

Secretariat of the Commission for Environmental Cooperation
Secretariat Determination in accordance with Article 24.28(1) of the
United States-Mexico-Canada Agreement

Submitters: [Names confidential pursuant to section 16(1)(a) of the ECA]
Party: United Mexican States
Date of submission: 1 June 2022
Date of determination: 4 November 2022
Submission No: SEM-22-001 (*Pollution in Playa Hermosa*)

Executive Summary

On 1 June 2022, the Secretariat of the Commission for Environmental Cooperation received Submission SEM-22-001 (*Pollution in Playa Hermosa*) alleging that Mexico is failing to effectively enforce its environmental laws with respect to the alleged failure to take sufficient action to both protect and conserve the coastal ecosystem of Playa Hermosa in Ensenada, Baja California, and to control the discharge of untreated sewage onto the beach.

The Submitters, a group of six organizations that requested confidentiality under Article 16(1)(a) of the ECA, claim that Mexico is failing to effectively enforce provisions of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*—Constitution); General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y Protección al Ambiente*—LGEEPA); LGEEPA Regulations on Environmental Impact Assessment (*Reglamento de la LGEEPA en materia de Evaluación de Impacto Ambiental*—REIA); the National Waters Act (*Ley de Aguas Nacionales*—LAN); National Waters Act Regulations (*Reglamento de la Ley de Aguas Nacionales*—RLAN); and the Official Mexican Standard NOM-001-Semarnat-2021, *which establishes the permissible limits for pollutants in discharges of wastewater into national water bodies* (NOM-001).

On 2 September 2022, Mexico submitted its response to the submission. The Party refers to various actions undertaken by administrative and judicial authorities and cites multiple pending administrative and judicial proceedings, related to the protection and conservation of the coastal ecosystem of Playa Hermosa and the contamination of this beach by the discharge of sewage without adequate treatment.

Having reviewed SEM-22-001 (*Pollution in Playa Hermosa*) and the Party's response, the Secretariat determines that the preparation of a factual record is not warranted. The Secretariat finds that Mexico has notified that there are various administrative and judicial proceedings underway that—in some cases—could lead to a resolution of the issue raised in the submission. Mexico also notes that, as a result of various citizen complaints, the Office of the Federal Attorney General for Environmental Protection (Profepa) and the National Water Commission (Conagua) have implemented some enforcement measures to address issues raised by the Submitters, which have resulted in administrative and judicial actions, some of which are ongoing. The Secretariat's full reasoning is set forth in this determination.

I. INTRODUCTION

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA/CUSMA) and the Agreement on Environmental Cooperation (ECA or “Agreement”) entered into force. After this date, the Submissions on Enforcement Matters process (“SEM process”) originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by Articles 24.27 and 24.28 of the USMCA/CUSMA. The Secretariat of the Commission for Environmental Cooperation (CEC or “the Commission”)¹ remains responsible for implementing the SEM process, as stipulated in the ECA.²
2. The SEM process allows any person of a Party—i.e., any national of a Party or entity organized under the laws of Canada, the United States or Mexico³—to file a submission alleging that a Party is failing to effectively enforce its environmental laws. The CEC Secretariat (“the Secretariat”) initially reviews submissions based on the requirements set forth in Article 24.27(1) and (2) of the USMCA/CUSMA. Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party's response, the Secretariat then determines whether the matter warrants preparation of a factual record and, if so, it informs the CEC Council and the Environment Committee,⁴ providing its reasons pursuant to Article 24.28(1); otherwise, it terminates the review of the submission.⁵
3. On 1 June 2022, a group of six environmental, youth, skateboarding and surfing organizations (collectively, “the Submitters”), who requested confidentiality of their data under Article 16(1)(a) of the ECA, filed a submission with the Secretariat pursuant to Article 24.27(1) of the USMCA/CUSMA.⁶

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, Mexico and the United States (the “Parties”). The constituent bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

² Pursuant to Article 2(3) of the Agreement on Environmental Cooperation between the Governments of the United Mexican States, the United States of America and Canada (“Agreement on Environmental Cooperation,” “Agreement” or “ECA”), the CEC “shall continue to operate under the modalities in effect on the date of entry into force of this Agreement.”

³ The USMCA/CUSMA provides that a request may be made by “any person of a Party,” in accordance with the general definitions in Article 1.5 as “a national [an individual with nationality or permanent resident status] of a Party or an enterprise [any private, public or social entity or organization established or incorporated under applicable law] of a Party.”

⁴ Established under Article 24.27(3) of the USMCA/CUSMA, the Environment Committee’s role is to oversee the implementation of Chapter 24 of the USMCA/CUSMA.

⁵ Further details regarding the various stages of the Submissions on Enforcement Matters (SEM) process, the public registry of submissions, and the findings and factual records prepared by the Secretariat can be found on the CEC website at: <<http://www.cec.org/submissions-on-enforcement/>>.

