



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

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13791, 14025, 14208, 14341, 14490, 16084, 16405.

DOCUMENT 112/

/06

Mexico City, 10 January 2007

**GEOFFREY GARVER  
DIRECTOR, SUBMISSIONS ON ENFORCEMENT MATTERS UNIT  
COMMISSION FOR ENVIRONMENTAL COOPERATION**

Based on the provisions of Article 14(3) of the North American Agreement on Environmental Cooperation (NAAEC), the United Mexican States, in its status as a Party, is providing herein an *ad cautelam* response to submission **SEM-06-003 (Ex Hacienda El Hospital II)** and to consolidated submission **SEM-06-004 (Ex Hacienda El Hospital III)**, submitted by Myredd Alexandra Mariscal Villaseñor, Justina Domínguez Palafox, Félix Segundo Nicolás, Karina Guadalupe Morgado Hernández, Santos Bonifacio Contreras Carrasco, Florentino Rodríguez Viara, Valente Guzmán Acosta, María Guadalupe Cruz Ríos, Cruz Ríos Cortés and Silvestre García Alarcón, as well as by Roberto Abe Almada, as the executor to the testamentary succession of Roberto Abe Domínguez.

To facilitate cross referencing with the Secretariat's determination, the Party's response is composed of three sections structured as follows:

**I. Existence of Pending Proceedings**

**II. Inadmissibility of the Submission**

- I.1. Invalidity of the submission due to non-compliance with the provisions of Article 14(1)(d) of the NAAEC, i.e., the submission is not aimed at promoting enforcement of the law.
- I.2. Invalidity of the submission due to non-compliance with the provisions of Article 14(1)(e) of the NAAEC, i.e., failure to notify the Party of the matter.
- I.3. Invalidity of the submission due to non-compliance with the provisions of Article 14(2)(c) of the NAAEC, i.e., failure to pursue the remedies available under the Party's law.

**III. Response of the Party**



SECRETARIA DE MEDIO AMBIENTE  
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[UNOFFICIAL TRANSLATION]  
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13791, 14025, 14208, 14341, 14490, 16084, 16405.

III.1. Alleged failures to effectively enforce environmental law

- III.1.A. Articles 4, 5, 6, 134, 135, 136, 139 and 152 bis of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*), and Articles 68, 69, 75, 78, 101, 103 and 106 of the General Waste Prevention and Comprehensive Management Act (*Ley General para la Prevención y Gestión Integral de los Residuos—LGPGIR*), with respect to the actions implemented by Mexico regarding alleged responsibility for the soil contamination caused by BASF Mexicana, S.A. de C.V. (hereafter, “BASF”) during the operation and dismantling of the Facility.
- III.1.B. Articles 140, 150, 151 and 152 of the LGEEPA; Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the LGEEPA Regulations respecting Hazardous Waste (*Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Residuos Peligrosos—RRP*)<sup>1</sup>, and Mexican Official Standards NOM-052-SEMARNAT-1993 and NOM-053-SEMARNAT-1993, in respect of the management and final disposal of the hazardous waste generated during the dismantling of the BASF facility.
- III.1.C. Articles 29 paragraph VI and VII and 119 paragraphs VI, VII, XI, XIV and XV of the National Waters Act (*Ley de Aguas Nacionales—LAN*), during the period the Facility was in operation; Articles 135 paragraphs IV-VI and 136 paragraph II of the Regulations to the National Waters Act (*Reglamento de la Ley de Aguas Nacionales—RLAN*); and Article 139 of the LGEEPA, as they pertain to residual wastewater discharges, the particular conditions imposed on discharges in the letters patent, the infiltration of hazardous waste into the subsoil via discharges and the measures to control groundwater contamination in the operation of the sewerage and drainage systems.
- III.1.D. Articles 160, 161, 162, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170, 171, 172, 173 and 174 of the LGEEPA with respect to the administrative proceedings brought by the

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<sup>1</sup> The Regulations to the LGEEPA respecting Hazardous Waste were abrogated by the Regulations to the General Waste Prevention and Comprehensive Management Act, which were published in *el Diario Oficial de la Federación* on 30 November 2006.



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13791, 14025, 14208, 14341, 14490, 16084, 16405.

environmental authorities against BASF and the imposition and effective implementation of emergency measures in relation to the matter raised in the submission.

III.1.E. Articles 415 paragraphs I and II and 416 paragraph I of the Federal Penal Code (*Código Penal Federal*—CPF) in force in 1997, as well as Articles 420 quater and 421 of the CPF in effect subsequent to the reform of 6 February 2002, in respect of the alleged commission of offenses by BASF, and the prosecution thereof.

III.1.F. Articles 134 and 152 of the LGEEPA; Articles 8 paragraphs II, III, VI, VII and IX, 14, 15 paragraphs II and VII and 17 paragraph II of the RRP; Articles 29 paragraph VII and 119 paragraphs VI, VII, XI, XIV and XV of the LAN; Articles 135 paragraphs IV-VII and 136 paragraph II of the RLAN, and Mexican Official Standard NOM-052-ECOL-1993, in respect of alleged omissions of which the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) was supposedly cognizant due to an Environmental Audit.

III.1.G. Articles 191, 192 and 193 of the LGEEPA with respect to the processing of citizen complaints filed with Profepa, in relation to the facts raised in the submission.

III.2. Assertions of the Submitter in submission SEM-06-004 (*Ex Hacienda El Hospital III*) with respect to:

III.2.1. The actions implemented by Mexico in relation to the soil contamination that supposedly persists within and beyond the bounds of the land rented by BASF on the Ex Hacienda El Hospital lot, including the effecting of soil characterization studies, the imposition of corrective measures, safety measures and administrative fines and penalties.

III.2.2. The investigation and prosecution of an alleged infraction in terms of environmental management, i.e., Profepa's alleged failure to adequately document a wastewater drainage system in its administrative records.



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Y RECURSOS NATURALES

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LEGISLATION AND REVIEW BRANCH

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F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

## BACKGROUND

On 28 September 2006, the Secretariat of the Commission for Environmental Cooperation determined that, pursuant to Articles 14(1) and (2) of the NAAEC, submission SEM-06-004 (*Ex Hacienda El Hospital III*) satisfies all the requirements established under Article 14(1) of said Agreement and that in accordance with the criteria stipulated under Article 14(2) of the NAAEC said submission warrants a response from the Party. Furthermore, pursuant to paragraph 10.3 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Secretariat consolidated the submissions SEM-06-004 (*Ex Hacienda El Hospital III*) and SEM-06-003 (*Ex Hacienda El Hospital II*), as both relate to the same facts, contain substantially the same assertions and cite the same environmental laws.

On 30 August 2006, via Notification A14/SEM/06-003/12/DET, the Secretariat determined that submission SEM-06-003 (*Ex Hacienda El Hospital II*) satisfies the requirements of Article 14(1) of the NAAEC and that bearing in mind the criteria established in Article 14(2), said submission warranted requesting a response from the Party concerned in respect of the legal provisions cited.

On 30 August 2006 and 28 September 2006, were officially received the Secretariat's notifications containing its determination that the submissions **SEM-06-003 (*Ex Hacienda El Hospital II*)** and **SEM-06-004 (*Ex Hacienda El Hospital III*)**, submitted by Myredd Alexandra Mariscal Villaseñor, on her own behalf and as the representative of Justina Domínguez Palafox, Félix Segundo Nicolás, Karina Guadalupe Morgado Hernández, Santos Bonifacio Contreras Carrasco, Florentino Rodríguez Viaira, Valente Guzmán Acosta, Cruz Ríos Cortés and Silvestre García Alarcón, as well as by Roberto Abe Almada, as executor of the testamentary succession of Roberto Abe Domínguez, respectively (hereafter, the "Submitters"), [warranted a response] concerning the alleged failure "to effectively enforce environmental legislation," in particular the LGPGIR, the LGEEPA, the RLAN, the FPC (Article 416, paragraph I), as well as Official Mexican Standards NOM-052-SEMARNAT-1993 and NOM-053-SEMARNAT-1993.

On 6 November 2006, the Party requested, via Official Communication 112/0008031/06, an extension to the deadline for its response to submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*).



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

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LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

A new deadline for submitting the Party's response, January 10, 2007, was granted. This was communicated via Determination A14/SEM-06-004/27/RPRO by the Submissions on Enforcement Matters Unit's Legal Officer.

## I. EXISTENCE OF PENDING PROCEEDINGS

Pursuant to the provisions of Article 14(3)(a), the United Mexican States, as a Party to the NAAEC, hereby notifies the CEC Secretariat of the existence of a pending administrative proceeding.

Said pending proceeding arises from a nullity proceeding<sup>2</sup> brought before the Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*) BASF (Exhibit No. 1) against the ruling contained in the Administrative Decision of 20 April 2006, issued by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat), in relation to file No. XV/2006/58 (Exhibit No. 2). Said ruling partially modified the Administrative Decision of 20 December 2005 (file No. B-0002/0775), issued by Profepa (Exhibit No. 3), which was also challenged pursuant to the provisions of Article 1 of the Federal Administrative Litigation Act (*Ley Federal del Procedimiento Contencioso Administrativo*).<sup>3</sup>

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<sup>2</sup> The nullity proceeding, or court case brought against the federal state, is instigated against definitive administrative decisions as defined by the Organic Law of the Federal Court of Fiscal and Administrative Justice (*Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa*), and is subject to the provisions of the Federal Administrative Litigation Act (*Ley Federal del Procedimiento Contencioso Administrativo*).

<sup>3</sup> **ARTICLE 1.-** Cases brought before the Federal Court of Fiscal and Administrative Justice shall be subject to the provisions of this Law, without prejudice to the provisions of any international treaties to which Mexico is a party. In the absence of provisions expressly stipulating the contrary, the Federal Civil Procedures Code shall also apply, provided that the provisions of the latter do not contravene those regulating litigation against the federal state as provided for under this Law.

When the ruling on an administrative remedy is contrary to the legal interests of an appellant, and said appellant challenges it in a court case brought against the federal state, it shall be understood that he is simultaneously challenging the appealed ruling in the parts that continue to affect him, and may assert legal arguments not raised in the remedy.

Furthermore, when the decision on an administrative remedy declares that it has not been properly brought or dismisses it as invalid, the litigation against the state shall proceed against the ruling that is the object of the remedy, provided that the competent Regional Chamber determines the case to be valid. In such a case legal arguments not raised in the remedy may be asserted.



SECRETARÍA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

It's worth pointing out that the administrative rulings challenged in the nullity proceeding derived from the administrative proceeding B-002/0750 initiated by Profepa against BASF and Roberto Abe Domínguez, then owner of the lot known as "Ex Hacienda El Hospital." Said administrative proceeding originated with an inspection effected from 23 to 25 June 1998 during which acts and omissions in terms of observance of the law were detected, resulting in the administrative decision of 1 July 1998. This administrative decision ordered BASF to execute various measures, in particular the completion and submission of a detailed inventory that would include the classification, characteristics and quantities of the existing hazardous waste generated while the Facility was in operation and/or during its dismantling, as well as a precise description of their location inside the building. In addition, the company was ordered to submit an inventory of the walls, original floors, roofs and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Also required: the submission of a detailed work schedule to indicate the clean up requirements re walls, original floors, roofing and other structural elements. Furthermore, it was required that said information should indicate which elements could be remediated, restored with new coverings or demolished, as well as how the wastes generated by such activities were to be managed. Moreover, the company was notified of its obligation to submit a description of the potable and wastewater management system as well as a program for dismantling both the drainage system that had been installed in the section of the building intended for industrial activities and the one outside up to the point where it reached the irrigation ditch. The information communicated to the company also included an account of the various inspections, administrative decisions and rulings made. Said account is appended herein as Appendix No. 1.

Let it be noted that there were two separate proceedings, with file No. B-002/0775 assigned to BASF Mexicana, S.A. de C.V., while file No. el B-002/0750 was assigned to Roberto Abe Domínguez.

The nullity proceeding bears on the administrative proceeding brought against BASF, i.e., file B-002/0775.

On 8 September 2006, the presiding magistrate, José Celestino Herrera Gutiérrez, of the of the Fifth Metropolitan Regional Chamber of the Federal Tax and Administrative Court (*Quinta Sala Regional Metropolitana del Tribunal Federal de Justicia Fiscal y Administrativa*), made a ruling based on the provisions of Article 58 of the Federal Code of Civil Procedures (*Código Federal de Procedimientos Civiles*—CFPC), to admit the proceeding as valid, thus leaving the decision of 2 August 2006 without effect; furthermore, said ruling summoned



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Semarnat to respond to the suit and decreed a suspension of the decision of the administrative appeal (Exhibit No. 4).

Clearly, the foregoing has materially changed the status of the submissions in relation to the provisions of Article 14(3)(a) of the NAAEC<sup>4</sup> and Guideline 9.4<sup>5</sup>. Consequently, **the Secretariat must not proceed further with submission SEM-06-003 (Ex Hacienda El Hospital II) and consolidated submission SEM-06-004 (Ex Hacienda El Hospital III), and it must notify the Submitter and the members of the Council of its reasons**, i.e., the existence of pending proceedings bearing on the same matters raised in said submissions.

## II. INADMISSIBILITY OF THE SUBMISSION

### I.1. INVALIDITY: Due to non-compliance with the provisions of Article 14(1)(d) of the NAAEC, i.e., the submission is not aimed at promoting enforcement of the law

Article 14(1)(d) of the NAAEC<sup>6</sup> indicates that in order to be admissible a submission to the Secretariat must aim to promote enforcement of the law,

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<sup>4</sup> **Article 14: Submissions on Enforcement Matters**

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3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) **whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further**; and
- (b) of any other information that the Party wishes to submit, such as:
  - (i) whether the matter was previously the subject of a judicial or administrative proceeding, and
  - (ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued. (Emphasis added)

<sup>5</sup> **9.4** If the Party informs the Secretariat that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission, and will notify the Submitter and the Council of its reason(s) and that the submission process is terminated. (Emphasis added)

<sup>6</sup> **Article 14: Submissions on Enforcement Matters**

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission: ... (d) appears to be aimed at promoting enforcement rather than at harassing industry; (emphasis added).



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

provided that said submission does not aim to harass an industry or is manifestly trivial. This requirement is reiterated in Guideline 5.4.<sup>7</sup>

However, said precepts were not fully observed inasmuch as the Secretariat admitted a submission that was manifestly aimed at harassing a particular company.

What substantiates the statement that the submission is not aimed at promoting the enforcement of environmental law, as opposed to the pursuit of private interests, is the fact that commencing in September 1997 Mr. Roberto Abe Domínguez no longer permitted BASF to enter the Ex Hacienda El Hospital lot to attend to the execution of the corrective measures decreed by Profepa in Administrative Proceeding 17/VI/040/97. Indeed, Mr. Abe Domínguez went so far as to instigate an *amparo* proceeding against official notifications PFFPA-MOR-02-422/97 of 12 November 1997 and PFFPA-MOR-02-545/97 of 17 November 1997, in which he was notified that the company in question would comply with the work ordered by Profepa by conducting an assessment of the environmental damages caused on the Ex Hacienda El Hospital installations. Said assessment was to include "soil and subsoil perimeter sampling and a determination of the effects on the aquifer and on the body of water receiving the wastewaters, as well as a proposal on remediation, which would be subject to prior authorization before any work is executed." In addition, Mr. Abe Domínguez was informed that he was jointly liable for the remediation activities. Once the *amparo* proceeding had concluded, the Profepa delegation in the State of Morelos, issued an administrative decision dated 10 March 1998, through which it requested that a consulting firm hired by BASF be granted permission to enter the site in order to carry out emergency corrective measures, which BASF had been ordered to execute in the administrative order of 2 August 1997. This order was later reiterated on 16 October 1997.

Furthermore, in the administrative decision of 20 April 2006, in which the decision on the appeal for review filed by BASF was communicated, the following declaration was made: "the corrective measures ordered via the aforementioned

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<sup>7</sup> 5.4 A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not: (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission; and (b) the submission appears frivolous.





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

decisions<sup>8</sup> remain pending, as attest the actions documented in the file that is the subject of this ruling; in effect, work recommenced on 11 May 2005 and was suspended on 31 May of the same year. This work remains unfinished to this day for reasons to be specified below. As is evident from the various written documents submitted by the company, the actions taken by Profepa and the public and private documents on file, **Misters Roberto Abe Domínguez y Roberto Abe Aldama**, the former as the owner of the building known as “Ex Hacienda de Nuestra Señora de la Concepción El Hospital” or “Ex Hacienda El Hospital,” and the latter as co-executor of the estate of the former, **repeatedly and by various means opposed and prevented the attempts of company BASF MEXICANA, S.A. de C.V. to carry out the corrective measures ordered by the Office of the Federal Attorney for Environmental Protection.**” In particular, said documents include:

- 1) Inspection record 17-006-0001/98-D-V-32, dated May 9th 2001, recorded the fact that **C. Roberto Abe Domínguez, prevented personnel from the Office of the Federal Attorney for Environmental Protection and personnel from the company Base Mexicana, S.A. de C.V. from gaining access to the building. The former were ordered to supervise the latter’s activities which were intended to insure remediation of the site.**
- 2) The minutes of Profepa’s meeting of 16 May 2002 with Mr. Roberto Abe Almada recorded the following:

“...Furthermore, he stated that as long as a ruling on a civil case and on criminal charges against the company in question remained pending, he deemed that in order to not run the risk of losing evidence it would be inadvisable to permit access to the building for the purposes of removing material and conducting sampling in zones 15 and 21...”

ADMINISTRATIVE DECISIONS:

... **Mr. Roberto Abe Almada and his legal advisor will not, at this time, permit access to zones 15 and 21**, for the abovementioned reasons. However, they indicate that in 90 days from today, once the respective expert assessments have been conducted and the results obtained thereof, and upon the conclusion of a civil agreement with the company, they would be in a position to analyze the request for access in order to execute the works in said zones...”

- 3) Also, **via notifications** dated February 20, March 14, April 2, 3 and, May 22, and July 10—all in the year 2002—Profepa’s Pollution Source Branch (*Dirección General de Inspección de Fuentes de Contaminación*) **requested**

<sup>8</sup> Administrative decisions No. DGIC-053/2004 and DGIFC-007/2005, dated 31 August 2004 and 25 February 2005, respectively.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

- Mr. Roberto Abe Domínguez's permission for access to the Facility on behalf of personnel from both BASF and Profepa, in order to execute the sampling and cleanup actions programmed in the Work Schedule.**
- 4) **At the request of Mr. Roberto Abe Domínguez, on 15 July 2002, the Second District Judge granted an *amparo* decision and protection from federal justice to Mr. Roberto Abe Domínguez, a circumstance which made it impossible to continue the works contemplated in the Environmental Restoration Program.**
  - 5) **Moreover, further to the preceding point, inspection record No. 17-006-0001/98-D-V-41, prepared by inspectors attached to Profepa, indicates that between 20 May and 21 June 2000 Mr. Roberto Abe Domínguez and his lawyers repeatedly prevented the personnel from BASF and Profepa from executing the sampling and/or cleanup tasks on the site that were programmed in the Work Schedule.**
  - 6) **Due to the impossibility of carrying out the corrective measures ordered by Profepa, BASF withdrew from Ex Hacienda El Hospital on 21 June 2002, ceding possession of the building to its owner C. Roberto Abe Domínguez, and leaving various corrective measures intended to remediate the site pending.**
  - 7) **Furthermore, it is extremely important to underline that the building is presently the subject of a civil suit.** This emerges in the documentary record contained in file B0002/0775, specifically sheets 24478 to 24495 and 24472 to 24477 which include copies of the following documents:

**1)** A copy of the interlocutory judgment of the thirty-second judge of the Court of Civil Proceedings of the Federal District, in which Mr. Roberto Abe Domínguez is ordered to pay legal costs to BASF MEXICANA, S.A. DE C.V. in the amount of P\$66,564,300.00.

**2)** The Writ of Seizure, prepared on 18 October 2006 by the actuary attached to the Fourth Court of Civil Proceedings of the First Judicial District of the state of Morelos, in which the following was recorded:

"... Thereafter, and having made known the motive of my presence, I demanded of him, pursuant to the terms of the ruling made by the thirty-second judge of the Civil Proceedings Court of Mexico City, dated 13 September 2005, as well as the ruling of the fourth judge of the Civil Proceedings Court of the First Judicial District of the state of Morelos, dated 3 October of the current year, that he, through this document, pay the defendant or his legal representative the sum of P\$66,654,300.00 (SIXTY-SIX MILLION, FIVE HUNDRED AND SIXTY-FOUR THOUSAND, THREE HUNDRED PESOS) [sic]. In response, he replied that he was aware of the existence of the proceeding and of the sentence imposed on him, but that at that time he was unable to pay and, following the instructions of his lawyer,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

he had nothing to declare and, furthermore, would not sign the present document...

.....Thereafter, and speaking on behalf of the defendant or his legal representative, I stated that pursuant to the negative response of the co-executor of the estate of Mr. Roberto Abe Domínguez to the request that he designate goods from said estate sufficient to guarantee the compensation demanded, I designate on behalf of BASF Mexicana, S. A. de C.V., the following buildings to be under my liability without fault: 1.- the rural lot known as "Ex Hacienda de Nuestra Señora de la Concepción El Hospital" or "Ex Hacienda El Hospital," located in the jurisdiction of Cuautla, Morelos (surface area: 43,273.95 square meters), with the following cadastre entry: Sheet No. 155, Tome XXXII, Volume I, First Section, Series C, under the number 226.  
..."

- 8) In light of the preceding, **it is necessary to bear in mind the series of obstacles that have made it impossible to fully comply with all of the corrective measures and cleanup tasks. Furthermore, it is evident that there is an ongoing legal dispute between the company BASF MEXICANA, S.A. DE C.V. and the estate of Mr. Roberto Abe Domínguez, owner of the building in which the measures imposed on BASF MEXICANA are to be executed.** (Exhibit No. 5).

The preceding constitutes clear evidence that the object of the submission is not enforcement of the law, nor is its object environmental protection, and as such contravenes the provisions of Article 14(1)(d) of the NAAEC and Guideline 5.4. Consequently, the **submission is not focused on the acts or omissions of a Party nor on the latter's compliance with its legal obligations as opposed to compliance with agreements between private parties.**

Furthermore, the requirements of Article 14(1)(d) of the NAAEC and Guideline 5.4 were not met due to the actions over the years of Roberto Abe Domínguez and Roberto Abe Almada, as is evident in such actions as, among others, the Judicial Settlement that both signed with BASF. In this settlement it was indicated that "commencing in September 1997, Mr. Roberto Abe Domínguez and BASF Mexicana, S.A. de C.V. had differences in relation to the LEASE. Consequently, both parties brought various legal and administrative actions in an attempt to resolve the dispute" and that "in the pursuit of their interests, Misters Roberto Abe Almada and Jorge I. Gastelum Miranda, as well as Bufete Gastelum, took action by implementing the legal and administrative actions cited..." (Exhibit No. 6).

It's worth pointing out that said legal and administrative actions ensue from the fact that in 1995 BASF expressed its wish to terminate its existing lease in



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

advance, which it did in fact do in 1997. These events were detailed in the judicial settlement.

