

Concise comparison between the National Environmental Policy Act and Mexico's General Law of Ecological Balance and Environmental Protection

Elva Denisse Varela Olivas

Table of Contents

- ⇒ Preface.
- ⇒ History and purpose of the NEPA and the LGEEPA.
- ⇒ Current governmental institutions in the U.S. and Mexico related to these environmental laws and how these agencies interact between them.
- ⇒ Overview of the Environmental Impact Assessment process regulated by the LGEEPA, and a brief comparison with the Environmental Assessment process regulated by the NEPA.
- ⇒ Conclusions
- ⇒ Acknowledge
- ⇒ Appendix.

Preface

This paper is a brief legal analysis of the similarities and differences between the National Environmental Policy Act (“NEPA”) and Mexico’s General Law of Ecological Balance and Environmental Protection (“LGEEPA”), which are enforced in the U.S. and Mexico, respectively. The NEPA has inspired other countries worldwide to use their lands following sustainability criteria and to address their environmental issues in a holistic way, and the LGEEPA in Mexico has not been the exception.

Mexico and the U.S. have executed interesting international environmental agreements; however, none of these agreements has duly considered the similarities and differences of the environmental laws applicable in Mexico or the U.S. For instance, one of the consequences of the lack of understanding of the applicable environmental laws in these countries is the reduced possibility to build sustainable major infrastructure in the U.S.-Mexico border. Therefore, this paper will show the similarities and differences between the NEPA and the LGEEPA in order to have a better understanding of these laws and to explore the possibilities of having broader international agreements, memoranda and treaties between Mexico and the U.S. in the near future.

1. History and purpose of the NEPA and the LGEEPA

1.1 Brief History of the NEPA and the LGEEPA

In December of 1969, the U.S. Congress enacted NEPA, which was signed into law by President Richard Nixon on January 1, 1970. NEPA was the first major environmental law in the United States and is often called the “Magna Carta” of environmental laws. More importantly, NEPA established a broad national framework for protecting the environment¹. The general regulations governing implementation of NEPA, which were published by the Council on Environmental Quality (“CEC”), are the most helpful elaboration on the bare requirements of the NEPA. These regulations are set forth in the Code of Federal Regulations pts. 1500 – 1508². Each federal agency also has its own regulations, which are typically published in the Code of Federal Regulations or in their internal manuals. They spell out in greater detail their policies for compliance with NEPA³.

Similarly, on March 21, 1971 the Federal Law for the Prevention and Control of Environmental Pollution (*Ley Federal para Prevenir y Controlar la Contaminación Ambiental*), which was the first federal environmental law in Mexico, was published in Mexico’s Federal Official Gazette. Three *Reglamentos*⁴ were enacted to implement this law: The *Reglamentos* were the Regulations to Prevent and Control Air Pollution; Regulations to Control Water Pollution; and Regulations to Prevent and Control Marine Pollution. In 1982, the Mexican Congress abrogated this law and enacted the Federal Law for the Protection of the Environment (*Ley Federal de Protección del Ambiente*), which included new environmental principles as the “socioeconomic development”. Subsequently, this law was abrogated by the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente –LGEEPA*)⁵.

The LGEEPA is the fundamental environmental law in Mexico. LGEEPA was enacted in 1988. This law has experienced several amendments: It sets forth chapters concerning environmental impact permits, prevention and control of air and water pollution. It also

¹ U.S.EPA. “Summary of the NEPA”. <http://www.epa.gov/lawsregs/laws/nepa.html> Last access to this Webpage: November 17, 2008

² NEPA is codified in 42 U.S.C. §§4321 – 4370.

³ PERCIVAL V., Robert. “Environmental Regulation: Law, Science, and Policy”. 1996. p. 1108.

⁴ *Reglamentos* are mandatory provisions that according to the Mexican Constitution are issued by the President of the Republic (or by Governor if the *reglamento* is only applicable in one State), through the competent Ministry, in order to detail how to implement a specific law issued by the Congress.

⁵ Notwithstanding in the 1970s, the Federal government in Mexico made its first attempts to establish laws designed to protect the environment. Mexico had to amend its Constitution in 1987 in order to give to the Congress, among other powers, the authority to enact laws to promote the participation of federal, state, and local authorities in environmental matters and to impose limitations on the use and ownership of real property in order to protect the ecological balance. This amendment gave rise to the enactment of LGEEPA.

provides enforcement procedures and other provisions concerning the respective responsibilities of the federal and state government⁶.

It is important to clarify the following: First, LGEEPA is not a federal law. It is a “General” Law, which according to Mexican Law it means that is a Law applicable to the all municipalities, states, and the federation. Second, when LGEEPA was enacted, unfortunately, the media, non-profit organizations and the population in general were focused mainly on deforestation⁷ and air pollution issues⁸. For this reason, environmental impact provisions were not considered a top priority in such Bill.

The *Reglamento* on LGEEPA regarding the environmental impact was published on June 7, 1988. It was subsequently abrogated by the new *Reglamento* on LGEEPA regarding environmental impact published on May 30, 2000. Other relevant Mexican provisions directly and indirectly related to environmental impact were published during discussions of the North American Free Trade Agreement (“NAFTA”) by the Mexican Government: the North American Agreement on Environmental Cooperation (“NAAEC”) and the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area⁹.

1.2 LGEEPA under the Civil Law perspective & NEPA under Common Law perspective

With respect to the fundamental differences between the legal systems of Mexico and the United States, it is important to point out that Mexico is a civil law jurisdiction while forty-nine states of the U.S. use the common law system¹⁰. Predominantly, the civil law system is based on statutes and laws. In contrast, the U.S. common law system is based on case law where judges set precedents for future cases. Civil law systems tend to be much more formalistic and rigid in which court decisions are based fundamentally on the text of statutes. Normally, civil law judges do not make public policy. However, in most civil law countries, the Supreme Court is the most important judicial branch that makes public policy, as well as some federal courts of appeals.

In the U.S., the common law was the legal system’s primary vehicle for responding to environmental issues, specially prior to the NEPA. Since 1970s the common law has been eclipsed by an explosion of environmental statutes in the U.S.¹¹ Conversely, the LGEEPA and all Mexican environmental laws have been published in Mexico in order to strengthen the civil law principles as the primary vehicle to respond to environmental issues.

⁶ Baker & McKenzie Abogados, S.C. “Doing Business in Mexico” 2006. p. 30.

