

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION for preparation of a factual record concerning consolidated submissions SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*) August 2012

I. The factual record process

The Commission for Environmental Cooperation of North America (CEC) is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”) initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC, the Secretariat may notify the CEC Council (the “Council”) that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with NAAEC Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances obtain, it then proceeds no further with the submission.¹

The introduction to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), effective as of 11 July 2012, gives guidance as to the contents of a factual record:

The purpose of a factual record is to provide an objective presentation of the facts relevant to the assertion set forth in a submission and to allow the readers to draw their own conclusions regarding a Party’s environmental law enforcement. Although a factual record is not to contain conclusions or recommendations, it is expected to generally outline the history of the environmental enforcement issue raised in the submission, the relevant legal obligations of the Party, and the actions of the Party in fulfilling those obligations; as such, it is another valuable outcome of this information sharing-process [...]²

Pursuant to NAAEC Article 15(4) and section 11.1 of the Guidelines, in preparing factual records, the Secretariat will consider any relevant technical, scientific or other information

¹ Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/citizen/>>.

² *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, (the “Guidelines”) p. 1.

that is publicly available; submitted by the Joint Public Advisory Committee (JPAC) or by interested non-governmental organizations or persons, or developed by the Secretariat or independent experts.³

In addition, pursuant to NAAEC Article 21(1)(a), on request of the Secretariat, each Party to the NAAEC shall:

promptly [make] available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data;...

On 15 July 2012, in Council Resolution 12-03, the Council, pursuant to NAAEC Article 15(2), unanimously instructed the Secretariat to prepare a factual record. The Secretariat is hereby requesting relevant information relating to the matters to be addressed in the factual record. The following sections provide background on the submission and describe the type of information requested.

II. Consolidated submissions SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*) and the Council Resolution 12-03 dated 15 de June 2012.

On 17 July 2006, Myredd Alexandra Mariscal Villaseñor, on her own behalf and representing Justina Domínguez Palafox, Félix Segundo Nicolás, Karina Guadalupe Morgado Hernández, Santos Bonifacio Contreras Carrasco, Florentino Rodríguez Viaira, Valente Guzmán Acosta, María Guadalupe Cruz Ríos, Cruz Ríos Cortés, and Silvestre García Alarcón, filed submission SEM-06003 (*Ex Hacienda El Hospital II*).⁴ On 22 September 2006, Roberto Abe Almada filed submission SEM-06-004 (*Ex Hacienda El Hospital III*) and endorsed the assertions of submission SEM-06-003.⁵ Both submissions were filed with the Secretariat in accordance with NAAEC Article 14(1).

In consolidated submissions SEM-06-003 and SEM-06-004 the persons listed in the preceding paragraph (the “Submitters”), assert that Mexico is failing to effectively enforce its environmental law with respect to the operation, shutdown, and decommissioning of a pigment production plant (the “Facility”) operated by BASF Mexicana, S.A. de C.V. (BASF), located in Ex Hacienda de Nuestra Señora de la Concepción El Hospital (“Ex Hacienda El Hospital”) in the municipality of Cuautla, state of Morelos.

On 30 August and 28 September 2006, the Secretariat determined that submissions SEM-06-003 and SEM-06-004, respectively, met the requirements of NAAEC Article 14(1) and found that, in light of the NAAEC Article 14(2) criteria, they warranted a response from Mexico.⁶ In accordance with paragraph 10.3 of the Guidelines in effect at the time, the Secretariat consolidated the two submission files.⁷

³ Guideline 11.1.

⁴ SEM-06-003 (*Ex Hacienda El Hospital II*), Submission pursuant to Article 14(1) (17 July 2006).

⁵ SEM-06-004 (*Ex Hacienda El Hospital III*), Submission pursuant to Article 14(1) (22 September 2006).

⁶ SEM-06-003 (*Ex Hacienda El Hospital II*), Determination pursuant to Article 14(1) (2) (30 August 2006), and SEM-06-004 (*Ex Hacienda El Hospital III*), Determination pursuant to Article 14(1) (2) (28 September 2006).

⁷ SEM-06-004 (*Ex Hacienda El Hospital III*), Determination pursuant to Article 14(1) (2) (28 September 2006), p. 1.

On 10 January 2007, Mexico filed its response with the Secretariat in accordance with NAAEC Article 14(3).⁸ In its response, Mexico states that Profepa followed up on the recommendations in an environmental audit of the facilities operated by BASF and that it processed citizen complaints filed in relation to the matter raised by the Submitters in a timely manner. Mexico's response notes that restoration actions for the site were blocked by one of the Submitters.