Notwithstanding the aforementioned judicial settlement, conflicts concerning private interests continued to arise, as attests the ordinary civil proceeding brought by Roberto Abe Domínguez against BASF, in which he sued the latter to obtain payment of diverse sums of money, including US\$100,000,000.00 US (one hundred million U.S. dollars), supposedly as reparations for the damages allegedly caused by industrial activities carried out by BASF. Said suit was settled by the sentence passed by the Thirty Second Civil Proceedings judge of the Federal District on 3 February 2005, who, in substance, ruled as follows:

First.- Ordinary civil proceedings were initiated to litigate this case, in which the principal plaintiff, Roberto Abe Domínguez did not prove the extreme grounds for his action and assertions ...

...

Fourth.- This Court orders Roberto Abe Domínguez, the plaintiff in the principal case, to pay the legal costs incurred in this case, to the defendant, with such to be payable in execution of the sentence.

....

Said sentence was upheld by the Fifth Chamber of the Superior Court of Justice of the Federal District (*Quinta Sala Civil del Tribunal Superior de Justicia del Distrito Federal*) by way of its sentence of 18 May 2005 (exhibit ) [sic], in which it basically ruled the following: (1) the grievances asserted by Mister Roberto Abe Domínguez are unfounded and the lower court's sentence is upheld, and (2) Mister Roberto Abe Domínguez is ordered to pay the legal costs of both trials.

It's worth pointing out that the building has been seized and is subject to said civil proceeding, according to the documentary evidence contained in file B-0002/0775. Said evidence includes the interlocutory judgment of 11 August 2005, made by the thirty-second judge of the Civil Proceedings Court of the Federal District, as a result of the sentences referred to above, and in which it is established that Roberto Abe Domínguez is ordered to pay the company BASF Mexicana, S.A. de C.V. the sum of P\$66,564,300.00 as costs. (Exhibit No. 7).

The preceding substantiates the argument that the submission was not put forward in order to promote the effective enforcement of the environmental laws in the territory of each of the Parties as opposed to the private interests of the Submitters through the harassing of a particular company. Consequently, it is deemed that neither Article 14(1)(d) of the NAAEC nor Guideline 5.4 were fully



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

observed by the Secretariat, inasmuch as it admitted a manifestly invalid submission.

Another element indicating that the citizen complaint submitted does not seek to promote enforcement of law is the fact that the citizen complaints mentioned by the Submitters, the ones filed by Roberto Abe Domínguez and Carlos Álvarez Flores, were later withdrawn. This indicates that they were not motivated by concern for the environment, which leads to the supposition that they were pursuing interests that do not align with the ones that should be pursued via the formulation of citizen submissions. This is even truer in the case of Mr. Álvarez Flores who strengthens this argument by acknowledging the following in the written statement through which he withdrew his complaint: "*...the information that had been submitted therein (i.e., the complaint) was erroneous, incomplete and therefore not truthful. Consequently, I wished to clarify that the statements made against the company BASF Mexicana, S.A. de C.V. are not true.*"

Furthermore, an important fact stands out: in several of Profepa's inspection visits, a number of individuals expressed their perception that Carlos Alvarez Flores sought to obtain some personal benefit by filing the complaint (Exhibit No. 8).

It's worth pointing out that an analogous situation was already considered by the Secretariat in submission **SEM-04-001 (Hazardous waste in Arteaga)**, where the point was made that in respect of Article 14(1)(d) of the NAAEC and Guideline 5.4 (a) the precepts therein are not satisfied [sic] if a submission "is focused on the acts or omissions of a Party rather than compliance by a particular company or business; *especially if the Submitter is a competitor that may stand to benefit economically from the submission.*" In addition, the Secretariat deemed that the same premises apply should the legal representative of the Submitter stand to obtain an undue economic benefit via the submission as a competitor of the entity against which it is alleged that the Party is not effectively enforcing its legislation.

As may be seen, the submission does not comply with the requirements of promoting effective enforcement of environmental law. Consequently, it cannot and must not be admitted by the Secretariat as it fails to comply with the requirements of Guideline 5.4., i.e., **the submission is not focused on the acts or omissions of a Party; it is instead focused on compliance by a particular company or business. Therefore, submission SEM-06-004 (Ex Hacienda El Hospital III) should be dismissed.**



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**I.2. INVALIDITY OF THE SUBMISSION due to non-compliance with the provisions of Article 14(1)(e) of the NAAEC and Guideline 5.5, i.e., failure to notify the Party of the matter.**

In addition to the fact that, as indicated in the preceding lines, submission SEM-06-004 (Ex Hacienda El Hospital III) should be dismissed, the consolidated file as well can proceed no further, inasmuch as submission SEM-06-003 (Ex Hacienda El Hospital II) is also invalid, albeit for a variety of reasons.

Guideline 5.5 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* stipulates that “*The submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question and indicate the Party’s response, if any. The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question.*”

It is clear that neither Myredd Alexandra Mariscal Villaseñor, nor her representatives, communicated in writing with the competent authorities of the Party in respect of the matters dealt with in the submission, notwithstanding their assertion to the contrary.

Nor did the Submitters make representations in writing to the Mexican environmental authority or pursue any other remedy to obtain information on the case. Their actions were limited to referring to the complaints filed by other persons, as neither Carlos Álvarez Flores nor Roberto Abe Domínguez, count among the Submitters in question. This is **evidence that the Submitters did not notify the Party of the matter, and as such failed to comply with the provisions of Article 14(1)(e) of the NAAEC and Guideline 5.5. Nor did they, moreover, pursue the remedies available to them under the terms of the laws of the Party, as is required under Article 14(2)(c) of the NAAEC and Guidelines 5.6 and 7.3.**

In light of the preceding, **the Secretariat must dismiss submission SEM-06-003 (Ex Hacienda El Hospital II) along with consolidated submission SEM-06-004 (Ex Hacienda El Hospital III).** In effect, they failed to comply with the provisions of Article 14(1)(e) of the NAAEC and Guideline 5.5 of the Guidelines, i.e., **the Submitters did not notify the Party about the matter raised in the submission.** In effect, among the documentary evidence presented in either submission, not a single document actually demonstrates that the



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Submitters of SEM-06-003 (*Ex Hacienda El Hospital II*) took any action, or promoted or effected any prior representations before the Mexican environmental authorities.

**I.3. INVALIDITY OF SUBMISSION: Remedies available under the laws of the Party, in accordance with Article 14(2)(c) of the NAAEC and Guidelines 5.6 and 7.3 of the Guidelines**

Regarding submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*), there has been a failure to comply with Article 12(2)(c) of the NAAEC and Guideline 5.6<sup>9</sup> inasmuch as the Secretariat improperly deems that the Submitters pursued private remedies available under the Party's laws. This is so in light of the following considerations:

Myredd Alexandra Mariscal Villaseñor, on her own behalf and as a representative of Justina Domínguez Palafox, Félix Segundo Nicolás, Karina Guadalupe Morgado Hernández, Santos Bonifacio Contreras Carrasco, Florentino Rodríguez Viara, Valente Guzmán Acosta, María Guadalupe Cruz Ríos, Cruz Ríos Cortés or Silvestre García Alarcón, Submitters of submission SEM-06-003 (*Ex Hacienda El Hospital II*), did not append a single document that would actually substantiate the assertion that they did indeed pursue any of the remedies provided for under the Party's law, in order to comply with the provisions of Article 14(2)(c) of the NAAEC and Guideline 5.6.

The underlying fact is that the Submitters did not complain in writing or pursue any remedy before the Mexican authorities. The Submitters only refer to complaints made by third parties, i.e., Carlos Álvarez Flores and Roberto Abe Domínguez, whose complaints were filed in 2005 and 1998, respectively. It is utterly clear that Mistery Carlos Álvarez Flores and Roberto Abe Domínguez are not among the Submitters in question; consequently, it is evident that **the Submitters of SEM-06-003 (*Ex Hacienda El Hospital II*) did not pursue the remedies available to them under the provisions of the Party's laws, as is required under Article 14(2)(c) of the NAAEC and Guidelines 5.6 and 7.3.**

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<sup>9</sup> 5.6 The Submission should address the factors for consideration identified in Article 14(2) of the Agreement to assist the Secretariat in its review under this provision. Thus, the Submission should address:

....  
(c) The actions, including private remedies, available under the Party's law that have been pursued (Article 14(2)(c));

....



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

In effect, the Submitters endeavor to adopt the complaints of Misters Carlos Álvarez Flores y Roberto Abe Domínguez as their own, which is improper, as the provisions of the NAAEC and the Guidelines specify that the Submitters themselves are the ones who must undertake and pursue the remedies available to them under the laws of the Party, prior to taking recourse to Articles 14 and 15 of the NAAEC.

This may be seen in the provisions of Guidelines 7.3 (c) and 7.5 (b), which read as follows:

**“7.3 As set forth in Article14(2) of the Agreement, the Secretariat will, in making that determination, be guided by whether:**

....

**(c) private remedies available under the Party’s law have been pursued;** and  
...”

**“7.5 In considering whether private remedies available under the Party’s law have been pursued,** the Secretariat will be guided by whether:

....

**(b) reasonable actions have been taken to pursue such remedies prior to making a submission,** bearing in mind that barriers to the pursuit of such remedies may exist in some cases.” (Emphasis added).

Therefore, submission SEM-06-003 (*Ex Hacienda El Hospital II*) should be dismissed and its file closed.

Concerning the complaints filed by Misters Carlos Álvarez Flores and Roberto Abe Domínguez, it is important to emphasize that these persons withdrew their respective citizen complaints. Therefore, *stricto sensu*, they too failed to pursue the remedies available to them pursuant to the laws of the Party. In effect, although they did indeed initiate citizen complaints, these were subsequently withdrawn; the legal effect, therefore, was to abandon the remedy pursued. Thus, the Submitters may not claim that they “pursued” the remedies provided for under Mexican law, if, subsequent to the filing of the citizen complaint, they abandoned the procedure that led to action on the part of the competent authority. Consequently, the Secretariat should not consider that Carlos Álvarez Flores and Roberto Abe Domínguez pursued the remedies available to them, as the Secretariat incorrectly states, given that to comply with such a premise, it isn’t sufficient to just file a complaint—one must follow through with all necessary actions available until the end of the process, which in the present case did not occur as both parties withdrew their complaints (Exhibit No. 9).





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

The preceding is confirmed by the fact that both Mr. Roberto Abe Domínguez, and Mr. Carlos Álvarez Flores withdrew their complaints in letters to Profepa dated 26 October 1999 and 16 May 2006, respectively. Indeed, Mr. Álvarez Flores went as far as to declare that *"...the information that had been submitted therein (i.e., the complaint) was erroneous, incomplete and therefore not truthful. Consequently, I wished to clarify that the statements made against the company BASF Mexicana, S.A. de C.V. are not true."*

It's useful to specify that the factors listed in Article 14(2) of the NAAEC are more than simple or mere considerations guiding the Secretariat. Rather, they are elements that, pursuant to said instrument and the Guidelines, in particular 7.5(b), are fundamental to the Secretariat's determinations regarding the admissibility of a submission and, where so required, requesting a response from a Party.

As the preceding indicates, the Submitters neglected the remedies provided for under domestic law and, therefore, failed to comply with the provisions of Article 14(2)(c) of the NAAEC.

In submission SEM-06-004 (*Ex Hacienda El Hospital III*), the Submitter indicates that a citizen complaint was filed by his father, Roberto Abe Domínguez, and that he had not instigated any other proceedings prior to making the submission. However, he fails to mention that his father withdrew the complaint. As such, he cannot and must not assert or deem that he pursued the remedies available to him. Therefore, the Submission does not satisfy the premises of Article 12(2)(c) of the NAAEC and Guideline 5.6, and consequently, the Secretariat may not affirm that the Submitter did indeed comply.

Also, the Submitter states that "different civil, criminal and administrative complaints and suits were instigated, which led to the signing of a judicial settlement."<sup>10</sup> However, not only does said settlement not count among the types of remedies pursuant to the laws of the Party, it deals with legal dispute between private entities, arising from the dispute between Roberto Abe Domínguez, Roberto Abe Almada and Jorge I. Gastelum, on the one hand, and BASF Mexicana, S.A. de C.V., Química Knoll, S.A. de C.V., on the other, in respect of the leasing of the lot known as "Ex Hacienda de Nuestra Señora de la Concepción El Hospital" or "Ex Hacienda El Hospital" (Exhibit No. 10). The judicial settlement bore neither on environmental issues nor on the facts raised in this submission, as the Submitter asserts. It is therefore inexact of the Submitter to consider that he has pursued the remedies available to private parties under the laws of the Party.

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<sup>10</sup> Submission SEM-06-004 (*Ex Hacienda El Hospital III*), page 4.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Consequently, the Submitter did not comply with the provisions of Article 14(2)(c) of the NAAEC and Guidelines 5.6 and 7.3, in particular, since the supposed proceedings referred to by the Submitter culminated in the signing of a judicial settlement between private parties.

Furthermore, in the Secretariat's determination A14/SEM/06-004/06/DET of 28 September 2006, it points out that "...it is evident from the information provided that Mr. Roberto Abe Domínguez instigated an Amparo proceeding before the Third District Judge of the State of Morelos, against the actions of the Profepa Delegation..." As evidence of this proceeding, the Secretariat cited Appendix 4 of the submission. However, Appendix 4 of the submission does not document the *amparo* as such. Instead, it includes a copy of the administrative decision of 1 June 1998, which was entered into file B-20002/0750. Moreover, the *amparo* proceeding referred to by the Secretariat (and which was not delivered to Mexico as a documented exhibit) was instigated at the request of Mr. Roberto Abe Domínguez against two Profepa notifications which requested that he allow Profepa personnel and BASF personnel to execute environmental remediation work. Said *amparo* proceeding made it impossible to continue the work scheduled in the Environmental Restoration Program (Exhibit No. 11).

The preceding is of capital importance in determining that neither Roberto Abe Almada nor did any of the Submitters ever pursue any remedies pursuant to the laws of the laws of the Party. Nor did they communicate with the environmental authorities of the Party, which demonstrates their non-compliance with the precepts of Article 12(2)(c) of the NAAEC and Guideline 5.6 in terms of being deemed to have pursued the remedies available to citizens under the laws of the Party. Consequently, submissions SEM-06-003 (*Ex Hacienda El Hospital I*) and SEM-06-004 (*Ex Hacienda El Hospital III*) must be dismissed.

### III. RESPONSE OF THE PARTY

Notwithstanding the grounds for inadmissibility detailed above, the United Mexican States submit *ad cautelam* the following Response as a Party:

#### III.1. ALLEGED FAILURES TO EFFECTIVELY ENFORCE ENVIRONMENTAL LAW

III.1.A. Articles 4, 5, 6, 134, 135, 136, 139 and 152 bis of the General Ecological Balance and Environmental Protection Act, and Articles 68, 69, 75, 78, 101 103 and 106 of the General Waste Prevention and Comprehensive



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**Management Act, with respect to the actions implemented by Mexico regarding responsibility for the soil contamination caused by BASF during the operation and dismantling of the Facility**

Article 4 of the LGEEPA stipulates that the three levels of government exercise their powers respecting the preservation and restoration of ecological balance and environmental protection, pursuant to the division of jurisdictions established by the LGEEPA and other legal provisions. Specifically, it stipulates the following:

**“ARTICLE 4.- The Federal Government, the States, the Federal District and the Municipalities shall exercise their powers** in respect of the preservation and restoration of ecological balance and environmental protection, **in accordance with the division of jurisdictions provided for in this Act** and other Laws and regulations.

The division of jurisdictions in respect of the regulation of the sustainable use, protection and preservation of forest resources and soils, shall be set forth in the General Sustainable Forest Development Act (*Ley General de Desarrollo Forestal Sustentable*).” (Emphasis added)

As the foregoing indicates, Article 4 of the LGEEPA constitutes a provision concerned with jurisdictional issues, one that defines the distribution of legal powers to different jurisdictions in respect of the preservation and restoration of ecological balance and the protection of the environment; consequently, it is not possible to assert, as the Submitters do, any failure to comply with said article. Moreover, the Secretariat fails to consider that those legal provisions that establish jurisdictions and delegate powers to the organs of government constitute the legal foundation for the execution of the acts of authority through which such powers are exercised.

In the present case, the federal government’s actions were well-founded, inasmuch as soil contamination caused by hazardous waste is a matter under federal jurisdiction.

Article 5 of the LGEEPA establishes the powers of the Federal Government in matters pertaining to the preservation and restoration of ecological balance, as well as environmental protection, in the nation’s territory and in the zones over which it exercises its sovereignty and jurisdiction. Specifically, its provisions are as follows:

**ARTICLE 5.-** The following are powers of the Federal Government:



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

- I.- The formulation and administration of national environmental policy;
- II.- The application of the environmental policy instruments provided for in the present Act, pursuant to the terms and conditions established therein, as well as the regulation of actions to preserve and restore ecological balance and protect the environment that are effected in relation to goods and areas under federal jurisdiction;
- III.- Attending to matters that affect ecological balance in the nation's territory or in zones subject to the nation's sovereignty and jurisdiction, which originated in territory or zones subject to the sovereignty or jurisdiction of other States, or in zones beyond the jurisdiction of any State;
- IV.- Attending to matters, originating in the nation's territory or in zones subject to the nation's sovereignty and jurisdiction, which affect the ecological balance of territory or zones subject to the sovereignty or jurisdiction of other States, or that of zones beyond the jurisdiction of any State;
- V.- The issuing of Official Mexican Standards and the monitoring of the compliance thereof with respect to matters provided for in this Act;
- VI.- The regulation and control of activities considered highly risky, and that of the generation, management and final disposal of materials and wastes that are hazardous to the environment or ecosystems, as well as to the preservation of natural resources, pursuant to this Act, other applicable laws and their regulatory provisions;
- VII.- Participation in the prevention and control of environmental emergencies and contingencies, pursuant to whatever civil protection policies and programs that may be established to that end;
- VIII.- The establishment, regulation, administration and monitoring of protected natural areas under federal jurisdiction;
- IX.- The formulation, implementation and evaluation of the general ecological zoning programs and marine ecological zoning programs referred to in Article 19 bis of this Act;
- X.- The evaluation of the environmental impact of the works and activities referred to under Article 28 of this Act and, where so required, the issuance of the required authorizations;
- XI. Regulation of the sustainable use, protection and preservation of national water resources, biodiversity, wildlife and other natural resources under its jurisdiction;
- XII.- Regulation of air pollution, whatever the source of emissions, as well as its prevention and control in respect of zones or sources, whether fixed or mobile, under federal jurisdiction;
- XIII.- Promoting the use of technologies, equipment and processes that may reduce emissions and discharges of contaminants from any type of source whatsoever, in coordination with state, Federal District and municipal authorities; as well as the establishment of mandatory provisions regarding the sustainable exploitation of energy resources;
- XIV.- Regulation of the activities pertaining to the exploration, exploitation and extraction of minerals and other subsoil substances and resources that are under the nation's sovereignty, in relation to the effects said activities may generate regarding ecological balance and the environment;
- XV.- Regulation of the prevention of environmental pollution arising from noise, vibrations, thermal energy, light, electromagnetic radiation and odors prejudicial to ecological balance and the environment;
- XVI.- Promoting the participation of society in relation to environmental issues, in accordance with the provisions of this Act;



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**XVII.-** Establishing the National Environmental and Natural Resources Information System (*Sistema Nacional de Información Ambiental y de Recursos Naturales*) and making said system accessible to the public pursuant to the terms of this Act;

**XVIII.-** Issuing recommendations to federal, state and municipal authorities with the object of promoting compliance with environmental legislation;

**XIX.-** Monitoring and promoting, within the bounds of its jurisdiction, compliance with this Act and the codes and regulations ensuing from it;

**XX.-** Attending to matters that affect the ecological balance of two or more entities of the federation; and

**XXI.-** The other powers that this Act and other legal provisions confer on the Federal Government.

The twenty-one paragraphs comprising Article 5 do not stipulate any obligations on the part of the authorities nor are rights derived from that may be demanded by citizens. They are instead solely and exclusively a list of the Federation's powers. Said powers constitute the foundation for the delegation of authority, and, consequently, are considered to be one of the essential requirements of an act of authority. There has been no noncompliance whatsoever with said precept, inasmuch as Profepa acted within the bounds of the powers conferred upon it by the law.

As for Article 6 of the LGEEPA, it identifies the competent authority for the exercise of the powers conferred on the Federation by this Law, sets the terms for coordinated actions and, as required, the course to take in the event that other laws or regulations stipulate jurisdictions in relation to other dependencies and entities of the Federal Public Administration. Specifically, it establishes the following:

**“ARTICLE 6.-** The powers that this Law confers on the Federation, shall be exercised by the Executive Branch of the Federal Government through the Ministry, except in the case of those powers that are expressly vested by law in the Presidency of the Republic. Moreover, in certain cases, the Ministry may act in collaboration with the Ministries of National Defense and the Navy should the nature and gravity of the problem so require.

When, due to the issue at hand and pursuant to the provisions of the Federal Public Administration Organization Act (*Ley Orgánica de la Administración Pública Federal*) or other applicable legal provisions, the intervention of other dependencies is required, the Ministry shall exercise its powers in coordination with the latter.

Dependencies and entities of the Federal Public Administration that exercise powers conferred on them by other laws and regulations, of which the provisions pertain to the object of the present Act, shall adjust their exercise of these powers pursuant to the criteria included in this Act, in order to preserve ecological balance, sustainably exploit natural resources and protect the environment, as well as to the provisions of



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

the regulations, Official Mexican Standards, ecological zoning programs and the other regulatory standards that ensue from this Act.”

Said Article has been fully observed, inasmuch as Profepa, as a decentralized administrative organ of Semarnat, is the entity entrusted with exercising the inspection and monitoring provided for in federal environmental legislation.<sup>11</sup>

The preceding arguments outlined in relation to Articles 4 to 6 of the LGEEPA, regarding which the Submitters allege a lack of enforcement, indicate that these articles are solely concerned with defining the powers of the environmental authorities. Profepa duly acts within this jurisdictional framework when issuing notifications to private citizens, such as during inspections, in that its inspection orders are based on the provisions of Articles 1, 5 and 6 of the LGEEPA, among others, as may be seen in notification No. PFPA.MOR.084.98.0525 of 2 March 1998, issued by the Profepa Delegation of the State of Morelos (Exhibit no. 12), which reads as follows:

“...Reyna Puentes Ramírez is hereby notified that, **pursuant to** Article 16 of the Political Constitution of the United Mexican States, Article 62 paragraph I, II, III and X of the Internal Regulations of the Ministry of the Environment, Natural Resources and

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<sup>11</sup> **ARTICLE 118.-** The Office of the Federal Attorney for Environmental Protection shall be in charge of an Attorney with the following powers:

**I.** To monitor and assess compliance with the applicable legal provisions in respect of: the prevention and control of environmental contamination; the restoration of natural resources; the preservation and protection of forestry resources, wildlife, chelonians, marine mammals and aquatic species at risk, and the ecosystems and genetic resources thereof; the biosecurity of genetically modified organisms; the federal maritime land zone, beaches and lands reclaimed from the sea or any other body of maritime waters; protected natural areas; environmental impact, ecological zoning under federal jurisdiction and discharges of wastewaters into bodies of water within the nation’s territory; and the establishing of policies and administrative guidelines to these ends;

**II.** To receive, investigate and attend to complaints regarding noncompliance with the applicable legal provisions in respect of the resources, goods, materials and ecosystems referred to in the preceding paragraph and, when so required, to identify the competent authorities and direct said complaints to same;

**III.** To safeguard the interests of the population and promote its participation in encouraging and monitoring compliance with the provisions of environmental law, as well as contribute to the solution of problems caused by environmental emergencies or contingencies, and to provide consulting expertise in matters of environmental protection and defense, forest wildlife and natural resources under the jurisdiction of the Ministry;

**IV.** Coordinate control over the enforcement of environmental regulations with other federal authorities, as well as with any other federal, municipal, Federal District entities and delegations that may request such coordination and monitoring;

....(A complete list of the powers of the Office of the Federal Attorney for Environmental Protection is appended as Appendix II)



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca—Semarnap*), **Articles 4, 5 paragraphs III, IV, VI and XIX, 192 and other related and applicable articles of the General Ecological Balance and Environmental Protection Act**, in order to comply with the administrative decisions dated the 6<sup>th</sup> and 24<sup>th</sup> of February 1998, which ordered the company BASF MEXICANA, S.A. de C.V. to effect the removal and final disposal of the debris cited in the complaint, as well as the materials or objects donated and/or sold by the company in question, and with the object of verifying the removal and full compliance with these Administrative Decisions, the Delegation communicates by the presents, on this date, that the company will proceed to collect the materials in your possession, to your entire satisfaction. On this occasion, the company will prepare a detailed record of its activities. We therefore request your cooperation to ensure that this task is completed as successfully as possible.”

