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Mexico

Carlos de Icaza Aneiros and Jessica Villaverde Gálvez
Creel, García-Cuéllar, Aiza y Enríquez, S.C.

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ENVIRONMENTAL REGULATORY FRAMEWORK

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

Sources of environmental law

Mexico has 31 states, one federal district and about 2,454 municipalities. The Federal Congress (Congress) can legislate to establish the concurrent authority of the federal, state and municipal governments to regulate, within their jurisdiction, the (*Mexican Constitution (Constitution)*):

- Protection of the environment.
- Preservation and restoration of the ecological balance.

Federal statutes (*see below, Statutes*) stemming from the Constitution provide the framework and basis for the national environmental regulatory scheme.

International instruments, such as international treaties or trade agreements, are also a source of environmental law. Their influence has shaped the environmental regime and provided instruments to enforce environmental legislation.

Statutes

General Law on Ecological Equilibrium and Environmental Protection (LGEEPA) 1988. LGEEPA is the primary environmental law. Through LGEEPA, Congress primarily distributes powers between the three levels of government and sets out overarching policies for environmental regulation, as well as the basic environmental legislation.

Other statutes. Various other general statutes have been issued at federal level, such as the:

- National Waters Law (LAN).
- General Law on Wildlife.
- General Law on the Prevention and Comprehensive Management of Waste (LGPGIR).

Environmental laws have emerged in all states and in many municipalities.

Regulations

Regulations to enforce environmental laws are issued by the administrative agency in charge of the relevant sector. These include regulations on hazardous waste, water, environmental audits, air emissions, natural protected areas and ecological ordinance. Environmental regulations have been also issued in the states and municipalities.

Mexican Official Norms (NOM)

NOMS are technical standards issued by the competent administrative authorities. They set out binding specifications, standards, values and characteristics applicable to any products, process, facilities, systems, activities, services or methods of production.

NOMS set out maximum allowable pollutant limits for contaminants in air, water and soil, and list hazardous waste, substances, and endangered species.

Additionally, there is a voluntary category of standards, known as Mexican Norms, which are mostly used to provide guidelines and criteria on technical matters.

Regulatory authorities

The Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*) (SEMARNAT) (*see box, The regulatory authority*) is the main governmental agency in charge of enacting and enforcing environmental regulation at the federal level.

There are four administrative agencies associated with SEMARNAT that oversee specific areas of environmental policy:

- The National Institute of Ecology (*Instituto Nacional de Ecologia*) (INE).
- The National Water Commission (*Comisión Nacional del Agua*) (CNA).
- The Office of the Federal Prosecutor for Environmental Protection (*Procuraduria Federal de Protección al Ambiente*) (PROFEPA). PROFEPA is the enforcement arm of SEMARNAT. It has the authority, under the internal regulations of SEMARNAT, to:
  - carry out inspection visits;
  - prosecute environmental non-compliance;
  - apply sanctions;
  - generally enforce environmental laws and regulations.

  PROFEPA also oversees the federal voluntarily environmental audit programme.
- The National Commission for Natural Protected Areas (*Comisión Nacional de Areas Naturales Protegidas*) (CONANP).

There are also two decent ralised administrative departments which act under the co-ordination of SEMARNAT:

- The Mexican Institute of Water Technology (*Instituto Mexicano de Tecnología del Agua*) (IMTA).
- The National Forestry Commission (*Comisión Nacional Forestal*) (CONAFOR).

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REGULATORY ENFORCEMENT

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

Environmental statutes and regulations are generally clear about the consequences and penalties for non-compliance with them, and on the procedures to enforce and apply them. Administrative law is strictly enforced, and law enforcement is driven by the constitutional principle of legality and due process.

Mexico has seen a trend of improvement in enforcement practices over the past decade. However, there are complex issues that affect law enforcement in general, ranging from Mexico's relatively new democratic regime to inappropriate practices in administrative and judicial structures.

A crucial factor is limited resources, both human and budgetary, facing the enforcement agencies. PROFEPA inspectors and public officers are usually outnumbered by the many matters requiring their attention, and the agency does not usually have sufficient resources to properly attend and prosecute environmental non-compliance to an acceptable level.

Limited knowledge and involvement from the judiciary in environmental matters is also a key factor. Historically, environmental issues have been kept at a certain distance from courts and judges. Consequently, there are a relatively small number of decisions to shed light on environmental laws and regulations, and their interpretation by judicial authorities.

ENVIRONMENTAL NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

There are legal mechanisms to involve NGOs and other organisations in environmental matters and decision making. Public consultation processes are set out in various statutes and regulations, and are widely used by NGOs and pressure groups to put a certain project or its effects under public scrutiny.

Recent amendments to LGEEPA have reinforced and increased the rights of the following to submit legal actions against acts that damage (or could damage) the environment or that breach environmental laws:

- Third parties with a legitimate interest in the matter (that is, who are directly affected by the project or activity).
- Interested parties that belong to communities that may become affected by a project or activity.