⁷ UGALDE Vicente “Los residuos peligrosos en México: El estudio de la política publica a través del derecho”. p. 18

⁸ Mexico City topped lists of places with the worst air pollution in the world in 1980s. On July 2005 the Mexican Nobel Prize winner Mario Molina said, Mexico City no longer has the world's most polluted air.

⁹ UGALDE, Vicente. “Los residuos peligrosos en México: El estudio de la política publica a través del derecho” 2008 p. 170 -177 According to Ugalde, during such discussion the Mexican government also increased substantially the bureaucracy related to environmental inspection.

¹⁰ The exception is Louisiana, which uses the civil code.

¹¹ PERCIVAL V. Robert “Environmental Regulation: Law, Science and Policy”. 1996. p. 72

The Constitution of the United States of America (“U.S. Constitution”) does not provide any right in favor of the environment”¹². This may be because of the long tradition of making a few amendments to the U.S. Constitution.

On the other hand, the Mexican Constitution, as most Constitutions in civil law jurisdictions, tends to be broader. For instance, Article 4 of the Political of the Meset forth that “every person has the right to health protection” as well as “the right to an environment adequate for their development and wellness”. Mexican Constitution states these rights expressly, probably because such legal system (civil law system) requires significant level of written detail¹³. In fact, the Mexican Constitution provides that the laws shall set forth the rules and conditions to access health services and shall establish the concurrence of the Federation, the States and the Municipalities or the Federal District, in matters of general public health, as provided in section XVI of Article 73 of the Mexican Constitution. Additionally, this same article establishes that every person has the right to an environment suited to his or her development and well being.

The above mentioned difference of styles between the Mexican Constitution and the U.S. Constitution regarding how to ensure the environmental protection almost certainly rises because of the sources of environmental law of both countries: common law and civil law. The foundations of both legal systems consequently influence the way the constitutions of each countries are structured. As a civil law Constitution, Mexico’s Constitution covers a significant number of areas while the U.S. Constitution keeps its tradition of providing only the fundamentals of how the governments is organized and the rights that every individuals must have.

1.3 Purpose of NEPA and Purpose of LGEEPA

The purpose of NEPA is to declare a national policy which will encourage productive and enjoyable harmony between the people and the environment. NEPA’s objectives are¹⁴:

1. Promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;
2. Enrich the understanding of the ecological systems and natural resources important to the Nation; and
3. Establish CEQ

Similar to other bodies of laws in a civil law system, the purpose of LGEEPA is more complex and broader than NEPA. LGEEPA covers various environmental subjects such as the environmental policies, environmental impact, air pollution, environmental education, the procedure of physical inspections, and environmental sanctions and

¹² *Idem*

¹³ Analogy to solving criminal cases in Mexico is forbidden by Article 14 of the Mexican Constitution. Such Article means it is mandatory to comply strictly with the wording of the law. For example, freedom of Judges to solve cases is highly limited to the precise application of procedural rules stated in civil codes.

¹⁴ 42 U.S.C. §4321

penalties. However, NEPA is more inclusive than LGEEPA regarding the roles of governmental agencies related to NEPA.

With respect to environmental impact matters, the purpose of LGEEPA is to promote a sustainable development and provides the rules in order to:¹⁵

1. Guarantee the right of any person to live in an appropriate environment in favor of his development, health and welfare.
2. Define the principles for environmental policies and the instruments required for their application.
3. Ensure the sustainable development and conservation of water and other natural resources, as well as the soil restoration.
4. Guarantee the co-responsible participation of people for the conservation and restoration of the environmental protection and ecological balance.
5. Create coordination, induction and cooperation mechanism between governmental authorities, between them and the private and social sectors, as well as people and social groups, in environmental matters¹⁶.

2. Governmental agencies in the U.S. and Mexico related to these environmental laws

2.1 Main obligations of the governmental agencies in the U.S. and Mexico

In NEPA, Congress adopted an unusual strategy to pursue its goal. Instead of approving, as others laws and statutes in Mexico and in the U.S., an elaborate regulatory scheme applicable to business and industry, NEPA provides a significant change in the decision making procedures used by federal agencies. NEPA required all federal agencies to consider all the environmental effects of their activities. This change in the decision making procedures used by agencies to consider values of environmental preservation in their spheres of activities is considered, for many experts, a major step¹⁷.

“Include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action [...]”¹⁸

NEPA imposes this general requirement to all federal agencies. Only the U.S. Congress can exempt an agency from NEPA. It is also possible for the Council on Environmental Quality (CEQ) to give alternative arrangements, but such arrangements are not statutory exemptions for the agencies. For additional information regarding specific cases related to the U.S. Department of Homeland Security activities and U.S. Department of Defense

¹⁵ Article 1 of the LGEEPA

¹⁶ These are some of the purposes of the LGEEPA.

¹⁷ PERCIVAL V. Robert. “Environmental Regulatory Law, Science, and Policy” p. 1109 and 1112

¹⁸ Section 102 of NEPA

training activities the reader may review *Sovereignty, Borders, and Transboundary Biodiversity*¹⁹.

The U.S. Congress directed that, the policies, regulations, and laws of the U.S. shall be interpreted and administered in accordance with the principles set forth in NEPA. To implement these NEPA's policies, U.S. Congress prescribed a procedure, commonly referred to as "the NEPA process" or "the environmental impact assessment process."²⁰

On the other hand, LGEEPA provides changes in the decision-making procedures used by Mexican ministries and other governmental authorities. However, in contrast to NEPA, it does not clearly state the obligation of all ministries to include in every recommendation or report a detailed statement on the environmental impact-

*"Regulations, Mexican Official Standards and sphere of activities of agencies and entities of the Federal Public Administration related to LGEEPA, but stated in other federal laws, will be adjusted in order to preserve and sustain the environment and natural resources."*²¹

In 1979, CEQ issued binding regulations directing agencies on the fundamental requirements necessary to fulfill their NEPA obligations. The CEQ regulations also directs agencies to create their own implementing procedures that supplement the minimum requirements based on each agency's specific mandates, obligations, and missions²².

In 1988, the Mexican Ministry of Ecology and Urban Development ("SEDUE")²³ issued the *Reglamento* on LGEEPA regarding environmental impact²⁴. This *Reglamento* was abrogated by the *Reglamento* on LGEEPA regarding environmental impact manifest published in 2000 by the Ministry of Environment and National Resources ("SEMARNAT"), because the SEDUE no longer exists, and the SEMARNAT is now the name of the federal ministry in charge of environmental matters. According to Article 2 of the *Reglamento* on LGEEPA regarding environmental impact manifest, SEMARNAT is the only governmental agency that has specific obligations and missions. And pursuant to article 4 Section III of the same *Reglamento*, SEMARNAT must request the opinion from other authorities (e.g. other federal ministries) and experts during the evaluation process.