In light of the preceding, it is inadmissible to argue that there has been a failure to effectively enforce Articles 4, 5 and 6 of the LGEEPA, as the exclusive purpose of these latter is to set forth the delegation of powers and jurisdictions.

As for Articles 134 and 135 of the LGEEPA, they must be analyzed and assessed in conjunction. Article 134 of the LGEEPA<sup>12</sup> establishes the principles for preventing and controlling soil contamination and the foundations for said principles. It also provides a framework for national policy in the matter. As for Article 135, it identifies the cases where said principles are to considered and expressly provides for the following four cases:

**ARTICLE 135.-** The principles for the prevention and control of soil contamination shall be considered in the following cases:

- I. The planning and regulation of urban development;
- II. The operation of municipal waste cleanup and final disposal systems in sanitary landfills;

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<sup>12</sup> **ARTICLE 134.-** The following principles shall bear on the prevention and control of soil contamination:

- I. Responsibility for preventing soil contamination rests with the State and society;
- II. Waste materials must be controlled as they constitute the principal source of soil contamination;
- III.- It is necessary to prevent and reduce the generation of solid, municipal and industrial wastes, to institute techniques and procedures for their reuse and recycling, as well as to regulate their efficient management and final disposal;
- IV.- The utilization of pesticides, fertilizers and toxic substances must be compatible with the equilibrium of ecosystems and consideration must be given to their effects on human health in order to prevent the harm they may cause; and
- V.- As for soils contaminated by the presence of hazardous materials or waste, the actions necessary to recover or restore their original conditions shall be mandatory, such that said soils may be used in any type of activity provided for in the applicable urban development or ecological zoning program.”



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

III.- The generation, management and final disposal of solid, industrial and hazardous wastes, as well as the authorizations and permits granted for such purposes; and

IV. The granting of any type of authorization to manufacture, import or use pesticides, fertilizers and toxic substances or, more generally, to carry out any such related activities.

As may be seen above, the principles for preventing and controlling soil contamination concern urban planning and regulation, which is not the subject of this submission. Nor is the operation of municipal waste cleanup and final disposal systems in sanitary landfills an object of this submission, as attests the non-inclusion of any arguments in this regard.

As for the generation, management and final disposal of solid, industrial and hazardous wastes, the submission does not include any documented assertions on these matters. The same is true regarding pesticides, fertilizers and toxic substances. Although assertions are made concerning hazardous waste, these, however, are not documented.

The United Mexican States complied with the provisions of both Articles. By means of the administrative decisions dated 20 July 2000 and 19 September 2000, entered into file B-0002/775, Profepa's Director General of Inspection and Monitoring granted BASF, "on the basis of the provisions of Articles 4, 5, 6, 134, 135, 136, 139, 140, 150, 151, 151 bis, 152, 152 bis, 160, 167 and 170 paragraph III of the LGEEPA; Article 32 bis of the Federal Public Administration Organization Act; Articles 1, 2 section C, paragraph IV, 13, 33, 34, 35, 68, 69 paragraph IX, 71, 76 paragraphs IV and VI, 81 paragraphs II, IV and V of the first and second drafts of Semarnat's Internal Regulations," the authorization to execute the building remediation program, pursuant to the terms and conditions detailed in Legal Argument VII of said administrative decision. Furthermore, the company in question was notified that these remediation works would be supervised by inspection personnel attached to Profepa. Consequently, the company was required to give prior notice to the abovementioned Profepa department of such remediation activities. Furthermore, the first administrative decision was modified such that the remediation program is subject to the authorization of the National Institute of Anthropology and History (*Instituto Nacional de Antropología e Historia*—INAH), and the National Water Commission (*Comisión Nacional del Agua*—CNA) (Exhibit No.13).





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Article 136 of the LGEEPA sets forth the mandatory conditions governing wastes that accumulate or may accumulate and that are deposited in or leak into soils. Its provisions are as follows:

**ARTICLE 136.-** Wastes that accumulate or may accumulate and that are deposited in or leak into soils shall satisfy the conditions required to prevent or avoid:

- I. Soil contamination;
- II. Harmful changes in the biological processes in soils;
- III. Changes in soils that prejudice their enjoyment, use or exploitation; and
- IV. Health risks and problems.

The provisions of Article 136 were observed via, among other actions, the inspection carried out from 23 to 25 June 1998 on the property of Mr. Roberto Abe Domínguez, as were the provisions of Articles 139 and 152 bis of the LGEEPA. Moreover, said provisions were also considered when the execution of the building remediation program was ordered, as attest the preceding two exhibits. In addition, pursuant to the administrative decision dated 20 July 2000 (entered into file B-0002/775), an environmental, soil and groundwater characterization study was carried out. Also, a determination was made, via the administrative decision dated 19 September 2000, that prior to removing the underlying soil and filling materials, the company was ordered to effect a sampling of said soils in each of the zones specified on the CRET1 sampling points distribution map. In addition, the materials originating from the works connected with the drainage systems, walls and the concrete basin in the treatment plant were to be piled up in 10m<sup>3</sup> mounds to enable the taking of at least four sub-samples from each mound, out of which a composite sample would be formed for analysis in accordance with Official Mexican Standards NOM-052-ECOL-1993 and NOM-053-ECOL-1993.

Article 139 of the LGEEPA stipulates that “any discharge, deposit or seepage of contaminating substances or materials in soils shall be subject to the provisions of this Act, those of the National Waters Act, its regulatory provisions and the relevant Official Mexican Standards issued by the Ministry.” In the present case, these legal provisions were observed, as attest the administrative decisions of 20 July 2000 and 19 September 2000, issued by Profepa’s Director General for Inspection and Monitoring in respect of file B-0002/775, and the inspection activities to be detailed below.

As for Article 152 of the LGEEPA, its provisions are as follows:

**ARTICLE 152.-** The Ministry shall promote programs tending to prevent and reduce the generation of hazardous waste, as well as encourage reuse and recycling of same.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

In those cases where hazardous wastes may be used in a process that is different from the one that generated them, the Regulations to this Act and whatever Official Mexican Standards which may be issued in this regard, shall establish the mechanisms and procedures that ensure their efficient management from the environmental and economic points of view.

Hazardous wastes that are used, processed or recycled in a process that is different from the one that generated them shall be subject to the internal control of the company responsible for the process, if said process takes place on the same lot, in accordance with the formalities stipulated by the Regulations to this Act.

Should the wastes referred to in the preceding paragraph be transported to a different lot from the one where they were generated, such wastes shall be subject to the regulations applicable to the land transport of hazardous waste.

In this regard, Profepa, via its Industrial Inspection Branch (*Dirección General de Inspección Industrial*) inspected the Ex Hacienda El Hospital facility pursuant to Inspection Order No. EOO-SVI-DG11-0221/98 of 23 June 1998. In said inspection order, which was addressed to Mr. Roberto Abe Domínguez, as the owner of the building, the following was expressly brought to his attention "...you as the owner and lessor of said building, took possession of said installations on 3 September 1997 and from that moment on did not permit the personnel of the company in question<sup>13</sup> to carry out the actions necessary to comply with the emergency corrective measures ordered by said official via the administrative decision dated 2 August 1997; and bearing in mind that the provisions of the General Ecological Balance and Environmental Protection Act are public and in the social interest and have as their object the preservation, restoration and improvement of the environment, the prevention and control of air, water and soil contamination and the establishment of control and safety measures to guarantee compliance with and enforcement of said Act; and whereas BASF MEXICANA, S.A. de C.V has been prevented from carrying out the corrective measures ordered, and that this may result in a case of soil, subsoil and aquifer contamination, with dangerous repercussions for ecosystems, the components thereof and for public health; **you are hereby notified that an inspection visit will be made with the object of verifying compliance with the provisions of Articles 136, 139, 150, 151 and 152 bis of the General Ecological Balance and Environmental Protection Act; Articles 5 and 8 paragraphs III, IV, V, VII, IX and X of the Regulations to the LGEEPA respecting Hazardous Waste; as well as the provisions of Official Mexican Standards NOM-052-ECOL/1993 and NO-053-ECOL/1993**, in respect of the generation, management and final disposal of hazardous materials and wastes that may have caused contamination of the soil, subsoil and aquifer,

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<sup>13</sup> The company in question is BASF Mexicana, S.A. de C.V.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

and with the ultimate goal of **determining actionable infractions and administrative responsibilities** (Exhibit No. 14).

The reasons detailed above demonstrate that the Submitters are arguing there was a failure to comply with legal provisions when they know no such failure to comply occurred. Moreover, it is unclear why Roberto Abe Almada is the principal promoter of this action when he himself was present during the inspection, as is evident from inspection record No. 17-006-0001/98 of 23 June 1998, during which various facts, acts and omissions to environmental legislation were recorded in detail. Also recorded in this inspection record was the fact that various samples were taken from the site and sent to Profepa's central laboratory for analysis. These sampling activities were documented with Photographs (Exhibit No. 15).

Furthermore, the Submitter argues that the Mexican environmental authority did not effectively enforce Articles 68, 69, 75, 78, 101, 103 and 106 of the LGPGIR.

In this regard, one must bear in mind that the articles invoked by the Submitter are based on different regulatory premises. Consequently, said articles differ in their legal scope.

Articles 68 and 69 of the LGPGIR regulate liability, which with respect to the contamination of sites bears on two different subjects. Whereas, Article 68 refers to the persons liable for the contamination of a site, regardless of the actions that caused said contamination,<sup>14</sup> Article 69 contains provisions specifically targeting those persons who generate and manage hazardous waste when such activities have as a consequence the contamination of a site. Furthermore, Article 69 stipulates the remediation of a site as a sanction for contaminating it.<sup>15</sup>

On this point, it's important to note that the actions carried out by the Mexican environmental authority, consisting of ordering BASF to execute the remediation actions on the lot belonging to the Submitter, not only constituted effective compliance with the environmental legislation in effect at the time said order was issued, but also translated into effective enforcement of Article 69 of the LGPGIR,

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<sup>14</sup> **Article 68.-** Whoever is liable for the contamination of a site, as well as damages to health as result of said contamination shall be obliged to repair the harm caused, pursuant to the corresponding legal provisions.

<sup>15</sup> **Article 69.-** The persons responsible for activities related to the generation and management of hazardous materials and wastes that may have caused contamination of sites with said materials and wastes are required to carry out remediation actions pursuant to the provisions of this Act as well as other applicable provisions.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

the sole provision applicable to the present case, although it entered into effect after the facts.

The fact that during a certain period of time the abovementioned company was unable to execute the measures imposed by the Mexican environmental authority because it had lost possession to the lot where it was legally bound to effect the remediation work constituted a material and legal obstacle caused by the Submitter himself, as the party that had dispossessed the company of the lot.

The Submitter may not now allege, as he is doing, that the environmental authority is responsible for the failure to carry out measures to contain or mitigate contamination of the lot, when he himself, in the exercise of his rights as owner of the site, prevented the company from executing the remediation actions and prevented the environmental authority from acting to monitor compliance.

Article 68, which the Submitter cites, is not applicable to the administrative proceeding instituted against the abovementioned company. In the first place, as indicated above, said article was not in effect at the time of the inspection activities carried out by the environmental authority.

In the second place, the case raised by the Submitter does not correspond to the scenarios regulated in the article mentioned. Nor does it correspond to the matters dealt with in Articles 75<sup>16</sup> and 78 of the abovementioned Act.

Although Article 78 does require the Mexican environmental authority to carry out actions to identify, inventory, register and categorize sites contaminated with hazardous waste, in order to determine whether remediation is necessary, it only became legally permissible to demand that this authority comply with said requirement after Article 78 entered into effect, i.e., on the 6<sup>th</sup> of January 2004.

The object of the obligation contained in the aforementioned Article is to determine whether there are legal grounds for the remediation of a site contaminated with hazardous waste. In the present case, the Mexican environmental authority made such a determination from the moment it imposed on the company the obligation to remediate the lot owned by the current Submitter. Consequently, the interpretation made by the latter and by the

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<sup>16</sup> **Article 75.-** The Ministry and the competent local authorities, as circumstances dictate, shall be responsible for carrying out actions to identify, inventory, register and categorize sites contaminated with hazardous waste, with the object of determining whether remediation is necessary, in accordance with the principles stipulated to that end in the Regulations.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Secretariat on the legal scope and alleged applicability of Article 75 of the LGPGIR is incorrect.

Concerning the obligation contained in Article 78 of the LGPGIR, let us reiterate the reasoning of the preceding two paragraphs, which argues that said legal precept, contrary to what the Submitter asserts, is not applicable to the case in question. Furthermore, **the matter at hand concerns discretionary or optional acts on the part of the authorities to resolve an issue and do not constitute an obligation to act in a given timeframe. Instead, such actions are subject to various circumstances that the authority must weigh before it is ready to implement legislation through administrative instruments.**

**The provisions of Article 45 (1)(a) and (b) of the NAAEC abound in the same sense in that they indicate that “it shall not be deemed that a Party has failed to ‘effectively enforce its environmental law’” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters, or results from *bona fide* decisions to allocate resources to enforcement of other environmental matters determined to be of higher priority.**

In respect of Article 101 of the LGPGIR, which the Submitter invoked, it's necessary to mention that although said article was not in effect when the Mexican environmental authority carried out an inspection order targeting BASF, the measures imposed in this proceeding (corrective and emergency measures) were in accordance with the LGEEPA.

Consequently, if we analyze the actions carried out by the Mexican environmental authority pursuant to the current Article 101 of the LGPGIR, it is evident that this article was indeed complied with as it expressly states that Semarnat shall impose lawful corrective measures, safety measures and fines pursuant not only to its own provisions, but also to those of the LGEEPA as well.

Therefore, bearing in mind that the LGPGIR was not in effect when the facts recounted by the Submitter occurred, it is clear that at the time the Mexican environmental authority could only carry out inspection and monitoring actions, and impose corrective measures, safety measures or emergency measures pursuant to the provisions established in the LGEEPA, which it did in fact do. Consequently, it is beyond question that there was no failure whatsoever to comply with the stipulations of Article 101 of the LGPGIR, as invoked by the Submitter.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Concerning the Submitter's accusation regarding a lack of effective enforcement of Article 103 of the LGPGIR, one must point out that said article did not exist at the time the facts recounted by the Submitter occurred.

If one analyzes the text of Article 182 of the LGEEPA as well as that of the Article 103 of the LGPGIR, now in effect, one will observe that in essence the action regulated therein is that of informing the authority charged with investigating and prosecuting offenses with respect to those facts or omissions which may constitute unlawful facts or omissions.

Such an action can only be carried out, when, as a result of the exercise of the powers vested in it, the Mexican environmental authority detects a fact or an omission that may constitute an infraction.

It is clear that the environmental authority's responsibility is to report facts or omissions. Whether such facts or omissions constitute offenses is for the competent authority, i.e., the Federal Public Prosecutor's Office (*Ministerio Público Federal*), to determine. It also falls to said authority to make a determination in respect of presumed responsibility.

Concretely, in this case, in the course of its inspections of BASF, the Mexican environmental authority detected irregularities deemed as administrative infractions under the environmental legislation then in effect; however, not all administrative infractions translate into facts which can be considered to constitute a criminal offense.

It is not the subjective assessment of the public servant that carried out the inspection which ultimately determines whether or not a recommendation is made to lay criminal charges. Rather, said determination is based on the analysis of all the evidence that the environmental authority is able to gather during the administrative proceeding, as only then may it be understood that *the Ministry* (and not the inspector) *is cognizant of acts constituting an offense*, which would require it to recommend that the Federal Public Prosecutor's Office file such charges.

Concerning the Submitter's assertion that the Mexican environmental authority did not effectively enforce Article 106 of the LGPGIR, it must be stated that this is incorrect. Although said Law stipulates the activities that shall be punished or fined under it, it was not in force at the time the facts related took place. Consequently, it is clear that this authority was not obliged to enforce it.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

The applicable article in any case is Article 171 of the LGEEPA, which was in force at the time company was inspected and fined. The provisions of this article were enforced by this Authority, as may be seen in the file on the administrative proceeding instituted against BASF.

Even if one were to argue that once the LGPGIR came into force, the environmental authority was bound to enforce it, one would have to bear in mind that an infraction is detected at the time of the inspection and that to enforce a later law would violate a constitutional protection (non-retroactivity of the law) enjoyed by the offending company.

For the preceding reasons, it is inadmissible to argue that the Party failed to effectively enforce its environmental legislation. Consequently, the Secretariat must dismiss the arguments adduced in the submission.

**III.1.B. Articles 140, 150, 151 and 152 of the LGEEPA; Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the RRP; Official Mexican Standards NOM-052-SEMARNAT-1993 and NOM-053-SEMARNAT-1993, in respect of the management and final disposal of hazardous waste generated during the dismantling of the BASF installation**

Profepa effectively enforced the abovementioned legal provisions through the implementation of various actions in respect of the management and final disposal of the wastes generated during the dismantling of the installations of BASF, as is evident from the measures ordered through the administrative decisions dated 1 July 1998, 3 September 1998, 29 September 1998, 20 July 2000, 31 August 2004 and 25 February 2005 (Exhibit No. 16).

Said administrative decisions demonstrate the effective enforcement of and compliance with the provisions of Articles 140<sup>17</sup>, 150<sup>18</sup>, 151<sup>19</sup> and 152<sup>20</sup> of the

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<sup>17</sup> **ARTICLE 140.-** The generation, management and final disposal of slowly degrading wastes shall be subject to the provisions of the Official Mexican Standards issued by the Ministry in coordination with the Ministry of Trade and Industrial Development (*Secretaría de Comercio y Fomento Industrial*).

<sup>18</sup> **ARTICLE 150.-** Hazardous materials and wastes shall be managed in accordance with this Act, its Regulations and the Official Mexican Standards issued by the Ministry, following prior consultation with the Ministries of Trade and Industrial Development, Health, Energy,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

LGEEPA; Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 16, 17 paragraph II and 23 of the RRP; and Official Mexican Standards NOM-052-ECOL-1993 and NOM-053-SEMARNAT-1993, in respect of the management and final disposal of hazardous waste generated during the dismantling of the installations occupied by BASF, as is evident from the following:

1. The administrative decision of 1 July 1998, issued by Profepa's Industrial Inspection Branch (*Dirección General de Inspección Industrial*) as part of file No. B-0002/0750 (Exhibit No. 18), established the following:

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Communications and Transportation, the Navy and the Interior. Regulation of the management of these materials and wastes shall encompass, as circumstances require, their use, collection, storage, transportation, reuse, recycling, processing and final disposal.

The Regulations and Official Mexican Standards, referred to in the preceding paragraph, shall include the criteria and lists that identify and classify hazardous materials and wastes according to the degree of hazard they present, bearing in mind their characteristics and volumes. In addition, a distinction must be made between those that are highly hazardous and that are not. The Ministry shall be charged with the regulation and control of hazardous materials and wastes.

Furthermore, the Ministry, in coordination with the other entities mentioned in the present article, shall issue Official Mexican Standards establishing the requirements for the labeling and packing of hazardous materials and wastes, as well as for risk evaluation, and information on contingencies and accidents that may occur when handling such materials and wastes, particularly as regards chemical substances.

<sup>19</sup> **ARTICLE 151.-** Responsibility for the management and final disposal of hazardous waste falls to the party that generates them. In the case where Ministry authorized companies are contracted to assure the management and final disposal of hazardous waste and the latter are delivered to said companies, the responsibility for these operations shall be theirs, irrespective of whatever responsibility may rest with the generator of said hazardous waste.

Whoever generates, reuses or recycles hazardous waste shall do so with the knowledge of the Ministry pursuant to the terms provided for in the Regulations to this Act.

In respect of authorizations for hazardous waste confinement, shall be included only such wastes that technically and economically cannot be reused, recycled or subjected to thermal or physical-chemical destruction. Furthermore, the confinement of hazardous waste in liquid form shall not be permitted.

<sup>20</sup> **ARTICLE 152.-** The Ministry shall promote programs tending to prevent and reduce the generation of hazardous waste, as well as encourage the reuse and recycling thereof.

In those cases where hazardous waste may be used in a process that is different from the one that generated said waste, the Regulations to this Act and the pertinent Official Mexican Standards which may be issued shall establish mechanisms and procedures to enable the efficient management of said waste from the environmental and economic points of view.

Hazardous waste that is used, processed or recycled, on the same lot, in a process that is different from the one that generated it, shall be subject to internal control on the part of the liable company, in accordance with the formalities stipulated by the Regulations to this Act.

Should the waste referred to in the preceding paragraph be transported to a different lot from the one where it was generated, such waste shall be subject to the regulations applicable to the land transport of hazardous waste.





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

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**FIRST.-** The company BASF MEXICANA, S.A. DE C.V. is ordered to carry out the following measures, within the time periods indicated, commencing on the day of notification of the present administrative decision:

1.- Draw up and submit a detailed inventory including the classification, characteristics and quantities of the existing hazardous waste (platforms, rubble, processing wastes, bottles and bags containing pigments, dimetol, formamide, resins, tubular drums impregnated with yellow coloring, raw materials wastes, nitric acid, caustic soda, sodium bichromate and lead monoxide, etc.) that were generated while the facility was in operation and/or during its dismantling, as well as a precise description of their location inside the building. Deadline: 10 working days.

2.- Submit the following documents to Profepa: manifests from the hazardous waste generating company, as well as those in respect of the delivery, hauling and reception thereof; quarterly reports on hazardous waste, materials and equipment shipped for recycling, treatment, incineration or controlled confinement; monthly logs on hazardous waste generation; and quarterly reports on the transport, if any, of hazardous waste, as well as on all waste already generated or to be generated by the cleanup, dismantling and remediation activities for the site and building. Deadline: 10 working days.

