



SECRETARIA DE MEDIO AMBIENTE
Y RECURSOS NATURALES

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LEGAL AFFAIRS COORDINATING UNIT
LEGISLATION AND REVIEW BRANCH
REVIEW DEPARTMENT

F.I.: 00580, 17106, 211614, 21695, 21978,
22488, 23445.

"2006: Año del Bicentenario del natalicio de Benemérito de las Américas, Don Benito Juárez García"

OFICIO 112/ 001156 /2006

Mexico City, 16 February 2006

**WILLIAM V. KENNEDY
EXECUTIVE DIRECTOR
COMMISSION FOR ENVIRONMENTAL COOPERATION**

DIRECTOR WILLIAM V. KENNEDY:

Based on the provisions in Article 14(3) of the North American Agreement on Environmental Cooperation (NAAEC),¹ the Mexican government, as a Party to such agreement, is providing its response *ad cautelam* to Submission **SEM-05-003 (Environmental Pollution in Hermosillo II)**, presented by the *Academia Sonorense de Derechos Humanos, A.C.* and Domingo Gutiérrez Mendivil. This response consists of two sections structured in the following manner:

I. INADMISSIBILITY OF THE SUBMISSION

- I.1. Remedies available under the Party's law.
- I.2. Documentary evidence on which the submission is based: Non-compliance with provisions in NAAEC Article 14(1)(c).
- I.3. Harm to the person or organization making the submission: Non-compliance with provisions in NAAEC Article 14(2)(a).
- I.4. Assertions based principally on mass media reports: Non-compliance with provisions in NAAEC Article 14(2)(d).

II. PARTY'S RESPONSE (AD CAUTELAM)

- II.1. Clarification to the Secretariat in the terms of NAAEC Article 45(1) (a) and (b), with regard to considering the assertions made by the Submitters as the alleged failure to effectively enforce environmental law.

¹ **Article 14: Submissions on enforcement of environmental law.**

3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:



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II.2. Actions for the prevention and control of air pollution (prevention and control actions, programs, monitoring, and inspection and enforcement activities).

II.3. Statements made by the Submitters.

II.3.1. Regarding the alleged failures of the Ministry of the Environment and Natural Resources (*Secretaría del Medio Ambiente y Recursos Naturales*—Semarnat).

II.3.2. Regarding the alleged non-compliance by the Office of the Federal Attorney for the Environment and Environmental Protection (*Procuraduría del Medio Ambiente y Protección al Ambiente*).

II.3.3. Prevention and control of air pollution, on the part of the Sonora State Government.

II.3.4. Regarding the alleged non-compliance in the prevention and control of air pollution on the part of the municipality of Hermosillo.

BACKGROUND

On 30 August 2005, the *Academia Sonorense de Derechos Humanos, A. C.* and Domingo Gutiérrez Mendivil presented a citizen's submission to the Commission for Environmental Cooperation (CEC) asserting that Mexico is failing to effectively enforce its environmental law in relation to air pollution control in the city of Hermosillo, Sonora.

On 9 November 2005 through Determination A14/SEM/05-003/06/14(1)(2), the Secretariat made the decision to request a response from the Mexican government, considering Submission SEM-05-003 (Environmental Pollution in Hermosillo II) to allegedly comply with the requirements specified in NAAEC Article 14(1).



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On 20 December 2005, through *Oficio* 112/00013471/05, a request was filed with William V. Kennedy, Executive Director of the Commission for Environmental Protection (CEC), based on provisions in NAAEC Article 14(3) and Guideline 9.2, to allow for an extension of the time period granted to the Party to respond to Submission SEM-05-003 (Environmental Pollution in Hermosillo II).

Through Determination A14/SEM/05-003/14/RPRO, dated 4 January 2005, the Secretariat, through the Legal Officer of CEC's Submissions on Enforcement Matters (SEM) Unit, communicated the extension of the time period for the presentation of the Party's response, to no later than 16 February 2006.

I. INADMISSIBILITY OF THE SUBMISSION

I.1. INADMISSIBLE ELEMENT: Remedies available under the Party's law, in accordance with NAAEC Article 14(2)(c) and Guidelines 5.6 and 7.3 of the Guidelines.

Submission SEM-05-003 (Environmental Pollution in Hermosillo II) fails to comply with NAAEC Article 12(2)(c) and Guideline 5.6 of the Guidelines,² however, the Secretariat unduly considers the Submitters to have pursued the remedies available to individuals under the Party's law.

The reason is because the written statements presented to the Sonora Governor and to the Ministers of Urban Infrastructure and Environment and of Health in the Sonora State Government, as well as to the municipality of Hermosillo and Semarnat's Representative in Sonora, and also to the Ministry of Health at the federal level, do not constitute an administrative remedy that is in accordance with the Party's law. Rather, these statements are simply requests for information, to which legal grounds not applicable to the case have been incorporated. The intention is to grant them a legal status they do not merit, since they are aimed at meeting the requirements not fulfilled in the previous submission. Furthermore, the Submitter, Domingo Gutiérrez Mendivil, as the legal expert he is, knows that they are attempting to establish alleged

² 5.6 The submission must address the factors to be considered, identified in Article 14(2) of the Agreement, in order to assist the Secretariat in its review in accordance with this provision. Consequently, the submission must address:

....

(c) the private remedies that are available to individuals under the Party's law, that have been pursued (Article 14(2)(c));

....



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failures, without presenting the citizen complaint required by the provisions in Articles 163 to 168 of the Sonora State Ecological Balance and Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente del Estado Libre y Soberano de Sonora*), and in Articles 189 to 204 in the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*), in order to request that state and federal authorities investigate the alleged failures in line with what they have asserted in their statements, which formally constitute merely requests for information.

In addition, and with respect to the *amparo indirecto* (first instance constitutional relief) 894/2004, attempted by Domingo Gutiérrez Mendivil, one of the Submitters, and which was dismissed as inadmissible, since it failed to satisfy the principle of *definitividad*³ in the regulatory *amparo* law in Articles 103 and 107 of the Constitution of the United Mexican States (*Ley de Amparo*), the Secretariat's consideration is therefore erroneous with regard to the statement that "the Submitters have taken reasonable actions to pursue the remedies within the reach of individuals in accordance with the Party's law." Pursuing the *amparo* without having previously exhausted the ordinary defense measures is not reasonable nor should it be considered reasonable, and therefore it cannot be assumed that the remedy was pursued in accordance with the Party's law, since Mexican law determines that the *amparo indirecto* is inadmissible when a legal defense or remedy proposed by the party filing the complaint is pending, as stipulated in Article 73, paragraph XV, in the *Ley de Amparo*, which states textually:

Article 73. The *juicio de amparo* is inadmissible:

XIV. When a legal defense or remedy proposed before the ordinary courts by the party filing the complaint is pending and may have the effect of modifying, revoking or nullifying the challenged act;

Consequently, it is not precise or accurate to state that the Submitters took "reasonable actions" to pursue the remedies within the reach of individuals, in accordance with the Party's law, merely because they presented a *juicio de amparo*. This legal recourse is in fact absolutely inadmissible, since it was not taken into consideration that in order to present any means of legal defense to

³ Articles 46 and 158 of the *Ley de Amparo* establishes the **PRINCIPLE OF DEFINITIVIDAD**, which arises from the provisions in Article 107, paragraphs III and IV of the Constitution of the United Mexican States. This principle involves the obligation to exhaust all ordinary means of defense that have the potential to revoke, nullify or modify the challenged act, before pursuing a guaranteed trial (*juicio constitucional de amparo*), which by definition is an extraordinary means of defense.



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challenge authorities' acts or resolutions, it is necessary to comply with the requirements and formalities established in the corresponding legal provisions. And if this is not the case, no legal remedy or action will be fully effective, and therefore **the Submitters cannot allege that they pursued the available remedies, if they were not used in the terms required by law.**

If the submission procedures continue to move forward, without taking into account this legal situation, it would be absurd to attempt to incorporate information in the factual record which—by law—the United Mexican States (hereinafter “Mexico”) would be unable to provide until the resolutions corresponding to the pending remedies are completely certain.

Stated in extreme terms, the Secretariat would be accepting that the term “pursuing” the available remedies would be fulfilled even though it occurs in an untimely manner, or when it is attempted before authorities not having the necessary jurisdiction, or without having satisfied the legal requirements imposed by the domestic law governing the Parties. A criterion of this type would be clearly unreasonable.

Furthermore, the *amparo de revision* 10/2005 was also discarded as inadmissible, and even though both *amparos* include all the legal provisions on which the submission was founded, it cannot be considered, as the Secretariat has done, that the Submitter pursued the remedies in accordance with the Party's law. This is because the law establishes clear requirements that must be fulfilled and if they are not fulfilled, it cannot be truly alleged that the Submitter pursued the remedies available in accordance with the Party's law.

By turning to the courts to take legal action regarding these alleged failures, the Submitter does not demonstrate or accredit with any element of evidence the alleged failures of environmental authorities, or the possible damages that could be caused by such alleged failures. This is another reason for the rejection of this demand, in addition to the indication that it lacks legal interest.

The alleged complaint presented before the Sonora State Human Rights Commission (*Comisión Estatal de Derechos Humanos de Sonora*—CEDH) against the municipality of Hermosillo, Sonora is in a similar situation. It was not accepted and in fact its corresponding *Recurso de Impugnación* was dismissed, since the enactment of the Municipal Environmental Protection Program as well as the Municipal Environmental Regulations constitute discretionary acts of authorities and do not lead to obligations to fulfill them within a determined period of time. This is because the standards that grant powers do not impose obligations, as determined by the General Coordinator of the President's Office



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of the National Human Rights Commission (*Comisión Nacional de Derechos Humanos—CNDH*), and also based on Article 45(1) with regard to the “effective enforcement of its environmental law.”⁴

In addition, human rights complaints filed do not constitute nor should they be considered to constitute administrative remedies, because they do not question administrative acts or any resolution-based procedure issued by administrative authorities. Rather, they constitute a nonjurisdictional channel (outside the judicial system) for the ombudsman to investigate and, when applicable, issue a recommendation, when it is considered that the human rights of those filing the complaint have been violated. This nonjurisdictional procedure can absolutely not be considered within the concept of environmental law, in accordance with NAAEC Article 45(2).

The above is also applicable to the *amparo indirecto* 620/1999, which was pursued in response to the resolution determined by the General Coordinator of the President’s Office of the National Human Rights Commission (CNDH), and which was dismissed, and also to the corresponding remedy pursued against the dismissal of that *amparo* and the subsequent complaints pursued before the CEDH and the CNDH.

The Third Court of the Sixth Circuit (*Tercer Tribunal Colegiado del Sexto Circuito*) reached a decision on this matter, and states the following in the precedent VI.3.16 K:

“While the National Human Rights Commission, in accordance with the law that governs it, is a decentralized public entity with its own legal status and patrimony, and its objective is to verify and investigate as its mandate alleged human rights violations and formulate recommendations, the latter cannot be demanded by force or through another authority, in the terms stipulated in Article 46 of the National Human Rights Commission Act (*Ley de la Comisión Nacional de Derechos Humanos*) which establishes: “The recommendation will be public and

⁴ **Article 45: Definitions**

1. For purposes of this Agreement:

A party has not failed to “**effectively enforce its environmental law**” or to comply with Article 5(1) in a particular case in which the action or failure in question on the part of agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;



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autonomous, it will not be of an imperative nature for the authorities or public servants to whom it is addressed, and consequently, cannot, on its own, nullify, modify or cancel the resolutions or acts against which the complaint or denouncement was presented ..." Therefore the final resolution issued by the cited commission in the corresponding complaints and denouncements does not have the status of an act of authority in relation to the *juicio de amparo*, since in accordance with the regulations governing it, it lacks the essential attributes characterizing all acts of this nature; since in addition to the fact that such recommendations cannot be demanded by force, nor may they nullify or modify the acts against which the complaint or denouncement has been formulated, the authorities being addressed may abstain from carrying out the recommendations made to them, and thus the recommendation is not obligatory.

THIRD COURT OF THE SIXTH CIRCUIT (*TERCER TRIBUNAL COLEGIADO DEL SEXTO CIRCUITO*)

Amparo en revisión 590/98. Ernesto Pérez Munive. 11 February 1999. Unanimous vote. Speaker: Filiberto Méndez Gutiérrez. Secretary: María de la Paz Flores Berruecos.

See: *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo VIII*, December 1998, page 223, item: *COMISIÓN NACIONAL DE DERECHOS HUMANOS. SUS RECOMENDACIONES NO TIENEN EL CARÁCTER DE ACTOS DE AUTORIDAD PARA EFECTOS DEL JUICIO DE AMPARO.*"

Due to the above, it cannot be argued that the Submitters have pursued the legal remedies available in accordance with the Party's law.

I.2. INADMISSIBLE ELEMENT: Lack of documentary evidence to support the submission, in accordance with NAAEC Article 14(1)(c).

In accordance with the provisions in NAAEC Article 14(1)(c), the Secretariat must determine whether a submission provides sufficient information to allow for its review by the Secretariat, and includes any documentary evidence on which it may be based.

It is thus considered that the Secretariat is failing to observe this requirement with regard to Submission **SEM-05-003 (Environmental Pollution in Hermosillo II)**, given that, in light of the documents attached, the existence of sufficient information regarding the submission is not evident, and not even the minimal documentary evidence on which it is based was included.



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It is therefore evident from an analysis of the submission that **SEM-05-003 (Environmental Pollution in Hermosillo II)** does not contain a succinct factual report on which its assertions are founded, nor does it provide sufficient information to support it. Furthermore, it describes as facts a series of actions carried out before human rights authorities, such as the state and national Human Rights Commissions, as well as actions taken against these Commissions before federal courts, such as the Second District Court of the State of Sonora (*Juzgado Segundo de Distrito en el Estado de Sonora*) and the Third Court of the Fifth Circuit (*Tercer Tribunal Colegiado del Quinto Circuito*). These aspects are considered to be outside the jurisdiction of the Commission for Environmental Cooperation, as the Secretariat has considered in other previous determinations.⁵

In addition, in Guideline 5.3⁶ of the “Guidelines for the presentation of submissions regarding the effective enforcement of environmental law in accordance with NAAEC Articles 14 and 15” establishes that **Submissions must contain a succinct factual report upon which its assertions are based, and must provide sufficient information** for an examination by the Secretariat, including the documentary evidence to support the Submission, as revealed in the following table:

Table 2. Comparison of the statements made by the Submitters and the evidence presented in citizen submission SEM/05-003/06 Environmental Pollution in Hermosillo II, demonstrating the unfounded nature of this submission.