PROFEPA is authorised to prosecute any claim made through a "popular denouncement" (that is, a mechanism allowing any person to denounce, through PROFEPA, any act or omission of a third party that may affect ecological balance, damage the environment or breach applicable environmental laws).

Amendments to the Mexican Federal Code of Civil Procedures and LGEEPA were published on 30 August 2011 and will enter into force on 30 March 2012. Under these amendments, NGOs will have the right to bring a collective action before Mexican Federal Courts on environmental matters (*see Question 30*).

ENVIRONMENTAL PERMITS

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

There is an integrated permitting regime (*see below, Single/separate permits*).

There is also an integrated reporting regime for the release of contaminants into the environment, which includes emissions into air and water, and hazardous waste management. The data on these emissions and the management of hazardous waste is annually reported through the Annual Operation Card (COA), which is submitted to SEMARNAT for inclusion in the Emissions and Transfer of Contaminants Register (RETC).

Single/separate permits

Sources of emissions subject to federal regulation must obtain an Integrated Environmental Licence (LAU), which includes in one single procedure environmental impact and risk, air emissions, hazardous waste and water. The LAU is optional for all other industries or companies that wish to integrate their permits for these matters into one procedure.

Some states also issue a local integrated environmental licence for air emissions sources subject to local regulation, and which generally covers other local environmental matters.

5. What is the framework for the integrated permitting regime?

Permits and regulator

Only the sources of air emissions subject to federal regulation must obtain the LAU (*see Question 4*).

In principle, the LAU must include all the federal environmental obligations that the source of air emission subject to federal regulation is also subject to. However, most other permits required in connection with federal environmental matters are usually initially applied for to SEMARNAT (or to the CNA, in the case of water permitting) individually, and the LAU includes certain conditions or terms that cover all these areas. Because of the specific terms and conditions of certain authorisations requiring compliance by the permit holder, these terms and conditions are sometimes not set out in the LAU.

Length of permit

Typically, an LAU is issued only once with an indefinite validity term, while other environmental permits, authorisations, licences and concessions have different terms which may range from one to 30 years, depending on a number of factors. They are generally renewable provided certain conditions are met.

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Restrictions on transfer

As a general principle, environmental authorisations are not assignable. If assignment of authorisations is permitted, it typically requires the prior written consent by SEMARNAT or the issuing agency.

Penalties

The consequences of non-compliance with the conditions of an authorisation (or generally of environmental laws) depend on a number of factors, including the type of authorisation and the seriousness of the non-compliance. In general, sanctions include, among others:

- Fines ranging from about US$90 (as at 1 August 2011, US$1 was about MXN11.8) to US$111,000.
- Definite, total or partial closure of the work or activity in question.
- Administrative arrest for up to 36 hours.
- Revocation of authorisations.

WATER POLLUTION

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Permits and regulator

The LAN is the most comprehensive federal statute to control water pollution. Among others, it regulates the extraction of federal underground or surface waters, discharge of residual waste water into federal recipient bodies and federal property under CNA's administration.

The following activities require a concession authorisation issued by the CNA, if private individuals are using or extracting federal property (such as groundwater) (*LAN*):

- Extraction of national waters.
- The discharge of wastewater into federal recipient bodies.
- The occupation of federal zones.

Permits or concessions issued by the CNA typically set contaminant limits for the discharges that the permit holder must comply with, which are usually determined according to the classification of the recipient bodies of water. This is mainly established through NOM-001-SEMARNAT-1996 or through particular discharge conditions that may apply on a case-by-case basis.

Domestic and non-industrial discharge of residual wastewater into municipal sewage systems requires no federal concession. However, it does usually require a permit issued by, or a registration with, the corresponding local authority. The maximum permissible limits of pollutants for water discharged into municipal sewage systems are set out in NOM-002-SEMARNAT-1996.

Prohibited activities

The CNA can order the suspension of any activities that lead to the discharge of wastewater, when:

- The discharges are made without a permit or concession.
- The quality of the discharges breach applicable NOMS or particular discharge conditions.
- No federal duties are paid for the use and enjoyment of federal recipient bodies where the wastewaters are discharged.
- The party responsible for the discharges dilutes wastewater to comply with applicable levels.

Clean-up/compensation

At the federal level, a party responsible for unauthorised discharge containing contaminants exceeding permitted levels into a national recipient body must immediately notify the CNA and PROFEPA of the discharge. This is so the CNA and PROFEPA can determine the measures to be undertaken by the responsible party. These can include clean-up directly by the party in breach or by the CNA at the contaminating party's cost, regardless of the penalties that may be imposed.

Exceeding maximum permissible limits for certain pollutants can be compensated through payment of additional federal duties, if this compensation is paid according to the tariffs set out in the Federal Duties Law.