Additional obligations of Mexican federal ministries and other interested parties - are set forth in the following laws and regulations:

¹⁹ Sovereignty, Borders, and Transboundary Biodiversity: Turning a Potential Tragedy into a True Partnership and Introduction to the Theory and Practice of Conservation Biology in the Security Bisected U.S.-Mexican Border Region. D. Rick Van Schoik, Elena Lelea and John Cunningham p. 14. 2006

²⁰ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last access to this Webpage: November 23, 2008.

²¹ Article 6 of LGEEPA

²² http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last access to this Webpage: November 23, 2008.

²³ The majority of its functions were passed to SEMARNAT

²⁴ New Regulations to LGEEPA regarding Environmental Impact were published in May 30, 2000.

Regulation on the Airports Law, Article 9 Section II-f)	Regulation on the Mining Law, Article 62	Federal Law of Roads, Bridges and Auto-transportation, Article 5 Section IV
It is mandatory to include in each project or proposal evidence of compliance with environmental provisions and technical safety.	It is mandatory for all interested parties, compliance with provisions of LGEEPA, its Regulations and Mexican Official Standards.	It is mandatory for the Ministry of Communications and Transportations (SCT) to verify the compliance of all applicable technical and mandatory provisions, within the limits of its own powers. Please review Article 6 of LGEEPA.

2.2 Governmental agencies in the U.S.

As discussed before, according to NEPA, each federal agency is responsible of implementing NEPA, but the primary responsibility is vested in the CEQ, set forth in NEPA. There are three federal agencies with particular responsibilities for NEPA (1) CEQ, (2) epa, and (3) U.S. Institute for Environmental Conflict Resolution:

- 1) **CEQ:** The U.S. Congress placed CEQ in the Executive Office of the President as part of the NEPA and gave it many responsibilities²⁵. Additional responsibilities were provided by the Environmental Quality Improvement Act of 1970. CEQ works closely with agencies and other offices in the development of environmental policies and initiatives. Furthermore, CEQ reports on important developments in the environment to the U.S. President; oversees federal agency implementation of the environmental impact assessment process; and acts as a referee when agencies disagree over the adequacy of such assessments. NEPA assigns CEQ the task of ensuring that federal agencies meet their obligations under the Act. The challenge of harmonizing the U.S. economic, environmental and social aspirations has put NEPA at the forefront of the U.S.'s efforts to protect the environment²⁶.
- 2) **EPA:** The Environmental Protection Agency's (EPA) Office of Federal Activities reviews environmental impact statements (EIS) and some environmental assessments (EA) issued by Federal agencies. It provides its comments to the public by publishing summaries of them in the Federal Register, a daily publication that provides notice of Federal agency actions. EPA's reviews are intended to assist Federal agencies in improving their NEPA analyses and decisions²⁷.

²⁵ PERCIVAL V. Robert. "Environmental Regulatory Law, Science, and Policy" p. 1111

²⁶ <http://www.whitehouse.gov/administration/eop/ceq/> Last access to this Webpage: March 22, 2009.

²⁷ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last access to this Webpage: November 23, 2008.

- 3) **U.S. Institute for Environmental Conflict Resolution:** Another government entity involved in NEPA is the U.S. Institute for Environmental Conflict Resolution, which was established by the Environmental Policy and Conflict Resolution Act of 1998 to assist in resolving conflicts over environmental issues that involve Federal agencies. While part of the Federal Government (it is located within the Morris K. Udall Foundation, a Federal agency located in Tucson, Arizona), it provides an independent, neutral, place for Federal agencies to work with citizens as well as State, local, and Tribal governments, private organizations, and businesses to reach common ground. The Institute provides dispute resolution alternatives to litigation and other adversarial approaches. The Institute is also charged with assisting the Federal Government in the implementation of the substantive policies set forth in Section 101 of NEPA²⁸.

2.3 Governmental agencies in Mexico

On the other hand, according to LGEEPA, each federal agency is responsible for adjusting their laws and regulations in order to preserve and sustain the environment, but the primary role is vested in the SEMARNAT. There are some federal authorities that have particular responsibilities in accordance with the Mexican Constitution and the LGEEPA (1) General Health Council, (2) SEMARNAT, and (3) PROFEPA:

- 1) **General Health Council:** Article 73 Section XVI of the Mexican Constitution establishes that the Congress shall have the powers to enact laws with regard to nationality, legal status of aliens, citizenship, naturalization, colonization, emigration and immigration and general public health of the Republic. As an exception of the powers to enact laws in these matters, the same Section XVI Article 73 of the Mexican Constitution provides that the President of Mexico shall create the General Health Council, which is under the sphere of Mexico's Executive Branch., in a similar way to the CEC in the U.S. The following are the four specific provisions contained in the referred Section XVI:

1° The General Health Council shall depend directly from the President of the Republic, without intervention from any Ministry, and its general provisions shall be mandatory throughout the country

2° In case of serious epidemics or danger of strike of exotic diseases throughout the country, the Ministry of Public Health shall be required to immediately issue any necessary preventive measures subject to the President of the Republic's subsequent approval

3° The public health authority is vested with executive powers, and its provisions shall be obeyed by the country's administrative authorities

4° The measures that the **Council has put into effect** in the campaign against alcoholism and the sale of substances that poison individuals or degenerate the human species, **as well as those measures adopted to prevent and fight against environmental pollution**, shall thereafter be examined by the

²⁸ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last access to this Webpage: November 23, 2008.