I. PURPOSE	
STATEMENTS BY SUBMITTERS	EVIDENCE PRESENTED BY SUBMITTERS
Academia Sonorense de Derechos Humanos, A.C. and Domingo Gutiérrez Mendivil (hereinafter, “the Submitters”) hereby request that the Secretariat of the Commission for Environmental Cooperation (hereinafter, “the Secretariat”), taking as a basis this citizen submission, obtain a response from the government of Mexico and obtain authorization from the CEC Council to prepare a factual record in accordance with Articles 14 and 15 of the North American Agreement on Environmental	No evidence

⁵ Submission SEM-04-002 (Environmental Pollution in Hermosillo I), Determination A14/SEM/04-002/06/14(1), page 8.

⁶ **5. What criteria should be considered in submissions?**

5.3 The submission must contain a succinct factual report on which its assertion is based and must provide sufficient information for an examination by the Secretariat, including the documentary evidence to support the Submission.



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<p>Cooperation (NAAEC). Simultaneously, the Submitters request that the Secretariat produce a report in accordance with NAAEC Article 13. The submission is made on two fundamental grounds: 1) Mexico is failing to effectively enforce its environmental law in relation to air pollution control in the city of Hermosillo, Sonora, as per NAAEC Articles 14 and 15, and 2) the matter in issue is related to the cooperative functions of the Commission for Environmental Cooperation (hereinafter, the "CEC") under NAAEC Article 13.</p>	
<p>I. FACTUAL BACKGROUND</p>	
<p>1. Ministry of the Environment and Natural Resources (<i>Secretaría del Medio Ambiente y Recursos Naturales</i>—Semarnat)</p>	
<p>STATEMENTS BY SUBMITTERS</p>	<p>EVIDENCE PRESENTED BY SUBMITTERS</p>
<p>1.- The Ministry of the Environment and Natural Resources (Semarnat) is failing to:</p>	
<p>a) enforce and promote compliance with Mexican official standards governing air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo;</p>	<p>No evidence</p>
<p>Office of the Federal Attorney for Environmental Protection (<i>Procuraduría Federal de Protección al Ambiente</i>—Profepa) Ministry of Health (<i>Secretaría de Salud</i>)</p>	
<p>STATEMENTS BY SUBMITTERS</p>	<p>EVIDENCE PRESENTED BY SUBMITTERS</p>
<p>The Office of the Federal Attorney for Environmental Protection (<i>Procuraduría Federal de Protección al Ambiente</i>—Profepa) and the Ministry of Health (<i>Secretaría de Salud</i>—SS) of the Federal Government are failing to: enforce the Mexican official standards governing air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo. In addition, the Ministry of Health is failing to establish and keep up-to-date a national air quality information system containing data for the city of Hermosillo, and is failing to enforce Mexican Official Standard NOM-048-SSA1-1993, establishing the standardized method for assessment of health risks arising from environmental factors, since it has never conducted any assessment of the impact of the Cytrar hazardous waste facility on the population of Hermosillo.</p>	<p>No evidence</p>



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<p align="center">State of Sonora Executive Branch Ministry of Urban Infrastructure and Environment (<i>Secretaría de Infraestructura Urbana y Ecología</i>) Ministry of Health (<i>Secretaría de Salud</i>)</p>	
STATEMENTS BY SUBMITTERS	EVIDENCE PRESENTED BY SUBMITTERS
The State of Sonora Executive Branch, Ministry of Urban Infrastructure and Environment, and Ministry of Health are failing to:	
a) take measures to prevent and control air pollution on property and areas under state jurisdiction;	No evidence
b) determine, in the state urban development plan, the zones in which polluting industrial facilities may be sited;	No evidence
c) monitor and enforce, within the limits of their jurisdiction, the Mexican official standards governing air pollution control;	No evidence
d) enact the relevant environmental technical standards;	No evidence
e) establish and operate or, as applicable, authorize the establishment and operation of inspection centers for motor vehicles used in mass transit under concession from the state, in accordance with the environmental technical standards (which do not exist);	No evidence
f) enact any regulations, circulars, and other generally applicable provisions that may be necessary to provide, within their administrative purviews, for strict observance of state environmental law, and in particular those provisions governing air pollution prevention and control, and they have also ceased to update the state environmental plan;	No evidence
g) propose plans for the verification, monitoring, and control of the parameters set out in Mexican Official Standards NOM-020-SSA1-1993 to NOM-026-SSA1-1993.	No evidence
<p align="center">Municipality of Hermosillo</p>	
STATEMENTS BY SUBMITTERS	EVIDENCE PRESENTED BY SUBMITTERS
The municipality of Hermosillo, Sonora is failing to:	
a) take measures to prevent and control air pollution on property and areas under municipal jurisdiction;	No evidence
b) determine, in the municipal urban development plan, the zones in which polluting industrial facilities may be sited;	No evidence



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c) monitor and enforce, within the limits of its jurisdiction, the Mexican official standards governing air pollution control;	No evidence
d) establish mandatory vehicle inspection programs, and establish and operate or, as applicable, authorize the establishment and operation of mandatory motor vehicle inspection centers, in accordance with the environmental technical standards (which do not exist);	No evidence
e) create the municipal environment commission contemplated in Article 138 of the relevant local act;	No evidence
f) enact any regulations, circulars, and other generally applicable provisions that may be necessary to provide within its administrative purview for strict observance of state environmental law, and in particular the air pollution prevention and control bylaw, the municipal environment bylaw, the municipal environmental protection plan, the environmental contingency response plan, and an air quality management plan;	No evidence
g) reduce or control air pollutant emissions, whether from artificial or natural and from fixed or mobile sources, in order to guarantee satisfactory air quality for public well-being and environmental stability.	No evidence
State of Sonora Human Rights Commission (Comisión Estatal de Derechos Humanos de Sonora) National Human Rights Commission (Comisión Nacional de Derechos Humanos)	
STATEMENTS BY SUBMITTERS	EVIDENCE PRESENTED BY SUBMITTERS
The State of Sonora Human Rights Commission, the National Human Rights Commission, the Second District Court of the State of Sonora, and the Third Collegiate Court of the Fifth Circuit are failing to: properly apply the environment-related legal provisions in their decisions, as shall be explained below, although it is understood that such authorities may not be deemed to have responsibility for this matter, as the Secretariat may determine.	No evidence
2. Among the legal actions aimed at remediation (cleanup) of the Cytrar toxic waste dump, on 3 December 1998 we requested of the municipality and of the municipal president of Hermosillo that they inform us of whether or not air quality monitoring is being done in the capital of the state of Sonora for the purpose of determining the	No evidence



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negative environmental impact of emissions from the above-mentioned containment facility. ⁷	
<p>3. In response to the foregoing, the City Council (<i>Cabildo</i>) of Hermosillo, meeting in ordinary session on 25 February 1999, resolved to provide the following information: that the last studies to determine the concentration of total suspended particles (TSP) and particles less than 10 μ (PM-10) in the ambient air of the city of Hermosillo were done by the federal Ministry of the Environment, Natural Resources, and Fisheries (<i>Secretaría de Medio Ambiente, Recursos Naturales y Pesca</i>—Semarnap) in 1995; that the air quality records possessed by the municipality are those deriving from sampling performed 1 December 1997 to 30 November 1998 in the environs of what is today the sanitary landfill, to determine the impact in that area of particles issuing from the operation thereof, and that since the beginning of that municipal administration, the federal government, acting by the National Institute of Ecology (<i>Instituto Nacional de Ecología</i>—INE), has claimed to be decentralizing air quality monitoring in urban areas, involving the municipal governments in such a way that they take charge of the administration of such programs.⁸</p>	
<p>4. In a statement to the media, the director of urban development of the commune, Fernando Landgrave, acknowledged that no air pollution records whatsoever were being kept because they did not have the necessary equipment. He also said that “an attempt will be made to include in the expense budget for the next year an allocation of 100,000 pesos for making this equipment operational.” (<i>Cambio</i>, 5 December 1998).</p>	<p>Based on an article from the <i>Cambio</i> newspaper, 5 December 1998.</p> <p>It should be pointed out that in this statement, Fernando Landgrave also indicates that “monitoring will only help in carefully measuring polluting particles, since there is general knowledge of the significant problem generated by dust and thermal inversion during the winter season. It is not necessary to have a monitoring system to know and be sure that the problem exists. What is needed is a solution, which is paving the streets, but this has been limited by a lack of</p>

⁷ On page 23, the following appears in the footnote. The text of the submission is as follows: “It is important to point out that the entire text of the submission is not incorporated, but rather only a portion, and it is therefore not possible to cite generally from the text when only a portion is included.”

⁸ In footnote no. 2 included in page 23 of the submission, the following is indicated: “The complete text of the cited agreement of the municipality of Hermosillo is the following:” However, the original Agreement document is not incorporated.



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<p>However, Municipal President Jorge Valencia stated that it was not so important to repair the monitoring equipment; rather, "what is important is to obtain money to pave and improve the city." He added that there is no need to measure air quality to realize that everybody is wheezing from bronchial disease and asthma caused by excessive dust pollution (<i>Cambio</i>, 8 December 1998).</p> <p>This latter statement reveals that Mr. Valencia could not even conceive that the atmosphere of the city of Hermosillo contained and still contains, in what he calls "dust," compounds that are extremely hazardous to human health, including ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. These enter the respiratory tract in the form of total suspended particles (primarily particles less than 10 μ) generated by fixed and mobile sources such as dye shops, auto repair shops, assembly plants (<i>maquiladoras</i>), cement plants, and motor vehicles. Now, a power plant must be added to this list.⁹</p>	<p>resources."</p> <p>He also said that "the definitive solution to this problem is paving the streets, especially in the northern part of the city, and for this reason, requests for more resources are being made of SEDESOL and other entities."</p> <p><u>No evidence</u></p>
<p>5. It is powerfully eloquent that, according to the official version, air quality monitoring "just happened to" cease during the same period in which larger quantities of contaminated slag were coming in to Cytrar. Even stranger is the information published on the matter if one considers that in early 1998, then deputy official of Semarnap César Catalán Martínez stated that "the local municipality has now earmarked a special budget for air quality monitoring and improvement" (<i>El Imparcial</i>, 14 and 18 January 1998).</p>	<p>No evidence</p> <p>Note: A publication of the <i>El Imparcial</i> newspaper, from 14 to 18 January 1998, is indicated as the evidence. <u>However, the information was not found.</u></p>
<p>6. Investigations into the Cytrar toxic waste dump case have pointed up numerous failures to enforce as well as the existence of outdated legal instruments. Thus, as mentioned previously, there is no up-to-date state environmental plan, nor has the municipality of Hermosillo enacted an environment bylaw, in contrast with other municipalities of Sonora which do have such an</p>	<p>No evidence</p>

⁹ In footnote no. 3 on page 23 the following is indicated: "It is obvious that the main person in charge of looking after the interests of the Hermosillo community did not even remotely know that, according to the data in the existing regulations, the specific damages that can be caused by the elements mentioned are the following: ..." In this respect it is important to point out that when something is asserted, it must be proven, given that the conditions may vary from one place to another, and thus change the context of the consequence.



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instrument; much less does it have an air quality management plan, and it has not enacted an environmental contingency response plan to deal with episodes like the thermal inversion that took place on 9 December 1998, a phenomenon that has recurred several times since.	
7. As a consequence of the lack of air quality monitoring in Hermosillo, the Sonora Ministry of Health has refrained from conducting epidemiological studies to determine the severity of the negative impact of air pollution on the health of Hermosillo residents.	No evidence
8. Ultimately, there is no money for air quality monitoring in Hermosillo, with the conclusion that the people "are wheezing... from excessive dust pollution," yet the municipality is required to conduct such monitoring under LGEEPA Article 8 paragraphs III and XII. Furthermore, it should be borne in mind that Mexican Official Standards NOM-020-SSA1-1993 to NOM-026-SSA1-1993, setting criteria for the assessment of ambient air quality with respect to ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, TSP, PM-10, and lead, published in the Official Gazette of the Federation (<i>Diario Oficial de la Federación</i> —DOF) on 23 December 1994, provide that: "Within 180 calendar days of publication... the governments of the federated entities shall put forward plans for verification, monitoring, and control of the parameters established." This means that the government of the state of Sonora had to comply with this provision no later than mid-1995, but has not done so to date.	No evidence
9. Similarly, the Mexican official standards originally known as NOM-CCAM-001-ECOL/1993 to NOM-CCAM-005-ECOL/1993, establishing measurement methods for determination of the concentration of these pollutants, as well as the Mexican official standards originally known as NOM-CCAT-001-ECOL/1993 to NOM-CCAT-014-ECOL/1993, setting limits on air emissions for various pollutants, published in the DOF on 18–22 October 1993, hold Profepa, the state government, and the municipality responsible for their enforcement, but these entities have done nothing to comply with these provisions.	No evidence



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<p>10. In response to the written request we made to him on 14 January 1999 to inform us as to whether air quality monitoring equipment was operational in Hermosillo and as to the municipality's compliance with the air pollution prevention and control measures it is obligated to implement, the Semarnap official in Sonora at that time, Juan Carlos Ruiz Rubio, in file no. DS-UAJ-095/99 of 26 February 1999, stated as follows, among other matters:</p> <p>"In regard to your request in point II, please note that said air quality monitoring equipment is not operational since those funds are included within the decentralization process currently taking place from this ministry to the municipalities.</p> <p>"In regard to the information you request in point III, consisting of a detailed report on compliance by the municipality with the air pollution prevention and control measures it is empowered to take, in this regard it should be clarified that this authority is not competent to verify compliance with the legal provisions which, in accordance with its powers, it has transferred to the municipality, and therefore that information must be requested from that order of government."</p>	<p>No evidence</p>
<p>11. On 29 April 1999, a complaint was filed against the municipality of Hermosillo, Sonora with the State Human Rights Commission (<i>Comisión Estatal de Derechos Humanos</i>) for its failure to issue the municipal environmental protection plan and the municipal environment bylaw.</p>	<p>No evidence</p>
<p>12. In its file no. 0309/99 of 6 May 1999 further to file no. CEDH/I/22/1/197/99, the First Inspector General (<i>Visitador General</i>) of the State Human Rights Commission notified us that the complaint had been dismissed.</p>	<p>A copy of file CEDH/I/22/1/197/1999 related to the complaint filed on 29 April 1999 before the Sonora State Human Rights Commission and against the municipality of Hermosillo was indicated as evidence. <u>Information not found or attached as a supporting document.</u></p>
<p>13. On 13 May 1999, an administrative appeal (<i>recurso de impugnación</i>) was filed against the dismissal.¹⁰</p>	<p>No evidence</p>

¹⁰ In the section of "notes" on page 24, the following is indicated: "The text of the offenses expressed in the cited resources is the following: ..." However, **a copy of the administrative appeal (*Recurso de Impugnación*) is not included, and instead the offenses are**



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<p>14. In file no. 16614¹ of 4 June 1999 further to file CNDH/121/99/SON/100159.000, the Coordinator General of the Office of the President of the National Human Rights Commission, Adolfo Hernández Figueroa, gave notice that the appeal was dismissed, presenting the grounds for dismissal as transcribed below:¹¹</p> <p>In effect, as may be discerned from Title Six, Chapter One of the State of Sonora Ecological Balance and Environmental Protection Act, the enactment of the instruments to which you refer is contemplated as a regulatory power of the municipalities, a power which, given its nature, translates into a discretionary act in so enacting and does not give rise to an obligation to do so within a given period of time, something which is not specifically set out in said Act, for as is well known, provisions granting powers do not impose obligations.</p>	<p>No evidence</p> <p><u>Information not found in the supporting documents sent by the Secretariat.</u></p>
<p>15. On 12 July 1999, indirect amparo no. 620/1999 was filed against this determination. The amparo was heard by the Second District Court of the State of Sonora. The Court dismissed the proceeding in a decision handed down on 13 December 1999.</p> <p>The fourth section of the decision by Rosa Eugenia Gómez Tello Fosado reads in substance as follows:¹²</p> <p>Moreover, Transitory Article 2 of the General Ecological Balance and Environmental Protection Act provides:</p> <p>“...Until such time as the local legislatures enact the laws, and the municipalities the ordinances, bylaws, and policing and good government provisions (<i>bandos de policía y buen gobierno</i>) governing the matters which, according to the provisions of this act, correspond to state and</p>	<p>No evidence</p>

transcribed. This cannot be considered as evidence, however, since it is not part of an original document.”