3.- Do an inventory for Profepa of movable property, electrical and hydraulic equipment and installations, including all those attached to walls and roofs. Describe the cleanup requirements regarding these installations and the cleanup procedures that will be followed. Detail as well how the wastes generated by cleanup activities will be managed, in particular as regards their final disposal. Deadline: 10 working days.

4.- Draw up and submit to Profepa an inventory of the walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Deadline: 10 working days.

5.- Submit to Profepa for its approval a work schedule indicating in detail the cleanup requirements re walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Said information must indicate the procedures that will be applied and which elements may be suitable for remediation, covering over or demolition, as well as indicate how the wastes generated by such activities are to be managed, in accordance with how hazardous they are. Deadline: 10 working days.

6.- Submit a detailed description to Profepa of the system for managing potable water and wastewater. Describe in particular the potable water supply system, potable water uses and the volumes that were managed, as well as the gutters, manholes, process and wastewater collection drainage systems and the path followed along the municipal drainage ditch up to the final discharge point. Deadline: 10 working days.

7.- Submit to Profepa a program for dismantling 1) the entire drainage system that was installed in the section of the building set aside for industrial activities and 2) the outside drainage system up to the point where it flows into the drainage ditch. Deadline: 10 working days.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

8.- Execute the cleanup and desilting of the wastewater treatment ditches contaminated with hazardous liquid and solid wastes. Said wastes must be packed, labeled and transported to a controlled waste confinement site. Deadline: 10 working days.

9.- Submit for Profepa's review and approval a proposal on a study to be conducted by a third party expert to evaluate the contamination of the soil, subsoil and aquifer, with special emphasis on the following points and areas: the areas adjacent to the paths of the drainage systems, manholes, seeping wells, sedimentation wells, the wastewater treatment plant and the sites of wastewaters flows up to the point of convergence with the municipal drainage ditch; the point where said wastewaters were discharged into the "Espíritu Santo" creek, 10 meters upstream and every 10 meters up to a distance of 50 meters downstream; the areas where yellow and red pigments were manufactured, the precipitation tanks and the raw materials warehouse. To be identified: aquifer levels, groundwater quality and direction of groundwater flow. This requires taking baseline samples that will serve as parameters in determining the site's natural conditions. For the latter, it will be necessary to drill as many monitoring wells as may be required to determine water quality and to conduct sampling in order to determine, tri-dimensionally, the degree of contamination of the soil, subsoil and aquifer. Said drilling shall be as deep as necessary, i.e., down to the point where no contamination is detected. Geophysical methods shall be employed to identify the approximate extent of the contaminated area. Deadline: 15 working days.

10.- Submit to Profepa a water quality analysis log of the wastewater treated in the treatment plant and released as effluent, duly documented with the corresponding laboratory reports. Deadline: 15 working days.

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In taking the above measures, Profepa fully complied with its responsibility to establish corrective or emergency measures, pursuant to the provisions of the LGEEPA and the laws and regulations cited above.

2. By means of the administrative decision of 3 September 1998, BASF was authorized, under certain terms and conditions, to execute 1) the "Program with timelines for the cleanup and/or dismantling of walls, floors, roofing and other structural elements" (*Programa calendarizado de limpieza y/o desmantelamiento de paredes, pisos, techos, y demás elementos constructivos del inmueble*), 2) the "Program to dismantle the building's drainage system" (*Programa de desmantelamiento del sistema de drenaje del inmueble*) and 3) the "Study project by a third-party expert to evaluate the contamination of the building's soil, subsoil and aquifer" (*Proyecto de estudio realizado por un tercero en la materia, para evaluar la contaminación del suelo, subsuelo y manto freático del inmueble*). Furthermore, the company was ordered to carry out, via authorized companies, the removal and final disposal of objects and debris from the lots of several citizens (Exhibit No. 19).



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

3. The administrative decision of 29 September 1998 imposed additional conditions on BASF in respect of both the "Program with timelines for the cleanup and/or dismantling of walls, floors, roofing and other structural elements" and the "Program to dismantle the building's drainage system." (Exhibit No. 20)
4. The administrative decision of 20 July 2000 ordered BASF to carry out various cleanup and remediation activities, such as: dismantling and disposing of the outside drainage network, dismantling and disposing of roofing and metallic structures, removal of contaminated walls, removal of contaminated soil, dismantling and disposal of the wastewater treatment plant, and the restoration of sediments. (Exhibit No. 21)
5. By means of the administrative decision of 31 August 2004, Profepa's Industrial Inspection Branch ordered BASF to undertake various measures in the furtherance of the cleanup and remediation tasks centering on the following specific points: the hosing areas, desilting and cleaning up sediments in the pre-existing drainage system and cleanup of the soil around it, removal of the industrial drainage system, cleanup of the industrial drainage area and the areas adjacent to the plant, systematic verification of the cleanup of the drainage system and the affected areas thereof, sampling and analysis of the results of the remediation work. (Exhibit No. 22)

Furthermore, it should be noted in relation to Article 151 of the LGEEPA and Articles 6, 8, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the RRP that pursuant to the administrative decision of 20 July 2000, BASF was ordered, as already mentioned, to carry out various cleanup and remediation activities, including: preparing the support infrastructures, dismantling and disposing of the outside drainage network, dismantling and disposing of roofing and metallic structures, removal of contaminated walls, removal of contaminated soil, dismantling and disposal of the wastewater treatment plant, and the restoration of sediments. The manner and requirements governing how these activities were to be carried out was also specified, as were the parameters to be complied with.

These measures were verified pursuant to inspection order EOO-SVI-DGIFC.-1068/2001 of 5 November 2001, which produced inspection record No. 17-006-0001/98-D-V-36.

It's worth emphasizing that the articles referred to in the preceding paragraph stipulate requirements on hazardous waste generators, i.e., on those physical or



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

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LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

moral persons, whether from the public or private sector, who generate wastes in the course of their activities. From the foregoing, it is evident that the environmental authorities are only empowered to monitor the strict compliance with said provisions—a responsibility that was, under the terms of the LGEEPA and Semarnat's Internal Regulations, fully observed and executed by Profepa. This is evident in its institution of an administrative proceeding to inspect and monitor the company in question (c.f. file No. B-0002/0750), which culminated, as already mentioned, in the imposing of a fine in the amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS) due to the failure of said company to comply with environmental standards and regulations.

Therefore, as the Secretariat shall note, said company's failure to comply with environmental regulations resulted in its being assessed with the following fines:

...

- 1) For failing to prove, at the time of the inspection visit, that the company maintained a log of all wastes generated during the dismantling of the plant under inspection, while taking into account as an attenuating factor that the company rectified this irregularity, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.
- 2) For not having the characterization of the wastes generated during the dismantling of the plant at the time of the inspection visit, while bearing in mind as an attenuating circumstance that the irregularity detected was rectified, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.
- 3) For improper storage in the open of hazardous waste, while taking into account that this irregularity was subsequently rectified and said hazardous wastes were duly shipped to and disposed of at a controlled confinement landfill, a fine was imposed in the amount of P\$28,080.00 (TWENTY-EIGHT THOUSAND AND EIGHTY PESOS), i.e., the equivalent of 600 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.
- 4) For not properly disposing of materials generated during the dismantling of the plant and considered to be hazardous waste, according to inspection records No. 17-06-05-98 and 17-06-07-98 and under the provisions of Official Mexican Standard NOM-052-ECOL-1993 (now NOM-052-SEMARNAT-1993), while bearing in mind that the irregularity was rectified and that said materials were recovered from the lots where they were located, in the possession of the persons to whom they had been delivered, and were then turned over to a controlled confinement landfill, a fine was



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e. the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

5) For failing to post safety notices in the hazardous waste storage area as of the time of the inspection visit of 23 June 1998, a fine was imposed in the amount of P\$18,720.00 (EIGHTEEN THOUSAND, SEVEN HUNDRED AND TWENTY PESOS), i.e., the equivalent of 400 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

6) For soil contamination originating from the accumulation, depositing or seepage of hazardous waste during the carrying out of its activities, while taking into consideration that there has been some remediation of the soil in question, and irrespective of the existence of pending corrective measures, which is taken as an attenuating factor in this sanction, a fine was imposed in the amount of P\$936,000.00 (NINE HUNDRED AND THIRTY-SIX THOUSAND PESOS), i.e., the equivalent of 20,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

7) For contamination of the structure of the building that it occupied for its industrial activities, located on the lot "Ex Hacienda de Nuestra Señora de la Concepción El Hospital" or "Ex Hacienda El Hospital," in the Municipality of Cuautla, state of Morelos, as defined by the terms of the present ruling, while taking into account as an attenuating factor the remediation of said contamination (the administrative decision of 26 July 2002 determined that the environmental remediation work scheduled in the corresponding program and adopted by the legal entity BASF MEXICANA, S.A. DE C.V. had been completed), a fine was imposed in the amount of P\$468,000.00 (FOUR HUNDRED AND SIXTY-EIGHT THOUSAND PESOS), i.e., the equivalent of 10,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

...

The foregoing demonstrates that, although the provisions contained in Article 151 of the LGEEPA and Articles 6, 8, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the RRP constitute legal requirements for private parties, Profepa acted within the purview of its powers to enforce compliance and impose, when the situation so requires, the appropriate sanctions for failure to comply with said provisions, which is what in fact happened. This is evidence that the Mexican environmental authorities observed and enforced the environmental provisions in respect of hazardous waste.

Profepa implemented various actions in relation to the management and final disposal of the hazardous waste generated during the dismantling of the BASF installations, as attest the measures that BASF was ordered and authorized to undertake pursuant to the administrative decisions of 1 July 1998, 3 September 1998, 29 September 1998, 20 July 2000, 31 August 2004 and 25 February 2005.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

These administrative decisions demonstrate compliance with Articles 140, 150, 151 and 152 of the LGEEPA; Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 16, 17 paragraph II and 23 of the RRP; and Official Mexican Standards NOM-052-ECOL-1993 and NOM-053-SEMARNAT-1993, in respect of the management and final disposal of the hazardous waste generated during the dismantling of the BASF facility.

Furthermore, it should be noted in relation to Article 151 of the LGEEPA and Articles 6, 8, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the RRP that pursuant to the administrative decision of 20 July 2000, BASF was ordered, as already mentioned, to carry out various cleanup and remediation activities, including: preparing the support infrastructures, dismantling and disposing of the outside drainage network, dismantling and disposing of roofing and metallic structures, removal of contaminated walls, removal of contaminated soil, dismantling and disposal of the wastewater treatment plant, and the restoration of sediments. The manner and requirements governing how these activities were to be carried out was also specified, as were the parameters to be complied with. These measures were verified pursuant to inspection order EOO-SVI-DGIFC.-1068/2001 of 5 November 2001, which produced inspection record No. 17-006-0001/98-D-V-36.

It's worth emphasizing that the articles referred to in the preceding paragraph stipulate requirements on hazardous waste generators, i.e., on those physical or moral persons, whether from the public or private sector, who generate wastes in the course of their activities. From the foregoing, it is evident that the environmental authorities are only empowered to monitor the strict compliance with said provisions—a responsibility that was, under the terms of the LGEEPA and Semarnat's Internal Regulations, fully observed and executed by Profepa. This is evident in its institution of an administrative proceeding to inspect and monitor the company in question (c.f. file No. B-0002/0750), which culminated, as already mentioned, in the imposing of a fine in the amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS) due to the failure of said company to comply with environmental standards and regulations.

Therefore, as the Secretariat shall note, said company's failure to comply with environmental regulations resulted in its being assessed with the following fines:

...

- 1) For failing to prove, at the time of the inspection visit, that the company maintained a log of all wastes generated during the dismantling of the plant under inspection,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

while taking into account as an attenuating factor that the company rectified this irregularity, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

2) For not having the characterization of the wastes generated during the dismantling of the plant at the time of the inspection visit, while bearing in mind as an attenuating circumstance that the irregularity detected was rectified, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

3) For improper storage in the open of hazardous waste, while taking into account that this irregularity was subsequently rectified and said hazardous wastes were duly shipped to and disposed of at a controlled confinement landfill, a fine was imposed in the amount of P\$28,080.00 (TWENTY-EIGHT THOUSAND AND EIGHTY PESOS), i.e., the equivalent of 600 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

4) For not properly disposing of materials generated during the dismantling of the plant and considered to be hazardous waste, according to inspection records No. 17-06-05-98 and 17-06-07-98 and under the provisions of Official Mexican Standard NOM-052-ECOL-1993 (now NOM-052-SEMARNAT-1993), while bearing in mind that the irregularity was rectified and that said materials were recovered from the lots where they were located, in the possession of the persons to whom they had been delivered, and were then turned over to a controlled confinement landfill, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e. the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

5) For failing to post safety notices in the hazardous waste storage area as of the time of the inspection visit of 23 June 1998, a fine was imposed in the amount of P\$18,720.00 (EIGHTEEN THOUSAND, SEVEN HUNDRED AND TWENTY PESOS), i.e., the equivalent of 400 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

6) For soil contamination originating from the accumulation, depositing or seepage of hazardous waste during the carrying out of its activities, while taking into consideration that there has been some remediation of the soil in question, and irrespective of the existence of pending corrective measures, which is taken as an attenuating factor in this sanction, a fine was imposed in the amount of P\$936,000.00 (NINE HUNDRED AND THIRTY-SIX THOUSAND PESOS), i.e., the equivalent of 20,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

7) For contamination of the structure of the building that it occupied for its industrial activities, located in the lot Ex Hacienda de Nuestra Señora de la Concepción El Hospital or "Ex Hacienda El Hospital," in the Municipality of Cuautla, state of Morelos,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

as defined by the terms of the present ruling, while taking into account as an attenuating factor the remediation of said contamination (the administrative decision of 26 July 2002 determined that the environmental remediation work scheduled in the corresponding program and adopted by the legal entity BASF MEXICANA, S.A. DE C.V. had been completed), a fine was imposed in the amount of P\$468,000.00 (FOUR HUNDRED AND SIXTY-EIGHT THOUSAND PESOS), i.e., the equivalent of 10,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

...

The foregoing demonstrates that, although the provisions contained in Article 151 of the LGEEPA and Articles 6, 8, 12, 14, 15 paragraphs II and VII, 17 paragraph II and 23 of the RRP constitute legal requirements for private parties, Profepa acted within the purview of its powers to enforce compliance and impose, when the situation so requires, the appropriate sanctions for failure to comply with said provisions, which is what in fact happened. This is evidence that the Mexican environmental authorities observed and enforced the environmental provisions in respect of hazardous waste.

Notwithstanding the foregoing points, it is necessary for the Secretariat to bear in mind that Misters Roberto Abe Domínguez and Roberto Abe Aldama, the former as owner of the building known as “Ex Hacienda de Nuestra Señora de la Concepción El Hospital” or “Ex Hacienda El Hospital,” and the latter as co-executor to the estate of the former, **repeatedly and by various means opposed and prevented the attempts of the company BASF MEXICANA, S.A. de C.V. to carry out the corrective measures ordered by the Office of the Federal Attorney for Environmental Protection. It is therefore inadmissible for them to argue now that there has been a failure to effectively enforce environmental law.**

**III.1.C. Articles 29 paragraph VI and VII and 119 paragraphs VI, VII, XI, XIV and XV of the National Waters Act (*Ley de Aguas Nacionales*—LAN); Articles 135 paragraphs IV-VI and 136 paragraph II of the Regulations to the LAN; and Article 139 of the LGEEPA, in respect of wastewater discharges**

In relation to the legal provisions alluded to in this section, the submission does not include a “documented assertion,” as is required under the NAAEC in respect of an alleged failure to enforce said provisions.





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

The United Mexican States have fully complied with the applicable legal provisions in respect of wastewaters, as the following actions attest:

In relation to Article 29 of the LAN in force at the time of the proceeding, it's necessary to point out that it stipulates obligations that private parties must observe, as may be seen in said article, which reads as follows:

“**ARTICLE 29.** Licensees or assignees shall be bound by the following obligations:

VI. To provide whatever information and documentation “the Commission” may request of them to verify compliance with the conditions contained in this Law and in the letters patent, deeds of transfer or permits referred to in it.

VII. To comply with the requirements for efficient water use and water reutilization pursuant to the terms of the Official Standards and any other particular conditions that may be stipulated in this respect; and

...”

In a word, it falls to the environmental authorities to monitor licensees of national water resources to ensure their strict compliance with said provisions, such as effectively happened in the administrative proceeding brought against BASF. In effect, records are on file that demonstrate that the company in question provided information and documentation to the CNA to prove its compliance with the particular conditions on water discharges specified in the letters patent granted it (exhibit No. 22 bis). Therefore, compliance with the provision in question was observed and verified.

Regarding the Article cited above and Article 119 of the LAN, which establishes the authority of the CNA to assess fines and penalties under the various scenarios described in the different paragraphs of said provision, particularly paragraphs VI, VII, XI, XIV and XV, it is necessary to point out that Profepa served notice to said Commission through various administrative decisions requesting it to exercise the powers with which it is vested. A fact which is evident in the administrative decisions of 10 December 1998, 19 September 2000 and 30 May 2002 (Exhibit No. 23).

In this regard, as is evident in legal argument V of the administrative ruling of 20 December 2005, entered into file B-0002/0775 of the proceeding brought against BASF, wherein Profepa specified the following: *“Do not fail to specify that in relation to the conditions of the aquifers, it is to be indicated, that in a written document dated 4 September 2002, the company BASF MEXICANA, S.A. DE C.V. submitted official document No. BOO.00R05.07.4/2944 of 26 August of the same year. In said document the National Water Commission determined that the*



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

*industrial activities carried out by the company in question in a section of the Ex Hacienda El Hospital lot did not alter the quality of the groundwater there, nor that of the Espíritu Santo creek, and that the concentrations of heavy metals such as total and hexavalent chrome, lead and molybdenum were inferior to the maximum permissible levels established under Official Mexican Standard NOM-127SSA1-1994 for potable water, and that therefore there exists no irregularity whatsoever."*

The preceding is evidence that the environmental authorities of Mexico fully observed the provisions in respect of water quality.

Regarding the matter of wastewater discharges, it is worth repeating the various actions of Mr. Roberto Abe Domínguez whereby he blocked the proper and immediate implementation of the different measures that Profepa ordered BASF to undertake to restore and remediate the premises located on the lot known as Ex Hacienda El Hospital.

In this regard, it is necessary to emphasize, as has already been done in preceding sections, that on 3 September 1997 Mr. Roberto Abe Domínguez, owner of the building located on the lot "Ex Hacienda El Hospital," took possession of same. As a consequence, BASF lost possession of the building and access to it. This interrupted the work that was under way in relation to the dismantling and removal of the equipment and machinery of the said company's industrial plant. Likewise, the emergency measures that said company was ordered to execute under the administrative proceeding brought against it were interrupted, since during the period from 3 September 1997 until 10 July 1998, the building in question was in the possession and under the control of its owner Mr. Roberto Abe Domínguez. A situation that can and does lead one to suppose that one of the reasons explaining the existence of waste mud would be the discharge of the untreated water that was in the treatment ditch when BASF lost possession of the building. This is a possibility to be considered in light of the fact that by submitting test results on the general conditions of its discharges the company was indeed keeping the CAN informed regarding its industrial process wastewater discharges from the building on the lot known as Ex Hacienda El Hospital.

Furthermore, in relation to Article 135 of the Regulations to the LAN, particularly paragraphs IV, V and VI,<sup>21</sup> which was in force when BASF Mexicana's facility was

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<sup>21</sup> **ARTICLE 135.-** The physical or moral persons who effect wastewater discharges into the receiving bodies of water referred to in this "Act", shall:

...



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

in operation, said company, let us reiterate, provided information and documentation to the CNA to demonstrate its compliance with the particular conditions for water discharges in the letters patent granted it. This shows that compliance with the provision in question was observed and verified.

Article 136 of the Regulations to the LAN was in force when the facility of the company in question was in operation (paragraph II is of particular relevance). It reads as follows:

“**ARTICLE 136.-** In permits for discharging wastewaters into public sewerage and drainage systems, it is, in addition to the provisions of the preceding article, mandatory to indicate how the following shall be effected, in accordance with the provisions of the law:

...

II. The verification of the state of conservation of the public sewer system with the object of detecting and correcting, where necessary, possible leaks that may affect the quality of underlying groundwater and result in the possible contamination of sources of water, and

...”

In observing said provision, the CNA stipulated, by way of the letters patent granted to BASF, the general and specific conditions governing permission to discharge wastewaters, including: specifying the location of wastewater discharges; description thereof in terms of type, volume, source, manner of discharge and receiving body of water; particular discharge conditions; maximum permissible levels of total coliforms; the requirement to submit periodic reports on average and maximum peak concentrations of the parameters included in the particular discharge conditions; as well as a general description of the actions, systems or works authorized by the Commission, including the mandatory deadlines which must be met to avoid contamination of the receiving bodies of water and, where required, for effecting treatment of wastewater.

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**IV.** Install and maintain in good condition, the water metering equipment and sampling access points that enable the verification of discharge volumes and concentrations of the parameters specified in discharge permits;

**V.** Inform "the Commission" of any changes in its processes, when this may cause changes in the characteristics or volumes of wastewater specified when the pertinent discharge permit was issued;

**VI.** Notify "the Commission" of the contaminants present in wastewaters generated by any newly introduced industrial process or service which was not originally considered when the particular conditions in respect of discharges were stipulated;

...”



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

In addition, it is specified that the granting of a concession depends on the following conditions, among others: *“Implementing the measures necessary to prevent and control the contamination of receiving bodies of water by discharges of wastewater arising from the licensee’s water uses or activities, as well as, where required, effecting the necessary preliminary water treatment in accordance with the terms and conditions of the law and the applicable regulatory provisions and standards; measuring the volume of water extracted, as well as the quantity and quality of wastewater discharges, pursuant to the terms and conditions of the Act and regulatory provisions.”*

The foregoing demonstrates that the Mexican environmental authorities did observe and enforce the relevant environmental provisions of Articles 29, paragraph VI and VII, and 119 paragraphs VI, VII, XI, XIV and XV of the LAN in force while the Facility was in operation; Articles 135 paragraphs IV-VI and 136 paragraph II of the RLAN; and Article 139 of the LGEEPA, in respect of wastewater discharges. Consequently, it is inadmissible to argue that there were failures to effectively enforce environmental law.

**III.1.D. Articles 160, 161, 162, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170, 171, 172, 173 and 174 of the LGEEPA in respect of the administrative proceedings brought against BASF by the environmental authorities and the imposition and effective implementation of emergency measures in relation to the matter raised in the submission**

It is worth pointing out that the Submitters did not submit a single argument on the alleged failure to enforce environmental law. Nor does there exist a single document to support such an assertion. Consequently, it is evident that it is the Secretariat itself which affirms that a response is warranted in respect of “Articles 160, 161, 162, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170, 171, 172, 173 and 174 of the LGEEPA” and that it is the Secretariat itself that points out that the matter at issue “concerns the administrative proceedings that the environmental authorities brought against BASF and the imposition and effective implementation of emergency measures in relation to the matter raised in the submission.” However, the Secretariat failed to provide the reasons that led it to this interpretation, despite its obligation to do so.