- 2) **SEMARNAT:** This is a cabinet-level agency entrusted with setting and overseeing national policy regarding environmental protection, restoration and conservation of ecosystems and natural resources in order to favor their well use and the sustainable development²⁹. SEMARNAT is organized in three Sub-ministries, seventeen General Offices, four Decentralized Agencies, and at least one Local Office in each State. The General Office of Risk and Environmental Impact is the office of SEMARNAT in charge of the EIAs³⁰. Specifically the General Office of Risk and Environmental Impact is in charge of the following, for example:
- a. Revise the EIAs and the Preventive Notices prepared as well as issue the corresponding authorization regarding environmental impact under Federal jurisdiction.
 - b. Supervise the public consultation process for EIAs.
 - c. Collaborate with PROFEPA measuring the environmental impact caused by those projects which did not comply with the regular environmental impact process³¹.
- 3) **PROFEPA:** The Federal Bureau of Environmental Protection (“PROFEPA”) is a federal decentralized³² agency of SEMARNAT in charge of carrying out enforcement activities³³. LGEEPA imposes administrative penalties, remedial actions and fines on violators. PROFEPA has wide authority to select and apply penalties. In the past, PROFEPA has generally handled violations of the environmental laws by ordering violators to take corrective actions and in certain cases to shut down their businesses until the violations were corrected. PROFEPA may also order a non-complying business to close permanently³⁴. It has the power to (i) impose administrative fines and to double their amounts in the case of repeat offenses, (ii) order the seizure of pollutant equipment or devices, (iii) order the cancellation of environmental licenses or permits and (iv) order the administrative arrest for up to 36 hours of managers, directors and any employee directly related to the breach of law. PROFEPA may also pursue criminal prosecution before the Attorney General’s Office. Environmental crimes are set forth in the Federal Criminal Code. Prison terms may range from 6 months to 10 years depending on the seriousness of the violation³⁵.

2.4 The relationship between the CEQ and the EPA:

²⁹ Article 32 Bis of the Organic Law of the Federal Public Administration.

³⁰ Article 2 of the Internal Regulation of SEMARNAT

³¹ Article 27 of the Internal Regulation of SEMARNAT.

³² A federal decentralized agency, is a federal department or agency created to support specific areas or works of a ministry.

³³ Baker & McKenzie Abogados, S.C. “Doing Business in Mexico”. 2006. p. 31.

³⁴ Baker & McKenzie Abogados, S.C. “Doing Business in Mexico”. 2006. p. 36.

³⁵ Idem

The Environmental Protection Agency (“EPA”) is legally required to comply with the procedural requirements of NEPA for its research and development activities, facilities construction, wastewater treatment construction grants under Title II of the Clean Water Act (CWA) EPA issued the National Pollutant Discharge Elimination System (“NPDES”) permits for new sources and for certain projects funded through EPA’s Annual Appropriations Acts³⁶.

On July 9, 1970, President Richard M. Nixon expressed the following regarding the relationship between the CEQ and the U.S.EPA:

“It is my intention and expectation that the two will work in close harmony, reinforcing each other's mission. Essentially, the council is a top-level advisory group (which might be compared with the Council of Economic Advisers), while the U.S.EPA would be an operating, "line" organization. The Council will continue to be a part of the Executive Office of the President and will perform its overall coordinating and advisory roles with respect to all Federal programs related to environmental quality.”³⁷

2.5 The relationship between Mexico’s General Health Council and SEMARNAT:

The General Health Council was created through a Constitutional amendment. Its creation was published on the Federal Official Gazette of Mexico on January 18, 1934. The General Health Council has experienced several roles along its history which has been mainly focused on public health³⁸. Since the Constitution amendment published on July 6, 1971, the General Health Council has also legal authority to put into effect measures to prevent and fight environmental pollution. Unfortunately, the General Health Council has never put into effect measures to prevent or fight environmental pollution. Therefore, the potential of the General Health Council as a genuine “Mexican CEQ” has not been duly explored in Mexico.

The same Mexican Constitution states that these measures to prevent and fight environmental pollution shall thereafter be examined by the Mexican Congress in the cases under its jurisdiction. It means the Mexican Congress would have the authority to enact those environmental measures raised by this “Mexican CEQ.” But the Mexican Congress has never examined the possibility to enact measures regarding environmental matters raised by this council. Besides, the Internal Regulations of the General Health Council are limiting the potential of the General Health Council as a genuine “Mexican CEQ”, because they do not state any provision regarding how to put into effect the “new” legal authority of this council to prevent and fight environmental pollution.

³⁶ U.S.EPA EPA Compliance with NEPA <http://www.epa.gov/compliance/nepa/epacompliance/index.html>
Last access to this Webpage: January 8, 2008.

³⁷ U.S.EPA History of the U.S.EPA <http://www.epa.gov/history/org/origins/reorg.htm> Last access to this Webpage: November 23, 2008.

³⁸ MARTÍNEZ BARBOSA Xóchitl, The General Health Council: historic explanation of its evolution and analysis of its current situation 1935-2000.

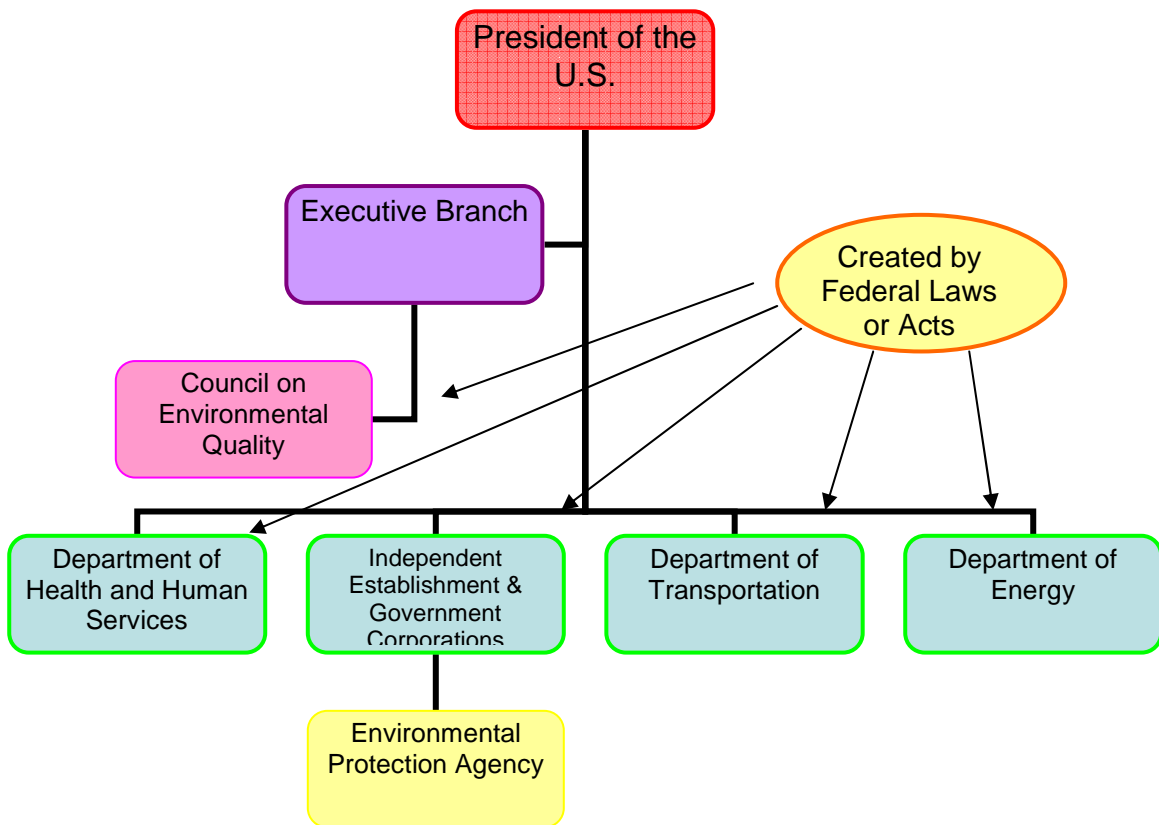
As a result, the General Health Council and the SEMARNAT have had only extremely limited interaction, notwithstanding the Constitutional amendment of 1971 herein discussed.

