

**MEXICO’S COMMENTS ON THE DRAFT FACTUAL RECORD IN RELATION TO
CONSOLIDATED SUBMISSIONS SEM-06-003 “EX-HACIENDA EL HOSPITAL II” AND
SEM-06-004 “EX-HACIENDA EL HOSPITAL III”**

Párrafo	Texto del Secretariado	Mexico’s comment	Justification
Aparatado de “Siglas, acrónimos y definiciones”	INE: Instituto Nacional de Ecología	INECC: National Institute of Ecology and Climate Change	Change the acronym in this section and throughout the factual record. The INE ceased to exist with the creation of the new INECC, a decentralized body of the Federal Public Administration.
Aparatado de “Siglas, acrónimos y definiciones”	Semarnat: Secretaría de Medio Ambiente y Recursos Naturales (antes Secretaría de Medio Ambiente, Recursos Naturales y Pesca, Semarnap)	Semarnat: Ministry of Environment and Natural Resources (formerly, Ministry of Environment, Natural Resources and Fisheries (Semarnap))	The name change from Semarnap to Semarnat occurred with the amendments to the Federal Public Administration Act (<i>Ley Orgánica de la Administración Pública Federal</i>), published in the Official Gazette of the Federation on 30 November 2000; therefore, the reference to the former name is irrelevant and could be confusing for the purposes of the facts presented in this factual record.
24	En virtud de ello, México dice presentar su Respuesta ad cautelam a las aseveraciones de los Peticionarios sobre las presuntas omisiones en la aplicación efectiva de la legislación ambiental. México asevera que actuó en ejercicio de sus facultades en materia de contaminación de suelo y cuerpos de agua, manejo y disposición de residuos peligrosos, auditoría ambiental, trámite de procedimientos administrativos y denuncias populares, como se resume en los siguientes párrafos. En la	For these reasons, Mexico’s Response is stated to be ad cautelam⁵⁹ with respect to the Submitters’ assertions of failures to effectively enforce the environmental law. Mexico asserts that it acted within the scope of its powers in the area of soil and water contamination, hazardous waste management and disposal, environmental auditing, and processing of administrative proceedings and public complaints, as summarized in the following paragraphs. In its response, Mexico refers to the possible	The redacted language is legalistic in nature and unnecessary in that it provides no information to help the public understand the facts presented in this factual record. Additionally, the text of footnote 59 is unnecessarily contentious.

	<p>Respuesta, México hizo referencia a la posible comisión y persecución de delitos. A continuación se presenta un resumen de las cuestiones centrales abordadas por México en su Respuesta.</p>	<p>commission and prosecution of offenses. The following paragraphs present a summary of the central issues addressed by Mexico in its response.</p>	
84	<p>Dada la remisión expresa que hace el artículo 139 de la LGEEPA a la LAN, debe añadirse que esta última dispone en su artículo 119: fracción XI, que la Comisión Nacional del Agua “sancionará, conforme a lo previsto por esta ley, [...] arrojar o depositar, en contravención a la ley, basura, sustancias tóxicas peligrosas y lodos provenientes de los procesos de tratamiento de aguas residuales, en ríos, cauces, vasos, aguas marinas y demás depósitos o corrientes de agua, o infiltrar materiales y sustancias que contaminen las aguas del subsuelo”.</p>	<p>Delete the paragraph.</p>	<p>The National Waters Act (LAN) is not covered by the factual record. While it is true that LGEEPA Article 139 makes reference to the LAN, it does not make reference to the specific article transcribed by the Secretariat. In addition, LGEEPA Article 139 also makes reference to regulatory provisions to the LAN as well as to Mexican Official Standards that are not transcribed or considered by the Secretariat in the factual record nor are they covered by it.</p>
93	<p>Fuera del marco normativo, la Profepa adoptó en 1988 una serie de criterios interinos que comprendían valores de restauración ambiental para sitios contaminados con metales pesados y que no contaban con la forma jurídica necesaria para su aplicación directa.²⁰³ Dichos criterios interinos fueron utilizados por la autoridad ambiental para el establecimiento de niveles de restauración en Instalación y la Finca Adyacente</p>	<p>Delete or reword the paragraph.</p>	<p>There are phrases in the paragraph that are inadequate or ambiguous and open to interpretation, such as “outside the legal framework” (<i>fuera del marco normativo</i>) or “interim” (<i>interino</i>), especially since it is not explained what these so-called interim criteria consisted of, what the word means, or in what way they were adopted “outside the legal framework.” Furthermore, there is no evident need to make mention of these things.</p> <p>In addition to the foregoing, footnote 203 does not relate to</p>

