

**Secretariat of the Commission for Environmental Cooperation
Determination of the Secretariat in accordance with Article 14(1) and (2)
of the North American Agreement on Environmental Cooperation**

Submitter: [Name withheld pursuant to NAAEC Article 11(8)]
Party: United Mexican States
Date received: 10 January 2018
Date of the determination: 19 February 2018
Submission no.: SEM-18-001 (*Transboundary Agricultural Burning*)

I. INTRODUCTION

- Articles 14 and 15 of the North American Agreement on Environmental Cooperation (“NAAEC” or the “Agreement”) provide for a process allowing any nongovernmental organization or person 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 in NAAEC Article 14(1). When Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the Party and in accordance with the NAAEC, the Secretariat determines whether the matter warrants the preparation of a factual record. If it so determines, it then notifies the CEC Council and explains the reasoning for its recommendation in adherence with Article 15(1); should the Secretariat determine instead that the preparation of a factual record is not warranted, it shall proceed no further with the submission.²
- On 10 January 2018, a resident, whose name is withheld pursuant to NAAEC Article 11(8) (the “Submitter”), of a village within the Tohono O’odham Indian Nation reservation in the United States (see Figure 1), filed a submission with the Secretariat pursuant to Article 14(1) of the NAAEC. The Submitter, a resident of Managers Dam (Ali Jegk, in the native language), asserts that:

Every few months we have unannounced episodes of smoke drift from Mexico (agricultural burns) that causes the 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.³
- Submission SEM-18-001 (*Transboundary Agricultural Burning*) further asserts that Mexico is failing to effectively enforce provisions of the General Law of Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecológico y la*

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”) and [NAAEC]. The constituent bodies of the CEC are its Council, Secretariat and the Joint Public Advisory Committee.

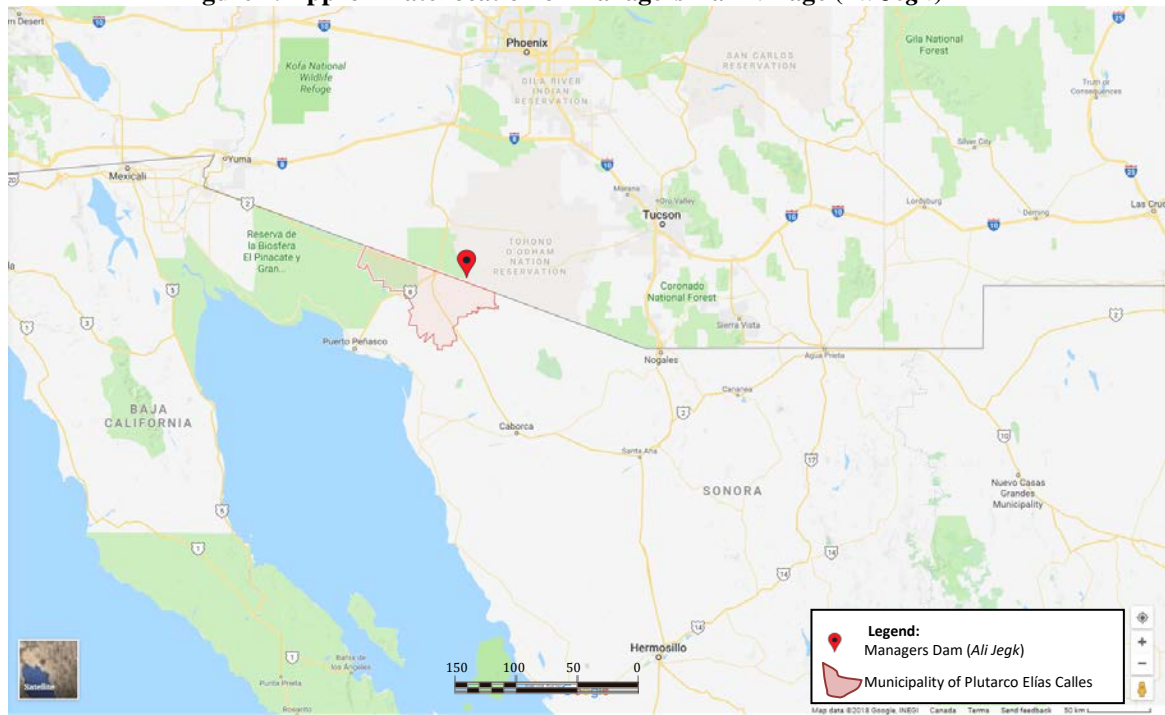
² For detailed information on the various stages of the submission process, as well as on the Secretariat’s determinations and factual records, please consult the CEC website: <www.cec.org/submissions>.

