, it contends, would violate Article 14 of the Political Constitution of the United Mexican States (the "Constitution"). The Party further contends that environmental impact assessment is an exclusively preventive procedure.[13]

The Party states that the Molymex expansion project submitted for approval in 1998 was subjected to an environmental impact assessment procedure, since on that date the LGEEPA did in fact require it.[14]

Furthermore, the Party states that it did not default on its obligation to define a zone where polluting facilities may be sited, as prescribed by LGEEPA Article 112(II), since the municipalities are the level of government empowered by Mexican law to define such zones, and the Municipal President and Secretary of Cumpas issued a zoning permit to Molymex on 7 September 1998. This, argues the Party, "implies that, by means of this permit, the zone in which the company was permitted to situate its facility was defined."[15]

Finally, the Party states that "the company has not violated the maximum contaminant limit for sulfur dioxide in ambient air established by the standard [NOM-022-SSAI/1993]" and states that at the Cumpas sampling point, the limit of 0.13 ppm of SO_2 was not exceeded during any 24-hour period between 1995 and 2000. According to the Response, during the same period, the annual arithmetic mean SO_2 concentration has not exceeded or equaled the limit of 0.03 ppm.[16]

The Party, in its Response, concludes that "the evidence and information provided and cited in this response to the Secretariat indicate that there is no failure to effectively enforce [Mexico's] environmental law."[17]

[12] Page 3 of the Response.
[13] Page 4 of the Response.
[14] Page 5 of the Response.
[15] Page 11 of the Response.
[16] Page 16 of the Response.
[17] Page 17 of the Response.

IV. ANALYSIS

A. Introduction

The process in regard to this submission is currently at the NAAEC Article 15(1) stage. To reach this stage, the Secretariat must first determine that the submission meets the requirements of Article 14(1) and that it merits a response from the Party, in consideration of the criteria of Article 14(2).

On 13 July 2000, the Secretariat determined that the submission did not meet all the requirements of NAAEC Article 14(1),[18] but the requirements of NAAEC Article 14(1)(a), (b), (c), (d) and (f) were deemed to be met. As stated in that Determination, the submission was filed with the Secretariat by a person and a non-governmental organization, asserting that Mexico is failing to effectively enforce various articles of the LGEEPA and NOM-022-SSA1-1993. These provisions qualify as "environmental law" under the definition contained in NAAEC Article 45(2). The submission was filed in writing and in Spanish, the language designated by Mexico for such purposes. The Submitters clearly identify themselves in the submission, and at least Academia Sonorense de Derechos Humanos, A.C. is domiciled in the city of Hermosillo, Sonora, Mexico. The Secretariat determined that the information and documents provided by the Submitters are sufficient to enable the Secretariat to review the submission, with the exception of the alleged failure to effectively enforce LGEEPA Articles 98 paragraph I and 153 paragraph VII (i.e., the matter of Molymex having been allowed to carry on operations that are incompatible with the appropriate categories of land use, and the matter of authorizations having been issued to Molymex to import allegedly hazardous material without guaranteeing compliance with the applicable law, nor repair of any damage or injury that may be caused on national territory). The Secretariat concluded that the submission is not aimed at harassing industry, but rather at promoting the enforcement of environmental law in Mexico. However, the requirement of Article 14(1)(e) was deemed not to be met, since the submission did not assert that the matter had been communicated in writing to the relevant Mexican authorities.

To correct this deficiency, the Submitters filed a revised submission with the Secretariat on 31 July 2000 in accordance with section 6.2 of the Guidelines. The Submitters state that the matter has previously been communicated to the relevant authorities in Mexico through various administrative and judicial proceedings, and they attach copies of 24 documents, including letters to the authorities and the responses to those letters. Consequently, on 19 October 2000, the Secretariat determined that the submission as amended met all the requirements of NAAEC Article 14(1). At the same time, it determined that in regard to the alleged failures to effectively enforce LGEEPA

[18] SEM-00-005 (Molymex II), Secretariat's Determination under Article 14(1), (13 July 2000).