2.6 Other governmental agencies in the U.S. and Mexico:

Many federal agencies in the U.S. have established offices dedicated to NEPA policy and program oversight. Employees in these U.S. offices prepare NEPA guidelines, policy, and procedures for the agency, and often make this information available to the public through sources such as the Internet. Agencies are required to develop their own capacity within a NEPA program in order to conduct analyses and review documents (or review those prepared by others) to ensure informed decision making³⁹. Conversely, hardly any federal ministry in Mexico has personnel dedicated to ensure the preservation of the environment in accordance with LGEEPA.

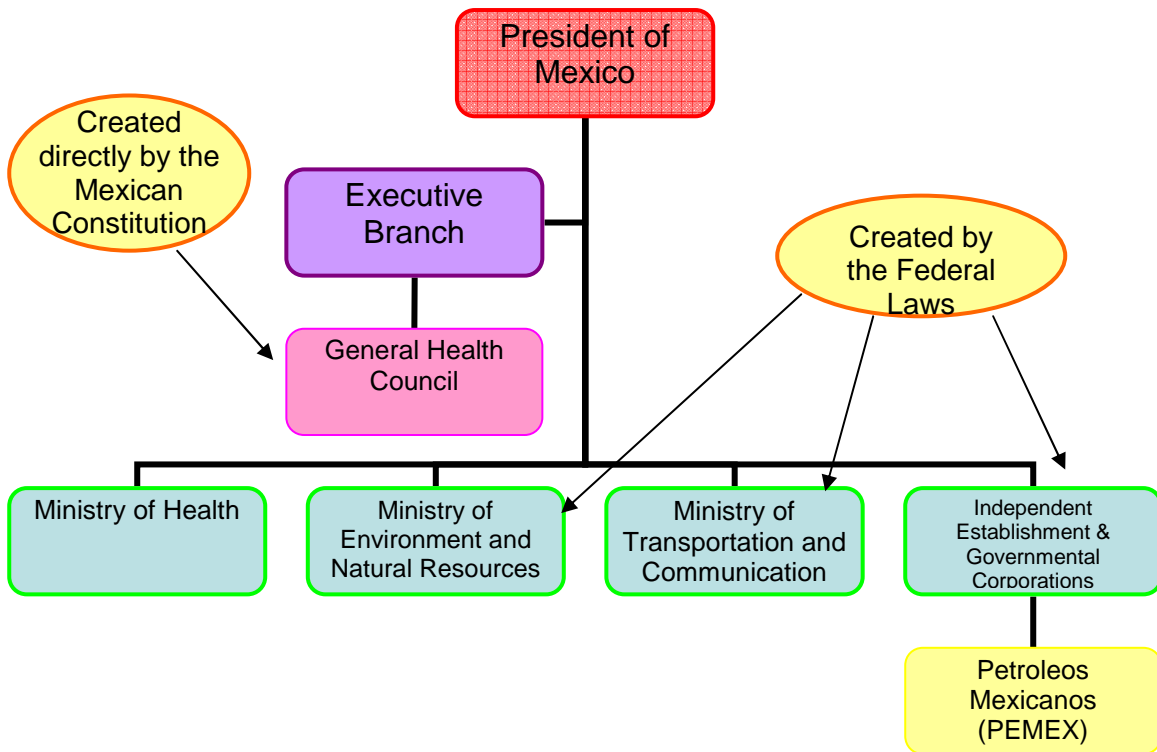
Because the charts only intend to demonstrate the similarities between the U.S. and the Mexican systems, the following organization charts do not include all the departments, offices and ministries

U.S. INSTITUTIONS



³⁹ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last update of this Webpage: November 23, 2008.

MEXICAN INSTITUTIONS



3. Overview of the Environmental Impact Assessment process regulated by the LGEEPA, and a brief comparison with the Environmental Assessment process regulated by the NEPA.

The purpose of the NEPA process is to implement the policies of NEPA provided in Section 101 [42 USC § 4331]. In order to comply with such purpose, among other actions, NEPA assures that all branches of government grant proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment⁴⁰. To implement these specific policies, NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA's policies⁴¹.

⁴⁰ U.S.EPA. "Summary of the NEPA". <http://www.epa.gov/lawsregs/laws/nepa.html> Last access to this Webpage: November 17, 2008

⁴¹ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last access to this Webpage: November 23, 2008.

NEPA requirements are invoked when proposals for airports, buildings, military complexes, highways, parkland purchases, regulations, and other federal activities take place. Environmental Assessments (“EAs”) and Environmental Impact Statements (“EISs”), which are assessments of the likelihood of impacts from alternative courses of action, are required from all federal agencies and are the most visible NEPA requirements. The threshold for the EIS requirement is set out in the NEPA, where an EIS must be prepared for “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”⁴²

Similarly, prior to initiating operations in Mexico, various activities must obtain an environmental impact authorization (EIA)⁴³. These activities include oil, petrochemical, steel, paper, sugar, mining, cement and electricity generation industries, as well as hazardous waste treatment, confinement and disposal activities. If the activity to be carried out at the facility is federally regulated pursuant to LGEEPA, such an EIA must be obtained from SEMARNAT⁴⁴. But if the activity to be carried out is not federally regulated, the EIA must be obtained from the corresponding State or Municipal Environmental Authority. As a result, federal highways and industrial facilities that initiated operations in Mexico prior to 1988 (year in which LGEEPA was enacted) were not required to obtain an EIA, as long as their construction or production process has not been modified after the enactment of LGEEPA⁴⁵.