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

Protección al Ambiente, LGEEPA); the Law of Ecological Equilibrium and Environmental Protection of the State of Sonora (*Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Sonora*) and the Environmental Protection Bylaw (*Reglamento de Equilibrio Ecológico y Protección al Medio Ambiente*—REEPMA) of the municipality of Caborca, Sonora.⁴

4. Under Guideline 16.1 the Secretariat translated the Submission into Spanish⁵ and provided a copy to Mexico and to the Submitter and posted the translation in the Registry of Submissions.⁶
5. After analyzing the Submission under Article 14 of the Agreement and guided by the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat finds that submission SEM-18-001 (*Transboundary Agricultural Burning*) meets all the admissibility requirements of Article 14(1) and warrants requesting a response from the Government of Mexico in accordance with the criteria of Article 14(2), for the reasons set out below.

Figure 1. Approximate location of Managers Dam village (Ali Jegk)



Source: Google Maps

⁴ Submission, p. 1.

⁵ Guideline 16.1: “Documents in the public registry, unless otherwise decided by Council, will be made available in the three official languages of the Commission in as timely a manner as practicable, in order to promote transparency and timely action at key steps in the submissions process.”

⁶ See English translation of the Submission in the Registry for SEM-18-001 (*Transboundary Agricultural Burning*) at: <<https://goo.gl/HdWoY2>>.

II. ANALYSIS

6. Article 14 of the NAAEC authorizes the Secretariat to consider submissions from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. As stated by the Secretariat in prior determinations made under NAAEC Article 14(1), this article is not intended to be construed as an insurmountable screening device.⁷ The Secretariat reviewed the submission in question with regard to this perspective.

A First paragraph of Article 14(1)

7. The first sentence of Article 14(1) allows the Secretariat to consider submissions “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law”. The Submission includes the Submitter’s name and sufficient information to contact its author. The Submitter is a resident of a village within the Tohono O’odham Nation located in the State of Arizona. There is no information in the Submission indicating that the Submitter is part of any government or is acting under its direction.

1. Environmental law in question

8. While most of the provisions cited in the Submission qualify as “Environmental Law”, some of them may not be applicable, due to the jurisdiction where the alleged burning activities are taking place (see paragraph 11 *infra*).
9. Article 5: paragraph IV of the General Law of Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) cited in the Submission provides that matters originating in the Mexican territory which affect the ecological balance of a foreign territory, will fall under Federal jurisdiction. Nothing in LGEEPA Article 5: paragraph IV, however, provides direct enforcement authority to the federal government with respect to such pollution, so the Secretariat reads this provision with others cited in the submission.
10. Article 126 *bis* of the Law of Ecological Equilibrium and Environmental Protection of the State of Sonora (*Ley del Equilibrio Ecológico y la Protección al Ambiente del Estado de Sonora*—LEEPAS), establishes that the burning of plant material in agricultural lands is prohibited unless a permit for controlled burning has been issued by the corresponding municipal authority. The primary purpose of the provision is the control of the release of air pollutants and falls within the definition of environmental law in NAAEC Article 45(2)(a).
11. The Submission cites Articles 144, 146, 150, 151, 167, 168, 169, 170 and 172 of the REEPMA.⁸ With the exception of REEPMA Articles 150 and 168, the rest of the provisions in question qualify indeed as Environmental Law as previously determined by the Secretariat since these are aimed at controlling air pollution from agricultural

⁷ See SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998) and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

⁸ These laws were also cited by the submitter in SEM-16-001 (*Agricultural Burning in Sonora*), Article 14(1) Submission (29 April 2016).

burning.⁹ However, the REEPMA may not be applicable to the matters raised by the Submitter. The area in Mexican territory south to the location indicated in the Submission corresponds to the municipality of Plutarco Elías Calles (see Figure 1),¹⁰ while the regulations referenced in the Submission are in force only with respect to the municipality of Caborca, according to the decree published in the Official Gazette of the State of Sonora.¹¹ A perusal of the Submission suggests that the smoke from the burning in question may originate inside the municipality of Plutarco Elías Calles, Sonora, south of Managers Dam, and that the municipality of Caborca borders with the US is at about 22 km from the village. It should also be noted that the City of Heroica de Caborca is located at about 130 kilometers from Managers Dam and that most of agricultural burning referred to in submission SEM-16-001 (*Agricultural Burning in Sonora*) occurs in that area.¹²

12. The Secretariat bears in mind that the Submitters may not be able to determine where exactly emissions are originating, as they are only able to determine that the smoke is coming from south of their community. A response from Mexico may confirm the origin of the burning activities referred to in the Submission.