¹¹ On page 24, in the section on “notes,” the following is indicated: “The complete text of the cited *Oficio* 16614 is as follows: ...” However, **the above cannot be considered as evidence since it is not a copy of an original document.**

¹² On page 24, related to the notes, the following is included as note 6: “The Fourth of the respective resolution states textually: ...” **To be constituted as evidence, it was necessary to have included the entire document and not only a transcribed portion of the document.**



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<p>municipal jurisdiction, the Federation is responsible for enforcing this law in the local context, coordinating its actions for that purpose with the state authorities and, with their participation, with the relevant municipalities, as applicable.”</p> <p>Transitory Article 4 of the State of Sonora Ecological Balance and Environmental Protection Act provides:</p> <p>“Until such time as the incumbent of the Executive Branch and the municipalities of the entity enact the regulations, bylaws, and other generally applicable provisions contemplated in this Act, the regulations to the General Ecological Balance and Environmental Protection Act shall apply, as relevant.”</p> <p>From the foregoing provisions it may be inferred that if the municipalities do not enact the ordinances, bylaws, and policing and good government provisions to regulate environmental protection, the Federation is responsible for enforcing the General Ecological Balance and Environmental Protection Act in the local context.</p> <p>“Therefore, it must be concluded that the failure by the municipality of Hermosillo to issue the municipal environmental protection plan and to enact the municipal environment bylaw does not affect the complainant's legal interest, for the General Ecological Balance and Environmental Protection Act contains necessary and sufficient environmental protection measures to guarantee his right to development and well-being, since this provision applies in the event where the states or municipalities have not enacted laws governing this matter...”</p>	<p>No evidence</p> <p>No evidence</p> <p>No evidence</p>
<p>16. An appeal (<i>recurso de revisión</i>) was filed against the decision in indirect <i>amparo</i> no. 620/1999 on 18 January 2000.</p>	<p>No evidence</p>
<p>17. On 31 January 2001, the Third Collegiate Court of the Fifth Circuit, composed of judges Epicteto García Báez, Gustavo Aquiles Gasca, and Elsa del Carmen Navarrete Hinojosa, in decision 223/2000, upheld the lower court's decision.</p>	<p>No evidence</p>
<p>18. In another connection, on 6 May 1999, a complaint under file no. CEDH/II/22/1/210/99 was</p>	<p>No evidence</p>



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filed with the State Human Rights Commission against the municipality of Hermosillo, Sonora for failure to conduct air quality monitoring and control in that city and to issue an environmental contingency response plan as well as an air quality management plan for Hermosillo.	
19. In a document of 16 July 1999, we responded to and took issue with aspects of the information provided by the Municipal President of Hermosillo in the aforementioned file and expanded the initial complaint to include the government of the state of Sonora as a responsible authority.	No evidence.
20. The fact is that in a decision of 11 August 2000, the Second Inspector General of the State Human Rights Commission of Sonora, Gabriel García Correa, definitively dismissed the matter in file no. CEDH/II/22/1/210/99. It should be pointed out that the expansion of the complaint to include the government of the state of Sonora was never processed, on the grounds that the requirement set out in decisions of 10 August 1999 and 18 January 2000 was never met, yet notice of those decisions was given to a person who was never authorized by us to receive notice. In addition, the arguments wielded in dismissing the complaint never contradicted or raised questions as to the factual correctness of the irregularities denounced in the initial complaint. Subsequently, in a document filed on 7 June 2001, the persistence of the violations mentioned in the complaint was reported, but despite this the file was never reopened.	No evidence
21. From all of the foregoing it may be seen that, according to the Semarnap official in Sonora, in regard to air pollution prevention and control, Semarnap is "not competent to verify compliance with the legal provisions which, in accordance with its powers, it has transferred to the municipality," when the exact opposite is established, among other things, by LGEEPA Article 5 paragraphs V and XIX; that according to the Coordinator General of the Office of the President of the National Human Rights Commission, the enactment of the municipal environmental protection plan and the municipal environment bylaw by the municipality of Hermosillo "is contemplated as a regulatory power of the municipalities, a power which, given its nature, translates into a discretionary act in so enacting and does not give rise to an obligation to do so within a given period of	No evidence



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<p>time, something which is not specifically set out in said Act, for as is well known, provisions granting powers do not impose obligations,” yet simple common sense tells us that the legal provisions necessary to prevent and control air pollution cannot be a matter left to the utter whim of the authority, besides the fact that, for example, Article 73 paragraph I of the State of Sonora Ecological Balance and Environmental Protection Act is unequivocal and leaves no doubt that both the municipality of Hermosillo and the state government are obligated to take “actions to prevent and control air pollution on property and areas under state or municipal jurisdiction”; that in the opinion of then judge of the Second District Court of the State of Sonora, “the failure by the municipality of Hermosillo to issue the municipal environmental protection plan and to enact the municipal environment bylaw does not affect the complainant's legal interest, for the General Ecological Balance and Environmental Protection Act contains necessary and sufficient environmental protection measures to guarantee his right to development and well-being, since this provision applies in the event where the states or municipalities have not enacted laws governing this matter...”, whereas it is the case that, as noted, the Semarnap officer in Sonora acknowledged that “said air quality monitoring equipment is not operational since those funds are included within the decentralization process currently taking place from this ministry to the municipalities,” not to mention that the aforementioned municipal plan and bylaw must be suited to the particular characteristics of the city of Hermosillo, which are obviously not contemplated in the General Act in question.</p>	
<p>23. The authorities identified as responsible are not taking the measures necessary to prevent and control environmental pollution in Hermosillo, Sonora, and are thereby failing to enforce the legal provisions indicated in the submission.</p>	<p>No evidence</p>
<p>24. In accordance with Article 14(1)(c) and (e) of the North American Agreement on Environmental Cooperation, be it noted that the matter raised in the submission has been communicated in writing to the competent authorities of the United Mexican States, as discussed below.</p>	<p>Copy of the statements in which the events explained in point 24 of the Section on Factual Background are described.</p>



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<p>...</p> <p>c) On 8 September 2004, the Governor of the State of Sonora, the state Minister of Urban Infrastructure and Environment, and the municipality of Hermosillo were notified that they were failing to effectively enforce the aspects of their environmental law set out in the submission. A similar letter was sent on 9 September 2004 to the state Secretary of Health and the Semarnat officer in the state of Sonora. The same notice was sent on 13 September 2004 to the Profepa officer in the State of Sonora.</p>	<p>No evidence</p>
<p>25. The failures to enforce the provisions of Article 4 of the Mexican Constitution, the General Health Act, the State of Sonora Health Act, and the State of Sonora Civil Protection Act are eligible for NAAEC Article 14 review since these provisions concern environmental matters. <u>However, if this argument should be found invalid, then the Submitters accept the exclusion of these legal provisions from further consideration in this matter.</u></p>	<p>No evidence</p>
<p>29. And so the available domestic remedies were exhausted without the irregularities denounced in this submission being in any way addressed.</p>	<p>No evidence</p>
<p>30. In the end there can be no doubt as to the harm caused to all the residents of Hermosillo, Sonora by the virtual absence of air pollution prevention and control measures.</p>	<p>No evidence</p>
<p>III. ARGUMENT</p>	
<p>STATEMENTS BY SUBMITTERS</p>	<p>EVIDENCE PRESENTED BY SUBMITTERS</p>
<p>The authorities indicated as those responsible have failed to effectively enforce practically all the legal provisions in the area of air pollution prevention and control in the municipality of Hermosillo, Sonora, as well as those related to the right to environmental information. Included are those specified below:</p>	<p>No evidence</p>



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<p>"The legal instruments considered to be violated are those indicated below;"</p>	
<p>B. IN ACCORDANCE WITH NAAEC ARTICLE 13:</p> <p>1. THE CEC SECRETARIAT SHOULD PRODUCE A REPORT ON THE CASE OF ENVIRONMENTAL POLLUTION IN HERMOSILLO, SINCE IT RELATES TO A MATTER LINKED TO THE COOPERATIVE FUNCTIONS OF THE NAAEC.</p> <p>NAAEC Article 13 empowers the Secretariat to prepare an evaluation report on the case of ENVIRONMENTAL POLLUTION IN HERMOSILLO as a matter related to the cooperative functions of the Agreement. Article 13 allows the Secretariat to produce a report "on any matter within the scope of the annual program," based on relevant scientific, technical, or other information presented by non-governmental organizations and persons. Under this article, the report is not required to be based on a claim of failures by a Party to effectively enforce its environmental laws and regulations.</p> <p>The case of ENVIRONMENTAL POLLUTION IN HERMOSILLO merits the production of such a report by the Secretariat in that it falls within three of its main strategic programs: one concerning the furthering of our understanding of the relationships between environment, the economy, and trade; another concerning the Parties' obligation to effectively enforce their environmental laws and regulations; and a third emphasizing the importance of cooperative initiatives aiming to prevent and correct the adverse human health and ecosystem impacts of pollution in North America.</p> <p>In the first place, the Secretariat can prepare a report to determine levels of pollution caused by lack of air quality control, the associated environmental and health risks, the current impact on Hermosillo and, fundamentally, a report considering the alternatives that can correct the irregularities committed. In the second place, a Secretariat report could make proposals as to how to support Mexico in a way that ensures that its enforcement of its environmental laws and</p>	<p>The Submitters do not have the power to request the preparation of reports. This is a power reserved exclusively for the Council.</p> <p>No evidence</p>



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regulations is effective.	
IV. CONCLUSION	
STATEMENTS MADE BY SUBMITTERS	EVIDENCE PRESENTED BY SUBMITTERS
Constitution of the United Mexican States	
Mexico is failing to effectively enforce Article 4 of the Mexican Constitution.	No evidence
General Ecological Balance and Environmental Protection Act (<i>Ley General del Equilibrio Ecológico y la Protección al Ambiente</i>—LGEEPA)	
Mexico is failing to enforce Articles 5, paragraphs II, V, XVIII and XIX; 7, paragraphs III, XII and XIII; 8, paragraphs III, XI, XII and XV; 10, 112 paragraphs II and IV; and 159 BIS3 of the General Ecological Balance and Environmental Protection Act (LGEEPA).	No evidence
Regulation to the General Ecological Balance and Environmental Protection Act (LGEEPA) Respecting Air Pollution Prevention and Control (<i>Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Prevención y Control de la Contaminación de la Atmósfera</i>)	
Mexico is failing to enforce Articles 3, paragraph VII; 4, paragraph III; 13, 16, and 41 of the Regulation to the General Ecological Balance and Environmental Protection Act Respecting Air Pollution Prevention and Control.	No evidence
Federal General Health Act (<i>Ley General de Salud</i>)	
Mexico is failing to enforce Articles 13(A), paragraph I and (B), paragraph VI; and 20, paragraph VII of the Federal General Health Act.	No evidence
State of Sonora Ecological Balance and Environmental Protection Act (<i>Ley de Equilibrio Ecológico y la Protección al Ambiente de Sonora</i>)	
Mexico is failing to enforce Articles 73, 75, 85 (B), paragraph I, 138 and 139 of the State of Sonora Ecological Balance and Environmental Protection Act.	No evidence
State of Sonora Health Act (<i>Ley de Salud de Sonora</i>)	
Mexico is failing to enforce Articles 15, paragraph VI and 18, paragraph VI of the State of Sonora Health Act	No evidence
State of Sonora Civil Protection Act (<i>Ley de Protección Civil de Sonora</i>)	



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Mexico is failing to enforce Article 9, paragraph II of the State of Sonora State Civil Protection Act.	No evidence
Mexican Official Standards (<i>Normas Oficiales Mexicanas</i>—NOMs)	
NOM-020-SSA1-1993	No evidence
NOM-021-SSA1-1993	No evidence
NOM-022-SSA1-1993	No evidence
NOM-023-SSA1-1993	No evidence
NOM-024-SSA1-1993	No evidence
NOM-025-SSA1-1993	No evidence
NOM-026-SSA1-1993	No evidence
NOM-048-SSA1-1993	No evidence
NOM-040-SEMARNAT-2002 (formerly NOM-040-ECOL-2002; NOM-CCAT-002-ECOL/1993)	No evidence
NOM-043-SEMARNAT-1993 (formerly NOM-043-ECOL-1993; NOM-CCAT-006-ECOL/1993)	No evidence
NOM 085-SEMARNAT-1994	No evidence
NOM-121-SEMARNAT-1997 (formerly NOM-121-ECOL-1997)	No evidence
NOM-041-SEMARNAT-1999 (formerly NOM-041-ECOL-1999; NOM-CCAT-003-ECOL/1993)	No evidence
NOM-042-SEMARNAT-1999 (formerly NOM-042-ECOL-1999; NOM-CCAT-004-ECOL/1993)	No evidence
NOM-044-SEMARNAT-1993 (formerly NOM-044-ECOL-1993; NOM-CCAT-007-ECOL/1993)	No evidence
NOM-045-SEMARNAT-1996 (formerly NOM-045-ECOL-1996; NOM-CCAT-008-ECOL/1993)	No evidence
NOM-048-SEMARNAT-1993 (formerly NOM-048-ECOL-1993; NOM-CCAT-012-ECOL/1993)	No evidence
NOM-050-SEMARNAT-1993 (formerly NOM-050-ECOL-1993; NOMCCAT-014-ECOL/1993) AS EXPLAINED IN THE FACTUAL BACKGROUND SECTION.	No evidence

Consequently, it is demonstrated that the submission lacks the supporting documentation to back its assertions. Furthermore, it should be pointed out that the notes included in the submission do not contain technical or legal information for effectively verifying the Submitters' assertions.