Penalties

Non-compliance with the National Waters Law can lead to different sanctions, for example:

- Fines ranging from about US$4,500.00 to US$89,000.
- Closure of water wells, and constructions or facilities for extracting water.
- Revocation of the concession authorisation or wastewater discharge permit.

To impose these sanctions, the CNA considers, among others, the:

- Seriousness of the breach of law.
- Economic situation of the party in breach and the profits derived from the breach.
- Whether the offence was committed intentionally or accidentally.
- Destruction or damage to federal property.
- The repetitive nature of the offence, if applicable.

AIR POLLUTION

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Permits and regulator

All sources of air pollution are regulated. Certain stationary sources (for example, chemical, petroleum, petrochemical, paint, automotive, pulp and paper, metal, glass, electricity, asbestos, cement and hazardous waste industries) and federal zones are subject to federal jurisdiction.

Local authorities regulate the prevention and control of contamination generated by industrial stationary sources located in their jurisdictions, and by mobile sources not of federal jurisdiction.

All federal stationary sources must secure an operating licence for air emissions (for example, an LAU (*see Questions 4 and 5*)) (*LGEEPA's*

Regulations on the Prevention and Control of Atmospheric Contamination 1988 (RPACAC)). This licence will be issued only once per industrial facility with an indefinite validity term (variations on the processes of the facility and changes in emissions must be reported and the LAU is updated accordingly). SEMARNAT can modify emission limits set out in LAUs if either:

- A certain zone has become critical.
- More efficient technologies for pollution control have emerged.
- New production processes have been implemented by the source.

Prohibited activities

All air emissions issued by stationary sources must not exceed the limits set out in NOMs (*see Question 1, Mexican Official Norms (NOM)*), which are issued jointly with the Health Ministry (*RPACAC*).

SEMARNAT can set out specific maximum limits for air emissions for sources that have certain facilities or processes which complicate their compliance with ordinary limits. Mobile sources must also comply with the levels issued for this purpose. These levels are jointly issued with other administrative agencies based on the criteria issued by the Health Ministry. RPACAC is federal, but mobile sources are usually regulated by states according to their policies and criteria.

Clean-up/compensation

Currently, the law does not provide for the payment of compensation for air pollution.

Penalties

For penalties for non-compliance, see *Questions 5* and *6, Penalties*.

CLIMATE CHANGE, RENEWABLE ENERGY AND ENERGY EFFICIENCY

8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)?

Mexico has established a non-binding long-term target of reducing its greenhouse gas (GHG) emissions by 50% by 2050 (using as a baseline the GHG emission levels from 2000) (*Special Programme on Climate Change (PECC)*). This target is subject to both:

- Industrialised countries providing financial and technological support to the less industrialised countries. Mexico as a less industrialised country would seek to receive financial support to invest in new technology to reduce its GHG emissions.
- "Common but differentiated responsibilities" being recognised in new international agreements in climate change. Common but differentiated responsibilities refers to the common responsibility of jurisdictions to protect the environment, taking into account each jurisdiction's contribution to the climate change problem and its ability to prevent, reduce and control it.

Currently, most power generation in Mexico comes from non-renewable sources (that is, fossil fuels). To address this:

- Mexico recently enacted legislation to promote the sustainable use of energy and the generation of renewable energy (*see Question 30*).
- A National Programme on the Sustainable Use of Energy was recently published. This provides strategies to:
  - incentivise private parties in relation to the use of sustainable energy;
  - incorporate the use of renewable energies into the national power system.
- Currently, only the federal public administration entities must comply with this programme and the PECC.

Under tax legislation, the acquisition of machinery and equipment which generate power is 100% tax deductible if the source is renewable (such as wind energy). In addition, permits required for self-generation of energy from a renewable source are exempt from the payment of certain federal duties.

NOMs have been published on energy efficiency, mainly for the industrial and household sectors. New buildings or expansions must meet NOMs on energy efficiency in relation to lighting. Household appliances and other equipment sold in Mexico must comply with these energy efficiency NOMs.

This sector of law and policy is rapidly evolving in Mexico (*see Question 30*).

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

Mexico is a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol.

Implementation

As a Non-Annex I party under the Kyoto Protocol, Mexico does not have binding GHG emission reduction targets. However, the Mexican government encourages the application of clean development mechanisms under the Kyoto Protocol through various projects, public policies and legislation to reduce GHG emissions (*see Question 8*).

Mexico hosted the 2010 COP16, UN climate change conference in Cancún, at which the Cancún Agreements were reached. These are a set of significant decisions by the international community to address climate change.

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

Mexico has not yet implemented any mandatory emissions trading schemes. In 2008, Pronatura (a reputable non-governmental organisation), CONAFOR and SEMARNAT launched a voluntary carbon market focused on forestry projects.

In practice, emission reduction certificates obtained for a project in Mexico are usually sold in the EU Emissions Trading Scheme, the Chicago Voluntary Carbon Market or in other emerging carbon markets.