Furthermore, if an industrial facility in Mexico uses or intends to use certain toxic, flammable or explosive substances, it may be considered a high-risk activity under Mexican law. High-risk activities are those in which specific threshold limits for toxic, flammable or explosive substances are surpassed. For example, the use of 500 kilograms or more of propane gas is considered a high-risk activity. Facilities engaging in high-risk activities are required to file with SEMARNAT a risk study in addition to the environmental impact manifest necessary to obtain an EIA⁴⁶.

EIA process is described in the *Reglamento* on LGEEPA regarding Environmental Impact. Recently, SEMARNAT has increased its sophistication and now this federal ministry is requiring “better” EIAs. From January to June 2008, for example, 276 EIAs were filed with SEMARNAT (15.5 percent more EIAs than 2007) and 307 EIAs were concluded, but only 61.6 percent of EIAs processes concluded during such period of time were approved by SEMARNAT in order to allow realization of the proposal (project)⁴⁷.

Although the achievements described above are acceptable, some obstacles to enforce the EIAs in Mexico still exist, For example, from January to June 2008, SEMARNAT

⁴² PERCIVAL V. Robert. “Environmental Regulatory Law, Science, and Policy” p. 1119

⁴³ Article 28 of LGEEPA

⁴⁴ Baker & McKenzie Abogados, S.C. “Doing Business in Mexico”. 2006. p. 32

⁴⁵ Baker & McKenzie Abogados, S.C. “Doing Business in Mexico”. 2006. p. 32

⁴⁶ Idem

⁴⁷ Presidential Annual Report

http://www.informe.gob.mx/informe/PDF/SUSTENTABILIDAD_AMBIENTAL/M408-415.pdf

concluded evaluation process of these 307 EIAs with a reduced personnel of 48 public servants of all levels⁴⁸.

Furthermore, once the project is approved, the physical inspection authorities of PROFEPA may also face some obstacles in order to enforce the compliance of the environmental laws. Specifically, PROFEPA has 850 federal inspectors⁴⁹ throughout Mexico. But some Mexican states have a deficit of inspectors. For instance, the State of Jalisco, with a population of 6 million of inhabitants, only has 7 inspectors⁵⁰; the State of Sinaloa has 21 inspectors⁵¹; and the State of Durango has 18 inspectors⁵².

Some obstacles related to the enforcement of law have been reduced according to statistics provided by SEMARNAT and PROFEPA. For example, the enforcement of environmental laws (measured in the amount of criminal cases solved in favor for the environment), increased 900 percent from 2001 to 2007⁵³. In 2007, for example, PROFEPA performed 15,246 physical inspections, and such Bureau solved 23,170 cases (only 7 percent of these resolutions were contested or challenged). The same year, 966 lawsuits against PROFEPA were filed with the Federal Court of Tax and Administrative Justice (TFJFA, in Spanish) and only 193 lawsuits⁵⁴ were filed before other judicial authorities against PROFEPA due to potential violations to the Constitutional Rights.

Conclusions

Various similarities and differences exist between NEPA and LGEEPA. To summarize, some of these similarities and differences are the followings:

- ⇒ NEPA requirements are invoked when proposals for airports, buildings, military complexes, highways, parkland purchases, and other federal activities take place. Similarly, prior to initiating operations in Mexico, several activities under federal jurisdiction, including petrochemical, mining, and electricity generation industries, as well as hazardous waste treatment and disposal activities, must obtain an EIA according to LGEEPA.
- ⇒ NEPA and LGEEPA both set forth as the continuing policy of the federal governments the use of all practicable means to create and maintain conditions under which man and nature can exist in productive harmony.

⁴⁸ The General Office of Risk and Environmental Impact of the SEMARNAT has

⁴⁹ <http://www.senado.gob.mx/gace.php?sesion=2008/10/02/1&documento=85> Last Update March, 2009.

⁵⁰ http://www.sisi.org.mx/jspsi/documentos/2006/seguimiento/16131/1613100002606_065.doc (2006) Last Update March 22, 2009.

⁵¹ <http://www.noroeste.com.mx/publicaciones.php?id=395781> (2008) Last Update March 22, 2009.

⁵² <http://www.elsiglodetorreon.com.mx/noticia/135031.enfrenta-profepa-falta-de-diez-inspectores.html> (2005) Last Update March 22, 2009.

⁵³ PROFEPA, Annual Report 2007 <http://www.profepa.gob.mx/NR/rdonlyres/467ACCCE-C28D-49BF-AC8D-D0050B4C22DD/0/JUSTICIAAMBIENTALINFORME2007.pdf>

⁵⁴ Total 193 = 121 Amparo Indirecto / 72 Amparo Directo

- ⇒ NEPA requires that all federal agencies prepare an EIS on major federal actions that significantly affect the quality of the environment. However, according to the *Reglamento* on LGEEPA regarding environmental impact manifest, SEMARNAT is the only federal agency that has specific obligations and missions regarding environmental impact evaluation. For specific projects, obligations to other federal ministries and interested parties in Mexico regarding the environmental impact assessment are set forth in other laws and regulations.
- ⇒ NEPA outlines duties and functions of CEQ including reporting on the condition of the environment. However, the General Health Council does not deal with environmental impact matters conducted by SEMARNAT. Neither the LGEEPA nor the Internal Regulations of the General Health Council outline duties and functions for the General Health Council regarding environmental impact assessments. Only the Mexican Constitution states the General Health Council as chief advisor to the President of Mexico regarding health and environmental concerns.