			the text of the paragraph.
97	Cabe señalar que todas las actividades de manejo de residuos peligrosos son de competencia federal y requieren de autorización de la Semarnat, conforme al artículo 10 del RRP, citado por los Peticionarios:	It should be noted that all the following hazardous waste- related management activities are under federal jurisdiction and require Semarnat approval pursuant to RRP Article 10, cited by the Submitters:	For clarity vis-à-vis the text of Article 10.
Encabezado de la Sección 6.2	Artículos 169 y 170: Medidas de control y de seguridad	LGEEPA Articles 169 and 170: Control and safety measures	For clarity.
102	El establecimiento de medidas tiene como finalidad garantizar que los residuos peligrosos se manejen de manera que queden protegidos el medio ambiente y la salud humana contra los efectos nocivos que pueden derivarse de tales desechos. ²¹³	Delete paragraph.	The measures mentioned in this paragraph are not the same as the ones contemplated in LGEEPA Articles 169–170. Additionally, the Basel Convention cited in footnote 213 is inapplicable to the case, nor does it form a part of the factual record.
104	El artículo 169 de la LGEEPA, citado en las Peticiones Acumuladas, establece:	In regard to corrective measures, LGEEPA Article 169, cited in the Consolidated Submissions, provides as follows:	For precision and clarity.
111	La LAN en su artículo 3º define algunos de los conceptos referidos en el tipo penal del artículo 416: fracción I del CPF, incluidos el de “aguas nacionales”, “acuífero”, “aguas del subsuelo” y “aguas residuales”.	Delete the paragraph.	The LAN is not covered by the factual record, nor are these concepts relevant or useful to an understanding of the facts discussed in the factual record.
112	El artículo 416: fracción I del CPF remite a otras disposiciones normativas de menor jerarquía legal, como	Delete the paragraph.	The wording of the paragraph is confusing. It does not provide information to clarify the facts in the factual record, especially

	<p>los reglamentos y las normas oficiales mexicanas. El conocimiento de éstos contribuirá a determinar si existe contravención a la autorización relativa a los límites máximos permitidos respecto de las descargas, depósitos o infiltraciones en cuerpos de agua de competencia federal, cuya transgresión daría lugar a sanciones administrativas, en una primera instancia, y penales, con posterioridad. Al respecto, la Comisión Nacional del Agua (Conagua) es la autoridad responsable en materia de protección y preservación de los recursos hídricos de carácter nacional.²³⁰</p>		<p>given that paragraph 110 already discusses CPF Article 416 paragraph I. Additionally, footnote 230 refers to the LAN, which does not form a part thereof.</p>
<p>116</p>	<p>...Además de usarse para sembrar de trigo, parte de las tierras del predio se destinaron a la construcción de un ingenio azucarero que habría de funcionar durante los siguientes tres siglos.²³⁶</p>	<p>...In addition to being used to grow wheat, some of the land on the property was dedicated to the construction of a sugar mill that would operate for the next three centuries.²³⁶</p>	<p>Syntax error.</p>
<p>123</p>	<p>Desde 1968 BASF Mexicana inicia su producción de pinturas, actividad que al parecer comienza con la adquisición de maquinaria de Pigmentos Mexicanos.²⁵¹ No se tiene información acerca de los métodos para prevenir la contaminación²⁵² ni tampoco sobre daños al ambiente a raíz de las actividades productivas anteriores a la llegada de BASF Mexicana. La poca información que hay al respecto coincide con que el Sr. Von Brentano, quien se ha</p>	<p>In 1968, BASF Mexicana began producing paint, apparently starting with the purchase of machinery from Pigmentos Mexicanos.²⁵¹ No information is available about the methods used to prevent contamination²⁵² or about any environmental impacts stemming from production processes taking place prior to the arrival of BASF Mexicana. The little information available indicates that Mr. Von Brentano, who was also a BASF Mexicana contractor, was a</p>	<p>The redacted statement has no basis, and furthermore it relates to situations occurred prior to the facts covered by the factual record. The Party contends that the references in paragraphs 122–3 (after the suggested deletion), for which there does exist documentary backing, are sufficient to provide context for the situation and the use of the property before it was occupied by BASF.</p>