Articles 98 paragraph I and 153 paragraph VII, the submission does not provide sufficient information.[19]

The Secretariat proceeded to evaluate the submission in view of the criteria set out in NAAEC Article 14(2), concluding in its Determination of 19 October 2000 that the submission warranted a response from the Party in respect of the alleged failures to effectively enforce LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112 paragraph II, as well as Mexican Official Standard NOM-022-SSA1/1993.[20] The Submitters assert the existence of health risks to the residents of Cumpas, Sonora, as well as various negative environmental impacts at that locality, allegedly caused by molybdenum trioxide and sulfur dioxide emissions produced by Molymex. The submission discusses the available remedies that have been pursued under the Party's law, and the Secretariat considers that a reasonable effort has been made to pursue them. The Submitters indicate that various administrative and judicial actions have been brought by different individuals and civic organizations in regard to Molymex's activities. The submission does not appear to be based exclusively on media reports, although the Submitters do refer to certain reports of this type. Finally, the Secretariat considered that further study in this process, of the effective enforcement of the public health and environmental protection provisions referred to in the submission on pollutant emissions, environmental impact assessment requirements, and land use planning criteria, would advance the goals of the NAAEC.

As a consequence of that Determination, the Party filed its response with the Secretariat on 18 January 2001.

B. Why Development of a Factual Record is Warranted

In accordance with NAAEC Article 15(1), and in light of Mexico's Response, the Secretariat considers the submission to warrant the development of a factual record. The submission raises matters of effective enforcement that are not resolved by Mexico's Response. These matters relate to environmental impact assessment of the activities of Molymex that began in 1994; to the definition of zones in Cumpas in which polluting facilities may be sited, and to sulfur dioxide emissions repeatedly denounced by the residents of Cumpas (which the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) described in 1995 as violating the concentration limits for SO_2 in ambient air established to protect public health).

[19] SEM-00-005 (Molymex II), Secretariat's Determination under Articles 14(1) and (2), (19 October 2000).

[20] SEM-00-005 (Molymex II), Secretariat's Determination under Articles 14(1) and (2), (19 October 2000).

The response asserts that the environmental impact procedure is purely a preventive instrument that cannot be applied retroactively, and states that the environmental authority has other instruments at its disposal with which to control any impacts that may occur. The factual record is warranted to review the effective enforcement of the environmental impact provisions in the case of Molymex, including the matter of retroactivity vis-à-vis environmental impact, which is not resolved by the Party's Response.

The response does not clarify the matter of whether there exists a definition, based on general criteria, of the zones in Cumpas in which polluting facilities may be sited, nor where Molymex is located with respect to that general zoning, although the Party asserts that a zoning permit issued to Molymex establishes such zoning. The factual record would provide clarification on these matters.

Finally, Mexico's response asserts that the company has not violated Mexican Official Standard NOM-022-SSA1/1993, but it does not include information on the specific measures taken in regard to the company (for example, any inspection reports or any reports on perimeter monitoring which the company allegedly filed with the authorities) to support that assertion. This information would be compiled in the factual record whose development is warranted in regard to this submission.

The examination of these issues as a whole would provide an understanding and an illustration of how the public health and environmental provisions relating to polluting facilities are applied to Molymex. The factual record would also compile additional information on the health and environmental effects identified by Profepa in 1995, which are attributed to Molymex by the Submitters. The factual record would provide a better understanding of the enforcement of the environmental law referred to in this submission to Molymex, contributing to its effective enforcement, and thereby advancing the goals of the NAAEC.

