

Secretariat of the Commission for Environmental Cooperation

**Article 15(1) determination that
preparation of a factual record is not warranted**

Submitter:	Name confidential pursuant to NAAEC Article 8(11)
Party:	United Mexican States
Date of receipt:	10 January 2018
Date of determination:	22 June 2018
Submission no.:	SEM-18-001 (<i>Transboundary Agricultural Burning</i>)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (“NAAEC” or “the Agreement”) provide for a process allowing any person or nongovernmental organization residing or established in the territory of Canada, the United States, or Mexico to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”)¹ initially considers submissions to determine whether they meet the requirements of NAAEC Article 14(1). Where the Secretariat finds that a submission meets these requirements, it then determines, pursuant to NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, it then proceeds no further with the submission.²
2. On 10 January 2018, a resident of the community of Menagers Dam, located within the Tohono O’odham Nation Reservation in Arizona, United States (see Figure 1), whose name is kept confidential pursuant to NAAEC Article 11(8) (the “Submitter”), filed an NAAEC Article 14(1) submission with the Secretariat.³

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

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

³ SEM-18-001 (*Transboundary Agricultural Burning*), Article 14(1) Submission (10 January 2018).

Figure 1. Approximate location of the Menagers Dam community (Ali Jegk)



Source: Produced by the Secretariat based on information from Google Maps.

3. Submission SEM-18-001 (*Transboundary Agricultural Burning*) asserts that Mexico is failing to effectively enforce the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), the Sonora State Environmental Protection Act (*Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Sonora*—LEEPAS), and the Environmental Protection Regulation (*Reglamento de Equilibrio Ecológico y Protección al Medio Ambiente*—REEPMA) of the municipality of Caborca, Sonora.⁴
4. On 18 May 2018, Mexico submitted its response in accordance with NAAEC Article 14(3).⁵ Mexico contends that the submission as filed lacks precision as to the facts in question, so that it is impossible for the Party to provide an adequate response to the Submitter's assertions.⁶ The response discusses law enforcement measures taken with respect to agricultural burning in Caborca.⁷ In addition, Mexico states that the air quality studies in its possession make no mention of agricultural burning in the part of Mexico that lies south of the Submitter's community (that is, the municipality of

⁴ Submission at 1.

⁵ SEM-18-001 (*Transboundary Agricultural Burning*), Party Response (18 May 2018), online at <<https://goo.gl/skWWmq>> [Response].

⁶ Response at 3–5.

⁷ *Ibid.* at 7–8.

Plutarco Elías Calles).⁸ Finally, the Party recommends that the Secretariat consider consolidating this submission with a prior submission already filed with the Secretariat, as prescribed by section 10.3 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”).⁹

5. Having reviewed Mexico’s response, the Secretariat finds that submission SEM-18-001 (*Transboundary Agricultural Burning*) does not warrant the preparation of a factual record for the reasons set out below.

II. ANALYSIS

6. The Secretariat’s review addresses three aspects of Mexico’s response which lead the Secretariat to conclude that the preparation of a factual record should not be recommended: the lack of precision in the submission’s assertions; the applicability of the cited environmental law in relation to the facts presented in the submission; and the question of whether this submission should be consolidated with SEM-16-001 (*Agricultural Waste Burning in Sonora*).

A Lack of precision in Submitter’s assertions

7. The Submitter, who resides in Menagers Dam (Ali Jegk in her native language), asserts that:

Every few months we have unannounced episodes of smoke drift from Mexico (agricultural burns) that causes community members to have itchy throats, headaches, nausea, irritated eyes, itchy skin, etc. We know that symptoms such as these are a result of pesticides and or unknown agrichemicals that are being over used in the production of these crops that are being burned.¹⁰

8. Mexico states that the submission is not precise in the assertions it makes and that, in any event, it would appear that the cases of agricultural burning “are isolated and do not systematically or recurrently occur”; it further contends that the submission does not recount any “ongoing concrete incidents of transboundary air pollution,” not does it establish a “causal link between the ongoing facts and the failure to effectively enforce the environmental law.”¹¹
9. In this regard, while it is probable that the Submitter has no way of accurately determining the source of the emissions affecting her, it is also true that Mexico cannot offer a response because it lacks data on the location and frequency of the agricultural burning. In any case, Mexico reports that it has a study of air emissions in the state of Sonora, the Sonora State Air Quality Improvement Plan (*Programa de Gestión para Mejorar la Calidad del Aire del Estado de Sonora—ProAire-Sonora*), which “does not mention agricultural burning as a source of pollutant emissions in the municipality of Plutarco Elías Calles” adjacent to the community of Menagers Dam.¹² Mexico notes

⁸ *Ibid.* at 5.

⁹ Response at 9.

¹⁰ Submission at 1.

¹¹ Response at 3–4.

¹² *Ibid.* at 5.

that ProAire-Sonora presents information about the measures taken by the government of Mexico to control and monitor agricultural burning, which are documented in the forthcoming factual record for submission SEM-16-001 (*Agricultural Waste Burning in Sonora*). The Secretariat notes, however, that ProAire Sonora does not indicate specific actions with respect to the area in question. After consideration, missing information on the alleged burning activities does not allow Mexico to file a response to the Submitter allegations.