B The six requirements of NAAEC Article 14(1)

13. The Secretariat evaluated submission SEM-18-001 in light of the six requirements of Article 14(1) of the NAAEC, and determined that it does meet all requirements listed therein. The Secretariat's reasoning is explained below.

a) [whether] it is in writing in a language designated by that Party in a notification to the Secretariat

14. The submission is written in English, which is one of the languages designated by the Parties under Guideline 3.2 for the filing of submissions.¹³ The Secretariat considers that the Submission meets the requirement under Article 14(1)(a).

b) [whether] it clearly identifies the person or organization making the submission

15. The Submission provides the name, postal address and other means of contact to identify and communicate with the Submitter and as such, it satisfies Article 14(1)(b).¹⁴

⁹ SEM-16-001 (*Agricultural Burning in Sonora*), Article 14(1) and 14(2) Determination (13 June 2016), §8-9. REEPMA articles 150 and 168 were considered not applicable to the matters raised by the Submitter as they relate to enforcement of an Official Mexican Standard that bear not applicability to air quality during agricultural burning activities. See: SEM-16-001 (*Agricultural Burning in Sonora*), Article 15(1) Notification (27 February 2017), §53-58.

¹⁰ The approximate coordinates of Managers Dam (*Ali Jegk*) included in the Submission are latitude 31°48'41.87"N, longitude -112°33'29.63"W (note that a negative sign was misplaced in the submission).

¹¹ Environmental Protection Bylaw (*Reglamento de Equilibrio Ecológico y Protección al Medio Ambiente*), published in the Official Gazette of the State of Sonora, vol. CXCI, no. 14, section II (17 February 2014), online at <<http://goo.gl/RfMpHJ>> (viewed 18 January 2018).

¹² Refer to the registry of this submission at: <<https://goo.gl/HdWoY2>>.

¹³ Guideline 3.2: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."

c) [whether] it provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based

16. The Submitter includes copies of a notice dated 18 January 2017, filed before the Environmental Protection Office of the Tohono O’odham Nation, where the Submitter reported a “heavy smoke and heavy smell of burning in the community”;¹⁵ photos showing alleged incidents of agricultural burning in the community; as well as communication on the matter, dated 18 October 2016, to the Attorney General for Environmental Protection (*Procuraduría Estatal de Protección al Ambiente—Proaes*) of the State of Sonora in Mexico, authored by the environmental specialist of the Tohono O’odham Nation.¹⁶ The Secretariat considers that the Submission satisfies Article 14(1)(c).

d) [whether] it appears to be aimed at promoting enforcement rather than at harassing industry

17. The submission satisfies Article 14(1)(d), as it appears to be aimed at promoting enforcement rather than at harassing industry. Guideline 5.4 guides the Secretariat in making this determination, and it is clear that the Submission is focused on the asserted failure to regulate these burning practices and that the Submission is not frivolous. The submission is centered on the alleged agricultural burning activities taking place in Mexico which, according to the Submitter, are having a negative harmful effect in Managers Dam within the Tohono O’odham Nation.
18. The Secretariat considers that the Submission satisfies Article 14(1)(d).

e) [whether] it indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any

19. The Submission includes communication of the matter to Proaes, the state environmental authority in Sonora, Mexico, authored by an environmental specialist of the Tohono O’odham Nation. The submitter is a member of this Indian tribe. The document describes that “[t]here have been four incidents concerning air drift coming from the Mexican side of the border” and that these events were reported in June 2016, when the officer began in his position as environmental specialist for the Nation. The specialist reports four other events occurred during the same month. The specialist indicates that residents complain of “raw throats, headaches, trouble breathing, and itchy skin.”¹⁷
20. The Secretariat considers that the matter has been communicated to the relevant government authority and as such, it satisfies Article 14(1)(e).

¹⁴ Following the filing of the Submission, the Secretariat contacted the Submitter to obtain additional contact information such as telephone and e-mail.

¹⁵ Tohono O’odham Nation, Department of Public Safety, Incident Report (18 January 2017).

¹⁶ Tohono O’odham Nation, Department of Public Safety, Letter to the Attorney General of Environmental Protection of the State of Sonora (18 October 2016).

¹⁷ Tohono O’odham Nation, Department of Public Safety, Letter to the Attorney General of Environmental Protection of the State of Sonora (18 October 2016).

f) [whether] the submission is filed by a person or organization residing or established in the territory of a Party

21. The Submitter is a resident of Managers Dam), a village inside the Tohono O'odham Nation whose reservation lands are geographically located within the State of Arizona in the United States (see Figure 1). Clearly, the submitter is a person residing in the territory of a NAAEC Party and satisfies Article 14(1)(f).