Other intra-governmental carbon trading schemes have been launched as virtual or pilot programmes within oil and power government-owned companies.

Under the PECC, a carbon trading scheme should launch after 2012, although some of its implementation mechanisms are still being discussed.

ENVIRONMENTAL IMPACT ASSESSMENTS

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

The aim of EIAs at a federal level is to regulate activities and works both:

- In certain sectors which imply environmental risks (such as the oil or mining industry).
- To be carried out in environmentally sensitive areas (such as the coast, mangroves or natural protected areas).

Generally, the works and activities subject to EIA are the following:

- Hydraulic works, communication routes (major highways), pipelines, gas pipelines, carbo-ducts (coal pipelines) and poli-ducts.
- Oil, petrochemicals, chemicals, steel, paper, sugar, cement and electricity industries.
- Exploration and exploitation, as well as benefiting from minerals and materials reserved to the federal government in terms of relevant mining and nuclear laws.
- Facilities for the treatment, confinement and elimination of hazardous and radioactive waste.
- Employment of forestry resources in tropical rainforests.
- Forestry cultivation.
- Land use change in forestry, rainforest and arid areas.
- Industrial parks where high-risk activities will be carried out.
- Real estate developments in coastal environments.
- Works and activities in wetlands, mangroves, lagoons, rivers, lakes and estuaries connected to the sea, including their coasts and federal zones.
- Works and activities in natural protected areas of federal jurisdiction.
- Fishing, aquaculture and agriculture activities that could endanger the preservation of one or more species, or cause damage to ecosystems.
- Works or activities of federal jurisdiction that may either:
  - cause grave and irreparable ecological imbalance;
  - have a harmful effect on public health or the ecosystems;
  - exceed the limits and conditions set out in the laws that regulate the preservation of ecological equilibrium and protect the environment.

Permits and regulator

An environmental impact authorisation at federal level must be obtained from SEMARNAT before carrying out certain listed projects and activities (*see above, Scope*).

At the federal level, SEMARNAT is in charge of the EIA procedure. This generally begins with submission of the environmental impact statement (EIS) for SEMARNAT's review and assessment, and ends with its final environmental impact resolution, which can:

- Allow the proposed project or activity under the terms set out in the EIS.
- Allow the work or activity to be carried out subject to conditions which must be complied with during the construction, operation and abandonment of the project.
- Deny the proposed work or project if it breaches applicable laws, if it threatens one or more endangered species, or if it contains false information or statements.

EIAs are limited to the environmental aspects of the works and activities subject to the environmental impact procedure. Under LGEEPA, if works require other environmental authorisations that are also in SEMARNAT's field, these can be included in the EIA. Even though there is no authorisation needed for an EIA, EIAs are often required for the issuance of other permits and authorisations. This is clearly seen in real estate projects, where the EIA is a prerequisite for other permits.

State legislatures can regulate the environmental impact of other activities outside federal jurisdiction. The projects subject to a state EIA vary from jurisdiction to jurisdiction but are generally smaller-scale projects with a less significant environmental impact (such as a shopping centre if it does not fall under any of the activities subject to federal jurisdiction).

EIA legislation generally allows for public and NGO participation.

Penalties

For penalties for non-compliance, see *Questions 5* and *6, Penalties*.

WASTE

12. What is the regulatory regime for waste?

Permits and regulator

Responsibility and jurisdiction. A range of statutory laws address the risks posed by hazardous waste. Waste is classified as hazardous waste, special management waste and solid waste. Hazardous waste generators, importers, exporters, consumers, companies authorised to manage waste, and the three levels of government, share the responsibility for the environmentally safe management of hazardous waste.

Hazardous waste is of federal jurisdiction and is deemed hazardous according to its corrosive, reactive, explosive, toxic, flammable and infectious nature. It is classified as hazardous under NOM-052-SEMARNAT-2005 and NOM-053-SEMARNAT-1993.

Generating hazardous waste. Generators of hazardous waste must be registered with SEMARNAT. They must comply with several obligations which vary depending on the amount of hazardous waste generated yearly, such as:

- Having an authorised management programme for the waste generated if required under the law.
- Filing and keeping records for generation, transport and final disposal, every time they send hazardous waste for final disposal.
- Keeping track of the entry and departure of hazardous waste in waste storage rooms.
- Submitting their annual COA.

Professional services. All professional services rendered in relation to the recollection, storage, transport and recycling of hazardous waste must have the prior authorisation of SEMARNAT (*LGEEPA*). In addition, operating a final site for treatment and disposal of hazardous waste requires special authorisation.

All companies or persons providing these services, or carrying out these activities, must give a deposit as security, to cover any possible damage during the service or activity. SEMARNAT determines the amount of the deposit, depending on the volume and types of hazardous waste handled.