1. Alleged Failures to Effectively Enforce the LGEEPA Environmental Impact Provisions

LGEEPA Article 28 provides that anyone who carries out works or activities that may cause ecological imbalance or exceed the limits and conditions set out in the applicable environmental provisions shall obtain a prior environmental impact authorization. The activities of the chemical industry, which encompass the molybdenum roasting activity of Molymex, fall under this provision (pursuant to LGEEPA Article 28 paragraph III). Finally, the current Article 30 provides that in order to obtain an environmental impact authorization, the interested parties shall file an environmental impact statement with the Ministry of the Environment, Natural Resources and

Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*—Semarnap; the "Ministry" [21]).[22]

The Submitters argue that Molymex did not comply with these provisions, since "it has been carrying on its activities in the municipality of Cumpas, Sonora without an environmental impact authorization."[23] In its response, the Party responds to this assertion with three arguments: first, that environmental impact assessment did not apply because it was not required when Molymex commenced its operations; second, that environmental impact assessment is a purely preventive procedure; third, that the relevant environmental impact provisions were in fact enforced in regard to Molymex, since the expansion project of 1998 did undergo assessment and obtained the relevant authorization.

In its first argument, the Party states that when Molymex commenced its operations in 1979, "there was no obligation in Mexican law to obtain an environmental impact authorization prior to initiating construction," and for that reason, this requirement was not imposed on the company.[24] Indeed, both the submission and the response indicate that Molymex commenced its operations in 1979, when no legal provision required it to file an environmental impact statement.

However, the submission specifically contends that the authority should have required Molymex to file an environmental impact statement once that obligation was incorporated into Mexican law in 1982,[25] and especially when the company resumed its operations in 1994 after having been idle since 1990. In this regard, the Party cites the first paragraph of Article 14 of the Constitution, which states that "no law may be given retroactive effect with prejudice to any person." With

[21] Now the Ministry of the Environment and Natural Resources (Semarnat).

[22] The transcriptions appearing in the submission correspond to the text of the LGEEPA in force prior to the reform published in the DOF of 13 December 1996. This, however, does not substantially affect the force of the Submitter's arguments, due to both the nature of the arguments and the fact that the previous Articles 28, 29 and 32 are incorporated into the current LGEEPA Articles 29 and 30. Prior to the reform of December 1996, the equivalent provisions of the LGEEPA provided as follows:
"Article 28.- The performance of public or private works or activities that may cause ecological imbalance, or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted by the Federation, requires the prior authorization of the federal government acting by the Ministry, the states, or the municipalities, according to the jurisdictions established by this Law, and all such works or activities shall comply with any requirements imposed upon them once the potential environmental impact is assessed, without prejudice to any other authorizations within the purview of the competent authorities." Article 29(III) invested the Federal Government with the responsibility of assessing environmental impact, "particularly with regard to the following activities: III. The chemical, petrochemical, steel, pulp and paper, sugar, beverage, cement, automotive, and electricity generation and transmission industries." Article 32 provided that "in order to obtain the authorization contemplated in Article 28 hereof, the interested parties must file an environmental impact statement with the competent authority. "

[23] Page 6 of the submission.

[24] Page 3 of the response.

[25] The environmental impact procedure first appears as a requirement in the Federal Environmental Protection Law (*Ley Federal de Protección al Ambiente*) of 1982 and, in more detailed form, in the LGEEPA of 1988.

reference to this article, the Party maintains that it cannot legally require Molymex to submit an environmental impact statement, since when the company commenced its operations, there was no such requirement in law. In support of its assertion, the Party cites a 1921 decision of the Mexican Supreme Court (*Suprema Corte de Justicia de la Nación*), which lays down the prohibition against retroactive application of law.[26]

The Submitters argue that the retroactive application of a law is valid in some cases. In justification, they cite two 1924 decisions in which the Supreme Court ruled that where public or societal interest so dictates, a court decision may be held to have retroactive effect.[27] The Party, in its response, does not refer to this argument of the Submitters, merely citing a previous decision to the contrary. It does not explain why the subsequent court decisions cited by the Submitters would not be applicable, even though these might support the application of the environmental impact procedure to activities that commenced before it was enacted.