Given the foregoing and the unknown nature of the reasons why it deemed that there has been a failure to comply with the abovementioned provisions, it is necessary to inform the Secretariat that its judgment is incorrect.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Profepa conducted various inspections of BASF at its Ex Hacienda El Hospital facility. Said inspections were well-founded and justified pursuant to the provisions of Article 16 of the Political Constitution of the United Mexican States. In effect, the inspection orders were based on, among others, the following legal provisions:

“Articles 14 and 16 of the Political Constitution of the United Mexican States, Articles 1, 5, 6, 136, 139, 150, 151, 151 bis, 152, 152 bis, 160, 61, 162, 163, 164, 165, 166 and 170 of the LGEEPA”

As may be seen, the provisions of Articles 160, 161 and 162 of the LGEEPA constitute the legal foundation for the acts of inspection and monitoring, among others, as is evident in the following:

**ARTICLE 160.-** The provisions of this Act shall apply to the execution of acts of inspection and monitoring, the execution of safety measures, the determination of administrative infractions and the commission of offenses, the corresponding fines or penalties thereof, and administrative procedures and remedies, when the matter in question is under federal jurisdiction and regulated by this Act, unless other laws specifically regulate such questions, in relation to the matters dealt with herein.

Concerning the aforementioned matters, the provisions of the Federal Administrative Procedures Act (*Ley Federal de Procedimiento Administrativo*) and the Weights and Measures Act (*Ley de Metrología y Normalización*) shall also apply.

**ARTICLE 161.-** The Ministry shall conduct inspections and monitoring to verify compliance with the provisions contained in this Act, as well as compliance with the provisions ensuing from it.

In Mexican waters, the Ministry shall itself, or via the Ministry of the Navy (*Secretaría de Marina*), conduct inspections and monitoring and, where required, impose fines or penalties for violations of the provisions of this Act.

**ARTICLE 162.-** The competent authorities may conduct inspection visits through duly authorized personnel, without prejudice to other measures provided for in legislation that they may also conduct pursuant to verifying compliance with this Act.

When conducting inspection visits, said personnel shall bear the official document accrediting or authorizing their right to conduct inspections or monitoring. They shall also bear the written order issued by the competent authority, which with good reason and upon a sound basis justifies the visit, and in which the place or area to be inspected shall be specified, along with the object of the inspection visit.

Likewise, Profepa duly observed these articles in relation to all actions in terms of inspection and monitoring, the imposition of safety measures and the determination of administrative infractions and the corresponding fines and penalties. This is also the case in respect of the administrative proceedings and



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

remedies instituted in relation to BASF, as is evident in the aforementioned evidence and in Exhibit No. 24.

The actions cited above were incorporated into Exhibit No. 25 and included in official document PFFA/SJ/DGCPAC/0235/06, dated 1 February 2006, issued by the Profepa's Director General for Control of Administrative Proceedings and Review (*Director General de Control de Procedimientos Administrativos y de Consulta*).

As is evident from the administrative ruling of 20 December 2005 against BASF and entered into file No. B-0002/0775,<sup>22</sup> it is clear that Profepa, in compliance with the provisions of Articles 161 to 169 of CHAPTER II, "Inspection and Monitoring" of Title Six "Control and Safety Measures, and Fines and Penalties" (*Medidas de Control y de Seguridad y Sanciones*), of the LGEEPA, did conduct inspection and monitoring actions, pursuant to the following inspection orders: Numbers EOO-SVI-DGII-003397, EOO-SVI-DGII-003471, EOO-SVI-DGII-003486, EOO-SVI-DGII-003485, EOO-SVI-DGII-004331, EOO-SVI-DGII-004377, EOO-SVI-DGII-004380, EOO-SVI-DGII-004683, EOO-SVI-DGII-004755, EOO-SVI-DGII-004767, EOO-SVI-DGII-004773, EOO-SVI-DGII-005278, EOO-SVI-DGII-000908, EOO-SVI-DGII-000910, EOO-SVI-DGII-119/99, EOO-SVI-DGII-000967, EOO-SVI-DGII-001022, EOO-SVI-DGII-001084, EOO-SVI-DGII-001360, EOO-SVI-DGII-00547, EOO-SVI-DGII-001697, EOO-SVI-DGII-0668, EOO-SVI-DGII-0675/99, EOO-SVI-DGII-0679, EOO-SVI-DGII-0678, EOO-SVI-DGII-0154, EOO-SVI-DGII-326/2000, EOO-SVI-DGII-3459/2000, EOO-SVI-DGII-509/2000, EOO-SVI-DGII-511/2000, EOO-SVI-DGII-729/2000, EOO-SVI-DGII-903/2000, EOO-SVI-DGII-1075/2000, PFFA-MOR-02-048/200, PFFA-MOR-02-055/200, EOO-SVI-DGIFC-707/2001, EOO-SVI-DGIFC-706/2001, EOO-SVI-DGIFC-708/2001, EOO-SVI-DGIFC-731/2001, EOO-SVI-DGIFC-805/2001, EOO-SVI-DGIFC-805/2001, EOO-SVI-DGIFC-860/2001, EOO-SVI-DGIFC-860/2001, EOO-SVI-DGIFC-925/2001, EOO-SVI-DGIFC-1016/2001, EOO-SVI-DGIFC-1068/2001, EOO-SVI-DGIFC-1170/2001, EOO-SVI-DGIFC-1169/2001, EOO-SVI-DGIFC-0102/2002, EOO-SVI-DGIFC-0175/2002, EOO-SVI-DGIFC-0446/2002 (Exhibit No. 26). These inspection orders served to order the verification of compliance with technical measures, the supervision of various actions to promote the restoration of the contaminated site, sampling and other procedures related to and inherent in the administrative proceeding brought against BASF.

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<sup>22</sup> Page 5.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Furthermore, as is clear in the ruling cited,<sup>23</sup> inspection records numbers 17-006-0001/98-D, 17-006-0001/98-D-CL, 17-006-0001/98-D-VA, 17-006-0002/98-D, 17-006-0003/98-D, 17-006-0001/98-D-VA-01, 17-006-0001/98-D-V-01, 17-006-0001/98-D-V-02, 17-006-0001/98-D-V-03, 17-006-0001/98-D-V-04, 17-006-0001/98-D-V-05, 17-006-0001/98-D-V-06, 17-006-0001/98-D-V-07, 17-006-0001/98-D-V-08, 17-006-0001/98-D-V-10, 17-006-0001/98-D-V-09-RRS, 17-006-0001/98-D-V-11, 17-006-0001/98-D-V-12, 17-006-0001/98-D-V-13, 17-006-0001/98-D-V-14, 17-006-0001/98-D-V-15, 17-006-0001/98-D-V-16, 17-006-0001/98-D-V-18, 17-006-0001/98-D-V-19, 17-006-0001/98-D-V-20, 17-006-0001/98-D-V-21, 17-006-0001/98-D-V-22, SIN NUMERO, SIN NUMERO, 17-006-0001/98-D-V-23, 17-006-0001/98-D-V-24, 17-006-0001/98-D-V-25, 17-006-0001/98-D-V-26, 17-006-0001/98-D-V-27, 17-006-0001/98-D-V-28, 17-006-0001/98-D-V-31, 17-006-0001/98-D-V-30, 17-006-0001/98-D-V-32, 17-006-0001/98-D-V-32-1, SIN NUMERO, SIN NUMERO, 17-006-0001/98-D-V-34, 17-006-0001/98-D-V-35, 17-006-0001/98-D-V-36, 17-006-0001/98-D-V-37, 17-006-0001/98-D-V-38, 17-006-0001/98-D-V-39, 17-006-0001/98-D-V-40, 17-006-0001/98-D-V-41 (Exhibit No. 27) served to record in detail the acts and omissions observed during inspection and monitoring activities to enable future assessments in whatever administrative ruling may be made in accordance with the law.

The foregoing actions constituted compliance with the provisions of, among others, Articles 164 to 166 of the LGEEPA, which read as follows:

**“ARTICLE 164.-** An inspection record shall be prepared, which shall record in detail whatever acts or omissions may have been detected during the inspection, in accordance with the provisions of Article 67 of the Federal Administrative Procedures Act.

Upon concluding the inspection, the person with whom the inspection was agreed to shall be given the opportunity to formulate his observations in relation to the acts or omissions entered into the corresponding record and to offer whatever evidence he may deem appropriate or to exercise this right within five days of the date of the inspection.

Thereupon, the inspection record shall be signed by the person with whom the inspection was agreed to, the witnesses and the authorized personnel, who shall forward a copy of said record to the interested party.

Should the person with whom the inspection was agreed to or the witnesses decline to sign the report, or the interested party decline to accept a copy thereof, said circumstances shall be entered into the record without prejudice as to its validity or evidentiary value.”

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<sup>23</sup> Page 6.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**“ARTICLE 165.-** The person with whom the inspection was agreed to must allow access for authorized personnel to the place or places subject to inspection under the terms stipulated in the written order as prescribed in Article 162 of this Act, as well as provide whatever information may facilitate the verification of compliance with this Act and other applicable provisions, with the exception of matters pertaining to industrial property rights considered confidential in accordance with the law. The authority shall maintain such information absolutely confidential, if the interested party so requests, except in the case of the existence of a court order.”

**“ARTICLE 166.-** The competent authority may request the assistance of peace officers to effect an inspection visit, when one or more persons block or oppose the execution of the inspection, regardless of whatever sanctions may be applicable.”

For the reasons set forth above, **it is not admissible to argue, as do the Secretariat and the Submitters, that there has been a failure to comply with the provisions of the abovementioned articles.**

In relation to compliance with Article 167 of the LGEEPA,<sup>24</sup> Profepa issued various administrative decisions which ordered BASF to immediately adopt corrective or emergency measures to remediate the contaminated site, as attest the administrative decisions dated 2 August 1997 and 1 July 1998, among others, issued by the Profepa Delegation in the state of Morelos and Profepa’s Industrial Inspection Branch, respectively. The same may be said of the administrative decision of 31 August 2004, also issued by the latter administrative unit, and in which the following was established:

1. The following was specified in the administrative decision of 2 August 1997:

...

**FIRST.-** Based on Article 170 bis of the General Ecological Balance and Environmental Protection Act and Articles 81 and 82 of the Federal Administrative

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<sup>24</sup> **ARTICLE 167.** After receiving the inspection record, the authority that ordered the inspection shall, if there are well-founded reasons for doing so, order, via personal notification or a certified letter requiring acknowledgement of receipt, the interested party to immediately adopt the corrective or emergency measures, if any, that are necessary to comply with the applicable legal provisions, as well as with the respective permits, licenses, authorizations or letters patent. Said notification shall indicate the deadline(s) for compliance and explain the basis and reasons for the measures ordered. Furthermore, the interested party shall be informed that it has fifteen days to present whatever arguments it wishes and, as required, submit evidence that it deems appropriate in relation to the actions of the Ministry.

Once the evidence submitted by the Interested Party has been admitted and presented, or the deadline referred to in the preceding paragraph has expired without the Interested Party having exercised this right, the measures required of it shall be put at its disposal, so that it may, within three working days, submit its arguments in writing. (Emphasis added)





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

Proceedings Act in force, this Authority decrees the following EMERGENCY CORRECTIVE MEASURES.

1. The company shall submit to this Delegation, within 10 working days, the complementary information to its program and work schedule for shutting down its Facility, in which it shall detail the actions to be executed in the dismantling of the plaza.
2. The company shall submit in writing to this Delegation, within 10 working days, a list of the required cleanup, restoration and remediation actions prior to delivery of the Facility to the Lessor.
3. Within 72 hours, the company shall initiate a log of its plant closing activities, in which it shall make a note of each action executed in accordance with the program and, where so required, describe whatever unforeseen modifications or actions were executed.
4. Within 72 hours, the company shall initiate a log in respect of hazardous waste storage.
6. [sic] The company shall submit to this Delegation of the Office of the Federal Attorney for Environmental Protection of the state of Morelos, within 5 working days, copies of the delivery, transportation and arrival manifests for its hazardous wastes, duly completed and stamped as received by the final disposal site.
7. The company shall submit to this Delegation, within 20 working days, the results of the studies conducted to determine the level of contamination of the soil and subsoil at the Facility, as well as that of the body of water receiving the wastewaters spilled into the creek known as "Espíritu Santo", a tributary of the Río Cuautla.
8. The company shall submit to this Delegation, within 15 working days, the results of the characterization of the mud residues contained in its treatment ditches in terms of the CRETIB parameters (Corrosive, Reactive, Explosive, Toxic, Ignitable or Biological/Infectious).
9. The company shall submit to this Delegation, within 10 working days, a copy of the acknowledgement of receipt in respect of its written notification to the National Ecology Institute (*Instituto Nacional de Ecología*—INE), in which it will have notified the INE of its plant closing cleanup, restoration and remediation activities.
10. Should it be required to comply with any provision in particular, the company shall request the relevant documentation from the INE so as to clarify the activities to be executed; a copy of the official response in this regard shall be forwarded to this Delegation in due course.
11. Prior to commencing its cleanup, restoration and remediation work, the company shall submit to this delegation its methodology and the actions it plans to carry out in writing.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

12. The company BASF Mexicana shall, upon termination of remediation activities and prior to the physical delivery of the installations, submit to this Delegation the results of the evaluation conducted by an authorized expert, including the results of the analyses done to certify that the cleanup executed complies with the provisions established in the existing environmental regulations and standards.

...”

2. The following was established in the administrative decision of 1 July 1998:

“**FIRST.**- The company BASF MEXICANA, S.A. DE C.V. is ordered to carry out the following measures, within the time periods indicated, starting from the day of notification of the present administrative decision:

1.- Draw up and submit a detailed inventory including the classification, characteristics and quantities of the existing hazardous waste (platforms, rubble, processing wastes, bottles and bags containing pigments, dimetol, formamide, resins, tubular drums impregnated with yellow coloring, raw materials wastes, nitric acid, caustic soda, sodium bichromate and lead monoxide, etc.) that were generated while the facility was in operation and/or during its dismantling, as well as a precise description of their location inside the building. Deadline: 10 working days.

2.- Submit the following documents to Profepa: manifests from the hazardous waste generating company, as well as those in respect of the delivery, hauling and reception thereof; quarterly reports on hazardous waste, materials and equipment shipped for recycling, treatment, incineration or controlled confinement; monthly logs on hazardous waste generation; and quarterly reports on the transport, if any, of hazardous waste, as well as on all waste already generated or to be generated by the cleanup, dismantling and remediation activities for the site and building. Deadline: 10 working days.

3.- Do an inventory for Profepa of movable property, electrical and hydraulic equipment and installations, including all those attached to walls and roofs. Describe the cleanup requirements regarding these installations and the cleanup procedures that will be followed. Detail as well how the wastes generated by cleanup activities will be managed, in particular as regards their final disposal. Deadline: 10 working days.

4.- Draw up and submit to Profepa an inventory of the walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Deadline: 10 working days.

5.- Submit to Profepa for its approval a work schedule indicating in detail the cleanup requirements re walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Said information must indicate the procedures that will be applied and which elements may be suitable for remediation, covering over or demolition, as well as indicate how the wastes generated by such activities are to be managed, in accordance with how hazardous they are. Deadline: 10 working days.

6.- Submit a detailed description to Profepa of the system for managing potable water and wastewater. Describe in particular the potable water supply system, potable water uses and the volumes that were managed, as well as the gutters, manholes,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

process and wastewater collection drainage systems and the path followed along the municipal drainage ditch up to the final discharge point. Deadline: 10 working days.

7.- Submit to Profepa a program for dismantling 1) the entire drainage system that was installed in the section of the building set aside for industrial activities and 2) the outside drainage system up to the point where it flows into the drainage ditch. Deadline: 10 working days.

8.- Execute the cleanup and desilting of the wastewater treatment ditches contaminated with hazardous liquid and solid wastes. Said wastes must be packed, labeled and transported to a controlled waste confinement site. Deadline: 10 working days.

9.- Submit for Profepa's review and approval a proposal on a study to be conducted by a third party expert to evaluate the contamination of the soil, subsoil and aquifer, with special emphasis on the following points and areas: the areas adjacent to the paths of the drainage systems, manholes, seeping wells, sedimentation wells, the wastewater treatment plant and the sites of wastewaters flows up to the point of convergence with the municipal drainage ditch; the point where said wastewaters were discharged into the "Espíritu Santo" creek, 10 meters upstream and every 10 meters up to a distance of 50 meters downstream; the areas where yellow and red pigments were manufactured, the precipitation tanks and the raw materials warehouse. To be identified: aquifer levels, groundwater quality and direction of groundwater flow. This requires taking baseline samples that will serve as parameters in determining the site's natural conditions. For the latter, it will be necessary to drill as many monitoring wells as may be required to determine water quality and to conduct sampling in order to determine, tri-dimensionally, the degree of contamination of the soil, subsoil and aquifer. Said drilling shall be as deep as necessary, i.e., down to the point where no contamination is detected. Geophysical methods shall be employed to identify the approximate extent of the contaminated area. Deadline: 15 working days.

10.- Submit to Profepa a water quality analysis log of the wastewater treated in the treatment plant and released as effluent, duly documented with the corresponding laboratory reports. Deadline: 15 working days.

..."

In relation to Articles 167 bis, 167 bis 1, 167 bis 2, 167 bis 3 and 167 bis 4 of the LGEEPA, cited by the Secretariat, it is pertinent to clarify that these provisions were not part of said Act during the period when the administrative proceeding was brought against BASF. In effect, these provisions were amendments in a reform to this Law that was published in *el Diario Oficial de la Federación* on 7 December 2005 (Exhibit No. 28). It is therefore legally impossible to affirm that they were not observed, as said provisions did not exist at the time of the various actions taken by Profepa during the proceeding in question. Consequently, it is clear that said authority acted in strict and full compliance with environmental law.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Furthermore, in respect of the administrative proceedings brought by the environmental authorities, it should be emphasized that Profepa, in accordance with the powers and jurisdiction vested in it by the LGEEPA and the internal regulations of the Ministry of the Environment, Natural Resources and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca—Semarnap*), Semarnat's predecessor, did institute administrative proceedings in relation to BASF and Mr. Roberto Abe Domínguez, as is evident in the previously cited administrative decisions of 2 August 1997 and 1 July 1998, which read as follows:

“... ”

**SECOND.-** Based on Article 16 of the Political Constitution of the United Mexican States, Articles 1, 2, 62, 81, 82 paragraphs IX, X, XI and XII of Semarnap's Internal Regulations, published in the *Diario Oficial de la Federación* on 8 July 1996, and Article 72 of the Federal Administrative Procedures Act, **the Owner and/or Legal Representative of the company BASF MEXICANA, S.A. DE C.V. is hereby notified that an administrative proceeding has been instigated**, inasmuch as is evident from inspection record No. 17-06-10-97, dated 13 July 1997 and concluded on 28 July 1997, that acts and omissions were observed that may constitute administrative infractions in respect of the precepts of the General Ecological Balance and Environmental Protection Act and its Regulations respecting Hazardous Waste, a situation which may lead this Office of the Federal Attorney to impose administrative fines or penalties. You are therefore notified that you have fifteen working days starting from the day after this notification formally takes effect to respond as you deem appropriate and, if so required, present whatever evidence you may deem pertinent.

...”

“... ”

**THIRD.-** Based on Article 167 of the General Ecological Balance and Environmental Protection Act and by means of this administrative decision, BASF MEXICANA, S.A. DE C.V. is hereby notified that **an administrative proceeding has been initiated against it**, inasmuch as is evident from the inspection record cited that acts and omissions were observed that may constitute administrative infractions in respect of the precepts of the General Ecological Balance and Environmental Protection Act and its Regulations respecting Hazardous Waste, as well as other Official Mexican Standards and other provisions ensuing from them, a situation which may lead this Office of the Federal Attorney to impose administrative fines or penalties. You are therefore notified that you may respond as you deem appropriate and, if so required, present whatever evidence you deem pertinent within fifteen working days of notification of this administrative decision...

**FOURTH.-** Based on Article 167 of the General Ecological Balance and Environmental Protection Act and by means of this administrative decision, **ROBERTO ABE DOMINGUEZ** is hereby notified that **an administrative inspection and monitoring proceeding has been initiated**, inasmuch as is evident from the



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

inspection record cited that acts and omissions were observed that may constitute administrative infractions in respect of the precepts of the General Ecological Balance and Environmental Protection Act and its Regulations respecting Hazardous Waste, as well as other Official Mexican Standards and other provisions ensuing from them, a situation which may lead this Office of the Federal Attorney to impose administrative fines and penalties. You are therefore notified that you may respond as you deem appropriate and, if so required, present whatever evidence you deem pertinent within fifteen working days of notification of this administrative decision...

...”

Article 170 of the LGEEPA establishes the actions to be taken in the event of an imminent risk of ecological imbalance, or of grave harm to or deterioration of natural resources, or in cases of contamination with dangerous repercussions for ecosystems or the components thereof, or for public health. It expressly stipulates the following:

**ARTICLE 170.- Should there exist an imminent risk of ecological imbalance, or of grave harm or deterioration of natural resources, or cases of contamination with dangerous repercussions for ecosystems or the components thereof, or for public health, the Ministry may, with good reason and upon a sound basis, order any of the following security measures:**

**I.- The temporary, partial or total closure of the sources of contamination, as well as of the installations where specimens, products or byproducts of species of flora or fauna and forest resources are handled or stored, or the installations where the activities that give rise to the situations referred to in the first paragraph of this article take place;**

**II.- The precautionary impounding of hazardous materials and wastes, specimens, products or byproducts of species of flora or fauna, or the genetic material thereof, and forest resources, as well as of the goods, vehicles, tools and instruments directly related to the activity or activities that gave rise to the imposition of this safety measure, or**

**III.- The neutralizing or any other analogous action that prevents the hazardous materials or waste from generating the effects listed in the first paragraph of this article.**

Also, the Ministry may recommend to the competent authority the execution of one or more of the safety measures provided for under other laws and regulations.

In complying with the provisions of Article 170 of the LGEEPA, Profepa ordered, by means of the administrative decision of 1 July 1998, (Exhibit No. 29), which derived from inspection record No. 17-006-0001/98-D of 23 June 1998, BASF to comply with a variety of corrective measures and enforced as a safety measure the Total Temporary Closure of the section of the building occupied by said



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

company on the Ex Hacienda El Hospital lot. The provisions of this ruling read as follows:

“**SIXTH.**- The TOTAL TEMPORARY CLOSURE of the section of the building that BASF MEXICANA, S.A. DE C.V. occupied as an industrial establishment is ordered as a safety measure. Closure notices shall be posted on the doors and accesses to said building, only to be removed by personnel of this Inspection Branch for the purposes of executing the corrective measures ordered in the present decision. The object of this measure is to guarantee that the premises are maintained in their present state. The parties are hereby warned that they may not modify the existing conditions of the lot or carry out any action, without the supervision of this Office of the Federal Attorney and, where so required, the prior authorization and direction of the National Institute of Anthropology and History (*Instituto Nacional de Antropología e Historia*—INAH). This safety measure shall cease to apply upon the total completion of whatever corrective restoration and remediation actions will have been ordered.”