Along these lines, it is important to consider that the only evidence presented by the Submitters to support their assertions consists of the requests they have made to federal, state and municipal authorities. These requests are aimed exclusively at acquiring additional information in order to comply with the requirements specified in NAAEC Article 14 for presenting citizen submissions, in accordance with the guidelines provided by the Secretariat in its



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determination in response to Submission **SEM-04-002/ Environmental Pollution in Hermosillo**, which was dismissed due to its failure to comply with the requirements specified in NAAEC Article 14(1) and (2). Therefore, the Submitters have not carried out actions to denounce the alleged failure to effectively enforce environmental law, even though one of the Submitters is a legal expert, and they have not proven that environmental law has not been enforced. It is especially noteworthy that Domingo Gutiérrez Mendivil¹³ did not pick up the information that he requested from the Ministry of the Environment and Natural Resources (Semarnat) through the Inquiries System (*Sistema de Solicitudes de Información*), even though it was made available to him (Exhibit 1). This indicates that his intention is to simply meet the formal requirements specified in the NAAEC in order to present the submission to the CEC.

It is important to add that his assertions regarding alleged failures to enforce environmental law have never been verified, and in fact the evidence that the Submitter allegedly presented was not included, as indicated in the following table:

Table 1. Evidence not found in Citizen Submission SEM/05-003/06 (Environmental Pollution in Hermosillo II)

Evidence Mentioned	Status
Without evidence number: <i>El Imparcial</i> , 14 and 18 January 1998.	Not delivered
Without evidence number: Copy of <i>Oficio</i> No. DS-UAJ-095/99, dated 26 February 1999, signed by the Representative in Sonora at the time from the Ministry of the Environment, Natural Resources and Fisheries.	Not delivered
Submitter's Evidence #4: Copy of File No. CEDH/I/22/1/197/1999, related to the complaint filed on 29 April 1999 with the Sonora State Human Rights Commission (<i>Comisión Estatal de Derechos Humanos de Sonora</i>) against the municipality of Hermosillo.	Not delivered
Submitter's Evidence # 5: Copy of <i>Oficio</i> No. 16614, dated 4 June 1999, derived from File CNDH/121/99/SON/I00159.000, through which the General Coordinator of the President's Office of the National Human Rights Commission, Lic. Adolfo Hernández Figueroa, communicated the dismissal of the <i>Recurso de Impugnación</i> filed against the agreement for the dismissal in the matter described in the previous point.	Not delivered
Submitter's Evidence # 7: Copy of the decision that was completed on 13 December 1999, dictated in the mentioned <i>amparo indirecto</i> no. 620/1999.	Not delivered
Submitter's Evidence # 8: Copy of the decision handed down on 31 January 2001 by the Third Court of the Fifth Circuit, in No. 223/2000, with regard to the <i>amparo de revisión</i> filed against the Constitutional resolution declared in the <i>amparo indirecto</i> (first instance constitutional relief) no. 620/1999.	Not delivered
Submitter's Evidence # 9: Copy of file no. CEDH/II/22/1/210/1999, with	Not delivered



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regard to the complaint filed on 6 May 1999 before the Sonora State Human Rights Commission against the municipality of Hermosillo.	
Submitter's Evidence # 10: Copy of the report entitled <i>Concentration of particles in ambient air for the city of Hermosillo, Sonora, Mexico during the 1990-1995 period</i> , issued by the Sonora State Environment Office of the Federal Ministry of the Environment, Natural Resources and Fisheries, August 1996. This document is included in the copy of File CEDH/II/22/1/210/1999.	Not delivered

The above also demonstrates the lack of supporting documentation for the submission. The requests made to different authorities merely indicate that information on various environmental provisions was requested, but this does not imply that the remedies available in the Party's law were pursued, nor does it imply that the Submitter demonstrated the alleged failure to effectively enforce environmental law. And this indicates a lack of compliance with the provisions in NAAEC Article 14(1)(c) and Guideline 5.3 of the Guidelines.

In order to provide the Secretariat with a clearer assessment of the lack of evidence and information, which in terms of the NAAEC Article 14(1)(c), the Submitters must present in order to support the statements they make, a number of examples are provided below to illustrate some of the assertions made by the Submitters without any corresponding document to support them:

- "the Ministry of the Environment and Natural Resources (Semarnat) is failing to: ...recommend to the government of the state of Sonora... and to the municipality of Hermosillo to take measures to prevent and control air pollution on property and areas under state and municipal jurisdiction, respectively."¹⁴

In this regard it is important to point out that the Submitters did not even demonstrate the grounds on which the Ministry would acquire such an obligation, thus revealing the lack of support for their assertions and the lack of information regarding their assertions.

- "The Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) is failing to: enforce compliance with the Mexican official standards governing air pollution control in the state of Sonora."¹⁵
Nevertheless, the Submitters do not present a single supporting document for this assertion, nor do they incorporate legal provisions that would

¹⁴ Submission, a) and c) of section II, page 5.

¹⁵ Submission, page 6.



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support such a power or obligation. These elements would be vital in claiming that Profepa is failing to enforce environmental law, since it is not enough to only consider what the Submitters assert in determining whether Profepa is actually failing to enforce compliance with the Mexican official standards. The Submitters fail to demonstrate their statements, and to the contrary, as indicated in Section II.2 of this Party's Response, Profepa has, within its jurisdiction, carried out diverse actions aimed at enforcing compliance with the various legal environmental provisions. This reveals that it is not enough for the Submitters to express their considerations regarding alleged failures, given that they fail to consider that those who make assertions are obliged to prove them, and they are also those who are obliged to provide the necessary elements to support their statements, as required in NAAEC Article 14(1)(c), and especially in order for the Secretariat to be able to review such a submission.

Furthermore, the Submitters **have not demonstrated** through any supporting element their assertion of alleged harm inflicted on the population of the city of Hermosillo.

The above reveals a lack of compliance with the provisions in NAAEC Article 14(1)(c), since documentary evidence for supporting the submission was not included, and the submission should therefore be concluded.

I.3. Failure to establish harm to the person or organization making the submission, indicating a lack of compliance with the terms of NAAEC Article 14(2)(a) and Guideline 5.6(a) of the Guidelines.

In accordance with NAAEC Article 14(2)(a), when the Secretariat considers whether or not a submission meets the requirements stipulated in the first paragraph of the Agreement's Article 14, it determines whether the submission merits requesting a response from the Party. In order to make such a determination, the Secretariat should be guided by a number of different considerations including whether or not the submission alleges that harm has been inflicted on the person or organization presenting the submission.

Also, Guideline 5.6 establishes that the submission must address the factors to be considered, identified in NAAEC Article 14(2), in order to assist the Secretariat in its review in accordance with this provision. Therefore, among other factors, the submission must address the matter of harm, which is contemplated in the Article cited.



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Also, Guideline 7.4 of the Guidelines establishes the factors to be considered in order to evaluate whether or not the submission alleges harm to the person or organization presenting the submission, by establishing the following:

“7.4 In order to evaluate whether or not the submission alleges harm to the person or organization making the submission, the Secretariat will consider factors such as the following:

- (a) whether the harm alleged is a result of the alleged failure to effectively enforce environmental law,
- (b) whether the harm alleged is associated with environmental protection, or with preventing a danger to human life or health (but not directly associated with worker safety and hygiene), as defined in Article 45(2) of the Agreement.”

In this case, it is believed the Secretariat did not adhere to these provisions, since it stated the following in its Determination A14/SEM/05-003/06/14(1)(2):

...

“With regard to whether or not the Submission alleges harm to the person or organization presenting it, the Secretariat observes that on the basis of the arguments provided by the Submitters, it is precisely that, due to the effective failure to enforce environmental law referred to in the submission, and because it turns out that essentially no actions are being pursued in the interest of air pollution prevention and control, damages are found to be inflicted on all the inhabitants of Hermosillo.”

...

The harm allegedly caused to the person or organization making the submission, or to the inhabitants of the city of Hermosillo, is not clear from the above conclusion. This needs to be specified in the Submission, and reviewed by the Secretariat, in order to reach a conclusion as to whether the Submission fulfills the provisions mentioned earlier—as it does not in this case. This is therefore a reason for the dismissal of the submission, due to the lack of the factors specified in Article 14(2) of the Agreement, to which all submissions must adhere, in accordance with Guideline 5.6.

It is important to emphasize that **the matter of harm is an aspect that must be expressed in detail in all submissions**, in accordance with Article 14 (2)(a), and Guideline 5.6. A submission cannot be considered to be complying with this requirement simply because it mentions that harm has been inflicted, without indicating what the harm consists of, or establishing an explanation or description of the harm inflicted. Consequently, a simple reference to harm does



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not constitute compliance with this requirement, and even less so, if there are no elements verifying such harm or an explanation of the cause and effect leading to such harm, particularly when it is alleged that environment law is not being enforced. In terms of the provisions mentioned, this must be expressed, since the term “the matter of harm” mentioned in the guideline, does not involve merely mentioning that harm occurred, but rather it involves expressing what the harm consisted of, and when applicable, the causes originating the harm and the effects from such harm. Considering the contrary would allow for one to assume that someone need only to simply declare that he/she has been harmed, without specifying what the harm consists of, in order for the Secretariat to assume there is compliance with the provision. This would be very imprecise and unreasonable.

For this reason, the Secretariat must adhere to what is established in Article 14(29)(a) in its Determination A14/SEM/05-003/06/14(1)(2), in terms of Guideline 5.6, since it merely indicates that the failure to effectively enforce environmental law leads to damages for all inhabitants of Hermosillo **without specifying the damages to which it is referring.**

In addition, as demonstrated in the previous section, the Submitters did not present any documentation that illustrates their statement in relation to the alleged harm caused to both the Submitter and the population of Hermosillo. This is vitally important in determining compliance with the factors established in Article 14(2), which in its own terms, are necessary for reviewing a submission and when applicable, in order for the Secretariat to be able to determine whether it will request a response from the concerned Party.

I.4. Assertions based principally on mass media reports.

In accordance with NAAEC Article 14(2)(d), when the Secretariat considers that a submission complies with the requirements stipulated in the first paragraph of Article 14 of the Agreement, it will determine whether the submission merits requesting a response from the Party. In this process the Secretariat must be guided by a number of different considerations, including whether the submission alleges harm to the person or organization presenting the submission.

Also, Guideline 5.6 establishes that the submission must address the factors identified in NAAEC Article 14(2) in order for the Secretariat to review the submission in accordance with that provision. Thus, one of the factors the



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submission must address is the degree to which the submission is based on mass media reports.

It is clear that the primary assertions made by the Submitters, particularly those regarding monitoring and actions related to air pollution control and prevention, arise primarily from mass media news reports that were used by the Submitters to make their own statements. This situation should have been more carefully considered by the Secretariat, since it is evident that most of the diverse information attached to the written submission consists exclusively of news clippings from different printed sources, used by the Submitters to support their assertions. This means the submission cannot be considered to be valid. It is also important to emphasize that part of the cited information dates back more than five years ago, making the submission even less adequate, since it is not even based on current information.¹⁶

Furthermore, while the Submitters present some information regarding the procedures carried out with different government authorities, we find that as pointed out by the Secretariat, this information consists of only requests for information. Thus, the foundation for the Submitters' assertions consists of information from the mass media, demonstrating the lack of support established for such assertions and for their statements declaring that federal, state and municipal authorities are failing to enforce environmental law. This situation should be more carefully analyzed by the Secretariat, in consideration of NAAEC Article 14(2)(d) and Guideline 5.6(d).

II. PARTY'S RESPONSE

Despite the inadmissible elements indicated earlier, Mexico presents *ad cautelam* the Party's Response, divided into the following sections:

II.1. Clarification to the Secretariat in terms of NAAEC Article 45(1)(a) and (b), in relation to considering the Submitter's assertions as the alleged failure to effectively enforce environmental law.

Before referring to the specific assertions made by the Submitters, and to the various actions taken by Mexico in compliance with its environmental law on air

¹⁶ The notebook of news reports presented to the Secretariat has been stamped as received by the Secretariat on 30 August 2005. We are referring to articles including those published in *El Imparcial* on 5 October 1996, 4 and 11 March 1997, 4, 10 and 11 December 1998, 15 July 1999, 9 December 1999(sic), and 21 December 2000; in *Cambio* on 5, 8 and 10 December 1998; in the *Independiente* on 13 December 2000, and in *La Crónica* on 14 December 2000.



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pollution control and prevention, it is deemed appropriate to make some clarifications in terms of NAAEC Article 45 (1)(2), with regard to the definition of effective enforcement of environmental law, stated textually as follows:

Article 45. Definitions

1. For purposes of this Agreement:

A party has not failed to “**effectively enforce its environmental law**” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;

It is clearly evident from this definition that when a Party engages in a **reasonable exercise of its discretionary powers in terms of regulations and compliance with the law, or when it applies the law to other environmental matters considered as high priority**, in the case of good-faith decisions related to the allocation of resources, it will not be considered a failure to enforce environmental law. This is vitally important in the case being addressed here, given the particular circumstances surrounding the matters related to air pollution prevention and control in Sonora and especially in the city of Hermosillo.

It should be emphasized that in terms of regulations and standards—in which the Submitters indicate a lack of compliance in the enactment of regulations, Mexican official standards and other legal provisions¹⁷ that are necessary for providing precise adherence in the area of air pollution prevention and control—they remain limited to the powers of the authorities who issue them, and therefore, the enactment of these provisions is discretionary for authorities and do not constitute or lead to obligations for authorities, and clearly do not constitute an obligation to issue such in a specific time period.

¹⁷ It is important to point out that the Submitters mention ecological technical standards [sic] and circulars as such. They do not consider, however, even though Domingo Gutiérrez Mendián is a lawyer and therefore an expert in law, that ecological technical standards do not exist and lack any legal validity, and furthermore circulars constitute only non-binding provisions for individuals, and are commonly used only in internal structures, for authorities to issue provisions from superiors to subordinates. Therefore their enactment is not obligatory, and even less so, their publication.



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Due to the above, discretionary acts, such as those in legal provisions that establish powers, are not accompanied by an obligation to carry them out. The provisions in NAAEC Article 45 (1)(a) and (b) are stated along these same lines, indicating that a Party will not be considered to have failed in “the **effective enforcement of its environmental law**,” or to have failed to comply with Article 5(1) in a particular case in which the action or inaction in question by agencies or officials of that Party reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priority.”

In this regard the First Court of the Twenty-Third Circuit in administrative matters has indicated the following in the precedent XXIII. 1. 9A:

“EVIDENCE. IT IS DISCRETIONARY AND NOT OBLIGATORY FOR THE AGRARIAN COURT TO PROVIDE, IN RELATION TO THE PRACTICE, EXPANSION OR IMPROVEMENT OF ANY PROCEEDINGS.