C NAAEC Article 14(2)

22. Having found that the revised submission does in fact meet all the requirements of NAAEC Article 14(1), the Secretariat continues its analysis in order to determine whether the submission merits requesting a response from the Party, pursuant to the criteria listed in Article 14(2) NAAEC.

a) Whether the submission alleges harm to the person or organization making the submission;

23. The Submitter asserts that the “unannounced episodes of smoke drift from Mexico” is allegedly causing “community members to have itchy throats, headaches, nausea, irritated eyes, itchy skin, etc.”
24. The Secretariat finds that the harm asserted in the submission is a consequence of the alleged failure to effectively enforce the environmental law and, pursuant to section 7.4 of the Guidelines, finds that the submission meets this criterion.

b) Whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;

25. The submission centers on the alleged health impacts on the residents of Managers Dam community in Arizona, which according to the Submitter's account, arise from unannounced agricultural burning episodes in the State of Sonora, Mexico. The Submitter asserts that this amounts to a failure to effectively enforce the environmental law cited in the Submission.
26. The Secretariat finds that submission SEM-18-001 (*Transboundary Agricultural Burning*) raises matters whose further study in this process would advance the goals of the NAAEC, specifically Article 1(a), (b), (c), (f), (g), and (h)¹⁸ and considers that it meets Article 14(2)(b) of the Agreement.

¹⁸ NAAEC Article 1:

The objectives of this Agreement are to:

- a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- ...
- f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- g) enhance compliance with, and enforcement of, environmental laws and regulations;

c) Whether private remedies available under the Party's law have been pursued;

27. The Submitter asserts that “[w]e have not filed for any legal recourse in Mexico because we lack the resources.”¹⁹ Guideline 7.5(b) reminds the Secretariat to bear in mind “barriers to the pursuit of some remedies” when evaluating whether a submission meets Article 14(2)(c). In similar situations, the Secretariat has considered if reasonable actions were taken prior to file a submission.²⁰ It has also considered that in some cases, the lack of resources may limit a submitter’s ability to undertake private remedies before filing a submission.²¹
28. The Secretariat considers that a barrier to a private remedy may include economic and social factors. In this case, the Submitters lack of resources to obtain legal counsel in Mexico in order to initiate private remedies. Bearing in mind the existence of barriers to pursue private remedies, a written communication to the State Attorney for Environmental Protection in 2016 is a reasonable step for the Tohono O’odham Nation to have taken, prior to making this submission.
29. The Secretariat therefore finds that the submission meets the criterion of NAAEC Article 14(2)(c).

d) Whether the submission is drawn exclusively from mass media reports.

30. The Secretariat does not find that the submission is based primarily on news published in the media, but rather on the facts observed and cited by the Submitter, which is evident from a perusal of the information presented in the appendices to both the original submission and the revised submission.
31. The Secretariat therefore finds that the submission meets the criterion of NAAEC Article 14(2)(d).

III. DETERMINATION

32. For the reasons set out herein, the Secretariat finds that submission SEM-18-001 (*Transboundary Agricultural Burning*) satisfies the eligibility requirements of NAAEC Article 14(1) and, in conformity with Article 14(2), that a response from the Government of Mexico is warranted with respect to the effective enforcement of LEEPAS Article 126 *bis* as to the burning of agricultural lands in Mexico and the steps taken by the federal authorities under LGEEPA Article 5: paragraph IV to address the alleged release of pollutants.
33. Depending on where the agricultural burning is occurring, Mexico may provide a response with respect to Articles 144, 146, 151, 167, 169, 170 and 172 of the REEPMA.

h) promote transparency and public participation in the development of environmental laws, regulations and policies;

¹⁹ Submission, at 1.

²⁰ SEM-04-005 (*Coal-fired Power Plants*), Article 14(1) and (2) Determination (24 February 2005), p. 12.

²¹ SEM-98-004 (*BC Mining*), Article 15(1) Notification (11 May 2001).

34. Pursuant to the provisions of NAAEC Article 14(3), the Party may provide a response to the submission within the thirty working days following the receipt of this determination, *i.e.*, by **5 April 2018**. In exceptional circumstances, the Party may give written notice of the extension of this period to sixty *i.e.*, **18 May 2018**.

Secretariat of the Commission for Environmental Cooperation

(Original signed)

per: Robert Moyer
Head, SEM Legal Unit

(Original signed)

per: Paolo Solano
Legal Officer, SEM Legal Unit

cc: Enrique Lendo, Alternate Representative, Mexico
Isabelle Bérard, Alternate Representative, Canada
Jane Nishida, Interim Alternate Representative, United States
César Rafael Chávez, Executive Director, CEC Secretariat
Submitter