Furthermore, in compliance with the provisions of the Articles 171, 172, 173 and 174 of the LGEEPA, Profepa imposed a fine in the amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS), pursuant to the administrative proceeding brought against BASF. In assessing this fine, due consideration was given to the gravity of the infraction, the economic status of the offender, the offender’s recidivism, the intentional or negligent character of the act or omission which constitutes the infraction, as well as the benefit directly obtained. This fine was assessed as a result of the violation of various provisions of environmental law, as is evident from the administrative ruling of 20 December 2005, which was entered into file No. B-0002/0775, (Exhibit No. 30). The ruling in question specified:

“... ”

VI.- For all of the foregoing reasons and based on the Article 171 paragraph I of the General Ecological Balance and Environmental Protection Act, it is determined that it is lawful to fine the establishment in question, in the total amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS), the equivalent of 40,000 days wages at the general minimum wage in effect in the Federal District at the time the fine was imposed, i.e., 46.80 pesos (FORTY-SIX PESOS 80/100). This fine, which is based on Article 77 of the Federal Administrative Procedures Act, is broken down as follows:

“... ”

**In light of the foregoing, the United Mexican States has fully proven that, via Profepa, and in strict compliance with the obligations ensuing from the LGEEPA and its Regulations respecting Hazardous Waste, it did comply with the applicable legislation in this case, and that it therefore effectively enforced said legislation.**



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

As for Article 174 of the LGEEPA, it establishes the applicable provisions in the event that a closure, whether temporary or definitive, total or partial, is ordered as a sanction:

**ARTICLE 174.- When the decommissioning or closure, whether temporary or definitive, total or partial, is a lawful sanction, the personnel commissioned to execute it shall prepare a detailed report of this task, and in so doing shall observe the provisions applicable to the conduct of inspections.**

**Should a temporary closure be imposed as a sanction, the Ministry shall advise the offender of the corrective measures and actions that he must carry out to rectify the irregularities that are the grounds for said sanction, as well as inform him of the deadlines for their completion.** (Emphasis added)

Concerning Article 174 of the LGEEPA, it's clear that the Submitters did not advance a single argument regarding the alleged failure in its enforcement. Nor is there a single document to substantiate such an assertion. Consequently, it would appear that it is the Secretariat itself which affirms that a response is warranted in this regard. Given the foregoing and the unknown nature of the reasons why it is deemed that there has been a failure to comply with the Article 174, it is necessary to indicate to the Secretariat that its assessment is incorrect inasmuch as Profepa did fully comply with the provisions of the aforementioned articles, including Article 174 of the LGEEPA.

**III.1.E. Articles 415 paragraphs I and II, and 416 paragraph I of the CPF in effect in 1997, and Articles 420 Quater and 421 of the CPF in effect subsequent to the reform of 6 February 2002, in respect of the prosecution of offenses allegedly committed by BASF**

In relation to the criminal charges brought against the company BASF Mexicana, S.A. de C. V., we hereby inform the Secretariat that, based on the provisions of Article 39(I) of the NAAEC, it is impossible, as Profepa has stated, for the Party to forward copies of said proceedings, or of any other document ensuing from them, due to the fact that the preliminary investigations initiated in respect of these acts were taken over by the Federal Attorney General (*Procuraduría General de la República*—PGR), specifically the then Special Prosecutor's Office for Environmental Offenses (*Fiscalía Especial en Delitos Ambientales*), now known as the Specialized Unit for the Investigation of Environmental Offenses and other



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Offenses Stipulated in Special Laws (*Unidad Especializada en Investigación de Delitos Contra el Ambiente y Previstos en Leyes Especiales*).

It's worth indicating that, in compliance with the provisions of Article 21 of the Political Constitution of the United Mexican States and Article 4 of the Organic Law of the Office of the Federal Attorney General (*Ley Orgánica de la Procuraduría General de la República*), the investigation and prosecution of offenses under federal jurisdiction is a power vested in the Federal Public Prosecutor's Office (*Ministerio Público de la Federación*) (Exhibit No. 31). Consequently, Profepa's actions took the form of assisting the PGR via the designation of experts and the issuing of expert opinions, which were added to official statements 58/98 and 6243/FEDA/98 (Exhibit No. 32), as well as the other official documents issued in this regard (Exhibit No. 33).

Furthermore, it is pertinent to point out that strictly speaking the provisions of the Federal Penal Code must not be included within the NAAEC's definition of environmental law. In effect, the FPC constitutes the aggregate of statutory enactments dealing with crimes; however, since "a crime is an act or omission punished by penal legislation," it is therefore beyond the scope of environmental legal provisions.

In light of the foregoing, Articles 415 paragraphs I and II, 416 paragraph I, 420 quater and 421 of the FPC are not applicable to the citizen submissions process. Therefore, it is not admissible to argue that there has been a failure to comply with the provisions cited. Moreover, Profepa did comply with its obligation to assist in the preliminary investigations under the responsibility of the competent ministerial authority.

Given the preceding, and based on the provisions of Articles 13, paragraph [sic] and 14 of the Federal Transparency and Access to Governmental Public Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental—LFTAIPG*), the abovementioned information is not public and must remain confidential. Furthermore, pursuant to the provisions of Article 16 of the Federal Criminal Procedures Code (*Código Federal de Procedimientos Penales*), public access to copies of the documentation in preliminary investigation files is not permitted.

**III.1.F. Articles 134 and 152 of the LGEEPA; Articles 8 paragraphs II, III, VI, VII and IX, 14, 15 paragraphs II and VII and 17 paragraph II of the RRP; Articles 29 paragraph VII 119**





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**paragraphs VI, VII, XI, XIV and XV of the LAN; Articles 135 paragraphs IV, V, VI and VII, 136 paragraph II of the RLAN and Official Mexican Standard NOM-052-ECOL-1993, in relation to the omissions of which Profepa was supposedly cognizant via an Environmental Audit**

The Submitters assert that Mexico committed omissions for *“failing to enforce the Environmental Law, with which BASF clearly was not in compliance in said installations, a fact made patent in the Executive Summary of the Plan of Action of the Audit that was conducted.”*

It's pertinent to underline that said assertion is erroneous for three fundamental reasons:

1. Environmental audits are voluntary environmental self-regulation processes, intended as a means for producers, businesses or organizations to improve their environmental performance in respect of the laws and regulatory standards in force and make a commitment to surpass or meet higher levels of compliance, goals or benefits in terms of environmental protection.

The foregoing is provided for in Article 38 bis of LGEEPA,<sup>25</sup> and is reaffirmed in Article 3 of the Regulations to the LGEEPA respecting Environmental Auditing, which reads as follows:

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<sup>25</sup> **ARTICLE 38.- Producers, companies or business organizations may develop voluntary environmental self-regulation processes, by means of which they may improve their environmental performance** in respect of the laws and regulatory standards in force and make a commitment to surpass or meet higher levels of compliance, goals or benefits in terms of environmental protection.

Acting within the purview of federal jurisdiction, the Ministry shall induce or coordinate:

**I.-** The development of suitable productive processes that are compatible with the environment, as well as systems for environmental protection and restoration, in concert with chambers of commerce, industry and other productive activities, producers' organizations, organizations representing a zone or region, scientific and technological research institutions and other interested organizations;

**II.-** The compliance with voluntary environmental standards or technical specifications that are stricter than the Official Mexican Standards or that refer to aspects not covered by them, and which shall be established with the common agreement of private citizens or of the associations and organizations that represent them. To this end, the Ministry may promote the establishment of Mexican standards in accordance with the provisions of the Federal Weights and Measures Act (*Ley Federal sobre Metrología y Normalización*);

**III.-** The establishment of certification systems for processes or products that induce patterns of consumption which are compatible with or which preserve, improve or restore the environment,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**“Article 3. Individuals responsible for running a business may, in a voluntary fashion, conduct environmental audits on contamination and the risks generated thereby, as well as on the degree of compliance of their business with environmental regulatory standards, foreign and international parameters and applicable good operating and engineering practices, with the object of defining the preventive and corrective measures necessary to protect the environment.”**

2. Environmental audits are solely and exclusively governed by the provisions of Section VII, “Self-Regulation and Environmental Audits” (*Autorregulación y Auditorías Ambientales*) of Chapter IV, “Instruments of Environmental Policy” (*Instrumentos de la Política Ambiental*), of the LGEEPA and the LGEEPA’s Regulations respecting Environmental Auditing.
3. Articles 134 and 152 of the LGEEPA; Articles 8 paragraphs II, III, VI, VII and IX, 14, 15 paragraphs II and VII and 17 paragraph II of the RRP; Articles 29 paragraph VII and 119 paragraphs VI, VII, XI, XIV and XV of the LAN; Articles 135 paragraphs IV-VII and 136 paragraph II of the RLAN; and Official Mexican Standard NOM-052-ECOL-1993, which establishes the characteristics of hazardous wastes and the procedures for the identifying, classifying and listing thereof, with respect to the omissions of which Profepa was supposedly cognizant via an environmental audit, are not applicable to the environmental auditing process; they therefore do not satisfy the requirement of legal specificity, as their provisions concern hazardous waste and wastewaters rather than environmental auditing.

Consequently, it is not admissible to argue, as the Submitters do, with the Secretariat’s concurrence, that there was a failure to enforce the articles cited above, as said articles are not applicable to environmental auditing. Furthermore it is incorrect to argue that Mexico “*did not punish the irregularities documented in an environmental audit,*” by virtue of the fact that an environmental audit is not intended to result in fines and penalties; instead, “the result of the environmental audit shall be to determine preventive and corrective measures, as well as the actions, studies, projects, works, programs or procedures that shall be implemented, each with their respective timelines, to ensure compliance with the regulatory standards in force.”<sup>26</sup> The results of the environmental audit voiced in the executive summary of the Audit of BASF’s facility were the fruit of “*a study on*

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while duly observing, where so required, the applicable provisions of the Federal Weights and Measures Act; and

**IV.-** Other actions that induce businesses to fulfill environmental policy objectives that surpass those provided for in the established environmental regulatory standards.

<sup>26</sup> Executive Summary of the Environmental Audit.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

*its present conditions, its maintenance and operations control procedures, both administrative and technical, and the emergency response training of its personnel.”*

The Auditor’s Report, the executive summary of which is referred to by the Submitters, along with the Action Plan, is only part of one of the audit’s ten stages.

**The Ten Stages of the Environmental Audit Process**



POST AUDITORÍA  
 EJECUCIÓN DE LA AUDITORÍA  
 PLANEACIÓN DE LA AUDITORÍA  
 10.- Certificación.  
 9.- Conclusión del Plan de Acción.  
 8.- Seguimiento al Plan de Acción.  
 7.- Concertación del Plan y Firma del Convenio de Cumplimiento.  
 6.- Plan de Acción.  
 5.- Reporte Auditoría.  
 4.- Inicio Trabajos de Campo y Gabinete  
 3.- Selección del Auditor Ambiental.  
 2.- Registro del Programa.  
 1.- Presentar la Solicitud a PROFEPA (Programa nacional de auditoría ambiental)

POST-AUDIT  
 AUDIT EXECUTION  
 AUDIT PLANNING  
 10. Certification  
 9. Conclusion of the Action Plan  
 8. Follow-up to the Action Plan  
 7. Negotiation of the Plan and Signing of the Compliance Agreement  
 6. Action Plan  
 5. Audit Report  
 4. Start of Field and Laboratory Work  
 3. Selection of the Environmental Auditor  
 2. Program Registration  
 1. Submission of a request to Profepa (National Environmental Audit Program)



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

It is important that the Secretariat keep in mind that an environmental audit makes it possible to address aspects that are not regulated by standards so as to enable companies to achieve a comprehensive level of environmental management. This is why the audit's fundamental objective is the identification, assessment, and control of the industrial processes that might be carried out under conditions of risk or cause contamination of the environment, and consists of a systematic and full review of a goods or services company's procedures and practices in order to verify its degree of compliance with regulated and unregulated environmental issues and thus detect potential risk situations in order to issue the preventive and corrective recommendations that may be warranted.

The Secretariat points out that it "... examined the legal provisions quoted in the submission and has determined that in the context of the citizen's submissions process some of the provisions included in the Environmental Audit are not subject to review. These are detailed in Appendix 1.["] However, the Secretariat fails to consider the fact that none of the environmental audit provisions are subject to its review as these provisions concern matters of self-regulation.

In addition to the aforementioned audit, Profepa acted in a timely fashion, as demonstrated by the various actions documented in the file B0002/0775 opened against BASF. These actions are described in this response and are documented by the different exhibits appended to said response; therefore, the latter part of the following assertion is incorrect. "On this issue, the Secretariat is not unaware of the voluntary nature of Profepa's clean industry program, which does not require the mandatory adoption of the action plan ensuing from an environmental audit. Nor does it fail to indicate that Mexican law contains provisions that guarantee the due process of law, and that consequently the action plan of an environmental audit may not be immediately invoked to impose sanctions. Nevertheless, *the submitters' argument is that the omissions documented in the Environmental Audit were not used to orient Profepa's actions in the Ex Hacienda El Hospital case. On the other hand, they claim that said voluntary instrument was used to avoid the enforcement of the law during the final phase of BASF's operations, without this having any consequences,*" since, as demonstrated above, Profepa ordered preventive and corrective measures and even carried out inspections, which led to the assessment of fines against the company. In conclusion, the Submitters' arguments are incorrect.

It is worth noting that the preventive and corrective measures ordered by Profepa did in fact comply with the observations and recommendations ensuing from the audit. This as is evident from document B.O.O.A.A.-DGO 652/97, dated May 20, 1997, through which the head of the Operations Branch of Profepa's



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Environmental Auditing Department (*Dirección General de Operación de la Subprocuraduría de Auditoría Ambiental de Profepa*) requested the Delegate in the State of Morelos to please prepare instructions on defining the actions that must be carried out in relation to the shutdown of operations by BASF. To this end, he submitted a photocopy of the Environmental Audit's executive summary (Exhibit 34). This demonstrates that the Secretariat's perception is erroneous. In addition, documents continued to be sent to the Environmental Audit Department to keep the report on the situation up-to-date (Exhibit 35).

In compliance with the provisions of article 152 of the LGEEPA<sup>27</sup>, Profepa conditionally authorized, through an administrative decision dated 3 September 1998, the company BASF MEXICANA S.A. de C.V. to execute 1) the "Program with timelines for the cleanup and/or dismantling of walls, floors, roofing and other structural elements," 2) the "Program to dismantle the building's drainage system" and 3) the "Study project by a third-party expert to evaluate the contamination of the building's soil, subsoil and aquifer" (Exhibit 36). Also, through an administrative decision dated September 29, 1998, stricter conditions were established for the "Program with timelines for the cleanup and/or dismantling of walls, floors, roofing and other structural elements" and the "Program to dismantle the building's drainage system" (Exhibit 37).

Article 29 of the LAN establishes obligations for licensees or assignees, including that of providing whatever information and documentation National Water Commission may request of them to verify compliance with the conditions contained in this Law and in the letters patent, deeds of transfer or permits referred to in said Law, as well as complying with the requirements for efficient water use and water reutilization pursuant to the terms of the Official Standards and any other particular conditions that may be stipulated in this respect. This provision was fully observed by the company and its compliance was verified by the authorities of the United Mexican States as indicated in Exhibit 38.

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<sup>27</sup> **ARTICLE 152.-** The Secretariat shall promote programs designed to prevent and reduce the production of hazardous waste as well as encourage the reuse and recycling of said waste.

In cases where hazardous waste can be used in another process that is different from the process that created said waste, the Regulation of this Act and the official Mexican standards that are issued must establish the mechanisms and procedures that allow for the efficient management of said waste from an environmental and economic perspective.

Hazardous waste that is used, treated or recycled in a process that is separate from the one that created it, but on the same premises, will be subjected to internal control by the liable company, in accordance with the provisions laid out in the Regulation of this Act.

Should the waste indicated in the preceding paragraphs be transported to premises other than those where it was produced, the applicable standards pertaining to the ground transportation of hazardous waste shall apply.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

As the preceding arguments show, the Party did not fail to enforce its environmental legislation. Consequently, the arguments of both submissions should be dismissed.

**III.1.B. Articles 191, 192 and 193 of the LGEEPA with respect to the processing of citizen complaints filed with Profepa, in relation to the facts raised in the submission**

Articles 191<sup>28</sup> and 192<sup>29</sup> of the LGEEPA establish the procedure to be followed regarding citizen complaints, once they have been received. Article 193 provides for the possibility of the plaintiff assisting Profepa by presenting exhibits, documents and information that he deems relevant.

Regarding this issue, the submitters of submission SEM-06-003 (*Ex Hacienda El Hospital II*) assert that, in relation to the judicial recovery of the Ex Hacienda installations on 3 September 1997, “*some of the neighbors and property owners filed citizen complaints with Profepa, as recorded in the aforementioned files, and that the owner initiated several legal proceedings against ‘the company,’ which we have been informed concluded in a judicial settlement between the Abes and ‘the*

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<sup>28</sup> **ARTICLE 191.-** Upon receipt of a complaint, the Office of the Federal Attorney for Environmental Protection shall acknowledge receipt thereof, assign a file number thereto and register the number.

If two or more complaints are received concerning the same facts, actions or omissions, they shall be consolidated in a single file and the plaintiffs shall be notified of this decision.

The Office of the Federal Attorney for Environmental Protection, within the 10 days following the filing of a complaint, shall notify the complainant of the decision on the admissibility thereof and describe the manner in which the complaint was processed.

Where a complaint falls within the jurisdiction of another authority, the Office of the Federal Attorney for Environmental Protection shall acknowledge receipt to the complainant but shall not allow the complaint to proceed, instead referring it to the competent authority for processing and resolution, and shall so notify the complainant in a fully articulated and reasoned decision.

<sup>29</sup> **ARTICLE 192.-** Once the complaint has been accepted, the Office of the Federal Attorney for Environmental Protection shall identify the plaintiff and notify the person or persons, or authorities, held responsible for the facts of the complaint, or the parties that may be affected by the outcome of the action undertaken, so that they may submit any documents and evidence they deem in their interest within 15 working days of their respective notification.

The Office of the Federal Attorney for Environmental Protection shall carry out the required procedures in order to determine the existence of the acts, facts or omissions raised in the complaint.

In like manner, in the cases provided for by this Act, it may initiate the appropriate inspection and monitoring procedures, in which case the applicable provisions of this Title shall be observed.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

company,” and that “parallel to the proceedings mentioned in the preceding point, Profepa visited the installations that ‘the company’ occupied **and only some of the adjacent lots**, without attending to said citizen complaints in a timely manner, as is demonstrated in the Decision dated 1 July 1998, signed by Artemio Roque Álvarez, Profepa’s Director General of Industrial Inspection in file B-0002/0750 (**Appendix 4**). We must emphasize that the actions carried out by Profepa regarding this specific point **were not only untimely, but also incomplete ...**”<sup>30</sup>.

In this regard, it should be specified to the Secretariat that none of the Submitters of submission SEM-06-003 (*Ex Hacienda El Hospital II*) filed a citizen complaint and therefore lack the legal grounds to claim a failure to apply Articles 191 to 193 of the LGEEPA. Consequently, the Secretariat’s assertion in determination A14/SEM/06-003/12/DET, dated 30 August 2006, is incorrect. Referring to compliance with Article 14(1)(e)<sup>31</sup>, it indicates that “... it considers that the issue was adequately communicated to the authorities in Mexico through the filing of two citizen complaints in 1998 and 2005 and that Profepa’s documents in response to Mr. Roberto Abe’s written communications are related to the matter raised in the submission”. This is incorrect because the Submitters **never communicated with the Party’s environmental authorities**, rather this was done by Carlos Álvarez and Roberto Abe Mondragón, as he himself has admitted.

Furthermore, it is also incorrect to state that the submissions filed by Carlos Álvarez and Roberto Abe Mondragón, which are not part of submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*), were not processed.

The citizen complaint filed by Carlos Álvarez Flores, in his own right and in representation of the association *México, Comunicación y Ambiente*, at the time Submitters of submission SEM-06-001 (*Ex Hacienda El Hospital I*), was filed in Profepa’s Federal Delegation on October 12, 2005, against the company BASF Mexicana, S.A. de C.V., accusing the latter of the alleged inadequate disposal of hazardous waste in the community of Ex Hacienda El Hospital. The reception of the complaint was duly acknowledged, given file number

<sup>30</sup> Submission SEM-06-003 (*Ex Hacienda El Hospital II*), pp. 4 and 5.

<sup>31</sup> **Article 14: Submissions on enforcement matters**

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

....

(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicated the Party’s response, if any; and

...



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

PFPA.MOR.DQ.78.187.05 and registered, in accordance with the provisions of the paragraph I of Article 191 of the LGEEPA.<sup>32</sup> Once the complaint was registered, Profepa, within 10 days of its filing, notified the complainant about the corresponding complaint status decision, and indicated the how the complaint had been processed. In this case, said legal opinion regarding the complaint was issued on 1 November 2005 (Exhibit 39).

Furthermore, through document PFPA.MOR.05713.2005 dated 1 November 2005, the Profepa delegate in Morelos, based on the provisions of LGEEPA's Article 192, asked the deputy delegate of Inspection and Monitoring to process the complaint and carry out the formalities required to detect the existence of the acts, facts or omissions raised in the complaint and, should they be found to be legitimate, to initiate the inspection and monitoring procedures pursuant to the provisions of Title VI of the LGEEPA (Exhibit 40).

On 10 December 2005, the Profepa delegate in Morelos, through document PFPA.MOR.05.738.2005, dated December 10, 2005, informed Carlos Álvarez Flores that on 6 December 2005, technical personnel attached to the Inspection and Monitoring Subdelegation completed an inspection visit of the locations referred to in the complaint, and prepared a detailed report (folio number: 019), as well as inspection records 17-06-11-2005 and 17-06-12-2005. Therefore, based on Article 192 of the LGEEPA<sup>33</sup>, the processing of the complaint was considered completed, with the conclusions to be reported at an opportune moment.

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<sup>32</sup> **ARTICLE 191.-** Upon receipt of a complaint, the Office of the Federal Attorney for Environmental Protection shall acknowledge receipt thereof, assign a file number thereto and register the number.

If two or more complaints are received concerning the same facts, actions or omissions, they shall be consolidated in a single file and the plaintiffs shall be notified of this decision.

The Office of the Federal Attorney for Environmental Protection, within the 10 days following the filing of a complaint, shall notify the complainant of the decision on the admissibility thereof and describe the manner in which the complaint was processed.

Where a complaint falls within the jurisdiction of another authority, the Office of the Federal Attorney for Environmental Protection shall acknowledge receipt to the complainant but shall not allow the complaint to proceed, instead referring it to the competent authority for processing and resolution, and shall so notify the complainant in a fully articulated and reasoned decision.

<sup>33</sup> **ARTICLE 192.-** Once the complaint has been accepted, the Office of the Federal Attorney for Environmental Protection shall identify the plaintiff and notify the person or persons, or authorities, held responsible for the facts of the complaint, or the parties that may be affected by the outcome of the action undertaken, so that they may submit any documents and evidence they deem in their interest within 15 working days of their respective notification.

The Office of the Federal Attorney for Environmental Protection shall carry out the required procedures in order to determine the existence of the acts, facts or omissions raised in the complaint.