	<p>señalado como contratista de BASF Mexicana, era productor de pigmentos.²⁵³ El contrato de arrendamiento entre BASF Mexicana y el propietario de la Instalación señala que la primera utilizaría el inmueble “con la maquinaria y equipo y demás instalaciones industriales que actualmente existen en el inmueble”.²⁵⁴</p>	<p>pigment manufacturer.²⁵³ The lease between BASF Mexicana and the Facility’s owner states that the former would use the premises “with the machinery, equipment, and other industrial infrastructure currently existing on the premises.”²⁵⁴</p>	
146	<p>...Mientras tanto, el delegado de la Profepa en el estado de Morelos, a petición de la DGII, decretó la suspensión del procedimiento administrativo que había instrumentado en contra de la empresa. Finalmente..</p>		<p>The Party considers it necessary to include more information about the measures taken by the Profepa office in the state of Morelos and the reasons why the latter suspended the administrative proceeding referred to in the transcribed portion of the paragraph.</p>
151	<p>La parte demandante otorgó, además, el perdón en relación con las querellas promovidas ante el Ministerio Público de Cuernavaca, Morelos, bajo el expediente núm. SC/2a/4480/98 y otra promovida ante el Juzgado Segundo de lo Menor en Cuernavaca, Morelos...</p>	<p>In addition, the complainant plaintiff granted forgiveness in relation to the matters at issue before the Public Prosecutor of Cuernavaca, Morelos in file no. SC/2a/4480/98 and before the Second Small Claims Court of Cuernavaca, Morelos....</p>	<p>In addition to the suggested terminological change, the Party feels that the identity of the complainant should be clarified.</p>
Figura 2			<p>The inclusion of a stage relating to the Supreme Court is speculative and there is no reliable information warranting this inclusion. It is suggested that this reference be deleted in order to provide the public with accurate and demonstrable information.</p>
Apartado 8			<p>The Party contends that since it concerns a description of the background to the site in question, its environmental</p>

<p>“Descripción del sitio en cuestión”— párrafos 164 al 187</p>			<p>surroundings, and the substances used in the industrial processes that were carried out there, this material would be more appropriately placed under section 7, “Background” (<i>Antecedentes</i>). The new section 7 could be divided into the information contained in the current section 8 (which provides mainly background information about the environment) and that which figures in the current sections 7.3–7.6, which constitutes background information of a legal nature. This change would provide a more logical structure for the factual record.</p>
<p>170</p>	<p>Dado de que los contaminantes en el suelo pueden migrar hacia el acuífero, se presenta información relevante sobre la hidrología El Hospital se encuentra en la región hidrológica 18 Balsas de la subregión Medio Balsas. La región hidrológica 18 es administrada por el Organismo de Cuenca Balsas, dependiente de la Comisión Nacional del Agua.³³⁷ Integra la hidrografía el río Cautla, que es una de las subcuencas intermedias del río Amacuzac, el cual, a su vez, forma una de las dos principales cuencas de la región hidrológica 18 Balsas.³³⁸</p>	<p>Since soil pollutants may migrate into the aquifer, relevant information is presented on hydrology. El Hospital is located in the hydrological region 18, Balsas, subregion Medio Balsas. Hydrological region 18 is administered by the Balsas Watershed Body, which reports to Conagua.³³⁷ It comprises the hydrography of the Cautla River, an intermediate subwatershed of the Amacuzac River, which in turn makes up one of the two main basins in hydrological region 18, Balsas.³³⁸</p>	<p>The redacted sentence is belied by all the studies mentioned subsequently in the factual record (see, for example, paragraph 186). Therefore, it provides speculative, unsupported information to the reader.</p>
<p>186</p>	<p>La información disponible destaca que “[...] las materias primas y los pigmentos producidos por los procesos de BASF Mexicana en la ex-</p>	<p>The available information underscores that “the raw materials and pigments produced by BASF Mexicana at the former plant contained lead</p>	<p>The Party considers it necessary to state clearly the nature of the “available information” to which this paragraph refers.</p>

	planta contenían plomo (Pb ⁺²), cromo hexavalente (Cr ⁺⁶), cromo trivalente (Cr ⁺³) y molibdeno (Mo ⁺⁶)” y ...	(Pb ⁺²), hexavalent chromium (Cr ⁺⁶), trivalent chromium (Cr ⁺³), and molybdenum (Mo ⁺⁶)” and...	
Cuadro 1	No reportada; no estética, debido a su apariencia lechosa.	Not reported; unaesthetic due to milky appearance	In the “Toxicity” column under zinc, the information appears to be inappropriate, since it does not coincide with the kind of information given for the other compounds.
208	...Al respecto, se consideró que “únicamente” el resultado de la muestra M-4A, proveniente de un predio de un habitante de El Hospital, tuvo una concentración superior al límite establecido en la NOM-052...	...In this regard, it was determined that only the result of sample M-4A, taken from the property of a resident of El Hospital, showed a concentration higher than the limit set out in NOM-052.	In this paragraph, the Secretariat is paraphrasing the report issued by Profepa. Therefore, the quotes around the word “only” (<i>únicamente</i>) constitute an inappropriate editorial comment on the part of the Secretariat.
278 y Figura 12			Paragraph 278 establishes that Figure 12 shows the approximate locations of the sites where buried pigments were found. However, the title of the figure does not refer to that circumstance and there is no key indicating the meaning of the points which, presumably, constitute the sites to which paragraph 278 refers.
Cuadro 16			To make this table more useful, it is suggested to indicate to the reader the map, figure, or table in the factual record where each of these zones can be found. In addition, the title of the table refers exclusively to “areas” (<i>áreas</i>) whereas the table uses both “area” and “zone” (<i>zona</i>), which could cause confusion.
Cuadro 17 y			For more clarity, it is suggested