Article 186 of the Agrarian Act contains **a discretionary power that is not obligatory** for agrarian Courts, consisting of providing in any time period the practice, expansion or improvement of any proceeding, that is, a discretionary power of the Judge and not a procedural right of the Parties, which in terms of Article 187 of the Act referred to, has the responsibility for proof of the constitutive acts of its claims.

Amparo directo 628/94. María Quiroz Cháirez. 6 October 1994. Unanimous vote. Speaker: María del Carmen Arroyo Moreno. Secretary: Lourdes Minerva Cifuentes Bazán.

Semanario Judicial de la Federación, XIV, December 1994, page 423, *Octava Época*.”

Therefore, the powers granted are discretionary acts, and in the area of regulations and standards at the three levels of government, correspond exclusively to the Executive Branches, constituting an autonomous power that may not be limited and its use may not be determined for a specific period of time, precisely given its discretionary nature. Therefore it cannot become an obligation that must be carried out in a determined period of time. At the same time, it does not translate—as asserted by the Submitters—into a power that is subject to the whims of authorities, given that it responds to administrative



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needs, legal reform and resource availability, in order for all general provisions to be fully operative. Furthermore, these provisions constitute the legal grounds for issuing the acts indicated in such powers.

Given that the alleged failures indicated by the Submitters refer to the enactment of laws, standards and programs, it is important to emphasize that the NAAEC contemplates that the Secretariat can review the effective enforcement of existing environmental law, however not with regard to the lack of standards, and even less so, their effectiveness.

It is necessary here to point out that in previous submissions, the Secretariat has made the decision to dismiss the assertions made by Submitters against the way in which NAAEC Parties have reserved the right to establish their own standards, as something that does not fit with arguments of “failures in effective enforcement” of existing standards. Therefore, if Mexico, at its three levels of government, has considered the enactment of environmental standards as a discretionary power, as a mechanism to establish its own laws, then the assertions made by the Submitters in relation to a failure to issue legal provisions should be dismissed. The above takes into consideration the determinations made by the Secretariat in the *Methanex* case (Determination on Submission **SEM-99-001**, p. 6), the *Great Lakes* case (Determination on 14 December 1998 corresponding to Citizen Submission **SEM-98-003**, p. 3) and the *Ontario Power Generation* case (Determination on 28 May 2004, p. 9).

Therefore, in accordance with that stipulated in NAAEC Article 45(1) and (b), they constitute a reasonable exercise of the discretionary power granted to authorities.

Along these same lines, it is also important to remember the actions carried out by the Mexican government, at its federal, state and municipal levels, to issue various legal provisions in the area of air pollution, such as:

AIR POLLUTION CONTROL	
REGULATIONS	DOF ¹⁸
Regulation to the General Ecological Balance and Environmental Protection Act (LGEEPA) Respecting Air Pollution Prevention and Control (<i>Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Prevención y Control de la Contaminación de la Atmósfera</i>)	25/NOV/98

¹⁸ Acronym for *Diario Oficial de la Federación* (Official Gazette of the Federation).



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Regulation to the General Ecological Balance and Environmental Protection Act (LGEEPA) Respecting the Pollutant Release and Transfer Register (PRTR) (<i>Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Registro de Emisiones y Transferencia de Contaminantes</i>)	3/JUN/04
MEXICAN OFFICIAL STANDARDS	
MEASUREMENT OF CONCENTRATIONS	DOF
Mexican Official Standard NOM-034-SEMARNAT-1993. Measurement methods to determine the concentration of carbon monoxide in ambient air and procedures for calibration of measuring equipment.	18/OCT/93
Mexican Official Standard NOM-035-ECOL-1993. Measurement methods to determine the concentration of total suspended particles in ambient air and procedures for calibration of measuring equipment.	18/OCT/93
Mexican Official Standard NOM-036-ECOL-1993. Measurement methods to determine the concentration of ozone in ambient air and procedures for calibration of measuring equipment.	18/OCT/93
Mexican Official Standard NOM-037-ECOL-1993. Measurement methods to determine the nitrogen dioxide in ambient air and procedures for calibration of measuring equipment.	18/OCT/93
Mexican Official Standard NOM-038-ECOL-1993. Measurement methods to determine the concentration of sulfur dioxide in ambient air and procedures for calibration of measuring equipment.	18/OCT/93
EMISSIONS FROM FIXED SOURCES	DOF
Mexican Official Standard NOM-039-ECOL-1993. Maximum permissible levels of air emissions of sulfur dioxide and trioxide and sulfuric acid mist in sulfuric acid production plants.	22/OCT/93
Mexican Official Standard NOM-040-ECOL-2002. Environmental protection-hydraulic cement production-maximum levels of air emissions (Modification published in DOF, 20 April 2004).	18/DEC/02
Mexican Official Standard NOM-043-ECOL-1993. Maximum permissible levels of air emissions of solid particles from fixed sources.	22/OCT/93
Mexican Official Standard NOM-046-ECOL-1993. Maximum permissible levels of air emissions of sulfur dioxide, sulfur trioxide mist and sulfuric acid from dodecylbenzenesulfonic acid production processes in fixed sources.	22/OCT/93
Mexican Official Standard NOM-051-ECOL-1993. Permissible maximum in sulfur weight, in liquid fuel and industrial oil used by fixed sources in the Mexico City metropolitan area.	22/OCT/93
Mexican Official Standard NOM-075-ECOL-1995. Maximum permissible levels of air emissions of volatile organic compounds from the processes of oil-water separators in oil refineries.	26/DEC/95
Mexican Official Standard NOM-085-ECOL-1994. Fixed sources that use fossil fuels in solid, liquid or gas form, or any combination thereof. Maximum	02/DEC/94



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permissible levels of air emissions of smoke, total suspended particles, sulfur dioxide and nitrogen oxides. Requirements and conditions for operating indirect warming by combustion equipment, as well as maximum permissible levels for sulfur dioxide emissions for direct warming by combustion equipment (Modification published in the DOF, 11 November 1997).	
Mexican Official Standard NOM-086-SEMARNAT-SENER-SCFI-2005. Specifications of fossil fuels for environmental protection.	30/JAN/06
Mexican Official Standard NOM-092-ECOL-1995. Requirements, specifications and parameters for the installation of systems for capturing gasoline vapors in service and self-service stations in the Valley of Mexico.	06/SEP/95
Mexican Official Standard NOM-093-ECOL-1995. Test method for determining the laboratory efficiency of systems for capturing gasoline vapors in service and self-service stations.	06/SEP/95
Mexican Official Standard NOM-097-ECOL-1995. Maximum permissible levels of air emissions of particulate matter and nitrogen oxides in the country's glass manufacturing processes (First clarification, DOF, 1 July 1996; Second clarification, DOF, 16 October 1996).	01/FEB/96
Mexican Official Standard NOM-105-ECOL-1996. Maximum permissible levels of air emissions of total solid particles and reduced sulfur compounds from the chemical recovery processes in pulp manufacturing plants.	02/APR/98
Mexican Official Standard NOM-121-ECOL-1997. Maximum permissible levels of air emissions of volatile organic compounds (VOCs) from operations for coating new bodywork in auto-manufacturing plants; multiple-use, passenger and utility vehicles; cargo and light trucks; and the method for calculating emissions (Clarification published in DOF, 9 September 1998).	14/JUL/98
Mexican Official Standard NOM-123-ECOL-1998. Maximum permissible content of volatile organic compounds (VOCs) in the manufacturing of air-dry solvent-based paint for domestic use and the procedures for determining the content of these compounds in paints and coverings (Clarification, DOF, 29 September 1999).	14/JUN/99
Mexican Official Standard NOM-137-SEMARNAT-2003. Air pollution – gas desulfurizing plants and sour condensate – control of emissions of sulfur compounds.	30/MAY/03
EMISSIONS FROM MOBILE SOURCES	DOF
Mexican Official Standard NOM-041-ECOL-1999. Maximum permissible levels of emissions of pollutants from exhaust gases from gasoline-using motor vehicles in circulation.	06/AUG/99
Mexican Official Standard NOM-042-SEMARNAT-2003. Establishes the maximum permissible levels of emissions of total or non-methane hydrocarbons, carbon monoxide, nitrogen oxides and particles from the exhaust of new motor vehicles with a gross vehicle weight that does not exceed 3,857 kilograms, and which use gasoline, liquefied petroleum gas, natural gas or diesel, as well as evaporative hydrocarbon emissions from the fuel systems	07/SEP/05



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of these vehicles.	
Mexican Official Standard NOM-044-ECOL-1993. Establishes the maximum permissible levels of emissions of hydrocarbons, carbon monoxide, nitrogen oxides, total suspended particles and smoke opacity from the exhaust of new engines that use diesel fuel and that will be used in automotive vehicles with a gross vehicle weight above 3,857 kilograms (Agreement on environmental criteria, DOF, 10 February 2003).	22/OCT/93
Mexican Official Standard NOM-045-ECOL-1996. Maximum permissible levels of smoke opacity from the exhaust of motor vehicles in circulation that use diesel or mixtures including diesel fuel.	22/APR/97
Mexican Official Standard NOM-047-ECOL-1999. Equipment characteristics and measuring procedure for verification of limits on pollutant emissions from motor vehicles in circulation that use gasoline, liquefied petroleum oil, natural gas or other alternative fuels.	10/MAY/00
Mexican Official Standard NOM-048-ECOL-1993. Maximum permissible levels of emissions of hydrocarbons, carbon monoxide and smoke from the exhaust of the motorcycles in circulation that use gasoline or a gasoline-oil mixture as fuel.	22/OCT/93
Mexican Official Standard NOM-049-ECOL-1993. Equipment characteristics and measuring procedure for verification of emission levels of pollutant gases from motorcycles in circulation that use gasoline or a gasoline-oil mixture as fuel.	22/OCT/93
Mexican Official Standard NOM-050-ECOL-1993. Maximum permissible levels of emissions of polluting gases from the exhaust of motor vehicles in circulation that use liquefied petroleum gas, natural gas or other alternative fuels as fuel.	22/OCT/93
Mexican Official Standard NOM-076-ECOL-1995. Maximum permissible levels of emissions of unburned hydrocarbons, carbon monoxide and nitrogen oxides from the exhaust and also evaporative hydrocarbons from the fuel system of vehicles that use gasoline, liquefied petroleum gas, natural gas or other alternative fuels, and that will be used for running new motor vehicles with a gross vehicle weight over 3,857 kilograms (Clarification, DOF, 29 December 2003).	26/DEC/95
Mexican Official Standard NOM-077-ECOL-1995. Measuring procedure for verification of emission levels of smoke opacity from the exhaust of motor vehicles in circulation that use diesel fuel.	13/NOV/95

With regard to states and municipalities, the enactment of regulatory instruments, as already pointed out above, is contemplated as a regulatory power assigned to them. This translates into a discretionary act that may be carried out by authorities and that does not become an obligation to carry them out in a determined time period.

It is important to point out that, in accordance with stipulations in Transitory Article 4 of the Sonora State Ecological Balance and Environmental Protection



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Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente para el estado de Sonora—LEES*), the Regulations to the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*) will be enforced until such time as the head of the State Executive Branch and the municipalities in Sonora issue regulations and other provisions for general adherence to what is covered in this Act. Thus, it cannot be claimed that there is a gap in regulations and standards arising from the alleged failure of state and municipal authorities to issue such instruments, since they are replaced by those issued at the federal level in accordance with LGEEPA provisions, its regulations and the Mexican Official Standards.

In addition, it is necessary to point out that one of the circumstances associated with the allocation of resources is the issue of unpaved streets and the dust pollution arising from this situation in the state of Sonora in general and in the city of Hermosillo. Together with the state's climatic and topographical conditions, these are the main factors that lead to air pollution, and the state and municipal governments have decided to apply more resources to paving city streets in order to prevent the adverse effects on air quality generated by dust particles.¹⁹ In other words local authorities have placed priority on addressing certain sources of air pollution with the aim of reducing the problems characterizing the city of Hermosillo. Therefore in the terms of NAAEC Article 14(1)(b), it is not admissible to consider this as a failure to enforce environmental law, since another environmental matter has been prioritized.

¹⁹ According to the Municipal Urban Development Program, pages 18 to 21, the city of Hermosillo is situated at an average altitude of 200 meters above sea level, and approximately 85% of the urban sprawl is located on very flat land, with slightly sloping land primarily toward the Sonora River bed. The points with the highest altitude in the population center can be found in the Sierra El Bachoco, located to the northeast of the city, while the lowest altitude areas of the city are located toward the western sector, especially in the zones near the Sonora River, in neighborhoods such as Las Minitas, La Manga, Las Quintas, Los Lagos and others. In the Sonora River area, there are large depressions resulting from rock mining, with the main area affected being Bulevar Solidaridad to the west, where some of this activity continues. Some of the city's western areas are mostly flat, and thus development efforts are difficult, especially in relation to resolving rainwater and sanitary drainage.

In addition, the climate in Sonora and particularly in Hermosillo is warm-dry to desert-like (BW(h')), with high temperatures in summer, while less extreme in winter. The coldest month of the year in the city of Hermosillo is December, with the lowest average temperature at 3.5 °C, and the warmest month is June, with an average high temperature of 45 °C. The month with the highest relative humidity is December, with an average maximum of 62% and the month with the least relative humidity is April, with the average low at 24.6%. The month with the most hours of sunlight is May, with a highest average of 326 hours of sunlight.



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Due to environmental conditions, the most urgent problem in Hermosillo consists of suspended particles, some of which are caused naturally and others are produced by human activities involving rock mining. These suspended particles are introduced into the air as solid or liquid particles, or they can also form through photochemical reactions on the basis of small pollutants already present in the air. **These particles and their excessive presence in the air is due primarily to the circulation of vehicles on the unpaved streets in a significant portion of the city**, construction and urbanization activities, wind erosion (dust storms), clandestine burning, agricultural burning, and other factors. Reports from the US Environmental Protection Agency (EPA) reveal that **unpaved streets contribute up to 78% of the generation of suspended particles, with 8% from construction activities, and 9% from dust storms**. All the activities that generate suspended particles in the air—most of which are human activities—aggravate the problem when combined with the unfavorable environmental conditions. The environmental conditions described further concentrate the problem, due to topographical characteristics that negatively influence the degree of dispersion of pollutants in the city. As already described here, the topography in Hermosillo is 90% flat, and this turns out to be a significant factor since there is some sloping land, varying between 2 and 5%, located toward the Sonora River bed, while the rest of the city is built on the hills of Cerro del Bachoco and Colorado to the north, Cerro de la Cementera to the southeast, Cerro del Coloso and del Mariachi to the east, and Cerro Tecoripita to the west. Since the prevailing winds are SW to NE during most of the year, pollutants concentrate in the area or they strike the surrounding hills and return to the city.

It is concluded from the above that an increase in air pollution is produced particularly in the winter months primarily due to unpaved streets in most of the city and wind erosion (dust storms).