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

On 17 May 2006, in a written document dated 16 May 2006, Mr. Carlos Álvarez Flores, on his own behalf and representing the association *México, Comunicación y Ambiente*, notified Profepa of the withdrawal of the citizen complaint in which he expressly stated: *“by this written document, I plainly and simply withdraw the complaint I presented 25 October 2005 before this Honorable Attorney’s Office. This is in accordance with the fact that the information and documents I had obtained to submit said complaint were erroneous, incomplete and consequently untrue. As a consequence, I wish to establish that the assertions that were made against BASF MEXICANA, S.A. DE C.V. were untrue.”* He also requested that the complaint be left without effect and filed as a matter totally and definitively concluded.

On 4 June 2006, the Profepa delegate for Morelos, through document PFFA.MOR.05.240.2006 dated 4 July 2006, asked Mr. Carlos Álvarez Flores to appear in the offices of said delegation in order to confirm the withdrawal of the complaint.

On 14 July 2006, a minute was recorded in which it was noted that, considering the issue to be resolved, Mr. Carlos Álvarez Flores did not appear to confirm the withdrawal of the complaint.

Finally, the complaint was deemed concluded due to the withdrawal of same and the corresponding file was considered closed based on the provisions of Article 199 paragraph VIII of the LGEEPA, which reads as follows:

**“ARTICLE 199.- Citizen complaint files may be may be closed due the following causes:**

- I.- Where the Office of the Federal Attorney for Environmental Protection lacks jurisdiction over the complaint;
- II.- Where the corresponding recommendation has been issued;
- III.- Where there is no contravention of environmental law;
- IV.- Where the complainant lacks interest under the terms of this Chapter;
- V.- Where a ruling to consolidate files has been rendered;
- VI.- Where the citizen complaint has been resolved through conciliation between the parties;
- VII.- Where a decision ensuing from the inspection procedure has been issued, or
- VIII.- Where the complainant withdraws the complaint.”

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In like manner, in the cases provided for by this Act, it may initiate the appropriate inspection and monitoring procedures, in which case the applicable provisions of this Title shall be observed.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

As a consequence, **the assertion of the submitters that the complaint filed by Carlos Alvarez Flores was not addressed does not correspond to the facts.**

As for Roberto Abe Almada, he indicated in submission SEM-06-004 (*Ex Hacienda El Hospital III*), that “in 1998 the first citizen complaint was presented by the property owner and other residents of the community. This is incorrect since the complaint he refers to was only filed by Roberto Abe Domínguez on 23 October 1997, by means of a written document dated the 1<sup>st</sup> of that month, against the company BASF Mexicana, S.A. de C.V., for its alleged “irresponsibility in the final disposal of hazardous waste produced by the company.” Profepa received this complaint by mail and assigned it file number 710/812/17.

On 23 October 1997, the Director General of Profepa’s Complaints Branch examined the complaint, in accordance with Article 190 of the LGEEPA, and issued a legal opinion deeming the complaint to be legitimate. Whereupon, he summoned the plaintiff to identify himself, provide the relevant evidentiary documents and accredit the legal status under which he was appearing. Furthermore, based on the provisions of Article 198 of the LGEEPA, he was informed that the filing of the complaint, and the decisions and rulings related to the case issued by Profepa would not affect the exercise of other rights or remedies. In addition to personally notifying him of the decision, he was also informed as to where the complaint file was kept for consultation purposes (Exhibit 41).

The same day, Profepa’s Director General of the Complaints Branch forwarded the complaint to the Profepa Delegate in Morelos, by means of document DG/003/DAD/1954/97, and asked him to investigate the complaint, in accordance with the terms of the legal opinion. He also issued document DG/003/DAD/1955/97, in which he notified Roberto Abe Domínguez that, based on the provisions of Articles 191 and 193 of the LGEEPA, his complaint was registered in the Citizen Environmental Complaint System (*Sistema de Denuncia Popular en Materia Ecológica*) and that upon its acceptance was forwarded to the Profepa Delegation in the state of Morelos.

On 9 December 1997, the Profepa Delegate in the state of Morelos, in accordance with Article 305 of the CFPC, asked the complainant to provide his legal address in order to hear and receive notifications in Cuernavaca, Morelos.

On 23 January 1998, Roberto Abe Domínguez requested that certified copies of the entire contents of file 108/97, i.e., the filed assigned to his complaint, be sent



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

to him at his expense. On the same day, he provided in writing his legal address where he could hear and receive notifications in Cuernavaca, Morelos, and named 21 lawyers for the same purposes.

On 27 January 1998, the Profepa Delegation in the state of Morelos agreed to send, at the complainant's expense, the requested certified copies of the rulings contained in the active file in question. Furthermore, on 2 February 1998, it issued a document acknowledging as duly filed the complainant's legal address to hear and receive notifications and as duly authorized for the same purposes the complainant's lawyers. On 3 February 1998, by way of document PFPA.MOR.05.034.98, said delegation informed Roberto Abe Domínguez that, as he already knew, on 2 August 1997, it had initiated an administrative proceeding against BASF due to the detection of irregularities in the handling and final disposal of hazardous waste and contamination of the installations by hazardous materials. However, the ensuing urgent corrective measures that the company had been ordered to execute had not been implemented pending resolution of the *amparo* motion 956/97-2, filed with the Third District Court of the state of Morelos. Furthermore, the complainant was informed that as follow-up to the citizen complaint process he would be kept informed on the progress of his complaint until its final conclusion.

It should be noted that the *amparo* motion 956/97-2 was initiated by Roberto Abe Domínguez himself against documents PFPA-MOR-02-422/97, dated 12 November 1997, and PFPA-MOR-02-545/97, dated 17 November 1997, which notified him that said company, pursuant to Profepa orders, would conduct an assessment of the environmental damages caused at the installations of the Ex Hacienda El Hospital. Said assessment was to include "soil and subsoil perimeter sampling and a determination of the effects on the aquifer and on the body of water receiving the wastewaters, as well as a proposal on remediation, which would be subject to prior authorization before any work is executed." In addition, Mr. Abe Domínguez was informed that he was jointly liable for the remediation activities. (Exhibit 42). Once the *amparo* proceeding had concluded, the Profepa delegation in the State of Morelos, issued an administrative decision dated 10 March 1998, through which it requested that a consulting firm hired by BASF be granted permission to enter the site in order to carry out emergency corrective measures, which BASF had been ordered to execute in the administrative order of 2 August 1997. This order was later reiterated on 16 October 1997. This request was issued because, commencing in September 1997, the complainant (father of the current Submitter) did not permit BASF to enter the Ex Hacienda El Hospital property in order to execute the corrective measures ordered by Profepa in



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

administrative proceeding 17/VI/040/97. In effect, the object of the *amparo* motion was to block BASF's access to the lot in question .

On March 10, 1998, through the administrative decision issued in document PFFA.MOR.05.151.98, the Profepa delegate in the state of Morelos ruled that the documents PFFA-MOR-02-422/97 02314, dated 12 November 1997, and PFFA-MOR-02545/97 2317, dated 17 November 1997, were null and void. This latter ruling was made to ensure compliance with the ruling of 26 January 1998 of the state's third district judge in respect of the *amparo* proceeding 965/97-III brought by Roberto Abe Domínguez. In light of the foregoing, and bearing in mind that document PFFA-MOR-02-422/97 02314, dated 12 November 1997, refers to this authority's response to the written communications of Roberto Abe Domínguez, dated 29 August, 1 October, and 4 November 1997, the Delegation responded to the document dated 4 November 1997 as follows:

"Based on the provisions of Article 16 of the Political Constitution of the United Mexican States, Articles 192 and 193 of the General Ecological Balance and Environmental Protection Act, and Article 50 of the Federal Administrative Procedures Act, you are hereby asked to assist this Delegation in the administrative proceeding that has been brought against the company BASF MEXICANA, S.A. DE C.V., by granting this company and the consulting company contracted by it access to the installations of the building of which you are the owner, and which is known as Ex Hacienda El Hospital, so that they may execute the urgent corrective measures that they have been ordered to implement, thus also enabling this authority to gather the elements of evidence it needs to assess the environmental damages caused in said installations.

It was also stated that pursuant to the provisions of Article 62 paragraph VI of the Internal Regulations of the Ministry of the Environment and Natural Resources, published on 8 July 1996 in the Official Gazette of the Federation, due compliance and follow-up of the corrective measures ordered would be monitored, and that at the appropriate moment of the proceeding, the proper administrative ruling would be issued to impose and order, in accordance with the provisions of Articles 169 and 170 of the General Ecological Balance and Environmental Protection Act, the fines and penalties owed by the company, as well as the appropriate technical measures to be executed, if so required."

On March 16, 1998, the Complaints Unit of Profepa's Delegation in Morelos issued PFFA.MOR.05.169.98.0753, respecting File 108 – 12 – 97, as a response to Roberto Abe Domínguez's document of 11 February 1998, which contained statements regarding the citizen complaint filed against BASF and requested that the Delegation grant him the right to participate in the ongoing administrative proceeding against the company, as he had a legal interest in knowing the facts and acting in said proceeding. To substantiate said request, he cited Article 33 of the Federal Administrative Procedures Act and various jurisprudence criteria



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

supported by public and private documents. In response to these arguments, the authority issued the following administrative decision:

"Roberto Abe Domínguez is duly registered together with the statements set forth in his written communication.

Regarding the evidence he provided, it was instructed that the complainant be informed that, based on the provisions of Article 193 of the LGEEPA, he is duly recognized as a contributory to this Delegation of the Office of the Federal Attorney for Environmental Protection in Morelos in relation to the complaint procedure. Consequently, his evidence was duly admitted and, by its very nature, presented, and will be taken into consideration when it is time to rule on the inspection and monitoring procedure brought against BASF the company that is the object of the complaint.

Regarding the request to participate in the proceeding, as well as the request that certified copies of all the documents related to the administrative proceeding initiated against the company BASF MEXICANA, S.A. de C.V. be sent to him at his expense, **notify the petitioner that his request is not warranted, inasmuch as while it is true that Articles 33 and 34 of the Federal Administrative Procedures Act regarding access to documents and information, does establish that: ... "The interested parties of an administrative procedure shall have the right to know at any time the status of its proceedings by obtaining the appropriate information in the relevant offices, except when said such information contains national defense or security information, is related to matters protected by trade secrets, of which the interested party is neither the person named nor an assignee, or concerns matters for which there are legal provisions that prohibit..."; and as for Art. 34: ... "Interested parties may request that a certified copy of the documents contained in the ongoing administrative file be sent to them at their expense, except in the cases listed in the previous article" ... . However, notwithstanding the foregoing, said right and access to information pertains to and is regulated in Article 159 bis 3 of the General Ecological Balance and Environmental Protection Act, a provision that states that any person has the right to have the environmental information he requests put at his disposal, pursuant to the terms provided for in said Act. Nevertheless, Article 159 Bis 4 of the law invoked stipulates limitations to the authority as it establishes that the delivery of information shall be denied when, as paragraph II states: ... "It is a matter of information related to legal formalities or inspection and monitoring procedures that are still pending" ...; and it is the case that the information requested of us does in fact pertain to an administrative procedure initiated against the company BASF MEXICANA, S.A. DE C.V. Moreover, in addition to the fact that this procedure is ongoing, the petitioner, despite being the owner of the building formerly occupied by the company cited, is not the person named or an assignee in said procedure, (i.e., a party in said administrative inspection and enforcement procedure). Given the foregoing, and based on the provisions of Article 159 Bis 4 of the General Ecological Balance and Environmental Protection Act currently in effect, his request that he be granted the right to participate in said procedure as the owner of the building, as well as to obtain a certified copy of the documentation thereof is not warranted since this procedure is pending. Based on the provisions of Article 191 of said law, it is legitimate that the**



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

complainant, who is in this case the petitioner, be informed about the steps taken respecting the citizen complaint he filed, which is what in fact has occurred inasmuch as the various documents of PFFA.MOR.05.034.98 have kept him informed about the progress of his complaint.”

On March 31, 1998, Roberto Abe Domínguez raised new considerations in relation to order PFFA-MOR-05-169-98, dated March 16, 1998.

Also, on April 13, 1998, the Profepa Delegate in Morelos issued a decision in relation to file 108 -12 -97 of the Complaints Unit of the Profepa Delegation in the State of Morelos. In effect, given the 31 [sic] March 1998 document signed by Roberto Abe Domínguez, in which evidence was presented pursuant to the proceeding discussed in the file 108 – 12- 97, the authority declared Roberto Abe Domínguez as duly registered, along with the elements of evidence he submitted, which were added to the charges in said file and, due to their special nature, presented ex officio. Finally, upon expiry of the of ten-day period for submitting evidence to the proceeding, which was granted in the decision of 16 March 1998, said period was declared ended, and this for whatever legal purposes may exist.

On May 28, 1998, the Profepa’s delegate in the state of Morelos issued a decision, through document PFFA.MOR.05.258.98.1332, in respect of file 108 – 12 – 97, in which he indicated the following:

“In light of the contents of the document dated 31 March 1998 and signed by Roberto Abe Domínguez, wherein the latter presents new evidence in relation to the decision issued via document PFFA-MOR-05-169-98 of 16 March 1998, with said evidence consisting of a photocopy of the contract of sale, the authority proceeded to address the foregoing by issuing the following decision:

The complainant’s case summary, which included his assertions and the accompanying appendix, was accepted as duly filed. Said documents were admitted and added to file 108-12-97 in their entirety, and will be taken into consideration at the time a ruling is made.

Regarding the request for reconsideration of the decision dated 16 March 1998, the petitioner is informed that his submission is inadmissible given that as the owner of the building in question, as well as the complainant, he will, at the appropriate time, be informed of the decision that shall be rendered respecting the administrative proceeding brought against the company BASF MEXICANA, S.A. DE C.V. Moreover, based on the provisions of Article 190 paragraph IV of the General Ecological Balance and Environmental Protection Act, he has filed the evidence that he deemed pertinent and, in so doing, has followed the proper procedure pursuant to the provisions of said law. Regarding this procedure, Article 193 of the LGEEPA established that, **as a complainant, he may assist the delegation by providing whatever evidence, documents and information he deems pertinent. The Act is clear and precise on this matter in that the complainant shall be considered a**



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

**contributory, but at no time does the Act state that the complainant may be considered a party in the administrative proceeding initiated** against the legal entity accused. Consequently, **the authority cannot consider the complainant as such.** Moreover, Article 198 of the General Ecological Balance and Environmental Protection Act establishes that neither the filing of a citizen complaint, nor the decisions, resolutions and recommendations that this Delegation may issue, may affect the exercise of other rights or remedies enjoyed by the affected parties pursuant to the applicable legal provisions. Therefore, and for the reasons given above, the ruling dated March 16, 1998, is upheld in each and every one of its parts. In conclusion, based on the provisions of Article 193 of the General Ecological Balance and Environmental Protection Act, Roberto Abe Domínguez shall retain his status as complainant when this authority shall render its decision respecting the complaint process in question.”

Therefore, the assertion of the Submitters to the effect that Article 193 of the LGEEPA was not complied with is incorrect and false, since, as shown above, Roberto Abe Domínguez was authorized to assist Profepa, in accordance with the following:

“**ARTICLE 193.-** The complainant may assist the Office of the Federal Attorney for Environmental Protection by submitting any evidence, documents, or information he considers relevant. The Office shall, when issuing a decision on the complaint, state the considerations adopted respecting the information provided by the complainant.”

On 14 May 1998, personnel attached to the Profepa Delegation in the state of Morelos prepared inspection record 17-06-08-98 in order to verify compliance with decision PFFPA.MOR.07.229.98.1151 of 11 May 1998, and to follow up on the complaint filed by Roberto Abe Domínguez with said Delegation (Exhibit 43).

Thus, on 23 June 1998, Profepa's Industrial Inspection Branch ordered an inspection visit of the Ex Hacienda El Hospital building in order to ensure further assessment, remediation and cleanup activities in a 5,231.09 m<sup>2</sup> area, corresponding to the area where the company carried out its production activities. This resulted in the issuing of inspection record 17-006-0001/98-D (Exhibit 44).

On 1 July 1998, Profepa issued an administrative decision which ordered BASF to take urgent corrective measures. Said decision also ordered the temporary total closure of the building occupied by the company.

On 31 July 1998, Roberto Abe Domínguez requested recognition as a contributory in the administrative procedure brought against him and BASF. In response thereto, the decision dated 10 December 1998 recognized Mr. Roberto Abe Domínguez as a contributory in the administrative proceeding respecting BASF, under file B-0002/0775, with the exclusive purpose of providing evidence.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

Consequently, supervening evidence was accepted and the administrative proceeding under file B-0002/0750 was divided into two files that would thenceforth proceed separately. Thus, file B-0002/0775 corresponds to BASF and file B-0002/0750 to Roberto Abe Domínguez, by virtue of his being jointly liable for the contamination of the Ex Hacienda El Hospital lot (Exhibit 45).

The preceding ensued from the facts and omissions in relation to the observance of the law detected during the inspection carried out from June 23 to 25, 1998. It emerged that said facts and omissions could represent an imminent risk of ecological imbalance and contamination of the soil, subsoil and aquifer with dangerous repercussions for ecosystems and the components thereof, as well as for public health. Consequently, the resulting, decision dated 1 July 1998, ordered BASF to execute various measures, in particular the completion and submission of a detailed inventory that would include the classification, characteristics and quantities of the existing hazardous waste generated while the Facility was in operation and/or during its dismantling, as well as a precise description of their location inside the building. In addition, the company was ordered to submit an inventory of the walls, original floors, roofs and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Also required: the submission of a detailed work schedule to indicate the clean up requirements re walls, original floors, roofing and other structural elements. Furthermore, it was required that said information should indicate which elements could be remediated, restored with new coverings or demolished, as well as how the wastes generated by such activities were to be managed. Moreover, the company was notified of its obligation to submit a description of the potable and wastewater management system as well as a program for dismantling both the drainage system that had been installed in the section of the building intended for industrial activities and the one outside up to the point where it reached the irrigation ditch.

The complaint was declared concluded pursuant to the provisions of Article 199 paragraph VIII of the LGEEPA, by virtue of the fact that on 9 December Profepa received a document dated 26 October 1999, in which Roberto Abe Domínguez plainly and simply withdrew, without any limitation whatsoever, from all the proceedings, requests and demands of all kinds that he had made as a complainant, and in which he also expressly and irrevocably renounced his role as a contributory. This development confirms that the processing of this complaint was in compliance with the provisions of Article 193 of the LGEEPA.

On 15 December 1999, the Industrial Inspection Branch received a copy of document PFFA.MOR.05.505/99, dated 26 November 1999, through which the





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Profepa Delegation in the state of Morelos notified Roberto Abe Domínguez of the decision to close the citizen complaint filed against BASF due to the withdrawing of the complaint.

In light of the reasons set forth above, the assertion of the Submitters that there was a failure to effectively enforce Articles 191, 192 and 193 of the LGEEPA in relation to the citizen complaints filed with Profepa respecting the facts raised in the submission is incorrect and, therefore, the Secretariat should dismiss the arguments advanced in the submission.

### **III.2. Assertions of the Submitter in submission SEM-06-004 (*Ex Hacienda El Hospital III*)**

#### **III.2.1. The actions implemented by Mexico in relation to the soil contamination that supposedly persists within and beyond the bounds of the land rented by BASF on the Ex Hacienda El Hospital lot, including the effecting of soil characterization studies, the imposition of corrective measures, safety measures and administrative fines and penalties**

The Secretariat's assertion that the Party failed to comply with its environmental legislation and that for this reason, it must respond with respect to "the actions implemented by Mexico in relation to the soil contamination that supposedly persists within and beyond the bounds of the land rented by BASF on Ex Hacienda El Hospital lot, including the effecting of soil characterization studies, the imposition of corrective measures, safety measures and administrative fines and penalties," is incorrect since the United Mexican States fully complied with the legal provisions that apply in this matter.

Regarding the alleged soil contamination referred to by the Submitters, it is worth noting, as was analyzed in the preceding subsections, that the actions carried out by the Mexican environmental authority fully complied with Mexican environmental legislation with respect to soil contamination and remediation through the imposing of lawful corrective measures, safety measures and fines, in accordance with the provisions of the LGEEPA.

In this sense, it should be noted that the LGEEPA indicates that criteria on the prevention and control of soil contamination must be taken into account under



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

various different scenarios. For example, the planning and regulation of urban development, a matter which has no bearing on this submission. Another example, the operation of systems for the cleaning and final disposal of municipal waste in landfills, which, once again, has no bearing on this submission, as said submission does not include any arguments in this regard.

As is evident from the various actions carried out by Profepa, the United Mexican States complied with the environmental provisions on soil contamination, since, through the decisions dated 20 July 2000 and 19 September 2000, entered into file B-0002/775, Profepa's Director General of Inspection and Monitoring granted BASF, "on the basis of the provisions of Articles 4, 5, 6, 134, 135, 136, 139, 140, 150, 151, 151 bis, 152, 152 bis, 160, 167 and 170 paragraph III of the LGEEPA; Article 32 bis of the Federal Public Administration Organization Act; Articles 1, 2 section C, paragraph IV, 13, 33, 34, 35, 68, 69 paragraph IX, 71, 76 paragraphs IV and VI, 81 paragraphs II, IV and V of the first and second drafts of Semarnat's Internal Regulations," the authorization to execute the building remediation program, pursuant to the terms and conditions detailed in Legal Argument VII of said administrative decision. Furthermore, the company in question was notified that these remediation works would be supervised by inspection personnel attached to Profepa. Consequently, the company was required to give prior notice to the abovementioned Profepa department of such remediation activities. Furthermore, the first administrative decision was modified such that the remediation program is subject to the authorization of the National Institute of Anthropology and History (*Instituto Nacional de Antropología e Historia*—INAH), and the CNA (Exhibit No. 46).

Moreover, as follow-up to the abovementioned decision dated 20 July 2000, entered into file B-0002/775, a characterization study of the environment, soils groundwater was carried out. Furthermore, it was determined in the decision of 19 September 2000 that prior to the removal of the underlying soil and backfill material, the company was required to carry out a sampling of said soil in each of the areas indicated in the CRETI sample points distribution plan. In addition, the materials originating from the works connected with the drainage systems, walls and the concrete basin in the treatment plant were to be piled up in 10m<sup>3</sup> mounds to enable the taking of at least four sub-samples from each mound, out of which a composite sample would be formed for analysis in accordance with Official Mexican Standards NOM-052-ECOL-1993 and NOM-053-ECOL-1993.

As a result of the aforementioned, Profepa determined in a decision dated 26 July 2002 that the environmental restoration works of the program, which the company had been ordered to execute through the administrative decision of 20 July 2000,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

were completed. That said, Profepa retained its power to order urgent measures or safety measures required for the execution of cleanup activities in the areas not leased to the company.

Given this Decision and in compliance with environmental legislation, Profepa, through a decision dated 31 August 2004 of its Industrial Inspection Branch (Dirección General de Inspección Industrial), specified various measures to be implemented by BASF in the furtherance of its cleanup and remediation activities. In effect, respecting said activities, the aforementioned company had not been freed of its duty to comply with the remediation program authorized on 20 July 2000. Consequently, it was ordered to continue the cleanup activities with respect to the following specific points: the hosing areas, desilting and cleaning up sediments in the pre-existing drainage system and cleanup of the soil around it, removal of the industrial drainage system, cleanup of the industrial drainage area and the areas adjacent to the plant, systematic verification of the cleanup of the drainage system and the affected areas thereof, sampling and analysis of the results of the remediation work (Exhibit 47).