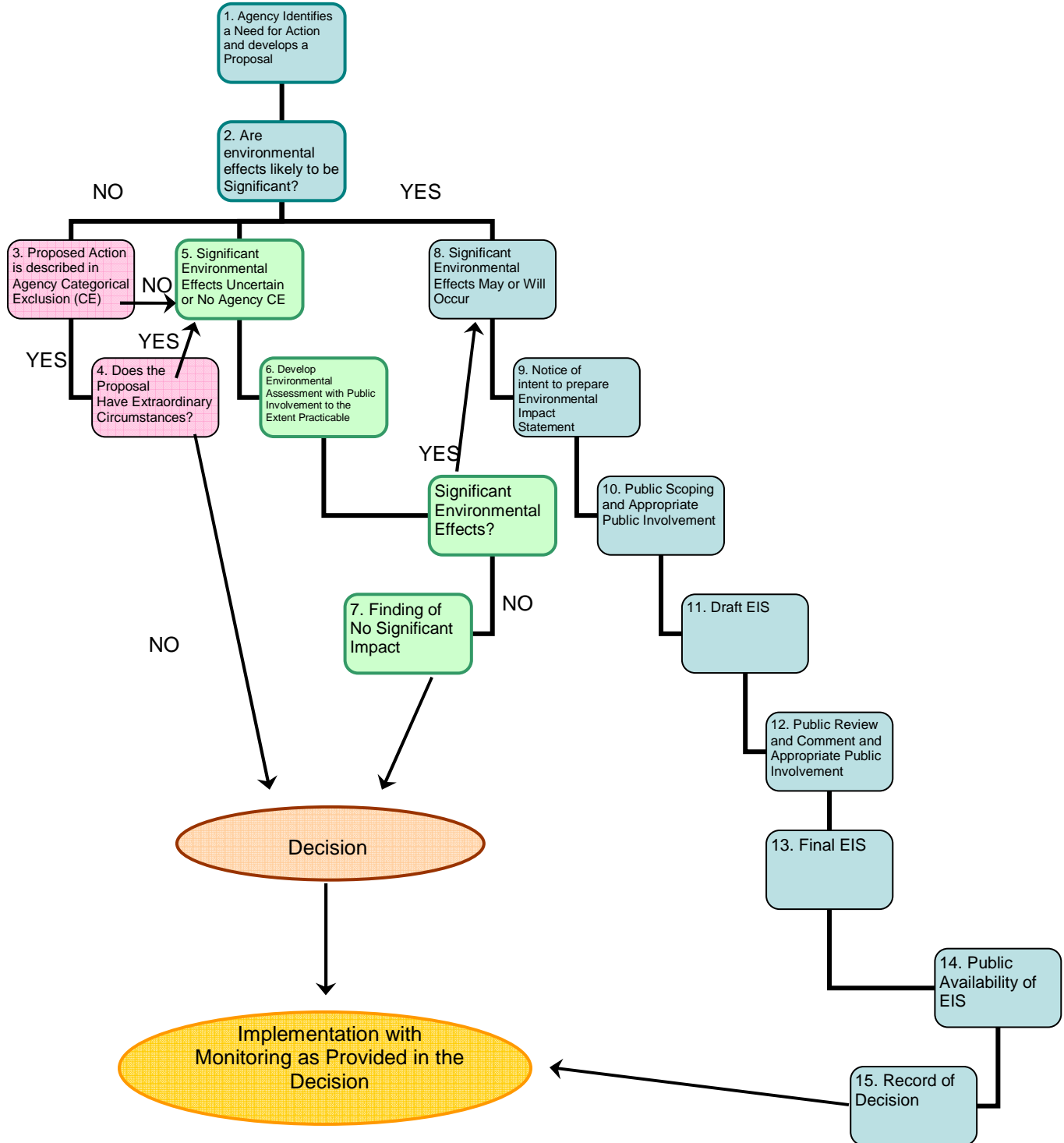
Acknowledgements

Thank you to all instructors of the NEPA courses that I took at Duke University, and thank you to the all staff members of Duke University, especially to Susanna Liller, Ray Clark, Gary Williams, Elizabeth Homer, Dinah Bear, Bill Cohen, Horst Greczmiel, Larry Camper, David Yentzer, Ted Boling, Gene Cleckley, George Prochaska, Masson Morisset, Joe and Carol Conner, Jessica Miller and Emily Guirl.

Thank you to Benjamin Varela (my brother) and Humberto Guerrero for their comments and very valuable feedback for the elaboration of this paper.

Thank you to my family (Lizette Varela and my parents), close friends (Marcos Perales, Grecia Cano and Saul Perez) and my bosses (Raul Felix and Federico Ruanova) for their incomparable support and honest advice.