It is important to emphasize the above, since the Submitters allege the failure on the part of authorities in the state of Sonora and the municipality of Hermosillo to carry out actions focused on controlling the pollution, claiming that efforts to monitor the air in the city have been abandoned in order to address other matters such as street paving. Nevertheless, in the terms of NAAEC Article 45(1) and (b), it cannot be considered that authorities are failing to enforce environmental law, since other environmental matters have been prioritized, given the availability of resources. And in addition the Submitters do not take into consideration that environmental authorities are not failing to carry out air monitoring, and to the contrary, as demonstrated in the following section, both the municipality of Hermosillo and Semarnat have conducted a number of



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monitoring efforts between 1998 and 2005 in compliance with environmental provisions, thereby demonstrating the inaccuracy of the arguments made by the Submitters.

II.2. Actions for air pollution prevention and control (prevention and control actions, programs, monitoring and inspection and enforcement activities)

The basic arguments made by the Submitters consist of the alleged failure to effectively enforce environmental law, which allegedly translates into the lack of actions taken by Mexico's environmental authorities aimed at controlling and preventing air pollution the municipality of Hermosillo, Sonora. Nevertheless, these arguments are totally without grounds, since Mexico has carried out actions at the three levels of government (federal, state and municipal) aimed at preventing air pollution, in compliance with legal provisions.

Among the different actions aimed at complying with legal provisions in the environmental area and associated with air pollution prevention, we find the following:

At the federal level, the Ministry of the Environment and Natural Resources, in compliance with environmental law and in accordance with its powers and jurisdiction as specified in the General Ecological Balance Act, has carried out the following:

1. **Monitoring of pollutant emissions.** This monitoring is carried out in a systematized manner, and is the responsibility of the Bureau for Air Quality Management and the Pollutant Release and Transfer Register (PRTR), an area that handles past and current information from emissions registering. It has provided data from emissions monitoring in Hermosillo during a period covering 1998 to the present, revealing the inaccurate nature of the Submitters' statements. The information from 2003 to the present is in the process of being systematized. Emissions from establishments under federal jurisdiction have been monitored, including particularly the following pollutants: SO₂, NO_x, TSP, HC, CO, CO₂, VOC, oils and lubricants, settleable solids, suspended solids, biological oxygen demand, arsenic (As), cadmium (Cd), cyanide (CN), copper (Cu), chromium (Cr), lead (Pb), mercury (Hg), nickel (Ni), nitrogen (N), Pb, Rp, nitric oxide, 2,4-toluenediisocyanate and volatile organic compounds. (Exhibit 2).



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It is important to point out that on 3 June 2004, the Regulation to the LGEEPA Respecting the Pollutant Release and Transfer Register (PRTR) was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*), and as a result of these regulations a national data base is being created with information on polluting substances released into the environment, specifically into air, water, soil and subsoil, or transferred in wastewater and/or hazardous wastes. Semarnat has information on the quality of not only the air, but also of a great diversity of environmental components. The information in the PRTR, which is public in nature, consists of the name of the establishment, its location and the amount emitted or transferred of a total of 104 substances, in addition to the emissions of criteria pollutants from fixed sources. This registry is stipulated in LGEEPA Article 109 bis and will bring information together from different emitting sources under the jurisdiction of the three levels of government. RETC information will be updated annually and will be available to the public beginning the second half of 2006. The instrument for collecting information from the industrial sector under federal jurisdiction is the Annual Operating Report (*Cédula de Operación Anual-COA*).

It is important to consider that the information contained in the RETC will make it possible to propose effective policies for preserving and protecting the environment, and will also support the evaluation of international agreements. Also, by having access to information on polluting emissions generated in national territory, it will be possible to verify much more precisely the environmental infrastructure needed in the country. The emitting sources will evaluate their own performance and will be able to identify their areas of opportunity for reducing emissions and transfers.

Currently, the RETC's legal framework allows for its implementation in states and municipalities, thereby enhancing the collection of environmental information for the Registry, and making it possible to link policies and strategies. The RETC at the national level will be gradually established as the states and municipalities make progress in collecting their environmental information.

The principles that guide the RETC's implementation in Mexico and that seek to provide basic information on emissions and pollutants are the following: transparency and objectivity of information; public access to environmental information; providing information that supports the identification and assessment of possible risks to humans and the environment; indicating the sources and amounts of potentially dangerous



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emissions and the transfers to all different mediums; supporting the private sector in its programs for comprehensive responsibility, competitiveness and improvement in their environmental performance, as well as supporting the government in the definition, application and follow-up to programs, goals, objectives and strategies.

2. **Single Environmental License (*Licencia Ambiental Única*) and Operating License (*Licencia de Funcionamiento*).** In the state of Sonora, Semarnat has issued a total of 92 operating licenses and single environmental licenses. At this time there are 84 businesses under federal jurisdiction with current authorization in the area of Air Pollution Prevention and Control. Of these businesses, approximately 24% of them are located in the municipality of Hermosillo; 67% in the municipalities of Cajeme, Nogales and Guaymas; and 9% in the rest of the state. These authorizations are granted on the condition that those in charge of the businesses implement measures aimed at minimizing, avoiding or mitigating environmental impacts on air quality (Exhibit 3).
3. **Annual Operating Report (*Cédula de Operación Anual—COA*).** The Annual Operating Report (COA) is a multi-media instrument for reporting environmental information, and for conducting follow-up on the conditions established for the Single Environmental License. It is the main annual instrument that provides information on the amounts of pollutant emissions and transfers by industrial establishment to the data base in the Pollutant Release and Transfer Register (PRTR). The activities carried out in the prior calendar year are reported on the COA. On 28 January 2005 the COA form, redesigned for gathering the necessary information for the PRTR, was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*). This form registers compliance with various obligations for providing information to Semarnat, such as six-month (now annual) reports from hazardous waste generators and inventories on pollutants released into the atmosphere. From the information reported and presented in 2004 regarding the operating conditions and parameters in the state of Sonora from the year 2003, it can be concluded that approximately **943,959 metric tons** of pollutants were generated and released into the atmosphere, resulting from the production activities having the corresponding authorization, through an operating license or a single environmental license.



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The table indicates the amounts generated, by pollutant:

POLLUTANT	AMOUNT (metric ton)	PERCENTAGE
Sulfur dioxide (SO ₂)	386,564	41
Nitrogen oxide (NO _x)	31,545	3
Total suspended particles (TSP)	121,842	13
Unburned hydrocarbons (HC)	197,095	21
Carbon dioxide (CO ₂)	196,192	21
Volatile organic compound (VOC)	2,305	0.2
Carbon monoxide (CO)	8,416	0.8

4. **Brick Industry.** The federal Semarnat office in the state of Sonora, in coordination with the municipality of Hermosillo, is currently addressing the environmental problems generated by brick industry activities. To this end, a number of meetings have been held with the Brick Producers' Union (*Unión de Ladrilleros*) with the aim of analyzing the feasibility of using alternative construction materials that are more environment-friendly (Exhibit 4).
5. **Inspection and enforcement actions.** The Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) has carried out environmental enforcement, inspection and verification activities in the establishments under federal jurisdiction that are located in the municipality of Hermosillo, Sonora, with the aim of verifying compliance with legal provisions related to the environment. Specifically, to verify the sources of air pollution and compliance with provisions in this area, 18 site inspections were conducted during the period from 1998 to 2005. Especially worth mentioning among the irregularities noted in relation to the atmosphere are the following: a) administrative irregularities (lacking operating licenses or emissions inventories); b) lacking operation and maintenance logs; c) not remaining within the maximum permissible limits, and d) lacking control equipment.

It is important to point out that in order to remedy the irregularities observed, Profepa ordered various technical corrective measures aimed at complying with the maximum permissible limits, controlling emissions and carrying out the corresponding administrative procedures.



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As a result of the site inspections mentioned above, 16 administrative orders were issued, as well as three resolutions resulting in the closing of administrative files.

In addition, there are two administrative files related to the atmosphere that remain open. These files are classified as reserved in the terms of Article 14, paragraph IV of the Federal Transparency and Access to Governmental Public Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*), since they are still pending.

It is important to mention that Profepa's Industrial Verification Office (*Subdelegación de Verificación Industrial*) in Sonora carries out other actions in terms of verification of compliance with legal provisions related to the environment. Thus, verification of air pollution prevention and control is only one area of verification it covers, particularly in the area of compliance with environmental law on the part of pollution sources under federal jurisdiction, and voluntary instruments and mechanisms for complying with environmental law.

At the state level, the Sonora government, through its Ministry of Urban Infrastructure and Environment (*Secretaría de Infraestructura Urbano y Ecología*—SIUE) has carried out various activities in the area of air pollution prevention and control, in strict compliance with the provisions in the LGEEPA and the Sonora State Ecological Balance and Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente de Sonora*).

1. **Environmental impact.** Since 1994, 451 resolutions have been issued for carrying out works or activities under state jurisdiction (Exhibit 5). These resolutions require those in charge to implement measures aimed at minimizing, avoiding or mitigating environmental impacts on air quality. Some examples are: flora rescue, reforestation, irrigation, paving, and sound waste management programs.²⁰
2. **Operating licenses.** Since 1996, 91 state-level operating licenses have been granted. These licenses authorize individuals and companies to operate fixed sources that emit or may emit odors, gases, or solid or liquid particles into the atmosphere. At the same time, it is the means through

²⁰ For the purpose of accrediting this statement, an environmental impact authorization is attached, as an example of the different types of authorizations that have been granted, and in which the various conditions imposed in these authorizations (to assure that individuals avoid or mitigate possible environmental impacts) can be clearly observed.



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which the SIUE determines the activities that need to be carried out by those in charge in order to prevent and control air pollution. Also, these fixed sources are legally required to report the following through their operating reports, inventories of their emissions, forms of measurement and monitoring of such emissions, and the measures and actions they must implement in the case of contingencies. These reports are the documents through which those in charge of the fixed sources that have been granted operating licenses present an annual report on the release of pollutants during the prior year. It is also an instrument that contributes information to assist authorities in developing strategies and policies for guaranteeing satisfactory air quality in all human settlements and all the state's regions. Since 1996, the SIUE has received and evaluated, in compliance with the resolutions issued in the area of air pollution prevention and control in Hermosillo, a total of 228 operating reports from the companies that have been granted authorizations (Exhibit 6).

3. **Pollution control.** During the period from 1999 to 2005, 90 site inspections were conducted in the city of Hermosillo, with the objective of verifying compliance with the provisions in the Sonora State Ecological Balance and Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente para el Estado de Sonora*), LGEEPA regulations and the corresponding Mexican Official Standards, which are applicable in addition to actions prompted by state jurisdiction and other legal provisions applicable for preventing and controlling pollution. Among the main irregularities observed are the late presentation of annual operating reports, the use of emission-generating equipment not authorized in the Operating License because it fails to use the frequency established in Table 5 of NOM-085-ECOL-1994 for measurement, and deficiencies in operation and maintenance logs. Various sanctions have been imposed as a result of these site inspections, including fines or closures, as well as the imposition of technical measures aimed at correcting the irregularities detected or compensating for environmental impacts caused (Exhibit 7).
4. **Actions in coordination with other levels of government, in the area of air pollution prevention and control.** The "Specific Coordination Agreement between the Ministry of the Environment, Natural Resources and Fisheries and the State of Sonora, with the objective of carrying out the Air Quality Management and Evaluation Program, in relation to the operation of air monitoring equipment in the municipalities of Agua Prieta, Cajeme, Cananea, Hermosillo, Naco, Nacozari de García, Navjoa, Nogales and San Luis Río Colorado, Sonora" (Exhibit 8) was published in



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the Official Gazette of the Federation (*Diario Oficial de la Federación*) on 5 September 2000.

5. **Actions to combat pollution caused by dust.** In relation to pollution caused by dust resulting from vehicles circulating on the city's unpaved streets—the primary source of air pollution—283,909 square meters of streets were paved during 2005 in the city of Hermosillo. These are streets in which the continuous movement of vehicles stirred up tons of dust and biological waste every day (Exhibit 9).

In response to this problem and as an appropriate measure for regulating transportation licensed by the State, the “Agreement on urban transit modernization (SUBA)” was signed by the municipality of Hermosillo and the Sonora state government on 18 January 2006. The agreement is aimed at acquiring new transportation units and redesigning routes for better transportation services, leading to a significant decrease in combustion gas and dust emissions generated by the existing fleet, as well as a decrease in particle emissions from redesigning traffic routes so that mass transit traffic is preferentially on paved streets (Exhibit 10).

In addition, in compliance with legal ordinances related to air pollution prevention and control, **the municipality of Hermosillo has also carried out a number of different actions** to prevent air pollution, with the following especially worth mentioning:

The municipality has implemented an Air Quality Assessment and Improvement Program (*Programa de Evaluación y Mejoramiento de la Calidad del Aire*) for monitoring air quality in Hermosillo. The aim is to assess air pollution levels, and compare them with the Mexican Official Standards issued by the Ministry of Health for Total Suspended Particles (TSP) and particulates less than 10 microns in diameter (PM10). The municipality of Hermosillo has three stations for the purpose of monitoring suspended particles on the basis of samples taken manually. These stations are located in different points around the city, as specified below:

STACIÓN	LOCATION	EQUIPMENT
Northwest (CEBATIS 206)	Colonia Camino Real	TSP, PM10
North (CESUES)	Colonia Apolo	TSP, PM10
Center (Former Mazon store)	Colonia Centro	TSP, PM10 since August 2001



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The following table describes the equipment and stations belonging to Semarnat and to private companies, and operated by the Hermosillo municipal government and those companies, respectively (Exhibit 11);

Manual		Automatic					
PM10	TSP	Dichotomous 2.5 – PM10	S02	NOX	Equipment	Stations	Person in charge
3	3	1			7	3	Municipality
3	3		3	3	12	3	Grupo Unión Fenosa

Based on the monitoring conducted by the Municipality of Hermosillo Ecology Office, a number of **Annual Technical Monitoring Reports** on particles in the ambient air have been developed, indicating and describing TSP and PM-10 concentrations in ug/m3. It is concluded in these reports that the data obtained in relation to air quality in the city of Hermosillo has visibly improved due to the activities conducted by the municipality. It is important to observe the results from the Air Quality Assessment and Improvement Program for the City of Hermosillo, since they clearly demonstrate that the TSP and PM10 averages in the ambient air have diminished (Exhibit 12).

It is also important to consider the complexity inherent in addressing air pollution problems, as well as the dynamics accompanying efforts to improve air quality, which involves the amount of pollutants disseminated and combined in the air in zones where human activities take place. Air quality in urban areas is influenced by diverse factors, including the city's topography and physiography, the wind's direction and velocity, plant cover, soil type, paving material used, empty lots, volume and status of vehicle fleet, emissions from fixed sources and other emissions from mobile or occasional sources.