In light of the preceding, the actions executed by the Mexican environmental authority, which consisted of ordering BASF to carry out remediation actions on the land owned by the Submitter, should be considered effective compliance with its environmental legislation. Therefore, it cannot be stated, as the submitter now claims, that this authority is responsible for the failure to carry out measures to contain or mitigate contamination on the lot in question. Furthermore, we must stress that the Submitter, by exercising his property rights over the site, prevented the company from executing the remediation actions ordered by Profepa and also prevented the environmental authority from intervening to follow up and verify the company's compliance.

Through a decision dated 24 July 1998, Profepa informed Roberto Abe Domínguez that it had taken samples for risk analysis and subsequently carried out said analysis, as attest inspection record 17-006-001/98D and point 7, paragraph b) of the decision dated 1 July 1998 (Exhibit No. 48).

Likewise, in the decision dated 20 July 2000 issued by Profepa's Industrial Inspection Branch, a series of technical and forensic studies was listed which said entity deemed necessary in order to identify and measure the scope and severity of the contamination caused by BASF, especially in legal argument VII, which established the mechanisms, procedures, technical studies and parameters through which different cleanup and restoration activities were carried out regarding both wastewaters and waste contaminated soil (Exhibit 49).



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

The foregoing contradicts the Submitter's assertion to the effect that Mexico failed to comply with its environmental legislation because it "*did not carry out directly the detailed technical and forensic studies required to identify and measure the scope and severity of the contamination caused by BASF*".

The contradiction expressed by Roberto Abe Almada, the Submitter of submission SEM-06-004 (*Ex Hacienda El Hospital III*), is obvious since he himself asserts in writing that Mexico failed to apply its environmental legislation because it "*did not act accordingly despite the results of the analyses of various samples taken by Profepa itself in the rest of the property of my client, which was not rented to BASF. Said results prove the presence of lead, chrome, cadmium and molybdenum in concentrations exceeding norms...*" (Exhibit 50). However, in Appendix 16 of the Submitter's own submission, in response to a written document of Roberto Abe Domínguez, dated May 7, 2002, Profepa clearly informs him regarding 250 (two hundred and fifty) analyses made by inspectors attached to Profepa (Exhibit 51).

This shows the lack of clarity and coherence of the Submitters' assertions, which are contradictory, inasmuch as they state, initially, that Profepa did not directly carry out the detailed technical and forensic studies required to identify and measure the scope and severity of the contamination caused by BASF, before contradicting themselves when the Submitters subsequently refer to "the results of the analysis of various samples, which Profepa itself had taken."

Profepa took action from the very moment it became cognizant of the alleged violations of environmental legislation and, pursuant to its inspection and monitoring powers, executed various acts of authority respecting BASF, which prompted the ordering of emergency measures, as attest several of its decisions regarding this case, such as:

1. Decision dated 2 August 1997, issued by the Office of the Federal Attorney for Environmental Protection, State of Morelos Delegation, entered in file 17/VI/040/97, through which emergency measures were ordered and BASF was summoned for the start of the administrative proceeding (Exhibit 52).

"...

**FIRST.-** Based on Article 170 bis of the General Ecological Balance and Environmental Protection Act and Articles 81 and 82 of the Federal Administrative Proceedings Act in force, this Authority decrees the following EMERGENCY CORRECTIVE MEASURES.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

1. The company shall submit to this Delegation, within 10 working days, the complementary information to its program and work schedule for shutting down its Facility, in which it shall detail the actions to be executed in the dismantling of the plaza.
2. The company shall submit in writing to this Delegation, within 10 working days, a list of the required cleanup, restoration and remediation actions prior to delivery of the Facility to the Lessor.
3. Within 72 hours, the company shall initiate a log of its plant closing activities, in which it shall make a note of each action executed in accordance with the program and, where so required, describe whatever unforeseen modifications or actions were executed.
4. Within 72 hours, the company shall initiate a log in respect of hazardous waste storage.
6. The company shall submit to this Delegation of the Office of the Federal Attorney for Environmental Protection of the state of Morelos, within 5 working days, copies of the delivery, transportation and arrival manifests for its hazardous wastes, duly completed and stamped as received by the final disposal site.
7. The company shall submit to this Delegation, within 20 working days, the results of the studies conducted to determine the level of contamination of the soil and subsoil at the Facility, as well as that of the body of water receiving the wastewaters spilled into the creek known as "Espíritu Santo", a tributary of the Río Cuautla.
8. The company shall submit to this Delegation, within 15 working days, the results of the characterization of the mud residues contained in its treatment ditches in terms of the CRETIB parameters (Corrosive, Reactive, Explosive, Toxic, Ignitable or Biological/Infectious).
9. The company shall submit to this Delegation, within 10 working days, a copy of the acknowledgement of receipt in respect of its written notification to the National Ecology Institute (*Instituto Nacional de Ecología*—INE), in which it will have notified the INE of its plant closing cleanup, restoration and remediation activities.
10. Should it be required to comply with any provision in particular, the company shall request the relevant documentation from the INE so as to clarify the activities to be executed; a copy of the official response in this regard shall be forwarded to this Delegation in due course.
11. Prior to commencing its cleanup, restoration and remediation work, the company shall submit to this delegation its methodology and the actions it plans to carry out in writing.
12. The company BASF Mexicana shall, upon termination of remediation activities and prior to the physical delivery of the installations, submit to this Delegation the



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

results of the evaluation conducted by an authorized expert, including the results of the analyses done to certify that the cleanup executed complies with the provisions established in the existing environmental regulations and standards.

The countdown for the timelines established for compliance with the emergency corrective measures shall commence the day following the date that the notification of this ruling officially takes effect.

“...”

2. Administrative decision of 1 July 1998, issued by Profepa's Industrial Inspection Branch as part of file No. B-0002/0750 (Exhibit No. 53), in which a ruling was rendered pursuant to the following terms:

“...”

**FIRST.-** The company BASF MEXICANA, S.A. DE C.V. is ordered to carry out the following measures, within the time periods indicated, commencing on the day of notification of the present administrative decision:

- 1.- Draw up and submit a detailed inventory including the classification, characteristics and quantities of the existing hazardous waste (platforms, rubble, processing wastes, bottles and bags containing pigments, dimetol, formamide, resins, tubular drums impregnated with yellow coloring, raw materials wastes, nitric acid, caustic soda, sodium bichromate and lead monoxide, etc.) that were generated while the facility was in operation and/or during its dismantling, as well as a precise description of their location inside the building. Deadline: 10 working days.

- 2.- Submit the following documents to Profepa: manifests from the hazardous waste generating company, as well as those in respect of the delivery, hauling and reception thereof; quarterly reports on hazardous waste, materials and equipment shipped for recycling, treatment, incineration or controlled confinement; monthly logs on hazardous waste generation; and quarterly reports on the transport, if any, of hazardous waste, as well as on all waste already generated or to be generated by the cleanup, dismantling and remediation activities for the site and building. Deadline: 10 working days.

- 3.- Do an inventory for Profepa of movable property, electrical and hydraulic equipment and installations, including all those attached to walls and roofs. Describe the cleanup requirements regarding these installations and the cleanup procedures that will be followed. Detail as well how the wastes generated by cleanup activities will be managed, in particular as regards their final disposal. Deadline: 10 working days.

- 4.- Draw up and submit to Profepa an inventory of the walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Deadline: 10 working days.

- 5.- Submit to Profepa for its approval a work schedule indicating in detail the cleanup requirements re walls, original floors, roofing and other structural elements, including the backfill and floor used to raise the initial level of the building used as an industrial establishment. Said information must indicate the procedures that will be applied and



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

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LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

which elements may be suitable for remediation, covering over or demolition, as well as indicate how the wastes generated by such activities are to be managed, in accordance with how hazardous they are. Deadline: 10 working days.

6.- Submit a detailed description to Profepa of the system for managing potable water and wastewater. Describe in particular the potable water supply system, potable water uses and the volumes that were managed, as well as the gutters, manholes, process and wastewater collection drainage systems and the path followed along the municipal drainage ditch up to the final discharge point. Deadline: 10 working days.

7.- Submit to Profepa a program for dismantling 1) the entire drainage system that was installed in the section of the building set aside for industrial activities and 2) the outside drainage system up to the point where it flows into the drainage ditch. Deadline: 10 working days.

8.- Execute the cleanup and desilting of the wastewater treatment ditches contaminated with hazardous liquid and solid wastes. Said wastes must be packed, labeled and transported to a controlled waste confinement site. Deadline: 10 working days.

9.- Submit for Profepa's review and approval a proposal on a study to be conducted by a third party expert to evaluate the contamination of the soil, subsoil and aquifer, with special emphasis on the following points and areas: the areas adjacent to the paths of the drainage systems, manholes, seeping wells, sedimentation wells, the wastewater treatment plant and the sites of wastewaters flows up to the point of convergence with the municipal drainage ditch; the point where said wastewaters were discharged into the "Espíritu Santo" creek, 10 meters upstream and every 10 meters up to a distance of 50 meters downstream; the areas where yellow and red pigments were manufactured, the precipitation tanks and the raw materials warehouse. To be identified: aquifer levels, groundwater quality and direction of groundwater flow. This requires taking baseline samples that will serve as parameters in determining the site's natural conditions. For the latter, it will be necessary to drill as many monitoring wells as may be required to determine water quality and to conduct sampling in order to determine, tri-dimensionally, the degree of contamination of the soil, subsoil and aquifer. Said drilling shall be as deep as necessary, i.e., down to the point where no contamination is detected. Geophysical methods shall be employed to identify the approximate extent of the contaminated area. Deadline: 15 working days.

10.- Submit to Profepa a water quality analysis log of the wastewater treated in the treatment plant and released as effluent, duly documented with the corresponding laboratory reports. Deadline: 15 working days.

..."

A point to be underlined: the total temporary closure of the section of the building occupied by BASF was ordered as an additional measure in paragraph VI of the ruling, which reads as follows:

**"SIXTH.-** The TOTAL TEMPORARY CLOSURE of the section of the building that BASF MEXICANA, S.A. DE C.V. occupied as an industrial establishment is ordered



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

as a safety measure. Closure notices shall be posted on the doors and accesses to said building, only to be removed by personnel of this Inspection Branch for the purposes of executing the corrective measures ordered in the present decision. The object of this measure is to guarantee that the premises are maintained in their present state. The parties are hereby warned that they may not modify the existing conditions of the lot or carry out any action, without the supervision of this Office of the Federal Attorney and, where so required, the prior authorization and direction of the National Institute of Anthropology and History (*Instituto Nacional de Antropología e Historia*—INAH). This safety measure shall cease to apply upon the total completion of whatever corrective restoration and remediation actions will have been ordered.”

3. Under the administrative decision of 20 July 2000, BASF was ordered to carry out various cleanup and remediation activities, including: preparing the support infrastructures, dismantling and disposing of the outside drainage network, dismantling and disposing of roofing and metallic structures, removal of contaminated walls, removal of contaminated soil, dismantling and disposal of the wastewater treatment plant, and the restoration of sediments. The manner and requirements governing how these activities were to be carried out was also specified, as were the parameters to be complied with.
4. By means of the administrative decision of 31 August 2004, Profepa’s Industrial Inspection Branch ordered BASF to undertake various measures in the furtherance of the cleanup and remediation tasks centering on the following specific points: the hosing areas, desilting and cleaning up sediments in the pre-existing drainage system and cleanup of the soil around it, removal of the industrial drainage system, cleanup of the industrial drainage area and the areas adjacent to the plant, systematic verification of the cleanup of the drainage system and the affected areas thereof, sampling and analysis of the results of the remediation work. (Exhibit No. 54)
5. Similarly, pursuant to the administrative decision of 25 February 2005 (Exhibit No. 55), Profepa’s Industrial Inspection Branch ordered BASF to execute the following additional measures:
  - “a) Install and equip a temporary storage area within the bounds of the areas set by this authority, in accordance with the following requirements:
    - 1) A waterproof canvas shall cover the ground.
    - 2) Mounds shall be covered by a canvas to prevent the dispersion of particulates.
    - 3) The continued storage of mounds may not exceed five days once the results from toxicity analysis have been released.
    - 4) Each mound shall be identified with the following data: volume in cubic meters, date of entry and place of origin.





SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

- 5) Access to the temporary storage area shall be restricted and signage shall be posted to indicate its status.
- 6) Concerning soil removal, specific routes for the transportation of materials shall be defined and used.
- b) Soil originating from remediation works shall be piled up in mounds not exceeding ten cubic meters in volume and one meter in height.
- c) At least four samples shall be taken from each mound for use in the forming of a composite sample.
- d) The sampling points from each mound shall be selected at random from different cells; to this end a grid composed of twenty equal cells shall be made, covering an area equal to the surface area of the mound.
- e) The cells shall be numbered from left to right, that is from the upper left corner of the grid to the bottom right thereof.
- f) With the assistance of a computer program that generates random numbers or a random numbers table, select at least four different cells.
- g) In each of the selected cells collect a soil sample at a depth of 0.5 meters.
- h) Each compound sample must be analyzed to determine the degree of hazard it presents, in terms of the CRET1 parameters, for nine inorganic constituents, in accordance with the procedure established in Official Mexican Standard NOM-053-SEMARNAT-1993.
- i) Should the results from the analysis of the samples exceed the limits established in Table 5 of Appendix 5 of Official Mexican Standard NOM-052-SEMARNAT-1993, the mounds corresponding to these samples must be managed in compliance with federal environmental legislation in respect of hazard waste."

The preceding demonstrates the untruthfulness of the Submitter's assertions when the latter affirms that Mexico failed to comply with its environmental legislation by "*not having decreed or carried out the necessary control measures to avoid the continued spread of the contamination detected there,*" as well as by "*not having taking the measures intended to achieve proper remediation of the site in an opportune manner....*" These assertions are erroneous and inexact, given that, as the Secretariat shall observe, Profepa took action as soon as it became cognizant of the alleged violations of environmental legislation. A fact which substantiates the argument that this entity did not any time cease to observe the provisions provided for in the LGEEPA. Indeed, once the final ruling had been decreed in the proceeding brought against BASF, Profepa ordered the following within the administrative decision of 20 December 2005 (file No. B0002/0775):

"....  
VII....the company BASF, MEXICANA, S.A. DE C.V. is ordered to continue its compliance with the following measures:



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

ONE.- It is reiterated that the company shall comply with the measures ordered in administrative decision No. DGIFC 053/2004 of 31 August 2004, of which the official notification was dated 1 September of the same year, as well as with the modification authorized by the Inspection of Sources of Contamination Branch (*Dirección General de Inspección de Fuentes de Contaminación*) in point FOUR of administrative decision No. DGIFC 053/2004 of 25 February 2005, in the sense that it shall fully comply with the item in relation to the management of the existing drainage, as well as with others that may arise and present issues of contamination, pursuant to the terms of the environmental restoration program authorized through the Administrative Decision of 20 July 2000.

....”.

With respect to administrative sanctions, the Submitter asserts that Mexico failed to enforce environmental legislation due to its not having fined the company known as BASF MEXICANA S.A. de C.V. for its alleged non-compliance with various laws and regulations respecting the environment and hazardous waste.

On this point, the Submitter is not truthful. In effect, he was fully aware of Profepa’s actions, inasmuch as he, as well as his father and lawyers, blocked access on various occasions to the “Ex Hacienda de Nuestra Señora de la Concepción El Hospital” lot for both Profepa and BASF personnel, who were there to conduct verification activities or to comply with the emergency measures ordered.

Profepa, acting within the purview of the powers vested in it, instituted an administrative proceeding against BASF, which culminated in the assessing of a fine in the amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS), for BASF’s infringement of various provisions of environmental law, as attests the administrative ruling of 20 December 2005 against said company, entered into file No. B-0002/0775 (Exhibit No. 56):

“... ”

VI.- For all of the foregoing reasons and based on the Article 171 paragraph I, of the General Ecological Balance and Environmental Protection Act, it is determined that it is lawful to fine the establishment in question, in the total amount of P\$1,872,000.00 (ONE MILLION, EIGHT HUNDRED AND SEVENTY-TWO THOUSAND PESOS), the equivalent of 40,000 days wages at the general minimum wage in effect in the Federal District at the time the fine was imposed, i.e., 46.80 pesos (FORTY-SIX PESOS 80/100). This fine, which is based on Article 77 of the Federal Administrative Procedures Act, is broken down as follows:

1) For failing to prove, at the time of the inspection visit, that the company maintained a log of all wastes generated during the dismantling of the plant under inspection,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

**[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT**

**LEGISLATION AND REVIEW BRANCH**

**REVIEW DEPARTMENT**

**F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.**

while taking into account as an attenuating factor that the company rectified this irregularity, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

2) For not having the characterization of the wastes generated during the dismantling of the plant at the time of the inspection visit, while bearing in mind as an attenuating circumstance that the irregularity detected was rectified, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e., the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

3) For improper storage in the open of hazardous waste, while taking into account that this irregularity was subsequently rectified and said hazardous wastes were duly shipped to and disposed of at a controlled confinement landfill, a fine was imposed in the amount of P\$28,080.00 (TWENTY-EIGHT THOUSAND AND EIGHTY PESOS), i.e., the equivalent of 600 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

4) For not properly disposing of materials generated during the dismantling of the plant and considered to be hazardous waste, according to inspection records No. 17-06-05-98 and 17-06-07-98 and under the provisions of Official Mexican Standard NOM-052-ECOL-1993 (now NOM-052-SEMARNAT-1993), while bearing in mind that the irregularity was rectified and that said materials were recovered from the lots where they were located, in the possession of the persons to whom they had been delivered, and were then turned over to a controlled confinement landfill, a fine was imposed in the amount of P\$140,400.00 (ONE HUNDRED AND FORTY THOUSAND, FOUR HUNDRED PESOS), i.e. the equivalent of 3,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

5) For failing to post safety notices in the hazardous waste storage area as of the time of the inspection visit of 23 June 1998, a fine was imposed in the amount of P\$18,720.00 (EIGHTEEN THOUSAND, SEVEN HUNDRED AND TWENTY PESOS), i.e., the equivalent of 400 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

6) For soil contamination originating from the accumulation, depositing or seepage of hazardous waste during the carrying out of its activities, while taking into consideration that there has been some remediation of the soil in question, and irrespective of the existence of pending corrective measures, which is taken as an attenuating factor in this sanction, a fine was imposed in the amount of P\$936,000.00 (NINE HUNDRED AND THIRTY-SIX THOUSAND PESOS), i.e., the equivalent of 20,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

7) For contamination of the structure of the building that it occupied for its industrial activities, located in the lot known as "Ex Hacienda de Nuestra Señora de la Concepción El Hospital" or "Ex Hacienda El Hospital," in the Municipality of Cuautla,



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

state of Morelos, as defined by the terms of the present ruling, while taking into account as an attenuating factor the remediation of said contamination (the administrative decision of 26 July 2002 determined that the environmental remediation work scheduled in the corresponding program and adopted by the legal entity BASF MEXICANA, S.A. DE C.V. had been completed), a fine was imposed in the amount of P\$468,000.00 (FOUR HUNDRED AND SIXTY-EIGHT THOUSAND PESOS), i.e., the equivalent of 10,000 days of wages at the general minimum wage in effect in the Federal District at the time of this fine.

...”

In conclusion, the assertions of Roberto Abe Almada, Submitter of submission SEM-06-004 (*Ex Hacienda El Hospital III*), to the effect that Mexico failed to enforce environmental legislation due to its not having fined the company known as BASF MEXICANA S.A. de C.V. for its alleged non-compliance with various laws and regulations respecting the environment and hazardous waste are clearly unfounded.

### **III.2.2. The investigation and prosecution of an alleged infraction against environmental management, i.e., Profepa’s alleged failure to adequately document a wastewater drainage system in its administrative records**

In relation to the criminal charges brought against the company BASF Mexicana, S.A. de C. V., we hereby inform the Secretariat that, based on the provisions of Article 39(I) of the NAAEC, it is impossible, as Profepa has stated, for the Party to forward copies of said proceedings, or of any other document ensuing from them, due to the fact that the preliminary investigations initiated in respect of these acts were taken over by the Federal Attorney General (*Procuraduría General de la República—PGR*), specifically the then Special Prosecutor’s Office for Environmental Offenses (*Fiscalía Especial en Delitos Ambientales*), now known as the Specialized Unit for the Investigation of Environmental Offenses and other Offenses Stipulated in Special Laws (*Unidad Especializada en Investigación de Delitos Contra el Ambiente y Previstos en Leyes Especiales*).

It’s worth indicating that, in compliance with the provisions of Article 21 of the Political Constitution of the United Mexican States and Article 4 of the Organic Law of the Office of the Federal Attorney General (*Ley Orgánica de la Procuraduría General de la República*), the investigation and prosecution of offenses under federal jurisdiction is a power vested in the Federal Public Prosecutor’s Office (*Ministerio Público de la Federación*) (Exhibit No. 58).



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

Consequently, Profepa's actions took the form of assisting the PGR via the designation of experts and the issuing of expert opinions, which were added to official statements 58/98 and 6243/FEDA/98 (Exhibit No. 59).

Furthermore, it is pertinent to point out that strictly speaking the provisions of the Federal Penal Code must not be included within the NAAEC's definition of environmental law. In effect, the FPC constitutes the aggregate of statutory enactments dealing with crimes; therefore, since "a crime is an act or omission punished by penal legislation," it is therefore beyond the scope of environmental legal provisions.

In light of the foregoing, Articles 415 paragraphs I and II, 416 paragraph I, 420 quater and 421 of the FPC are not applicable to the citizen submissions process. Therefore, it is not admissible to argue that there has been a failure to comply with the provisions cited. Moreover, Profepa did comply with its obligation to assist in the preliminary investigations under the responsibility of the competent ministerial authority.

Given the preceding, and based on the provisions of Articles 13, paragraph, and 14 of the Federal Transparency and Access to Governmental Public Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*—LFTAIPG), the abovementioned information is not public and must remain confidential. Furthermore, pursuant to the provisions of Article 16 of the Federal Criminal Procedures Code, public access to copies of the documentation in preliminary investigation files is not permitted.

Given the arguments set forth in this response as a Party, the United Mexican States deems that submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*) should be dismissed based on the grounds for their inadmissibility detailed in sections I and II of this Response. Should the Secretariat proceed with the analysis of these submissions despite said grounds for their inadmissibility, it may hereby consider the Response of the Party as duly submitted on an *Ad cautelam* basis within the present document. Furthermore, by virtue of this Response, the Secretariat should close this file and not recommend the elaboration of a factual record.



SECRETARIA DE MEDIO AMBIENTE  
Y RECURSOS NATURALES

[UNOFFICIAL TRANSLATION]  
LEGAL AFFAIRS COORDINATING UNIT

LEGISLATION AND REVIEW BRANCH

REVIEW DEPARTMENT

F.I.: 10805,10806, 12502, 12890, 12955, 13515,  
13791, 14025, 14208, 14341, 14490, 16084, 16405.

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**HEAD OF THE LEGAL AFFAIRS COORDINATING UNIT**

**LIC. WILEHALDO CRUZ BRESSANT**

c.c.: Minister of the Environment and Natural Resources. Respectfully submitted  
for your information.

MPU-PAR-TCC