On 12 May 2008, the Secretariat notified the Council that consolidated submissions SEM-06-003 and SEM-06-004 merited development of a factual record. After considering the submissions in light of Mexico's response, the Secretariat concluded that the response left open central questions as to the effective enforcement of environmental law in relation to several of the Submitters' assertions. The central open questions identified by the Secretariat relate to the following environmental laws: the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) Articles 134, 135 paragraph III, 136, 139, 150, 151, 152 *bis*, 169, and 170; the General Waste Prevention and Integrated Management Act (*Ley General para la Prevención y Gestión Integral de Residuos*—LGPGIR) Articles 68, 69, 75, and 78; the Federal Criminal Code (*Código Penal Federal*—CPF) Article 421, as well as CPF Articles 415 paragraph I and 416 in force prior to 6 February 2002; the Regulation to the LGEEPA respecting Hazardous Waste (*Reglamento de la LGEEPA en materia de Residuos Peligrosos*—RRP Articles 8 paragraph X, 10, and 12, and Mexican Official Standards (*Normas Oficiales Mexicanas*—NOM) NOM-052-SEMARNAT-1993⁹ and NOM-053-SEMARNAT-1993.¹⁰

On 15 June 2012, by means of Council Resolution 12-03, the Council unanimously decided to instruct the Secretariat to prepare a factual record in accordance with NAAEC Article 15(2) with regard to alleged failures by Mexico to effectively enforce its environmental law. The Council directed the Secretariat to provide the Parties with an overall plan for gathering relevant facts, as well as to keep the Council informed of any future changes or adjustments to such plan. In following the Secretariat sets out the overall plan of work for developing the draft factual record.

III. Request for Information

In view of the instructions received via Council Resolution 12-03, the Secretariat takes note that the factual record is not to include information about the effective enforcement of the LGPGIR.

In accordance with Council Resolution 12-03, on 9 August 2012 the Secretariat issued a work plan delimiting the scope of the factual record and envisioning the gathering of information pursuant to NAAEC Article 15(4). According to the work plan, the information gathering process is to focus on the following aspects:

⁸ SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*) Response pursuant to Article 14(3) (10 January 2007).

⁹ This standard was originally issued as NOM-CRP-001-ECOL/93, *which establishes the characterization of hazardous wastes, a listing of hazardous wastes, and their maximum acceptable levels of toxicity*. Its title was later changed to NOM-052-ECOL-1993, and it is currently in effect under the title NOM-052-SEMARNAT-2005.

¹⁰ This standard was originally issued as NOM-CRP-002-ECOL/93, *which establishes the procedure to examine the components of a hazardous waste in order to determine its toxicity levels*. Its title was later changed to NOM-053-ECOL-1993, and it is currently in effect under the title NOM-053-SEMARNAT-1993.

- a) LGEEPA Article 170 in connection with the alleged illegal dumping of hazardous waste in the community of Ex Hacienda El Hospital, in the Municipality of Cuautla, State of Morelos, and the alleged crimes against the environment, during the operation, shutdown and decommissioning of the Facility operated by BASF.
- b) LGEEPA Articles 134, 135, paragraph III, 136, 139, 150, 151, 152 *bis*, and 169; CPF Article 421, as well as Articles 415 paragraph I, and 416 paragraph I, of the CPF in force before February 6, 2002; RRP Articles 8 paragraph X, 10 and 12; NOM-052-SEMARNAT-1993 and NOM-053-SEMARNAT-1993, regarding the alleged illegal dumping of hazardous waste in the Facility and the alleged illegal dumping of hazardous waste in the community of Ex Hacienda El Hospital, in the Municipality of Cuautla, State of Morelos, and the alleged crimes against the environment, during the operation, shutdown and decommissioning of the Facility operated by BASF.

IV. Examples of relevant information

The following are examples of technical, scientific, or other information that could be presented by members of the community and the public with respect to the case before the Secretariat of the CEC. To facilitate the management and compilation of this information, it is requested that this information be submitted in electronic form.

1. Information about the area in question, specifically:

- a. Maps (in high-quality electronic format with GIS, Autocad, or Acrobat compatible vectors) of the municipality of Cuautla, the locality of Ex Hacienda El Hospital, and the boundaries of the Facility.
- b. Information about watersheds in which the municipality of Cuautla is located, with identification of the “Espíritu Santo” receiving body.
- c. Urban development programs or plans for the municipality of Cuautla that were in force during the operational phase of the Facility, with identification of the activities that were planned for the locality of Ex Hacienda El Hospital.