Moreover, under the LGEEPA Environmental Impact Regulations (RIA) in force as of 8 June 1988 and until 29 June 2000,[28] the Party was empowered to require Molymex to file an environmental impact statement, even though the company's activities had commenced prior to the enactment of this requirement in Mexican law. Transitory Article 5 of the RIA empowered the Ministry to require an environmental impact statement even in cases of works or activities in place on 8 June 1988, provided that such works or activities met certain criteria set out in that article: (i) that they covered by Article 5 of those regulations, and (ii) that they cause ecological imbalance or exceed the limits or conditions set out in the environmental protection regulations and technical standards.[29] But most important, since operations at the plant were suspended in 1991 (although

[26] Page 4 of the Response.
[27] Page 7 of the submission.
[28] The date when it was repealed by new regulations. We refer to these regulations and not the current ones, since those were in force when the submission was filed.
[29] Transitory Article 5 provides as follows:
"Article 5.- In cases of works or activities *being carried out at the time this provision comes into force*, provided that they are contemplated by Article 5 of the Regulation and that they cause environmental imbalance or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted to protect the environment, the Ministry *may* require their owners or the persons carrying them out to file the general form of the environmental impact statement within a period not exceeding thirty working days from the notice of such requirement" (emphasis added). Article 5 of the Regulation states as follows:
"Article 5.- The following natural or legal persons shall possess prior environmental impact authorization from the Ministry: those who seek to carry out public or private works or activities that may cause environmental imbalance or exceed the limits and conditions set out in the environmental protection regulations and technical standards enacted by the Federation; they shall also fulfil any requirements imposed on them in relation to the matters under federal jurisdiction by virtue of Articles 5 and 29 of the Law, particularly the following:
…V. The chemical, petrochemical, steel, pulp and paper, sugar, beverage, cement, automotive, and electricity generation and transmission industries;…"

whether the suspension was total or partial is unclear), the application of the environmental impact procedure to the activities commenced in 1994 would not appear to be retroactive.

In sum, then, the assertion that the Party cannot legally apply the environmental impact procedure to the Molymex operations commenced in 1994 is questionable on at least three grounds. First, there are mutually contradictory judicial interpretations of the retroactivity prohibition contained in Article 14 of the Constitution, particularly where the public interest is at issue, as in the present case. Second, in cases of ongoing activities where the activity is interrupted, it is not clear that the application of a provision upon its resumption should be considered retroactive. Finally, RIA Transitory Article 5 authorized the Party in certain cases to apply the legal provisions concerning environmental impact retroactively.

Irrespective of the question of retroactivity, there are other factors that appear to indicate that it was appropriate for the authority to require Molymex to file an environmental impact statement. The Submitters assert that the Molymex plant operated until 1990 using material of 92% purity extracted from the Cumobabi mine, which closed in 1991. According to the submission, Molymex resumed operations in 1994 using a different raw material which is a waste byproduct of the copper smelting process containing 30% impurities, including arsenic, cadmium, mercury, lead and selenium (in quantities not indicated). The submission also asserts that Molymex operated a seven-hearth roasting furnace until 1991, but when it resumed its operations in 1994, it added three more hearths. Based on these facts, the Submitters argue that the Molymex plant's activity had changed, and as a consequence, the company should have been required to file an environmental impact statement for strict compliance with LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, and 32.[30]

Although the response does not make direct reference to these facts, its second argument about environmental impact relates to them. The response states that "any claim that environmental impact assessment should be applied to existing industrial activities that neither required an assessment at the time they commenced, nor were obligated to obtain any such authorization, *is contrary to the preventive nature* of this instrument" (emphasis added). The Party argues that environmental impact assessment "is of an exclusively preventive nature, and thus its precepts and provisions are prior to works and activities, not subsequent." It further argues that "at all times, Semarnat has the power to control all the works and activities within its sphere of jurisdiction that may generate or are generating environmental impacts, using such instruments as licenses, permits, standards, economic instruments, registers, etc., above and beyond the environmental impact assessment procedure."[31]

[30] The foregoing information on pages 3–8 of the submission.
[31] The foregoing information on page 5 of the Response.