párrafo 279			<p>that paragraph 279 provide a more complete explanation of Table 17.</p> <p>In addition, the third column of Table 17 does not have values like the second column, and it may therefore be difficult for the reader to draw conclusions from the information provided.</p>
280			<p>Given the confusion between areas and zones in Table 16, the identity of “area 21” mentioned in the first sentence of this paragraph is not clear.</p>
309	<p>El 29 de octubre de 2001 continuó la diligencia sin que se registraran hechos relativos al alcance autorizado en este expediente de hechos; sin embargo, sin razón aparente, se modificó la numeración del acta de inspección.⁶⁸¹</p>	<p>Delete the paragraph.</p>	<p>The paragraph does not offer the reader information that is relevant to this factual record, and it is unnecessarily contentious.</p>
315	<p>... El 5 de noviembre se abrió el acta de inspección núm. 17-006-0001/98-D-V-36 para la supervisión de los trabajos de restauración ambiental.⁶⁹² En relación con el alcance autorizado en este expediente de hechos, el inicio del acta documenta que el 5 de noviembre BASF Mexicana continuó retirando suelo con pigmento de las subáreas 1 y 2 del área de oficinas y baños.⁶⁹³ Dicha actividad continuó ...</p>	<p>...On November 5, inspection record no. 17-006-0001/98-D-V-36 was opened for the purpose of supervising the environmental restoration work.⁶⁹² In relation to the authorized scope of this factual record, the The beginning of the record documents that on 5 November, BASF Mexicana continued removing pigment-containing soil from sub-areas 1 and 2 of the offices and restrooms area.⁶⁹³ This activity continued...</p>	<p>In addition to the considerations set forth in regard to paragraph 309, the clarification is unnecessary, since it goes without saying that the content of the factual record is as authorized by the Council.</p>
341 (342, 347)			<p>The Party finds that it is necessary to specify the reasons why the proceeding was closed. If it was closed for the reasons set out in paragraph 342 (and/or paragraph 347, as the</p>

			<p>case may be), it would be useful to indicate this in paragraph 341 for the reader's clarity and convenience.</p> <p>In addition, there is a discrepancy as to the dates when the proceeding was closed between paragraphs 341 (May 21), 342 (May 31), and 347 (May 31).</p> <p>Furthermore, there is a discrepancy (or incomplete description in each of the paragraphs) between paragraphs 342 and 347 as to the reasons for the suspension of the proceeding.</p>
364			<p>It is suggested to expand the information offered to the public in this paragraph since this information is considered a crucial period of the facts covered by the factual record.</p>
367	<p>...La información consultada arroja que se registraron diversas investigaciones instrumentadas por la PGR las cuales tuvieron lugar hasta el 26 de agosto de 1999, fecha en que se recibieron 209 muestras tomadas de diferentes partes de la Instalación. A partir de entonces, las investigaciones de la autoridad ministerial fueron suspendidas, por lo que el 31 de enero de 2008 la Subprocuraduría de Investigación Especializada en Delitos Federales de la PGR determinó que el delito había prescrito desde el 12 de octubre de 2002. Con todo, la información consultada por el Secretariado, da cuenta de la</p>	<p>...The information consulted includes records of various PGR investigations up to 26 August 1999, the date the PGR took receipt of 209 samples from different parts of the Facility. From that date forward, the PGR's investigations were suspended. Consequently, on 31 January 2008, the PGR's Special Unit for Investigation of Federal Offenses determined that the offense had expired under the statute of limitations on 12 October 2002. Nevertheless, according to the information consulted by the Secretariat, nearly 60 procedures were carried out between 26 August 1999 and 12 October 2002, the date the offense expired.</p>	<p>The Party recommends deleting the redacted text, since in its view the introduction of this text at this point in the factual record breaks the narrative thread and the historical sequence in which the facts relating to this section are presented. This is particularly true given that these assertions are reiterated in paragraphs 376-9.</p>