2. Information about the identification of hazardous materials and wastes generated prior to the alleged delivery thereof to persons in the locality of Ex Hacienda El Hospital (it is suggested that information be presented about the final year of the operational phase of the Facility), including, for example:

- a. Quantity and type of hazardous waste generated, with reference to the determination arising from the hazardous waste classification procedures set out in NOM-052-SEMARNAT-1993.
- b. Information about the extraction tests performed in order to determine the hazardousness of a waste as a function of its toxicity in the environment, pursuant to NOM-053-SEMARNAT-1993.

3. Information about the facts relating to the alleged disposal of hazardous waste inside the Facility, such as:

- a. Information about the date of cessation of operations and the beginning of the process of dismantling, cleaning, and shutting down the Facility.

- b. Information about notices given to the competent environmental authority about spills, infiltrations, discharges, or dumping of hazardous waste occurred in the Facility, as well as the characteristics of such waste.
- c. Log of plant shutdown activities describing measures taken in the Facility to identify the possible burial, disposal, infiltration, or spill of hazardous waste, as well as the fate thereof.
- d. Activities, measures, and any other action by the federal environmental authority to reduce potential risks to the environment and public health arising from the possible burial of hazardous waste in the Facility.

4. Information about the facts relating to the alleged delivery of hazardous and non-hazardous materials and wastes from the Facility to persons in the locality of Ex Hacienda El Hospital, such as:

- a. Documentation of the type, quantity, and methodology used to determine the hazardousness, if any, and treatment, if any was necessary, of the materials and wastes delivered to persons in the locality of Ex Hacienda El Hospital; as well as about the legal arrangements under which such delivery was made.
- b. Information substantiating the identity of persons to whom delivery was apparently made, including censuses, estimates, and other measures taken.
- c. Mapping information, ideally in electronic format with usable vectors, about the location of lots in the locality of Ex Hacienda El Hospital that allegedly received materials and wastes from the Facility.
- d. Any report produced in connection with the shipping of materials and wastes to third-party lots in the locality of Ex Hacienda El Hospital and, as applicable, contamination control measures planned and/or implemented for such lots.
- e. Information about inspection and surveillance measures taken by the competent authorities to verify that the materials and wastes from the Facility that were stockpiled, dumped, or infiltrated in the locality of Ex Hacienda El Hospital met the conditions necessary to prevent or avoid soil contamination and health risks.

5. Information about facts relating to the removal and final disposal of hazardous and non-hazardous materials and wastes from the locality of Ex Hacienda El Hospital and evaluation of the lots further to removal thereof, for example:

- a. Information about verification of removal and adequate final disposal of hazardous and non-hazardous materials and wastes from third-party lots in the locality of Ex Hacienda El Hospital, including any relevant plan produced, as well as statistical or census data.
- b. Information about the implementation of studies and methodologies to assess soil, subsoil, and groundwater contamination from third-party lots subsequent to removal of materials and wastes allegedly originating from the Facility.
- c. Information about corrective measures for the restoration and remediation of lots in the locality of Ex Hacienda El Hospital that BASF was ordered to comply with.
- d. Activities, measures, plans and/or programs carried out by the competent authorities for prevention and control of soil contamination and the prevention of human health harms subsequent to the removal of materials and wastes originating from the Facility and found in the locality of Ex Hacienda El Hospital.

6. Information about facts relating to liability arising from the alleged act of delivery, shipping, and illegal disposal of hazardous waste in the Facility and on lots in Ex Hacienda El Hospital, such as:

- a. Information about expert testimony or opinions that were added to investigations 58/98 and 6243/FEDA/98 as part of the investigation and prosecution of crimes under federal jurisdiction.
- b. Information about the result of criminal investigations conducted by the office of the Attorney General of the Republic for the investigation of acts or omissions noted by the relevant environmental authority that could have caused or could cause harm to public health, natural resources, fauna, flora, or ecosystems.
- c. Any investigation carried out by the competent authority and any penalties and/or safety measures ordered in relation to the alleged illegal disposal of hazardous waste from the Facility, and during alleged acts of sale, shipping, delivery, dumping, disposal, burial, or donation of hazardous and non-hazardous substances, materials, and wastes on or to lots and/or persons in the locality of Ex Hacienda El Hospital.