In coordination with other institutions, different analyses were conducted of particles found in the ambient air, with the aim of determining the amount, composition and origin of the particles, and in this way implement programs aimed at combating pollutant levels in the ambient air (Exhibit 13).

In addition the municipality conducts Environmental Impact Assessments of businesses under municipal jurisdiction, in order to verify, prior to granting the corresponding authorizations, that such businesses adhere to existing regulations on environmental impact. These assessments are also conducted by states and at the federal level (Exhibit 14).



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With respect to pollution control, the municipality has a mechanism for responding to environmental complaints, and specifically for responding to citizen petitions related to non-compliance with environmental laws and standards, especially in terms of burning, use of fossil fuels, gas emissions and other mechanisms similar to those established at the federal level and subsequently by states (Exhibit 15).

Among the environmental activities with the most complaints filed are those related to air pollution. Different types of petitions have been addressed, with the most common being those resulting from garbage burning, wood-burning stoves, the use of solvents and paints at open-air sites, and brick factories. In 2003, for example, 36 cases were addressed, and in 2005, a total of 39.

Regarding the complaint response mechanism, the procedure includes making a site inspection and may conclude with a fine imposed or technical measures established, when applicable. In the case of burning, for example, the corresponding fine is imposed and the fire is put out. In problems arising from the use of paints and solvents, the necessary modifications for avoiding the release of substances into the atmosphere are requested, such as building paint chambers with gas extractors and traps.

The municipality also has an *Environmental Contingency Program*, similar to the one implemented at the federal level, and such a program also exists at the state level. As a result of this program, which is established primarily during the winter season, authorizations for controlled burning practices and extraordinary emissions into the atmosphere are cancelled, construction permits are suspended when there is a thermal inversion, and programs for controlling clandestine fires and burning are reinforced (Exhibit 16).

Other actions focused on air pollution prevention have also been carried out, such as those involving collecting and recycling used tires, in collaboration with the state government (Ministry of Health) and the private sector. As a result of these efforts, over 100,000 used tires have been collected and recycled since late 2004, thus preventing the burning of these tires and consequently the pollution that would have been released into the atmosphere (Exhibit 17).

The municipality also, in compliance with applicable legal provisions, and as established in the LGEEPA, works in coordination with the federal and state governments on special programs and actions designed to prevent air pollution. One example consists of the efforts in relation to the brick-making industry (Exhibit 4). As already mentioned, talks are being held with brick-makers and at the different levels of government in order to find a joint solution to the problem,



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such as environmentally efficient handling of alternate fuel in brick production activities. Meetings have been held at the three levels of government to reach an agreement for regulating brick-making activity in the state of Sonora and especially in the municipality of Hermosillo. Among the agreements reached, especially worth noting are: the use of experiences with this issue in other Mexican states; cost-benefit analysis on brick production conducted by the Sonora state government; research on possible alternative sites for relocating brick factories; and developing an inventory and geographic mapping of the brick factories in the Hermosillo urban area.

In addition there is now a proposal for the *Regulation to Ecology and Environmental Protection in the Municipality of Hermosillo*, contemplated within the Municipal Urban Development Program as one of the primary instruments for achieving the program's objectives and strategies, including those related to urban administration, information dissemination, evaluation, training, finances, coordination and agreement-reaching. These regulations will make it possible to improve environmental standards in the municipality of Hermosillo. It will increase the clarity and precision of the requirements for taking care of the environment and for rational use of natural resources in the municipality. The municipal, state and federal governments exercise their powers in environmental matters together and according to each of their jurisdictions, State regulations and the general Act. Coordination and cooperation among the three levels of government will make it possible to exercise more control over environmental matters and thereby make Hermosillo a healthy, sustainable city. As soon as this instrument is available, the municipality will be able to issue Complementary Technical Standards in the environmental area, for the purpose of improving the enforcement of the eventual Regulation to Ecology and Environmental Protection and the correct application of ecological and sustainable development criteria, with the objective established in LGEEPA Article 36.

As stated earlier, we can see that Mexico has enforced air pollution provisions, and not only in relation to standards, but the country has also implemented a number of programs with the aim of maintaining strict prevention and control of air pollution. The commitment assumed by Mexico to enforce environmental legislation and standards at its three levels of government is clear.

The actions described above not only demonstrate the effective enforcement of environmental law, but also clearly reveal the fraudulent behavior of the Submitters, which asserted alleged failures that are completely false in nature, lack substance and are totally outside the current context.



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II.3. Statements made by Submitters

II.3.1. Regarding the alleged failures of the Ministry of the Environment and Natural Resources (Semarnat)

The Submitters state that the Ministry of the Environment and Natural Resources (Semarnat) is failing to:

a) enforce and promote compliance with Mexican official standards governing air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo. It is important to point out in this regard that the mechanisms contemplated in the LGEEPA for enforcing and promoting compliance with not only Mexican official standards, but also the various environmental provisions, are particularly inspection and enforcement actions. Nevertheless, in order to promote compliance with these provisions, especially those related to air pollution prevention and control, the Regulation to the LGEEPA in the area of air pollution prevention and control contemplates granting operating licenses to fixed sources under federal jurisdiction that emit or may emit odors, gases or solid or liquid particles into the atmosphere, prior to their operating or at the beginning of operations.

Along these lines, **contrary to what is stated by the Submitters with regard to failures to enforce and promote compliance with Mexican official standards, it is important to emphasize the actions that Mexico has taken in relation to compliance with environmental provisions.** It is thus necessary to point out to the Secretariat, and reiterate that, in the case of compliance with Mexican official standards, Semarnat, through Profepa, has carried out inspection and enforcement activities in establishments under federal jurisdiction located in the municipality of Hermosillo. During the period from 1998 to 2005, it conducted 18 site inspections, during which diverse irregularities related to the atmosphere were observed, with the following especially worth mentioning: a) administrative irregularities (lacking operating licenses or emissions inventories); b) lacking operation and maintenance logs; c) not remaining within the maximum permissible limits, and d) lacking control equipment. In addition, in order to remedy the irregularities observed, Profepa ordered various corrective technical measures aimed at complying with the maximum permissible limits, controlling emissions and carrying out the corresponding administrative procedures. Also, as a result of the site inspections mentioned here, Profepa imposed fines for a total amount of P \$325,050 (Three hundred twenty-five thousand and fifty Mexican pesos) and



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has issued 15 administrative resolutions and an Agreement, thereby concluding the same number of administrative procedures.²¹

In addition, in line with promoting compliance with Mexican official standards, 92 operating licenses and single environmental licenses in the area of Air Pollution Prevention and Control, have been issued to businesses under federal jurisdiction in the state of Sonora. It is stipulated in these licenses that those responsible for these businesses are required to implement measures for minimizing, avoiding or mitigating environmental impacts on air quality (Exhibit 18).

b) recommend to the government of the state of Sonora that it take measures to prevent and control air pollution on property and areas under state jurisdiction; determine, in the state urban development plan, the zones in which polluting industrial facilities may be sited; enforce, within the limits of its jurisdiction, the Mexican official standards governing air pollution control; establish and operate or, as applicable, authorize the establishment and operation of inspection centers for motor vehicles used in mass transit under concession from the state; among others. The Submitters also state that Semarnat is failing to **recommend to the municipality of Hermosillo** that it take air pollution prevention and control measures on property and in areas under municipal jurisdiction; determine, in the municipal urban development plan, the zones in which polluting industrial facilities may be sited; enforce, within the limits of its jurisdiction, the Mexican official standards governing air pollution control; among others.

Once again, the Submitters make statements that are absolutely unfounded, since while Article 5, paragraph XVIII of the LGEEPA contemplates the issuing of recommendations to federal, state and municipal authorities, this responds to the need contemplated in Article 195 of the same law, which states textually:

ARTICLE 195. If it is determined from the results of the investigation conducted by the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*) that there are acts, facts or failures in which federal, state or municipal authorities have been involved, it will issue the necessary recommendations to urge these authorities to take the appropriate actions.

²¹ Regarding the information described in this section, it is important to point out to the Secretariat that only two administrative procedures established by Profepa are attached to this Party's response, as examples of the actions taken by Profepa. In order to avoid including a considerable volume of documents, this information will instead be made available to the Secretariat upon request.



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The recommendations issued by the Office of the Federal Attorney for Environmental Protection will be public, autonomous and non-binding.

We can see from the above that **in order for Semarnat to be able to recommend the corresponding actions to state and municipal authorities, there must be a citizen complaint that has been filed with Profepa, and it must be clear from the investigations conducted in response to this denouncement that there are actions, facts or failures on the part of these authorities that produce or may produce ecological imbalance or damages to the environment** or natural resources, or that violate the provisions in the present Law and other ordinances governing areas related to environmental protection and the preservation and restoration of ecological balance.

Due to the above, the Submitters cannot assert the lack of compliance with this power granted, especially when there is a specific provision that indicates the terms in which such recommendations will be made—which the Submitters skillfully and irrationally attempt to distort in order to mislead the Secretariat.

Nevertheless, and despite the above, environmental authorities at the federal, state and municipal levels have carried out actions to coordinate, cooperate and provide special assistance for preserving the environment, when applicable, as already mentioned in the case of addressing the problem of the brick-making industry in the state of Sonora, or reaching the agreement entitled “Specific Coordination Agreement between the Ministry of the Environment, Natural Resources and Fisheries and the State of Sonora, with the objective of carrying out the Air Quality Management and Evaluation Program, in relation to the operation of air monitoring equipment in the municipalities of Agua Prieta, Cajeme, Cananea, Hermosillo, Naco, Nacozari de García, Navojoa, Nogales and San Luis Río Colorado, Sonora,” published in the Official Gazette of the Federation (*Diario Oficial de la Federación*) on 5 September 2000.

II.3.2. Regarding the alleged non-compliance by the Office of the Federal Attorney for Environmental Protection (Procuraduría del Medio Ambiente y Protección al Ambiente—Profepa).

The Submitters assert that the Office of the Federal Attorney for Environmental Protection is failing to enforce the Mexican official standards governing air pollution control in the state of Sonora and, in particular, in the municipality of Hermosillo. However, as demonstrated in the previous section, Profepa has



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indeed taken actions within the scope of its jurisdiction to enforce not only Mexican official standards, but also all the legal environmental provisions. As already mentioned, Profepa has conducted inspection and enforcement activities in establishments under federal jurisdiction and located in the municipality of Hermosillo, Sonora, indicating once again that the arguments presented by the Submitters should be rejected.

II.3.3. Regarding air pollution prevention and control by the Sonora state government

The Submitters assert that the Sonora state government is failing to take measures to prevent and control air pollution on property and areas under state jurisdiction.

As demonstrated in paragraph b) of section II.2 of this Party's response, the executive branch of the Sonora state government, through the Ministry of Urban Infrastructure and Ecology, has taken various actions to prevent and control air pollution, in strict compliance with the provisions in environmental law.

Among the measures taken, those especially worth mentioning are those associated with Environmental Impact aspects²² (in which 451 resolutions have been issued for conducting works or activities within state jurisdiction, and which require those responsible for fixed sources to implement measures that minimize, avoid or mitigate environmental impacts on air quality), operating licenses (that establish the obligation to present operating reports, inventories of emissions, forms of measurement and monitoring of such emissions, and the measures and actions that should be carried out in the case of contingencies), as well as actions in coordination with other levels of government (Specific Coordination Agreement to carry out the Air Quality Management and Evaluation Program, in relation to the operation of air monitoring equipment in various municipalities in the state of Sonora) (Exhibit 19).

In terms of environmental impact, for example, efforts since 1994 have included flora rescue, reforestation, irrigation, paving, and sound waste management programs.

²² For the purpose of accrediting this statement, an environmental impact authorization is attached, as an example of the different types of authorizations that have been granted, and in which the various conditions imposed in these authorizations (to assure that individuals avoid or mitigate possible environmental impacts) can be clearly observed.



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Between 2003 and 2005, municipal authorities and educational institutions donated 28,798 plants to society, making it possible to reforest approximately 68 hectares.

In addition, two agreements have been signed with higher education institutions, specifically the University of Sonora (*Universidad de Sonora*) and the Sonora State Center for Higher Studies (*Centro de Estudios Superiores del Estado de Sonora*), with the aim of coordinating the definition and implementation of actions and strategies for consultation, scientific and technological research and training programs in the areas of Urban Development and Planning, Engineering, Environment, Ecology, Environmental Pollution and Sustainable Development.

Finally, it is important to mention that during 2005, five open-air fires were approved and evaluated for drill purposes, to train personnel in charge of: fighting fires out of control, requiring the use of materials for burning that will guarantee adequate combustion, assuring safe conditions for burning, and assuring that the necessary environmental conditions are present in order for emissions to be adequately dispersed.

Given the above, it is clear that the Submitters falsely pointed to the failure to take actions aimed at controlling and preventing pollution, since they based their arguments on aspects that cannot be found to be true.

Also, the Submitters point to the failure to define in the State Urban Development Plan the zones in which polluting industrial facilities may be sited.

In this regard it is important to take into consideration that the State Development Plan establishes the preferred context for such facilities, based on strategic planning and on an economically sustainable, socially equitable and environmentally sustainable perspective (Exhibit 20).

Contrary to what has been stated by the Submitters, Chapter 3 of the Plan, in the part corresponding to *Ciudades ordenadas y vivienda digna* (Orderly cities and dignified housing), contemplates the establishment of strategies and lines of action to include "assuring growth in cities takes place in an orderly and sustainable manner, and stimulating investment in infrastructure and housing" by:

- Enhancing the ecological protection contents in urban legislation.
- Consolidating the state's system of cities, on the basis of considering them within regional, national and international contexts, by taking advantage of their



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strengths, neutralizing their weaknesses, confronting opportunities and minimizing risks, all within economic, social, environmental and territorial contexts.

-Incorporating an environmental perspective in territorial ordering and urban growth, within a framework of sustainability and in accordance with the site's physical-natural characteristics.

-Incorporating the rural setting as a space for providing productive and environmental inputs, goods and services to the population, to cities and to regions.

Another line of action mentioned in the Plan is to promote modifications in the legislative framework, with the aim of determining jurisdictions, principles, guidelines and mechanisms for the implementation of territorial ordering and urban development policies, as well as to define regulations and standards for making territorial planning, the organization of actions and the definition of instruments operational. This will be accomplished by considering ecology as a fundamental input for territorial ordering and urban development; by defining the objective of regulating and stimulating land use and productive activities in relation to the potential of the natural physical medium, with the aim of achieving environmental protection and the preservation and sustainable use of natural resources; by defining instruments for regulating and controlling urban development in order to assess the economic, social, environmental and territorial impacts from urban development activities.

Also, with regard to the strategy to "Promote the updating of urban development plans with a vision and through the use of high technology, in order to raise the quality of life in cities," the Plan's environmental focus establishes the following objectives: a) Developing a modern and efficient planning system for regulating and guiding urban growth, to stimulate the establishment of settlements in adequate areas, with the potential for growing and with limits when economic, social and ecological costs compromise the sustainable development of cities; and b) Defining priorities and criteria for locating human settlements, in close coordination with municipal authorities.