	realización de cerca de 60 diligencias realizadas entre el 26 de agosto de 1999 y el 12 de octubre de 2002, fecha en que operó la prescripción del delito.		
376 al 379			Since the party finds the presentation of the information in these paragraphs confusing, proposed wording for these paragraphs is provided in Appendix 1 of these comments on the factual record.
Nota Final Párrafos 392 a 403		Move to the “Executive Summary” section of the factual record.	The Party is of the view that the paragraphs in question are not appropriate for a “final note” but rather for an executive summary of the factual record. Since the factual record already has a portion in which the submission and the Party response are summarized, it makes sense that these paragraphs be relocated to that section, giving the reader a summary of the whole process in a single section. In addition, it is suggested that each of paragraphs 394 to 403 make reference to the section of the factual record from which the information summarized is derived, as well as a reference to the paragraphs comprised by each section.
394	...La documentación también describe el uso doméstico de bienes y materiales pigmentados entregados por BASF Mexicana a sus ex trabajadores y a habitantes de la comunidad de El Hospital. ⁸⁷⁰	The documentation also describes the domestic use of pigment containing materials delivered by BASF Mexicana to its former employees and residents of the community of El Hospital. ⁸⁷⁰ The information	This text should be deleted since the factual record does not contain a description of the domestic use allegedly made of these materials, and given that the reference in the footnote is incorrect.

	La información revela que...	reveals that...	
397	...Las actividades de restauración ambiental de la Finca Adyacente fueron suspendidas el 31 de mayo de 2005. ⁸⁸⁴		In order to provide the best possible information to the reader, it is considered necessary to include a brief explanation or reference to the reasons why the environmental restoration activities on the Adjacent Lot were suspended.
403	...El Secretariado hace notar que las Partes acordaron informar voluntariamente de las acciones emprendidas en relación con los expedientes de hechos un año después de la publicación de cada uno.		It is suggested that reference be made to the document in which the Parties committed to this, as well as specifically stating the nature and details of the Parties' commitment.

APPENDIX 1

Proposed text of paragraphs 376–9

376. The information consulted by the Secretariat indicates that the last action by the Public Prosecutor's Office took place on 26 August 1999, when both solid and liquid samples from the Facility were received. It should be noted that after that date other actions were carried out by the MPF, such as receipt of reports, issuance of decisions, questioning of individuals, etc.

377. On 5 November 2002, Director General for Control of Criminal Proceedings "A" authorized, pursuant to Article 131 of the Federal Code of Criminal Procedure, that criminal investigation file 6243/FEDA/98 be archived,⁸³⁶ i.e., that the investigation be suspended pending the appearance of new information.⁸³⁷ On 12 March 2007, the UEIDAPLE requested the criminal investigation file for the purposes of continuing with it.⁸³⁸

378. Finally, the Office of the Deputy Attorney for Investigation of Federal Offenses of the PGR reached a decision of *nolle prosequi*, concluding that the statute of limitations for criminal liability had run on 12 October 2002, counting from the "last" action taken on 26 August 1999. Notwithstanding the foregoing, the Secretariat identified that the *nolle prosequi* decision noted the existence of at least 60 proceedings subsequent to the supposed last proceeding, which are mentioned in the preamble to the document.⁸³⁵

379. The *nolle prosequi* decision takes note of a set of evidence derived from the actions carried out as part of the criminal investigation, which were not considered when determining that the statute of limitations for criminal liability had run, as is evident from the following passage of said decision:

Notwithstanding the preceding, from the studies conducted on the documented evidence and the investigatory actions incorporated in the file of investigation number 6243/FEDA/98, it is evident that criminal liability has expired. [In effect,] the criminal conduct that the company BASF Mexicana, S.A. de C.V. may have engaged in – emitting, giving off and discharging gases, smoke and dust into the atmosphere, as well as discharging and permitting the infiltration of wastewater, chemical or biochemical liquids and contaminating wastes into the subsoil of El Hospital and into the Espíritu Santo Creek, thus causing serious harm to both the environment and to the public health of the entire local population – [constituted] a situation which could have made it feasible, as required, for the Representación Social de la Federación [i.e., the MPF] to bring criminal proceedings.⁸³³

NOTE: The footnote numbering in this proposed text is not that which would result from making the proposed changes to the master file of the factual record. The numbering is left as in the current factual record for easier reference on the part of the editor.