Despite the fact that the environmental impact assessment procedure is essentially preventive, as indicated above, in some circumstances such an instrument may be employed to assess the environmental consequences of an ongoing work or activity, or of changes to an activity. This is evidenced by the aforementioned RIA Transitory Article 5, which contemplates environmental impact assessment of activities already in process. Moreover, the Party adduces, as its third argument regarding this assertion, the fact that environmental impact assessment was applied to the Molymex expansion project of 1998.

The Party states that the Molymex expansion project filed in 1998 was indeed subjected to the environmental impact procedure,[32] since this was a requirement of the version of LGEEPA in force at that time.[33] The response does not explain why different treatment was accorded to the changes made in 1994, which were also subsequent to the entry into force of the LGEEPA. According to the submission, Molymex appears to have suspended its operations for three years (presumably the period 1991–1994) and to have resumed its operations using a different raw material from the original, with a roasting furnace consisting of ten hearths instead of the original seven.[34] Clearly, the activity with which Molymex resumed its operations is different from the previous one, in terms of both the raw material used and the production volume (both having an obvious effect on the type and volume of the plant's potential emissions). It cannot be deduced from the response, nor from the environmental impact authorization itself, that the environmental impact assessment process for the expansion project of 1998 covered the changes of 1994. Consequently, the matters raised by the Submitters regarding the effective enforcement of the environmental impact provisions with relation to the activities commenced in 1994 remain unresolved, since these activities are different from the expansion project.

In light of the foregoing, the three arguments adduced by the Party in its response do not convincingly address the assertion that Mexico is failing to effectively enforce the environmental impact assessment procedure in regard to the Molymex plant. In light of the response and the foregoing reasoning, the Secretariat considers the development of a factual record in regard to the enforcement of LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, and 32 paragraph III to be warranted in respect of Molymex's operations. In the preparation of the factual record, additional information would be obtained on the activities with which Molymex resumed its operations in 1994, and the application of the environmental impact assessment procedure to these activities would be reviewed.

2. Alleged Failures to Effectively Enforce LGEEPA Article 112 paragraph II

[32] The environmental impact authorization was issued to Molymex on 29 January 1999.
[33] Page 5 of the Response.
[34] Pages 3 and 7 of the submission.

LGEEPA Article 112 paragraph II states as follows:

> "Article 112.- In respect of air pollution prevention and control, the governments of the States, the Federal District and the Municipalities, in accordance with the distribution of powers established by Articles 7, 8 and 9 of this Law, as well as the relevant local laws:
>
> "II. Shall apply *general criteria* on air quality protection *in the urban development plans* under their jurisdiction, *defining zones* in which polluting facilities may be sited" (emphasis added).

The Submitters contend that the Municipality of Cumpas, in violation of LGEEPA Article 112 paragraph II, did not issue the municipal urban development plan, and thus it failed to define the zones in which polluting facilities may be sited.[35]

The Party states in its response that "within its scope of jurisdiction and by means of City Council Resolution Number Nineteen, Special Session no. Eleven of 4 September 1998 (sic), the President and Municipal Secretary of Cumpas, Sonora, signed document no. 854-98 of 7 September 1998, whereby an industrial land use permit was issued to the Company; this permit may be implicitly construed as the instrument used to define the zone in which the Company was permitted to situate its facility."[36]

The provision in question establishes the municipal authority's responsibility to enact a general legal provision that defines the territorial parameters governing the authorities and private parties in regard to the siting of polluting facilities.[37] From paragraph II of that article and related provisions, it is clear that the parameters contained in the urban development plans are provisions of an impersonal, general and abstract nature.