Another area in which the Submitters claim the lack of compliance on the part of the Sonora state government consists of enforcing, within the scope of their jurisdiction, the Mexican official standards governing air pollution control.

As it has already been specified, the mechanisms contemplated in environmental law for enforcing and promoting compliance with not only Mexican official standards, but also the various environmental provisions, are



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particularly inspection and enforcement actions. In fact, the Sonora state government, through the State Ministry of Urban Infrastructure and Ecology, has conducted 90 site inspections in the city of Hermosillo during the period from 1999 to 2005. The objective of these visits is to verify compliance with the provisions specified in the Sonora State Ecological Balance and Environmental Protection Act (*Ley del Equilibrio Ecológico y la Protección al Ambiente para el Estado de Sonora*), regulations, Mexican official standards, and other applicable legal provisions for preventing and controlling pollution. Among the main observations made are the late presentation of annual operating reports, the use of emission-generating equipment not authorized in the operating license because it fails to use the frequency established in Table 5 of NOM-085-ECOL-1994 for measurement, and deficiencies in operation and maintenance logs (Exhibit 21). Various sanctions have been imposed as a result of these site inspections, including fines or closures, as well as the imposition of technical measures aimed at correcting the irregularities detected or compensating for environmental impacts caused.

In addition the Submitters indicate that the Sonora state government is failing to enact the relevant environmental technical standards, as well as to enact any regulations, circulars, and other generally applicable provisions that may be necessary to provide, within their administrative purviews, for strict observance of the state's environmental law, and in particular those provisions governing air pollution prevention and control.

It should be highlighted that the Submitters also allege a failure on the part of the municipality of Hermosillo, particularly in terms of failing to enact regulations, circulars, and other generally applicable provisions.

In this regard, it is important to specify to the Secretariat that the enactment of regulatory instruments by the state and municipal governments is contemplated as a discretionary power granted to environmental authorities in the area of regulations and compliance with the law. It therefore translates into a regulatory power that, within the different levels of government, corresponds only to the executive branch. It thus constitutes an autonomous power and cannot be limited nor can it be mandatory within a specific period of time, precisely because it is discretionary. It is therefore an optional act to be carried out by authorities, and does not arise from an obligation that must be carried out in a determined period of time.

It is important to remember that local legislation does not establish a period of time for enacting regulations and other general provisions, but this does not imply non-compliance with the law. Transitory Article 4 of the cited law



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establishes that: “until such time as the incumbent of the Executive Branch and the municipalities of the entity enact the regulations, bylaws and other generally applicable provisions contemplated in this Act, the regulations to the General Ecological Balance and Environmental Protection Act shall apply, as relevant.”

Along these lines, as maintained in the legal courts, and as even the Submitters mention in their submission: “the failure by the municipality of Hermosillo to issue the municipal environmental protection plan and to enact the municipal environment bylaw does not affect the complainant's legal interest, for the General Ecological Balance and Environmental Protection Act contains necessary and sufficient environmental protection measures to guarantee his right to development and well-being, since this provision applies in the event where the states or municipalities have not enacted laws governing this matter...”²³ In other words, there are no legal gaps, given the transitory application of the LGEEPA and its regulatory provisions in the state and local spheres.

With respect to the Programs alluded to by the Submitters, these exist and are implemented, as the Secretariat can observe, contributing to taking care of the environment and the health of the inhabitants of the state of Sonora, as well as the municipality of Hermosillo.

Finally, the Submitters state that the state government is failing to establish and operate or, as applicable, authorize the establishment and operation of inspection centers for motor vehicles used in mass transit under concession from the state, in line with ecological technical standards.

Regarding the matter of motor vehicles, it is important to emphasize the existence of an Agreement for urban transit modernization in the framework of the State Urban Transit Modernization Program (SUBA). In the part focusing on strategies, transit is contemplated as an element for territorial ordering, as an element that should stimulate development, a comprehensive system and an element of social integration (Exhibit 10).

The program is aimed at the acquisition of new transportation units and the redesigning of routes to improve transportation services, leading to a significant decrease in combustion gas and dust emissions generated by the existing fleet. The redesigning of traffic routes will place mass transit traffic preferentially on paved streets.

²³ Submission, page 11.



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A problem that should not be overlooked is the problem of dust pollution resulting primarily from vehicles circulating in the state's streets and causing serious air pollution effects. This problem has led to a program for redefining the routes for mass transit under concession, in order to avoid increasing levels of dust pollution. And in 2005, 283,909 square meters of streets in the city of Hermosillo were paved, These are streets in which the continuous movement of vehicles stirred up tons of dust and biological waste every day. In addition an increase in the amount of particles in the air was noted during the windy season.

II.3.4. Regarding the alleged lack of compliance in preventing and controlling air pollution, on the part of the municipality of Hermosillo

Regarding the municipality of Hermosillo, the Submitters:

Assert that authorities fail to "take actions to prevent and control air pollution on property and areas under municipal jurisdiction."

Once again, the Submitters make false statements, attempting to mislead the Secretariat, by asserting that the municipal government has not taken actions to prevent and control air pollution. As demonstrated here, this statement is contrary to the effective actions taken by the municipal government and aimed at complying with the enforcement of environmental law, as reiterated and described below.

The municipality of Hermosillo monitors air quality in the city of Hermosillo through the Air Quality Assessment and Improvement Program (*Programa de Evaluación y Mejoramiento de la Calidad del Aire—PECMA*), through samples taken manually for the purpose of assessing the levels of air pollution and comparing them to the Mexican Official Standards issued by the Ministry of Health for Total Suspended Particles (TSP) and particulates less than 10 microns in diameter (PM10).

PECMA allows the municipality, on the one hand, to establish a reliable diagnostic assessment of the status of the urban atmosphere in Hermosillo, and on the other hand, to promote and carry out activities that tend toward preventing, controlling and restoring air quality. As well, the studies conducted through the PECMA and the information collected by the environmental monitoring equipment provides a basis for implementing stricter environmental regulations.



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In addition, it is important to mention that the municipality has environmental impact evaluation mechanisms for ensuring that establishments under municipal jurisdiction comply with existing regulations on environmental impact, prior to the beginning of operations that may release particles into the environment.

In terms of pollution control, the municipality has an Environmental Complaints Program for addressing petitions from citizens on failures to comply with environmental laws and standards, especially in relation to burning, use of fossil fuels and gas emissions, for example. In the particular case of air pollution, different types of petitions are addressed, with the most common being those related to garbage burning, wood-burning stoves, the use of solvents and paints at open-air sites, and brick factories. In 2003, 36 cases were addressed, and in 2005, a total of 39.

Finally, it is important to emphasize that, as established in the LGEEPA, the municipality carries out special programs and actions together with the state and federal governments.

Based on the above, it is absolutely clear that the municipality indeed carries out actions aimed at preventing and controlling air pollution.

The Submitters also assert that the Municipal Urban Development Program fails to define the zones where polluting industrial facilities may be established.

This assertion is false and lacks any degree of truthfulness, since as the Secretary will be able to observe in the Municipal Urban Development Program for the Municipality of Hermosillo, the municipality has clearly specified the types of establishments that are allowed in each zone defined (Exhibit 22). It is also important to point out that the Municipal Urban Development Program for the Municipality of Hermosillo was established in the 1990s under the name of "Municipal Urban Development Program for the Hermosillo Population Center." It was developed in 1993 and approved, registered and published in 1994, constituting an important element in the city's urban planning.

This document was updated in 1997, and then again in 2000, with a significant portion of the original structure and many of the concepts in the original program maintained. Later, based on national development plans, a modern version was developed and published in 2003. In the most recent version of this new Hermosillo Urban Development Plan (2005+), the city has a planning instrument based on a long-term vision, territorial ordering policy and a macro, regional network city structure that allows orderly, sustainable development,



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through the development of favorable qualities and principles, allowing Hermosillo to offer quality of life to its inhabitants and to establish itself as a competitive city.

It is therefore evident that the assertion made by the Submitters is completely false and unfounded when it states that the municipality fails to indicate the zones where industrial facilities may be established, and especially when it states that the municipality does not have an Urban Development Program.

The Submitters also assert that the municipality is failing to “enforce, within the limits of its jurisdiction, the Mexican official standards governing air pollution control.”

Contrary to this assertion, it should be pointed out that the municipality effectively complies with the various provisions related to the atmosphere, including the Mexican official standards, through the implementation of each of its various programs, including the Air Quality Assessment and Improvement and Environmental Complaints Programs. As these programs are developed and implemented, each of the applicable legal provisions is considered, to ensure that the actions carried out adhere to the law, meaning that stipulations in the official standards applicable to each concrete case are considered and applied.

In particular, as already demonstrated above, the Complaints Program provided a channel for citizen petitions regarding non-compliance with environmental laws and standards, especially in relation to burning, use of fossil fuels, gas emissions, wood-burning stoves, the use of solvents and paints in open-air sites, and brick factories. A total of 36 cases were addressed in 2003, and 39 in 2005.

Another assertion made by the Submitters is summarized in its statement that the municipality is failing to “establish mandatory vehicle inspection programs, and establish and operate or, as applicable, authorize the establishment and operation of mandatory vehicle inspection centers, in accordance with the ecological technical standards.”

In this regard it is important to mention that for the municipality, with the aim of complying with the provisions contemplated for establishing vehicle inspection programs, with the establishment and operation of vehicle inspection centers, it is necessary to consider, first of all, that the municipality confronts extreme climatic variations each year, and this is a natural situation that makes it difficult



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to carry out precise analysis with monitors for obtaining the data necessary for developing and operating a Vehicle Inspection Program.

The above is highly important when considering the costs-benefits such a program could represent, in order to constitute an effective, interest-yielding program. There are other environmental programs requiring a range of actions for the benefit of the environment and human health, and requiring the use of resources. One example for the municipality, as well as for the state, is the amount of dust in cities. Given the topographic characteristics of the municipality, dust has become an urgent problem in the prevention of air pollution. The decision has been made to give it priority, by paving streets, which are the channels through which vehicle transit generates the greatest amount of dust particles. It is therefore necessary to have valid evidence on the amount of air pollutants corresponding to the vehicular fleet in Hermosillo, taking into consideration the variations throughout the different seasons of the year.

The above does not signify that a lack of compliance with the provisions addressed here. Rather, in order to establish this type of program, it is necessary, as already specified here, to obtain the appropriate data on the emissions generated by motor vehicles and their impacts on the atmosphere, to then develop an optimal vehicle inspection program and allocate the necessary resources.

It should, nevertheless, be taken into consideration that the data obtained from monitoring the city's air quality is being analyzed, with the objective of obtaining the necessary data for implementing such a program. Also, preparations are underway for establishing a station for monitoring gases, in order to more appropriately determine the data required for developing the corresponding program. When such data is available, it will be possible to establish and operate such a program, in collaboration with the state government.

The Submitters also assert that the municipality is failing to "create the municipal environment commission contemplated in Article 138 of the relevant local act."

In this regard, the municipality is working on a draft environmental Impact regulation for the municipality of Hermosillo in which the functions of this commission are being contemplated. This process will provide greater clarity for the creation of such a commission. Nevertheless, it is important to point out that the local law, in its Transitory Article 4, establishes that "until such time as the incumbent of the Executive Branch and the municipalities of the entity enact the



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regulations and other generally applicable provisions contemplated in this Act, the regulations to the General Ecological Balance and Environmental Protection Act shall apply, as relevant, and therefore in the absence of the Municipal Environmental Commission, the Advisory Council on Sustainable Development (*Consejo Consultivo para el Desarrollo Sustentable*) is operating in its place.”

The Council was created in 1995 with the objective of promoting the protection and conservation of ecosystems and natural resources, as well as environmental goods and services, with the aim of providing for their sustainable use and development. It is important to emphasize that, as in the Municipal Environmental Commission, the members of this council include representatives of academic, social, private and nongovernmental sectors, as well as representatives of the State Congress and the state government.

Lastly, the Submitters allege a lack of compliance with provisions for reducing or controlling emissions of pollutants into the atmosphere, whether from artificial or natural, and fixed or mobile sources, in order to ensure satisfactory air quality for the population’s well-being and ecological balance.

The municipality of Hermosillo has an Air Quality Assessment and Improvement Program (PECMA), which consists of a network of stations for monitoring suspended particles, used to monitoring the air quality in the city of Hermosillo.

This monitoring network has three stations, each equipped with high-volume TSP and PM10 samplers (with the exception of the Center station that only measures TSP). These stations are located as follows: toward the northeast (at Ley Federal del Trabajo and Israel González streets), toward the northwest (at Cócorit and República de Panamá streets) and toward the Center (at Plutarco Elías Calles and Guerrero streets) in the city of Hermosillo (PEMCA 2000 Executive Program) (Exhibit 23). Each station covers a radius of approximately 1 to 1.5 kilometers, as can be observed in the distribution map for the sampling stations.

As a result of this monitoring, technical reports on ambient air particles have been prepared annually (Exhibits 12 and 13), describing the behavior of particles during each period. The results are compared with Environmental Health Standards and the satisfactory conditions from this monitoring are specified. In addition, the necessary recommendations are established for complying with the criteria for evaluating ambient air quality, as established in the Mexican official standards, and for seeking the most satisfactory conditions for emission levels.



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In accordance with the data obtained from the activities carried out by the municipality, it should be pointed out that the air quality in the city of Hermosillo has visible improved as a result of the activities carried out by the municipality for the benefit of air quality. In particular it is important to note the results from the city's Air Quality Assessment and Improvement Program. It has also been verified that TSP and PM10 averages in the ambient air have decreased.

It should not be forgotten that air quality is related to the amount of pollutants disseminated and combined in the air in zones where human activities take place. Air quality in urban areas is influenced by diverse factors, including the city's topography and physiography, the wind's direction and velocity, plant cover, soil type, paving material used, empty lots, volume and status of vehicle fleet, emissions from fixed sources and other emissions from mobile or occasional sources.

In addition, seasonal changes during the year have a major impact on air quality. Air pollution problems appearing during the winter season are caused primarily by climatic conditions: temperatures, the altitude of the mixed layer, and periods of thermal inversion, which are all natural consequences that are impossible to control.

All of the above demonstrates that Mexico is not failing to comply with or effectively enforce legal environmental provisions.

**SINCERELY,
ASSISTANT GENERAL DIRECTOR
OF LEGISLATION AND CONSULTATION**

LIC. WILEHALDO CRUZ BRESSANT

In substitution of the General Legal Coordinator, as established in Article 154 of the Internal Regulations for the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*)

Cc: José Luis Luego Tamargo, Ministry of the Environment and Natural Resources (*Secretario de Medio Ambiente y Recursos Naturales*) – (For his information)

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