Storing hazardous waste. Storage of hazardous waste must comply with special conditions established in LGPGIR and its Regulations.

Transporting hazardous waste. Transport of hazardous waste is jointly regulated by SEMARNAT and the Federal Communications and Transportation Ministry, which authorises the routes, drivers and units used to transport hazardous waste.

Final disposal. Companies authorised for the final disposal of hazardous waste must both:

- Secure the relevant authorisations.
- Comply with the design, operation and other applicable specifications for the facilities and procedures to dispose of hazardous waste.

Prohibited activities

It is prohibited to carry out the above activities without a permit (*see above, Permits and regulator*).

In addition, while the storage of self-generated hazardous waste does not require a specific permit, the warehouse and storage itself must comply with certain procedures and specifications provided under the LGPGIR and its Regulations. Storage of hazardous wastes generated by third parties requires SEMARNAT approval.

Operator criteria

There are numerous technical and legal requirements that must be met by operators who provide hazardous waste-related services. For example, a financial guarantee must be granted to cover the damages that may be caused during and after these services are rendered.

Special rules for certain waste

Special management waste is of state jurisdiction and is classified in LGPGIR. Its regulation varies from jurisdiction to jurisdiction. Some states require special management waste generators to register with the local environmental authority.

Solid waste is municipally regulated. Usually, generators of non-domestic solid wastes use an authorised company to transport waste from its source to municipal final disposal. Some municipalities require solid waste generators to register with the environmental authority of the municipality.

Penalties

For penalties for non-compliance, see *Questions 5* and *6, Penalties*.

ASBESTOS

13. What is the regulatory regime for asbestos in buildings?

Prohibited activities

Generators of friable asbestos as hazardous waste, as well as its management and storage at a site, must not be performed without being registered as a hazardous waste generator with SEMARNAT (*see Question 12*).

Main obligations

Certain types of asbestos and their derivatives, essentially friable asbestos, are listed as hazardous waste (mainly under NOM-052-SEMARNAT-2005) and require special handling and final disposal.

Additionally, particles of asbestos fibres in the workplace are regulated and must comply with certain health and safety levels (mainly set out in NOM-010-STPS-1999) (although the applicable law does not require the performance of surveys of asbestos or asbestos-containing materials).

Permits and regulator

PROFEPA enforces the special handling and final disposal or friable asbestos.

The Ministry of Labour and Welfare (*Secretaría del Trabajo y Previsión Social*) enforces the relevant health and safety levels in relation to asbestos fibres in the workplace.

No permits or authorisations are required for asbestos containing materials in buildings that contain asbestos.

Penalties

For penalties for non-compliance, see *Questions 5* and *6, Penalties*. Administrative sanctions may also be imposed by the Ministry of Labour and Welfare.

CONTAMINATED LAND

14. What is the regulatory regime for contaminated land?

Regulator and legislation

LGEEPA and LGPGIR and its Regulations establish the main policies for soil remediation. Remediation standards and procedures are gradually beginning to be implemented through NOMs (including NOMs on soils contaminated with total petroleum hydrocarbons and with heavy metals). LGEEPA sets out the obligations for parties responsible for soil contamination to carry out the necessary remedial action, so that soils are

restored to a condition for the proposed uses under the applicable ecological ordinance or urban development plan.

SEMARNAT and PROFEPA are the responsible regulators.

Investigation and clean-up

SEMARNAT or PROFEPA can require a soil investigation and remediation as part of an administrative proceeding related to soil contamination. Soil investigation and clean-up can also be imposed if an establishment voluntarily stops operations and the possibility of soil contamination exists.

SEMARNAT oversees site remediation. Its main supervisory method is approval of a remediation programme, which must be applied for in almost all cases of remediation, before any remedial actions are undertaken by the responsible party.

Matters regarding remediation programmes are still at relatively early stages of enforcement. Consequently, there is a certain degree of uncertainty as to the scope of many remediation programmes and how they are enforced.

Penalties

For penalties for non-compliance, see *Questions 5* and *6, Penalties*.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

The party causing soil contamination is ultimately responsible for carrying out or paying for remedial actions to clean-up contaminated sites (polluter pays principle) (*LGEEPA* and *LGPGIR and its Regulations*) (however, see below, *Owner/occupier liability*).

Owner/occupier liability

Owners or occupiers of real property affected by soil contamination are jointly and severally liable for the remediation of contaminated sites. This is irrespective of both:

- Any liability of the contaminating party.
- Actions these owners or occupiers may have against the liable contaminating party.

If the owner or occupier of a contaminated site is unknown, SEMARNAT, in co-ordination with other state and municipal authorities, can carry out remediation works and issue a remedial declaration for a site.

Previous owner/occupier liability

Previous owners or possessors of land can be liable for carrying out remedial works if either:

- It is proved that they caused the contamination.
- They failed to secure a transfer authorisation before transferring the site. The direct transfer of contaminated sites is subject to SEMARNAT approval. If no responsible party is determined at the time of the transfer, the selling party is deemed responsible for the contamination.

