
Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 14(1) of the North American Agreement for
Environmental Cooperation**

Submission No.: SEM-98-002

Submitter(s): C. Héctor Gregorio Ortiz Martínez
Party: United States of Mexico
Date: 14 October 1997

I. BACKGROUND

On 14 October 1997, the Submitter forwarded to the Secretariat of the North American Commission for Environmental Cooperation ("the Secretariat") a submission under of articles 14 and 15 of the North American Agreement for Environmental Cooperation ("the NAAEC" or "the Agreement"). Article 3.3 of the Guidelines for Submissions on Enforcement Matters ("the Guidelines") establishes that submissions should not exceed 15 pages of typed, letter-sized paper, excluding supporting information. Since the submission exceeded this limit, the Secretariat requested that the Submitter provide a revised version in accordance with the above-mentioned provision.

On 10 February 1998, the Secretariat acknowledged receipt of the revised submission delivered to the Secretariat's liaison office in Mexico City. The Secretariat also informed the Submitter that, under Article 3.1 of the Guidelines, submissions must be delivered to the Secretariat's offices located in Montreal, Quebec, Canada.

In accordance with Article 14(1) of the NAAEC, the Secretariat hereby records its determination, in relation to the above-mentioned submission.

II. SUMMARY OF THE SUBMISSION

The submission alleges "that there has been a lack of due process, omissions and persistent non-compliance in the effective enforcement of current environmental legislation" on the part of the Ministry of the Environment, Natural Resources and Fisheries ("Semarnap") and the Federal Attorney for Environmental Protection ("Profepa") of the United States of Mexico ("Mexico"), in relation to a citizen

denunciation ("denuncia popular") made by the Submitter. The Submitter alleges procedural violations during various processes described in the submission, which are related to forestry operations in "El Taray", in the state of Jalisco.

The submission indicates that an Inspection Visit was carried out on the above-mentioned site, after a Technical Audit order had been issued. As a result, sanctions were imposed on the person against whom the "denuncia popular" had been filed, and under the specific circumstances, sanctions were also imposed upon the Submitter himself. The Submitter alleges that neither the Technical Audit nor the Inspection Visit constitutes an adequate response to the "denuncia popular". The Submitter also claims that the authorities have not issued "a technical opinion regarding harm, [which would be] deemed as [admissible] evidence if adduced in a trial, under the provisions of Article 194 of the [Mexican] Ecological Balance and Environmental Protection Law (LGEEPA), which was in effect at the beginning of said proceedings." The Submitter also states that he has challenged the imposed sanctions and that the proceeding is under appeal, although he claims that this does not preclude the Secretariat's consideration of the submission.

III. ANALYSIS

Under Article 14(1), the Secretariat may:

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

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

Noteworthy amongst the evaluation criteria established in Article 14(1) is the threshold requirement that the submission be related to "environmental law". The Secretariat will now address this preliminary matter to determine whether the submission meets the necessary requirements to be considered by the

Secretariat. Article 45(2) defines the term "environmental law" as follows:

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

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

Although the Secretariat has concluded that the Submission makes many allegations that could not be construed as relating to "environmental law", the Secretariat has also concluded that there are some claims that could potentially meet the threshold requirement of being assertions of a failure to effectively enforce "environmental law". The Secretariat now turns to the latter claims.

1) Failure to effectively enforce the LGEEPA in relation to the "denuncia popular" procedures

The Submitter argues that Mexico has failed to effectively enforce environmental legislation with relation to the "denuncia popular" pursued by the Submitter through writs delivered on 14 January 1994 and 6 October 1995 to the [Mexican] Department of Agriculture and Water Resources and to the Semarnap (pages 1 and 5 of the submission).

Firstly, the Secretariat observes that the submission and its annexes do not sufficiently support the claim

that the documents filed by the Submitter on 14 January 1994 and 6 October 1995, constitute a "denuncia popular". The term "denuncia popular" is not used in such submissions, nor is it indicated that the complaint was made under the provisions of the LGEEPA. Furthermore, the documents do not relate to a "fact, act or omission that resulted or may result in ecological imbalance or harm to the environment or natural resources, or that contravened the provisions of the LGEEPA and other legal codes regulating environmental protection and ecological balance preservation and restoration", as provided in Article 204 of the LGEEPA in relation to the "denuncia popular" procedure.