7. Any other technical, scientific, or other information that could be relevant for the preparation of this factual record.

V. Additional background information

The submission, Mexico's response, the Secretariat's determinations, the Council Resolution and other information are available in the Public Registry in the Submissions on Enforcement Matters section of the CEC website at <<http://www.cec.org/SEMregistry>>. These documents may also be requested from the Secretariat to the following address <sem@cec.org>.

VI. Where to send information?

Relevant information for the development of the factual record, may be sent to the Secretariat until **15 October 2012**, via email to the following address <sem@cec.org>

If the information is not available in electronic form, please send it to either of the following addresses:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393, rue St-Jacques Ouest
bureau 200
Montreal QC H2Y 1N9
Canada
Tel. (514) 350-4300

CCA / Mexico Liaison Office
Atención: Unidad sobre Peticiones
Relativas a la Aplicación Efectiva de la
Legislación Ambiental
Progreso núm. 3
Viveros de Coyoacán
México, D.F. 04110
México
Tel. (5255) 5659-5021

Please refer to submission SEM-06-003 (*Ex Hacienda El Hospital II*) and/or SEM-06-004 (*Ex Hacienda El Hospital III*) in your correspondence.

ANNEX I
Environmental law in question for development Factual Record concerning consolidated submissions SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*)

General Ecological Balance and Environmental Protection Act

Article 134.- For the prevention and control of soil contamination, the following criteria shall be considered:

- I.** The prevention of soil contamination is the responsibility of the state and society;
- II.** Waste shall be controlled since it constitutes the main source of soil contamination;
- III.-** It is necessary to prevent and reduce the generation of municipal and industrial solid waste, incorporate techniques and procedures for its reuse and recycling, and regulate its efficient management and final disposal;
- IV.-** The use of pesticides, fertilizers, and toxic substances shall be compatible with the stability of ecosystems and shall consider the effects of such products on human health so as to prevent any harm such products could cause, and
- V.-** In soils contaminated by the presence of hazardous materials or wastes, the necessary measures shall be taken to restore them to their original condition, such that they may be used for any type of activity contemplated in any applicable urban development plan or environmental land use plan.

Article 135.- The criteria for prevention and control of soil contamination shall be considered in the following cases:...

III.- The generation, management, and final disposal of industrial and/or hazardous solid waste as well as any authorizations and permits issued for such purpose.

Article 139.- Any discharge, dumping, or infiltration of contaminating substances or materials into soil shall comply with the provisions of this Act, the National Waters Act, their regulatory provisions, and any applicable Mexican official standards that may be issued by the Ministry.

Article 150.- Hazardous materials and wastes shall be managed with adherence to this Act, its Regulation, and any Mexican official standards issued by the Ministry, with advice from the ministries of Trade and Industrial Development, Health, Energy, Communications and Transportation, the Marine, and the Interior. The regulation of the management of such materials and wastes shall include their use, collection, storage, transportation, reuse, recycling, treatment, and final disposal, as applicable.

The Regulation and Mexican official standards to which the previous paragraph refers shall contain criteria and lists identifying and classifying hazardous materials and wastes by degree of hazardousness, with reference to their characteristics and volumes; in addition, they shall differentiate between high and low degrees of hazardousness. The Ministry is responsible for the regulation and control of hazardous materials and wastes.

In addition, the Ministry, in coordination with the entities to which this article refers, shall issue Mexican official standards establishing the requirements for the labeling and packing of hazardous materials and wastes, as well as for risk assessment and information concerning contingencies and accidents that could arise from the management thereof, particularly in regard to chemicals.

Article 151.- The responsibility for the management and final disposal of hazardous wastes rests with the generator thereof. Where a contract is made for hazardous waste management and final disposal services with companies authorized by the Ministry and waste is delivered to such companies, responsibility for the operations rests with them, irrespective of any responsibility that may rest with the generators thereof.

Anyone generating, reusing, or recycling hazardous waste shall so notify the Ministry in accordance with the Regulation to this Act.

In authorizations for the establishment of hazardous waste containment facilities, only waste that cannot be technically and economically reused, recycled, or thermally or physicochemically destroyed may be included, and the containment of hazardous waste in the liquid state shall not be permitted.