Limitation of liability

Parties cannot limit their clean-up liability set out in the statutory legislation. However, parties can contractually agree indemnification, defence and hold harmless provisions (that is, provisions in an agreement under which one or both parties agree not to hold the other party responsible) among themselves. Non-compliance with these contractual conditions involves civil and commercial responsibilities. It does not release a responsible party from liability to government authorities for carrying out remediation for contamination it has caused, or for ownership or possession of contaminated sites.

16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

Mexican environmental law does not contain any specific provisions establishing lenders' liability for financing projects that may result in harm to the environment or natural resources. However, if due to foreclosure of a security interest a lender takes title to and becomes the owner or occupier of a contaminated site, it will be jointly and severally liable for clean-up of the site. This liability can be enforced by competent environmental authorities during the time the lender remains the owner of the contaminated site, or after transferring the site if the lender fails to secure authorisation for the transfer.

Under applicable statutes, lenders can also incur environmental liability from their own actions (for example, potential instructions given by the lender to the debtor to adopt or implement a contaminating or illegal action).

Minimising liability

To minimise liability, it is advisable for a lender to perform a comprehensive environmental due diligence of the debtor's assets and activities.

17. Can an individual bring legal action against a polluter, owner or occupier?

A private individual can bring legal action for damages and loss of profits before a civil court against any party that is causing damage to its property (through the release of a hazardous substance or otherwise from a contaminating activity). Damage remediation must consist of either:

- Re-establishment of the property to its previous condition, if possible.
- Payment of damages and lost profits.

Administrative liability can also arise if a third party publicly reports the polluter to PROFEPA. This will lead to an investigation by PROFEPA and the imposition of administrative sanctions, if the polluter is found liable.

ENVIRONMENTAL LIABILITY AND ASSET/SHARE TRANSFERS

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

The buyer can inherit environmental liability on a purchase of real property if he both:

- Takes title to or possession of the land.
- Cannot prove to SEMARNAT that the seller assumed liability for pre-existing contamination on transfer.

If an issue is detected before the purchase of the property that could involve contamination and remedial action, a potential buyer should require the seller or other responsible third party to expressly assume liability for such issues towards SEMARNAT on transfer of the property, for the purchaser to avoid liability.

In an asset sale, if the environmental contamination issue is detected before the transaction, the sale must be authorised by SEMARNAT. Authorisation cannot unwind the sale but aims to determine a party responsible for remediation of the site.

Share sale

By acquiring an equity interest in a Mexican limited liability corporation (*sociedad anónima*) or similar type of entity (target), the buyer acquires an indirect (through the target) proportionate share of any liabilities of the target. The liability is limited to the buyer's equity contribution to the target (the corporate veil of a Mexican limited liability corporation protects the buyer/shareholder). The target remains liable for any contamination it may have caused, and for any environmental liability from ownership or possession of contaminated sites.

Indemnification, defence and hold harmless provisions between the seller and buyer (*see Question 15*) are typically negotiated contractually in asset and share deals.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

Contractually, the seller can agree to retain environmental liability. Legally, the seller retains liability for any contamination it may have caused or for transferring a contaminated site without the prior approval of SEMARNAT.

Share sale

In a share sale, retention of environmental liability by the seller typically only happens contractually. The party liable for any past contaminating activities or for ownership or possession of a contaminated site is typically the entity being sold (the target).

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Asset sale

The seller is bound by statute to inform the buyer of both:

- The environmental condition of the site.
- Any past remedial actions conducted at the site.

This must, under statute, be represented by the seller in the purchase and sale agreement, together with any remediation obligations.

Share sale

Although the obligation does not exist under statute, most share sales involve a certain degree of environmental disclosure by the seller in relation to the target.

21. Is environmental due diligence common in an asset sale/a share sale?

Areas covered

Environmental due diligence is common in an asset or share sale. Generally, environmental due diligence covers:

- Emissions to air.
- Water extraction.
- Wastewater discharge.
- Occupation of maritime terrestrial zones administered by SEMARNAT and other federal zones administered by CNA.
- Environmental impact and risky activities, including compliance with conditions of environmental impact authorisations.
- Hazardous waste and solid waste.
- Past and potential releases of hazardous substances into a property.
- Land use (including changes of forestry land use), and ecological zoning restrictions, as well as general compliance with all required permits and applicable laws.
- The assignability or need for re-issuance of permits on completion of the transaction.

Types of assessment

Phase I and Phase II environmental site assessments are most commonly used in transactions. Although these assessments are very common in Mexico, they are not legally required and are therefore not specifically defined. However, in practice, Phase I and Phase II environmental site assessments are typically defined in line with American Society for Testing and Materials (ASTM) standards or international standards. If soil contamination is detected through these, risk assessments and other studies may follow.