Notwithstanding the above, the Secretariat has examined the alleged "denuncia popular" presented by the Submitter, to determine whether it is related to "environmental law" for the purposes of its Article 14(1) review. In the opinion of the Secretariat, it is evident that the provisions of the LGEEPA establishing the "denuncia popular" procedures qualify as "environmental law" as defined in the above-mentioned Article 45(2). Nevertheless, it is equally clear for purposes of the NAAEC, that the facts addressed in the "denuncia popular" shall in each specific case comply with the provisions of Article 45(2). A "denuncia popular" may refer to violations of Mexican environmental laws as well as to other threats to the environment. It is the opinion of the Secretariat that the definition of "environmental law" in Article 45(2) implies that if procedural provisions such as those establishing the "denuncia popular" procedure, relate to substantive provisions that are clearly environmental in nature, they must also qualify as "environmental law" under Article 45(2).

In the present case, the Secretariat notes that the facts reported by the Submitter as a "denuncia popular" in the above-mentioned documents are not relevant to "i) prevention, control or abatement of a spill, discharge or emission of environmental pollutants, ii) control of hazardous or toxic chemicals, substances or waste and the dissemination of relevant information, or iii) protection of wildlife, including endangered species and their habitat, and natural protected areas." Therefore, the Secretariat cannot conclude that those complaints of the Submitter relate to environmental protection. On the contrary, the complaints are related to the management of commercial forestry resources, a subject which, under paragraph (b) of the above-mentioned the NAAEC article, is expressly excluded from the definition of "environmental law". The Submitter refers to this definition and argues that the complaint "is also related to wildlife species or forestry resources, the exploitation of which has been restricted by the authorities" (page 14 of the submission). In this regard, the Secretariat has examined the submission, the documents attached, and particularly the alleged "denuncia popular" and the Technical Audit Certificate in question. The Secretariat again notes that the above are related to the management of commercial forestry resources and do not relate to environmental protection. Therefore, this complaint cannot constitute a matter of "environmental law" as defined in Article 45(2).

2) Failure to effectively enforce the LGEEPA, in relation to the issuance of a technical opinion on harm caused as a result of violations of LGEEPA provisions

The Submitter claims that environmental authorities did not issue a technical opinion on harm in accordance with Article 194 of the LGEEPA, as that provision existed at the time of the "denuncia popular" (page 6 of the submission). Article 204 of the current LGEEPA, which contains the same text as the former Article 194, stipulates that parties concerned may request that Semarnap issue a technical opinion concerning harm caused as a result of violations of the LGEEPA. As regards these allegations, the Secretariat has found no evidence in the submission or in the attached documents that the Submitter requested a technical opinion under said provisions.

3) Failure to effectively enforce the [Mexican] Forestry Law, its Regulations and the Federal Administrative Procedures Law

The Submitter has made various allegations involving "procedural violations" (see pp. 2, 3, 7, etc. of the submission). In this regard, it should be noted that the process established in articles 14 and 15 of the NAAEC does not constitute a forum in which to revisit a Party's internal administrative proceeding; rather it is strictly framed within the obligations undertaken by the Parties signatory to the Agreement to effectively enforce their "environmental laws". In the context of the current submission, the provisions of the Forestry Law, its Regulations and the Federal Administrative Procedures Law cited by the Submitter do not constitute "environmental law" for the purposes of Article 14(1) of the NAAEC. In light of the above, the assertions regarding omissions in the effective enforcement of said provisions cannot be the subject of analysis on the part of the Secretariat, within the framework of the process established in articles 14 and 15 of the NAAEC.

4) Additional considerations by the Secretariat

The Secretariat is not required to examine all the questions raised by the Submitter until it has determined that the submission meets the requirements of Article 14(1) of the NAAEC, including the threshold requirement that submissions relate to "environmental law". However, we believe it is important to refer to a type of allegation which in the opinion of the Secretariat is not within its jurisdiction nor contemplated by the objectives listed in Article 1 of the NAAEC. The submission in question contains accusations against various government officials in different agencies and at different levels of government, which in the opinion of the Secretariat are inappropriate for this forum. The process established by the NAAEC in articles 14 and 15 aims at promoting cooperation amongst the Parties for environmental protection in North America. It should be stressed that this process, designed to examine submissions related to the failure to effectively enforce "environmental law", is not intended as a mechanism to review allegations respecting the performance of individual public officials. This process solely addresses the actions of the authorities as institutions, and the specific facts and actions that are related to the effective enforcement of "environmental law", as defined in the Agreement.

IV. DETERMINATION BY THE SECRETARIAT

The Secretariat has examined the submission in accordance with Article 14(1) of the NAAEC and has determined that it does not meet the requirements established therein, because it does not refer to a "failure to effectively enforce environmental law", for the reasons set out above. Under Article 6.1 of the Guidelines, the Secretariat hereby notifies the Submitter that it will not proceed to examine the submission. In accordance with Article 6.3 of the Guidelines, the Submitter has 30 days to file a submission that meets the criteria established in Article 14(1).

per: Janine Ferretti
Interim Executive Director

(23 June 1998.)