Article 152 bis.- Where the generation, management, or final disposal of hazardous materials or wastes causes soil contamination, the persons responsible for such operations shall take the measures necessary to restore the original conditions thereof, such that the soil may be devoted to any of the activities contemplated in any urban development plan or environmental land use plan that may be applicable to the relevant lot or zone.

Article 169.- The relevant administrative decision shall indicate or include, as the case may be, the measures that must be taken to correct any deficiencies or irregularities observed, the time period for compliance by the violator, and any sanctions for which the violator may be liable pursuant to the applicable provisions.

Within the five working days following the expiry of the period granted to the violator to cure the deficiencies or irregularities observed, the violator shall give detailed notice in writing to the ordering authority of having complied with the measures ordered in the manner prescribed by the applicable order.

In the case of a second or subsequent inspection to verify compliance with a previous order or orders, where a lack of compliance with the measures previously ordered is evident from the resulting official record, in addition to the sanctions arising from Article 171 of this Act, the competent authority shall impose a fine not exceeding the maximum limits set out in that provision.

In cases where the violator performs the corrective or urgent measures or cures the irregularities detected within the time period ordered by the Ministry, provided that the violator is not a repeat offender and none of the criteria set out in Article 170 of this Act is met, the Ministry may revoke or amend the sanction or sanctions imposed.

Where applicable, the federal authority shall notify the Public Prosecutor of the occurrence of acts or omissions noted in the course of its duties that could constitute one or more offenses.

Federal Criminal Code

Article 415 [Text in force prior to the revision of 6 February 2002]. Anyone who does the following is liable to a prison term of three months to six years and one thousand to twenty thousand days' fine:

I. Performs any activity with hazardous materials or wastes that causes or could cause harm to public health, natural resources, fauna, flora, or ecosystems without the authorization of the competent federal authority or in violation of any terms under which such activity may have been authorized.

...

Article 416 [Text in force prior to the revision of 6 February 2002]. Anyone who does the following without any authorization that may be applicable or in violation of any applicable legal or regulatory provisions or Mexican official standards is liable to a prison term of three months to six years and one thousand to twenty thousand days' fine:

I. Discharges, dumps, or infiltrates, or authorizes or orders the discharge, dumping, or infiltration of, wastewater, chemical or biochemical liquids, refuse, or contaminants in soils, marine waters, rivers, basins, ponds, or other bodies of water or watercourses under federal jurisdiction that cause or may cause harm to public health, natural resources, flora, fauna, the quality of water in watersheds, or ecosystems.

...

Article 421.- In addition to the provisions of the preceding chapters of Title Twenty Five, one or more of the following penalties or safety measures shall be ordered:

I. The taking of the measures necessary to restore the natural elements making up the affected ecosystems to the condition they were in before the offense took place;

II. The suspension, modification, or demolition of any structures, works, or activities, as the case may be, that may have given rise to the environmental offense in question;

III. The reintroduction of the natural elements, specimens or species of wild flora or fauna into the habitat from which they were removed, provided that their reintroduction does not pose a threat to ecological stability or impede the reproduction or migration of wild flora or fauna species;

IV. The return of the hazardous materials or wastes or specimens of threatened or endangered wildlife species to the country of origin, with adherence to the stipulations of international treaties and conventions to which Mexico is a party, or

V. Disqualification, where the perpetrator or accomplice to the offense has the capacity of a public servant, for a period of time up to that which is set as a custodial sentence, which shall run from the time when the convict has completed his prison term or said term is deemed to be completed.

The community work to which Article 24 of this Act refers shall consist of activities related to environmental protection or restoration of natural resources.

For the purposes to which this article refers, the judge shall request the issuance of the appropriate technical report from the competent federal body or from institutions of higher education or scientific investigation.

The competent bodies of the public administration shall provide the public prosecutor or the judge with any technical or expert reports that may be required further to charges laid as a result of the commission of the offenses to which this Title refers.

Where the accused voluntarily repairs the harm without such an obligation being determined by administrative decision, the penalties corresponding to the offenses committed shall be those resulting from the halving of the minimum and maximum parameters contemplated in this Title.

Mexican Official Standards

[Only the titles are presented.]

Mexican Official Standard **NOM-052-SEMARNAT-1993** establishing the characteristics of hazardous waste, the list thereof, and the thresholds above which a waste is considered hazardous due to its toxicity in the environment.

Mexican Official Standard **NOM-053-SEMARNAT-1993** establishing the procedure for conducting the extractive tests to be used to determine the components that make a waste hazardous due to its toxicity in the environment.