Environmental consultants

Environmental consultants are generally engaged to conduct environmental assessments of a business. An engagement letter usually covers:

- Objective and scope of the work.
- Required tasks.
- Cost of the project.
- Information disclosure and confidentiality.
- Disclaimers.
- Indemnifications.
- Environmental indemnities granted by the client.
- Responsibilities of the consulting firm.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

Asset sale

A seller generally grants warranties relating to at least the following:

- Compliance with environmental laws.
- Past releases and presence of hazardous substances.
- Past remedial actions.
- Existence and validity of permits.
- Administrative or judicial procedures.
- Disclosure of environmental reports and studies.

Share sale

Representations and warranties used in a share sale typically include those used in an asset sale (*see above, Asset sale*), but tend to be more comprehensive and extensive, given the framework of liability (*see Question 18*).

23. Are there usually limits on environmental warranties and indemnities?

Environmental warranties and indemnities can be as important as tax or labour matters in a share or asset sale. Sellers commonly agree to both:

- Have environmental warranties and indemnities last for at least two years after the transaction's close (and in some cases even for as long as the maximum statute of limitations allows (typically five years)).
- Set financial caps at a relevant percentage of the purchase price, which in environmentally sensitive cases can reach 100% or even be uncapped.

However, in bidding contests, warranty periods and caps tend to be substantially lower.

REPORTING AND AUDITING

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Public registers

Although not yet fully operational, a national inventory of contaminated sites is contemplated by LGPGIR and its Regulations, and its implementation is progressing. This will run parallel with the information kept at the public registries of property rights, to provide information on contaminated sites at federal and local level, under the jurisdiction of each level of government. If a site is detected by SEMARNAT as being contaminated it will be added to the national inventory and noted in the public registry of property rights as a form of environmental lien. When a site has been remedied and released by SEMARNAT, the site will be taken out of the national inventory and the note in the public registry will be deleted.

On other regulatory matters, SEMARNAT has created a public database with recent federal environmental impact statements that is available at their central offices. Environmental impact and other authorisations (or extracts of them) issued by SEMARNAT are also publicly available on the internet at SEMARNAT's webpage.

Other types of information can be requested from SEMARNAT and obtained subject to a waiting period and confirmation that the information is not classified or otherwise protected or exempted from public scrutiny (*Federal Law on Access to Public Information*).

Information on concession titles issued by CNA is publicly available on the website of CNA's Public Registry of Water Rights.

Third party procedures

The procedure through which a third party will be able to request information in the national inventory is not yet determined. Regulations, guidance or criteria on this matter are expected in the near future.

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

Environmental auditing in Mexico is voluntary and carried out through PROFEPA's environmental audit programme.

Reporting requirements

Companies that join the environmental audit programme must comply with Mexican environmental laws and, in some cases, international environmental standards. An individual compliance programme and timeline is set out in an agreement between the entity joining the programme and PROFEPA, under which certain reporting obligations can be imposed.

Companies and other regulated parties must report environmental compliance with federally regulated matters such as hazardous waste, federally regulated sources of air emissions and wastewater discharges into national recipient bodies, through annual filing of a COA (*see Question 4*).

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

In addition to the disclosure and reporting obligations through the COA (*see Question 4*), companies must report any unregulated discharge containing contaminants into national recipient bodies. All incidents regarding the use of hazardous waste and substances must also be immediately notified to PROFEPA, unless the accident causes the release of hazardous materials into soil covering an area under one cubic metre.

Reports and governmental information regarding incidents are regulated by the Federal Law on Access to Public Information and are available to the public, subject to certain restrictions (*see Question 24*).

27. What access powers do environmental regulators have to access a company?

PROFEPA can conduct all necessary inspection procedures, using authorised personnel, to verify compliance with LGEEPA and other federal environmental laws and regulations. All inspection visits must be carried out through an inspection order, which must be served on the inspected party before the inspection. Both the inspection order and the notice must comply with the conditions of all administrative acts (*Federal Law of Administrative Procedure*). This includes that authorities must specify the purpose and scope of the visit, as well as other time and place details.

Authorities can require any document covered by the scope of the visit, except for those that are allegedly in the authority's files. Competent authorities can access the facilities specified in the inspection order that relate to the inspection and must be allowed entry. An inspection record must be made during and after the visit, containing a section in which the person in charge of the facilities can express anything related to the inspection (this is one of many opportunities the administrative law procedure gives to inspected parties to argue their defence).

ENVIRONMENTAL INSURANCE

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

LGEEPA sets out an obligation to obtain insurance when a regulated party carries out certain activities that could harm the environment, including high risk activities and hazardous waste generation. Procedural aspects and the nature of the required insurance are not yet fully regulated.