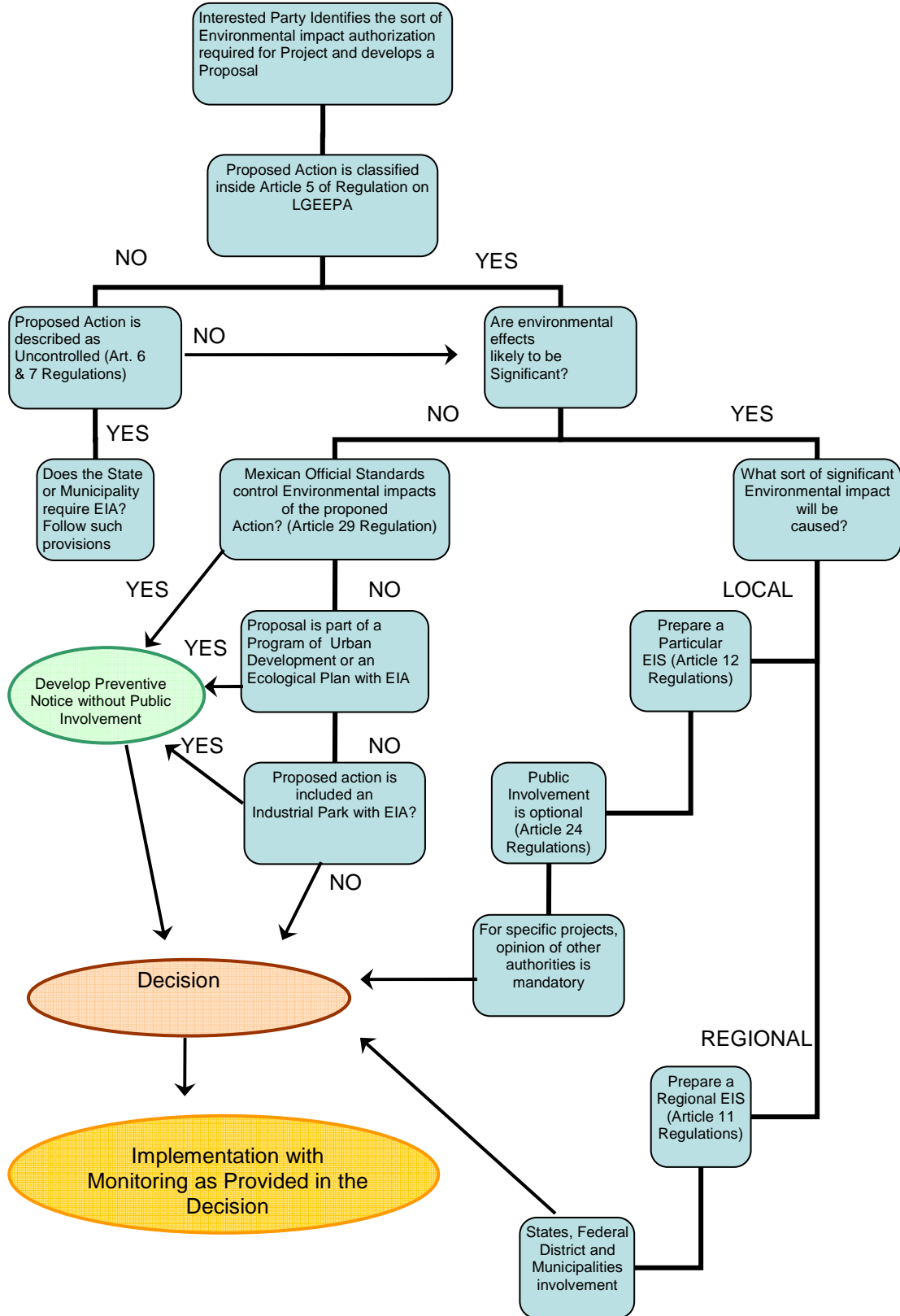
The NEPA Process



**Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).⁵⁵*

⁵⁵ http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf Last update of this Webpage: November 23, 2008.

The LGEEPA Process



EIA: Environmental Impact Authorization
 EIS: Environmental Impact Survey
 This Chart was prepared according to LGEEPA and the Regulations on LGEEPA in the area of Environmental Impact

List of References

“Environmental Regulation: Law, Science, and Policy”. Robert V. Percival, Alan S. Millar, Christopher H. Schroeder and James P. Leape. Aspen Law & Business. Aspen Publishers, Inc. Second Edition. 1996.

“Los residuos peligrosos en México: El estudio de la política publica a través del derecho”. Vicente Ugalde. El Colegio de México. First Edition. 2008.

Constitution of the United States of America (U.S. Constitution)

Political Constitution of the United Mexican States (Mexican Constitution)

General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y Protección al Ambiente –LGEEPA*)

Regulations to LGEEPA regarding Environmental Impact Assesment (*Reglamento de la LGEEPA en materia de evaluación de impacto ambiental*)

Internal Regulations of SEMARNAT (*Reglamento Interior de la Secretaria de Medio Ambiente y Recursos Naturales*)

Internal Regulations of the General Health Council (*Reglamento Interior del Consejo de Salubridad General*)

National Environmental Policy Act –NEPA

“Doing Business in Mexico”. Baker & McKenzie Abogados, S.C. 2006.
http://www.bakernet.com/NR/rdonlyres/219EF148-9DD9-49C8-8513-13CB1B6829C6/0/dbi_mexico2006.pdf

Sovereignty, Borders, and Transboundary Biodiversity: Turning a Potential Tragedy into a True Partnership and Introduction to the Theory and Practice of Conservation Biology in the Security Bisected U.S.-Mexican Border Region. D. Rick Van Schoik, Elena Lelea and John Cunningham. The U.S.-Mexican border environment: Transboundary Ecosystem Management. SCERP Monograph Series, no. 15, 2006.

“Environmental Policy and NEPA: Past, Present, and Future”. Ray Clark and Larry Canter. St. Lucie Press. 1997.

“The General Health Council: historic explanation of its evolution and analysis of its current situation 1935-2000” Xóchitl Martínez Barbosa, Fernando Martínez Cortés, and Octavio Rivero Serrano. 2000.

(NEPA) www.nepa.gov

(U.S.EPA) www.epa.gov

(U.S.C.) United States Code

(PROFEPA) www.profepa.gob.mx

www.sisi.org.mx/jspsi/documentos/2006/seguimiento/16131/1613100002606_065.doc

www.informe.gob.mx

(Mexican Congress) www.senado.gob.mx

APPENDIX

NEPA	Does LGEEPA have similar provisions?
§101 establishes as the continuing policy of the Federal Government the use of all practicable means to create and maintain conditions under which man and nature can exist in productive harmony.	Yes. Article 1 of LGEEPA. The Mexican Constitution also establishes similar provisions.
§102 requires all federal agencies to prepare an environmental impact statement (EIS) on major federal actions significantly affecting the quality of the environment.	No.
§102 The EIS must include a detailed statement of environmental impacts, alternatives to the proposed action and any irretrievable commitments of resources involved.	Yes. Article 30 of LGEEPA.
§102 creates judicially enforceable duties.	Yes. Articles 171 and 182 of LGEEPA. The Federal Criminal Code also describes what is considered an environmental crime.
§103 requires all federal agencies to propose measures to bring their policies into conformity with NEPA.	Not clear enough. Article 6 of LGEEPA .
§201 requires the president to submit to Congress an annual Environmental Quality Report. Additionally, the U.S. Constitution stipulates that the president “shall from time to time give to Congress information of the State of the Union and recommend to their Consideration such measures as he shall judge necessary and expedient” (Article II, Section 3).	No exactly. SEMARNAT only has to support the President with the elaboration of the <i>Informe Presidencial</i> , which is equivalent to the U.S. State of the Union Address. The General Health Council does not have to submit any report to the President of Mexico or the Mexican Congress. Article 69 of the Mexican Constitution and Article 20 Section X of the Internal Regulations of SEMARNAT.
§202 establishes three-member Council on Environmental Quality (CEQ) in the Executive Office of the President.	Mexico’s Minister of Health is the President of the General Health Council. This Council is established with at least twelve-members. A representative from SEMARNAT is one of the members of this Council. Article 3 of the Internal Regulations of the General Health Council.
§204 outlines duties and functions of CEQ including reporting on the condition of the environment,	General Health Council does not deal with environmental impact matters

information gathering, investigation and appraisal of changes in the natural environment and review and appraisal of federal programs and activities.

conducted by SEMARNAT.

Sources:

- ⇒ LGEEPA
- ⇒ U.S. Constitution
- ⇒ Mexican Constitution
- ⇒ Internal Regulations of SEMARNAT
- ⇒ Internal Regulations of the General Health Council
- ⇒ “Environmental Regulation: Law, Science, and Policy”. Robert V. Percival, Alan S. Millar, Christopher H. Schroeder and James P. Leape. Aspen Law & Business. Aspen Publishers, Inc. Second Edition. 1996. p. 1110 - 1113