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[35] Page 11 of the submission.
[36] Page 11 of the Response.
[37] This is a local power by virtue of Article 115(V)(a) of the Constitution, which states:

> "V. The Municipalities, under the terms of the applicable federal and state laws, are empowered to:
> "a) Formulate, approve and administer zoning schemes and municipal urban development plans;"
> This same power is reiterated in Article 136(VIII) of the Political Constitution of the State of Sonora; Article 37(V) of the Organic Law of Municipal Administration (*Ley Orgánica de Administración Municipal*) (of the State of Sonora); and Article 6(X) of the Sonora State LGEEPA. The government of the State of Sonora is empowered to establish a Sectoral Urban Development Program and "to cooperate with the municipalities in the definition of standards to govern projects carried out by the public, private and civic sectors in relation to urban development." (Article 29(IV) of the Organic Law of the Executive Branch of the State of Sonora (*Ley Orgánica del Poder Ejecutivo del Estado de Sonora*)).

In contrast, a land use permit is a personalized, individualized, concrete provision which, like any such provision, is based on a general standard. Therefore, one cannot consider that the requirement of issuing general criteria that define the zones in which polluting facilities may be sited, as prescribed by LGEEPA Article 112 paragraph II, is met by issuing a land use permit.

Notwithstanding the foregoing, it should be noted that the submission contains contradictory statements on this point. On the one hand, the Submitters argue that the Municipality of Cumpas "did not issue the municipal urban development plan," and that therefore, "it did not define the zones in which polluting facilities may be sited." On the other hand, it states that the urban development masterplan for Cumpas establishes a zone "devoted to industrial use" and that Molymex is located outside of that zone.[38]

The Party, in its response, neither denies nor affirms the existence or applicability of that urban development masterplan for Cumpas, nor does it clarify whether that plan contains definitions of zones in which polluting facilities may be sited. Based solely on the Submitters' assertions,[39] it would appear that the municipal authority did fulfill its responsibility to establish a specific zone in which polluting industrial activities may be carried on.

Neither is it possible to determine from the information provided by the Submitters and the Party whether the Molymex plant is improperly located. While a zoning map and two photographs are annexed to the submission,[40] it is impossible to discern from them whether Molymex is or is not located in a zone in which polluting facilities may be sited.

Considering that the mere issuance of a land use permit does not satisfy the obligations established by LGEEPA Articles 112 paragraph II, additional information must be gathered to determine whether the municipal urban development plan defines zones in which polluting facilities may be sited, and whether the Molymex plant is located outside of such zones. This matter should be relatively easy to clarify, and would be appropriate to do so in the factual record that is warranted in regard to the submission.

3. Alleged Failures to Effectively Enforce NOM-022-SSA1/1993

NOM-022-SSA1-1993 establishes that:

[38] The foregoing information from page 11 and Appendix IV of the submission.
[39] The submission attaches a copy of a document from November 1980 titled "Urban Development Masterplan, Municipality of Cumpas, Strategic Guidelines" (Appendix IV), but that document is incomplete, consisting of only 3 poorly legible pages.
[40] Appendices I–III of the submission.

> "The concentration of sulfur dioxide as an air pollutant shall not exceed the limit of 0.13 ppm, or the equivalent of 341 $\mu g/m^3$ in 24 hours once a year, and 0.03 ppm (79 $\mu g/m^3$) in annual arithmetic mean, for the protection of the health of the susceptible population."[41]

The Submitters append to their submission, and the Party to its Response, an operating permit issued 11 February 1994 by means of *oficio* No. DS-139-4-SPA-126, whose condition no. XVII sets out the following concentration limits for sulfur dioxide from the molybdenum disulfide roasting process: 0.065% in volume, at startup, shutdown or machine failure in any 6-hour period, and 0.13 ppm during a 24-hour period. This operating permit was amended numerous times:

- On 27 May 1994, the SO_2 concentration limit was replaced by 650 ppmv (parts per million by volume) for 6 hour average, in force as of 1 May 2005.[42]
- The *oficio* of 3 April 1996 changes the deadline for bringing the emissions of the Molymex roasting furnace into compliance to 1 October 1997.[43]
- The operating permit was amended again on 30 May 1996, but the limit for sulfur dioxide emissions was maintained at 650 ppmv, with a deadline for compliance of 31 December 1997. The same permit grants a deadline of 9 December 1996 for installation of a stack for compliance with NOM-022-SSA1-1993.[44]
- The *oficio* of 17 June 1997 extends the deadline for compliance with the concentration limit of 650 ppmv of sulfur dioxide to 1640 days, starting on 31 December 1997 (i.e., until mid-2002), and additionally authorizes the plant to operate at its installed capacity. The *oficio* further indicates that the company shall comply with the concentration limits for SO_2 in ambient air established in *oficio* DFS-D-0114-97, although the Secretariat ignores what those limits are because it was not provided a copy of this *oficio*.[45]
- On 29 January 1999, the molybdenum sulfide roasting capacity was increased to 4,200 tons per month, leading to an increase in molybdenum trioxide production from 15 to 40 million pounds per year, following the installation of the second roaster (expansion project of 1998).[46]
- Finally, on 29 November 2000, the operating permit was revised to a production level of 30,000 tons per year of molybdenum trioxide. With respect to SO_2, this revision again maintains the limit of 650 ppmv, with a deadline for compliance of 31 December 2001.[47]

[41] Point 4, "Specifications", of NOM-022-SSA1-1993.
[42] Page 3 of Appendix 5 of the Response.
[43] Page 2 of Appendix 7 of the Response.
[44] Pages 5–6 of Appendix 6 of the Response.
[45] Page 2 of Appendix 8 of the Response.
[46] Page 3 of Appendix 1 of the Response.
[47] Pages 2 and 9 of Appendix 9 of the Response.

Regarding verification of Molymex's compliance with the applicable environmental law and the conditions and measures imposed by the authorities, the only document appended to Mexico's response is a report sent to the Semarnap Legal Affairs Branch (*Dirección General de Asuntos Jurídicos*) on 17 January 2001, from the State Deputy Attorney for Industrial Auditing (*Subdelegación de Verificación Industrial*) of the Sonora State Profepa Office.[48] The response and that document state that the company is in compliance with its air emissions obligations[49] as well as with certain conditions of its operating permit. According to the report, the company filed the results of the perimeter monitoring stations with the authority as of October 1994, although neither those results nor any documents relating to acts of inspection and monitoring whereby the authorities verified compliance by the company are annexed to the response.

Meanwhile, the Submitters transcribe in their submission various portions of a document produced by Sonora Branch Office B39 of the Office of Profepa in April 1995. These transcriptions indicate that the environmental authority of Mexico "authorized the company to violate Mexican Official Standard NOM-022-SSA1/1993."[50]

NOM-022-SSAI-1993 is a mandatory standard whose enforcement is not left to the discretion of the authorities, and which does not allow for extensions.[51] Yet Molymex was granted extensions for compliance with the applicable concentration limits, and the Party does not explain in its response how those limits and extensions make for the effective enforcement of NOM-022-SSA1-1993.[52] First, the limit established by the standard refers to concentrations in ambient air, whereas the limits and extensions granted by means of *oficios* DFS-D-0986-97 and DS-SMA-UNE-LF-282 refer to concentrations at the stack. The Party does not provide information on the

[48] Appendix 10 of the Response.

[49] Specifically, that document asserts compliance with Article, 13(I) and (II), 16, 17(I)–(VIII), 23, and 26 of the LGEEPA Regulation respecting Air Pollution Prevention and Control *(Reglamento de la LGEEPA en Materia de Prevención y Control de la Contaminación de la Atmósfera*) (presumably because the document does not so specify).

[50] The foregoing information from pages 4–5 of the submission.

[51] According to the Federal Metrology and Standardization Law (*Ley Federal sobre Metrología y Normalización*), compliance with the Mexican Official Standards (such as NOM-022-SSAI-1993) is not voluntary, and the authority is obligated to enforce and guarantee compliance with them. In this regard, Article 52 of that Law states:
"Article 52.- All products, processes, methods, facilities, services and activities shall comply with the Mexican Official Standards." In addition, NOM-022-SSAI-1993 states that: "This Mexican Official Standard shall be observed by the federal and local authorities responsible for enforcement and assessment of air quality for the purposes of public health protection… The competent authorities, within the scope of their powers, shall enforce compliance with this Mexican Official Standard… This Mexican Official Standard comes into force as a mandatory standard on the day following its publication in the Official Gazette of the Federation."