THE REGULATORY AUTHORITY

Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*) (SEMARNAT)

Main activities. SEMARNAT is the main regulatory agency on environmental matters. SEMARNAT's main mandate is to foster the protection, conservation and restoration of ecosystems, natural resources, and environmental goods and services, for their sustainable development. It makes and implements environmental policy, regulates industries and natural resources, and enforces environmental laws and regulations through its enforcement arm, the Office of the Federal Prosecutor for Environmental Protection (*Procuraduria Federal de Protección al Ambiente*) (PROFEPA).

W *www.semarnat.gob.mx*

There are different kinds of insurance, such as to cover:

- Third parties for damage that can be caused by the company.
- Catastrophic events.
- Breach of environmental agreements.
- Damage caused by the company to the environment.

Obtaining insurance

Insurance to cover environmental liabilities between individuals can be privately obtained. Not all insurance companies offer insurance for environmental risks.

ENVIRONMENTAL TAX

29. What are the main environmental taxes in your jurisdiction?

Environmental taxes are at a very early stage and are yet to be thoroughly regulated and implemented. Environmental taxes are indirectly regulated through the Federal Duties Law, which collects funds to support environmental causes, such as whale watching and visiting natural protected areas. Other duties are paid by the title concession's holder for:

- Discharge of residual wastewaters.
- The use of groundwater (or other waters coming from federal sources).
- The occupation of federal zones.
- The issuance of certain permits.

These are used for recovering costs incurred in that specific area by the administration.

The CNA and Ministry of Finance recently published the mechanism to calculate the payment of a guarantee duty provided under the LAN. This guarantee duty is to protect unused volumes of national water granted under a certain concession title, from being cancelled for lack of use. Partial or total cancellation is generally warranted if during two consecutive and uninterrupted years a concession title holder does not extract the full volume of water which it is allowed to extract. However, if the guarantee

duty is paid by the title holder on time, the CNA should not cancel the unused volumes of water.

There are certain tax incentives to foster investigation and technological developments (*see Question 8*). In addition, organisations with the purpose of preserving flora and fauna, and threatened species, can benefit from certain tax exemptions.

REFORM

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

Civil liability

Certain NGO's political sectors have long argued for the need for the creation of a law for civil liability in environmental matters. Discussions on the subject continue.

Underground water contamination

New regulations under the LAN are being drafted. Further regulations or NOMS on underground water contamination (among others) are also being considered.

Class actions

On 29 July 2010, the Mexican Constitution was amended to establish the possibility for class action lawsuits. On 30 August 2011, the *Official Federal Gazette* published amendments to the Mexican Federal Code of Civil Procedures and several other statutes, including the LGEEPA, to implement the system and mechanics allowing class action lawsuits. This will enter into force on 30 March 2012.

The legal framework will give PROFEPA, non-governmental organisations and groups of people the right to bring collective actions before Mexican Federal Courts, against individuals or entities responsible for causing environmental harm.

Third party actions

On 28 January 2011, the Congress enacted an amendment to the LGEEPA. This allowed any individual or entity that is member of a community affected by an illegal work or activity, to challenge this through an administrative appeal or annulment complaint. The claimant does not need to demonstrate actual damage to the environment, but only the risk of damage.

Climate change

A bill on climate change is currently under discussion at the Senate. Among other things, it proposes a cap-and-trade system. Local climate change laws are also under discussion and Mexico City has enacted the Law on Climate Change Mitigation and Adaptation and on Sustainable Development.

CONTRIBUTOR DETAILS



CARLOS DE ICAZA ANEIROS
Creel, García-Cuéllar, Aiza y Enríquez, S.C.
T +52 551 105 0641
F +52 551 105 0690
E *carlos.deicaza@creelmx.com*
W *www.creelmx.com*

Qualified. Mexico, 1997

Areas of practice. Environmental law; climate change; real estate law.

Recent transactions

- Acted on different occasions as outside legal counsel to Prudential Real Estate Investors Latin America, Morgan Stanley Real Estate Fund, GE Real Estate and GE Capital in environmental aspects of certain of their Mexican real estate portfolios and transactions.
- Currently advises companies such as Colgate, Celanese and Vulcan Materials Company, in certain legal environmental matters of their Mexican operations.



JESSICA VILLAVERDE GÁLVEZ
Creel, García-Cuéllar, Aiza y Enríquez, S.C.
T +52 551 105 0623
F +52 551 105 0690
E *jessica.villaverde@creelmx.com*
W *www.creelmx.com*

Qualified. Mexico, 2003

Areas of practice. Contaminated sites; hazardous wastes and water.

Recent transactions

- Counsel to Brown Forman Corporation in all legal environmental aspects of the acquisition of Tequila Herradura.
- Strategic environmental counsel to GE Real Estate in all legal environmental aspects of real estate portfolio of 112 properties located throughout Mexico.
- Advising on water and hazardous wastes related matters for Celanese Corporation's chemical plants located in Mexico.
- Counsel to Colgate Palmolive, S.A. de C.V. in certain environmental matters related to its personal and home care products.