B Environmental law cited in the submission

10. The Submitter asserts that Mexico is failing to effectively enforce the following provisions:
 - i. LGEEPA Article 5 paragraph IV, a federal statute;
 - ii. LEEPAS Article 126 *bis*, a Sonora state statute, and
 - iii. REEPMA Articles 144, 146, 150, 151, 167, 168, 169, 170, and 172, a bylaw of the municipality of Caborca, Sonora.¹³
11. Mexico's response sheds light on the applicability of the provisions cited in the submission. In this regard, although the Submitter cites LEEPAS Article 126 *bis*, which establishes restrictions on agricultural burning, Mexico states that it is LEEPAS Article 126 *ter* — not cited in the submission — that establishes municipal jurisdiction over agricultural burning:

Article 126 *ter*. The municipalities, acting by their environment departments, shall issue licenses to anyone who, having submitted a controlled burning plan, meets the requirements established by the same municipalities for mitigation of the impact on natural resources and adjacent properties.
12. Mexico states that the state authority “is not involved in the regulation of the agricultural burning carried out in the state's municipalities,” so that responsibility for control of such activities does not reside with the state of Sonora but with the municipality where they take place.
13. The submission cites provisions applicable to the municipality of Caborca. The municipality of Caborca borders the US at about 22 kilometers away from Menagers Dam while reported burning activities occur near to the city of Caborca, at about 130 kilometers from Menagers Dam. In this regard, there is no information in the submission or the response confirming that smoke from agricultural burning is coming from Caborca such that it would be possible to address the effective enforcement of the cited REEPMA provisions. Nor can it be confirmed that the alleged burning is taking place on the territory of the municipality of Plutarco Elías Calles, since the recently published ProAire-Sonora does not mention such activities.
14. The Secretariat concludes in light of Mexico's response that the legislative provisions cited in the submission cannot be applied to the burning described therein.

¹³ Submission at 1.

C Whether the submission should be consolidated with submission SEM-16-001 (*Agricultural Waste Burning in Sonora*)

15. Mexico states that submissions SEM-16-001 and SEM-18-001 address the same matters and contends that the Secretariat could consolidate them in accordance with the Guidelines. Section 10.3 of the Guidelines reads as follows:

The Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law. In other situations where two or more submissions relate essentially to the same facts and enforcement matter and the Secretariat considers that it would be more efficient or cost-effective to consolidate them, it may so propose to the Council.

16. The section in question provides that submissions may be consolidated in two instances: i) where they relate to the same facts and the same asserted failure to effectively enforce the environmental law, or ii) where they *essentially* relate to the same facts and enforcement matter. In the first case, where the facts and assertions are the same, the Secretariat may consolidate the submissions without the need for CEC Council involvement. The second case, where the facts and enforcement matters are *essentially* the same, requires Council involvement.
17. Submission SEM-16-001, for which a final factual record has now been transmitted to the CEC Council for a vote on publication, , asserts that approximately 100 tons of crop residues are burned each year on some 13,000 hectares of land in the vicinity of the municipality of Caborca, Sonora.¹⁴ That submission contends that crop residue burning is taking place in violation of the REEPMA provisions in force in the municipality of Caborca.
18. For its part, submission SEM-18-001 contends that agricultural burning taking place in Mexico is causing an impact on the health of the residents of a community located in the United States. As mentioned, the agricultural burning in near the city of Caborca is taking place 130 km from the community of Menagers Dam, so that it is unlikely that the same activities are in question. In any case, the burning in question could be taking place in the municipality of Plutarco Elías Calles, but the submission makes no mention of any data on frequency of occurrence or location that would enable Mexico to provide further details.
19. The Secretariat finds that the two submissions do not appear to deal with the same facts (which are occurring in Caborca in one case and in Plutarco Elías Calles, presumably, in the other). Nor is the same environmental law applicable, since it does not stand to reason that the emissions could originate in the municipality of Caborca, and neither are the facts *essentially* the same, since there is no connection between the activities in Caborca, Sonora and the harm asserted to be occurring in Menagers Dam, Arizona.
20. The Secretariat finds that it cannot consolidate submissions SEM-16-001 and SEM-18-001, nor can it ask the Council to do so at this time. In any case, the Submitter may file a new submission with the Secretariat to clarify the place and frequency of the burning as well as the applicable environmental law.

¹⁴ SEM-16-001 (*Agricultural Waste Burning in Sonora*), NAAEC Article 14(1) Submission (22 January 2016).

III. DETERMINATION

21. The Secretariat has reviewed submission SEM-18-001 (*Transboundary Agricultural Burning*) in the light of the response of the United Mexican States and determines not to recommend the preparation of a factual record.
22. This determination terminates the submissions process without prejudice to the Submitter's right to file a new submission.

Secretariat of the Commission for Environmental Cooperation

(original signed)

per: César Rafael Chávez, Executive Director

cc: Enrique Lendo, Alternate Representative, Mexico
Isabelle Bérard, Alternate Representative, Canada
Jane Nishida, Alternate Representative, United States
Submitter