[52] It can be discerned from the documents relating to the operating permit that the authority, in deciding to grant the permit, took account of the calculations performed by the company on dispersion of pollutants (including SO_2), but nowhere is the relationship between the limits established for stack emissions and compliance with the ambient air concentration limits explained.

relationship between stack emissions and compliance by the company with NOM-022-SSA1/1993. In addition, the information provided with the response in regard to measurements of SO_2 in ambient air is scant. The Party does no more than assert, without attaching supporting information, that "the State Profepa Office in Sonora reported that in view of the annual results from 1995 to 2000 at each of the four perimeter monitoring stations, the sulfur dioxide concentrations are within the limits established in the aforementioned official standard [referring to NOM-022-SSA1/1993]."[53] Notwithstanding this statement, the question of whether the operating permit authorizes the company to produce emissions above the limits for human health protection established by NOM-022-SSA1-1993, as well as the question of how that authorization would amount to effective enforcement of that standard, remain unresolved.

In light of the foregoing, and despite the information provided by the Party, the matters raised by the submission in regard to the alleged failure to effectively enforce NOM-022-SSA1/1993 remain unresolved. It would be appropriate to address these matters in the factual record concerning this submission. In particular, the factual record should present information on the relationship between the SO_2 emissions permitted to Molymex and the observance of the maximum SO_2 concentration in ambient air as established by NOM-022-SSA1/1993 for the protection of human health. Likewise, further information would be gathered on measurements and other acts of enforcement carried out with respect to stack emissions and ambient SO_2 concentration, and the concrete results of such measurements, so as to illustrate the Party's assertion of compliance on the part of Molymex and effective enforcement of the NOM in question. Finally, the factual record would document the alleged human health and environmental effects or risks that the Submitter, and previously the Mexican environmental authority, attributed to SO_2 emissions from the Molymex plant.

On balance, although the Submitters did not provide overwhelming evidence of failures to effectively enforce the environmental law on the part of Mexico with respect to Molymex, the Secretariat considers that the Profepa memorandum on which the Submitters base the central concerns of their submission raises important matters that remain unresolved relating to the effective enforcement of environmental law in regard to Molymex. In addition, the Secretariat finds that the development of a factual record on several of the assertions in this submission would help to resolve the concerns of the Submitters and certain members of the community of Cumpas, Sonora, resulting in greater transparency, public participation and effective enforcement of environmental law.

V. RECOMMENDATION

[53] Page 16 of the Response.

For the reasons set forth in this notification, the Secretariat hereby informs the Council that in light of the response of Mexico, it considers the development of a factual record to be warranted for the assertions contained in submission SEM-00-005 regarding LGEEPA Articles 28 paragraph III, 29 paragraphs IV and VI, 32, and 112, and in regard to Mexican Official Standard NOM-022-SSA1/1993, all in relation to the operation of the Molymex plant in Sonora, Mexico. The submission raises questions which the response leaves unresolved regarding the effective enforcement of environmental law with respect to the Molymex plant, in regard to the environmental impact authorization for activities commenced in 1994; the definition of zones in Cumpas in which polluting facilities may be sited; and the sulfur dioxide emissions that have been of constant concern for the population of Cumpas (which the environmental authority itself considers to have violated the SO_2 concentration limits in ambient air). The factual record would clarify unresolved matters and gather additional information on the effective enforcement of these provisions with respect to Molymex. This would serve to illustrate the enforcement of environmental law for the protection of public health and the environment, as it relates to polluting facilities, and thus contribute to effective enforcement and advance the goals of the NAAEC.

Respectfully submitted for your consideration on this 20th of December 2001.

(Original signed)
Janine Ferretti
Executive Director