⁶ SEM-22-001 (*Pollution in Playa Hermosa*), USMCA/CUSMA Article 24.27(1) Submission (1 June 2022),

4. The Submitters allege that the state and municipal governments initiated the construction of a boardwalk and urban-tourist development project at the edge of the ocean in Playa Hermosa without prior federal environmental impact authorization. After the closure of the project, no actions were taken to restore the damage to the Playa Hermosa dune system, which was impacted in 2021 as a result of the project's construction work. The Submitters assert that to date no actions have been implemented to rehabilitate the site. They also claim that the water quality of Playa Hermosa is compromised due to the discharges that are occurring without adequate treatment.
5. Located in Todos Santos Bay, municipality of Ensenada, Baja California, Mexico, Playa Hermosa is of great relevance for its coastal ecosystem of beach and dunes. According to the submission, it has been catalogued in the Ecological Management Program of Baja California with a conservation policy, in addition to having been identified as an “area of importance for the conservation of birds” by the Commission for the Knowledge and Use of Biodiversity (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*—Conabio) and as a “site of regional importance” in the Western Hemisphere Shorebird Reserve Network, with the presence of bird species that are protected.⁷ Also, the Federal Maritime Terrestrial Zone (Zofemat)⁸ of Playa Hermosa has been assigned an “ornamental” use, in accordance with the Destination Agreement issued by the Ministry of Environment and Natural Resources on 2 October 2020.⁹
6. On 1 July 2022, the Secretariat determined that the submission was admissible in accordance with the requirements of Article 24.27(2) of the USMCA/CUSMA, and that, pursuant to Article 24.27(3), a response from the Government of Mexico was merited regarding the effective enforcement of the following provisions cited in the submission:¹⁰
 - a. Article 4, fifth and sixth paragraphs of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*—Constitution);
 - b. Articles 2: Sections I and V, 28: Section X, 29, 117: Sections I, II, III, IV and V, 123, 157, 189, 194, 195 and 202 of the General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y Protección al Ambiente*—LGEEPA);
 - c. Articles 47, 88 *bis* 1, 95, 96 and 96 *bis* 1 of the National Waters Act (*Ley de Aguas Nacionales*—LAN);

at: <<https://bit.ly/3CsmBh0>> [Submission].

⁷ Submission at paras 7 and 8.

⁸ The Federal Maritime Terrestrial Zone (Zofemat) comprises a twenty-meter-wide strip of dry land contiguous to the beach. See: “What is the Zofemat?” at <<https://bit.ly/3I5El4j>>.

⁹ Semarnat, “Agreement whereby the area of 19,118.623 square meters of federal maritime-terrestrial zone, located at Boulevard Lázaro Cárdenas, Acapulco subdivision, municipality of Ensenada, B.C., is designated to the service of the municipality of Ensenada, State of Baja California,” published in the *Diario Oficial de la Federación* on 15 October 2020; online at: <<https://bit.ly/3N1EveJ>> [Designation Agreement].

¹⁰ SEM-22-001 (*Pollution in Playa Hermosa*), Determination Pursuant to USMCA/CUSMA Articles 24.27(2) and (3) (1 July 2022), §86 [Determination].

- d. Articles 5, paragraph Q, 55, 57, 58, 59 and 65 of LGEEPA Regulations on Environmental Impact Assessment (*Reglamento de la LGEEPA en materia de Evaluación de Impacto Ambiental—REIA*);
 - e. Articles 84 and 149 of the National Waters Act Regulations (*Reglamento de la Ley de Aguas Nacionales—RLAN*); and
 - f. Mexican Official Standard NOM-001-Semarnat-2021, *which establishes the permissible limits for pollutants in discharges of wastewater into national water bodies* (NOM-001).
7. On 2 September 2022, the Secretariat received the response from the Government of Mexico.¹¹ In its response, the Party states that some of the provisions cited in the submission are not applicable to the assertions made by the Submitters. It also provides an analysis of the application of environmental laws to several of the cited provisions and notifies the existence of pending proceedings.¹²
8. Pursuant to Article 24.28(1) of the USMCA/CUSMA, the CEC Secretariat examined whether, in light of the response of the Government of Mexico, submission SEM-22-001 (*Pollution in Playa Hermosa*) warrants the preparation of a factual record.
9. After examining the submission in light of the response, the Secretariat finds that the preparation of a factual record regarding the alleged failure to take sufficient action both to protect and conserve the coastal ecosystem of Playa Hermosa and to control untreated wastewater discharges at the site is not warranted and sets forth its reasons below. The Secretariat finds that Mexico has notified that there are various administrative and judicial proceedings underway that—in some cases—could lead to a resolution of the issue raised in the submission. It also notes that, as a result of various citizen complaints, the Office of the Federal Attorney General for Environmental Protection (Profepa) and the National Water Commission (Conagua) have implemented some enforcement measures to address the issue raised by the Submitters, which have resulted in administrative and judicial actions that, in some cases, are ongoing.

II. ANALYSIS

10. In accordance with Article 24.28(1), the CEC Secretariat sets forth its reasoning for concluding that, in light of the response of the Government of Mexico, submission SEM-22-001 (*Pollution in Playa Hermosa*) does not merit the preparation of a factual record.
11. Based on Article 24.27(4)(a) of the USMCA/CUSMA, Mexico notified the existence of various administrative and judicial proceedings (including a criminal investigation), some of which are pending.¹³ In its response, the Party refers to 10 administrative proceedings initiated by Profepa between 2021 and 2022, two of which are still open; it also refers to four judicial proceedings under review by the Federal Judiciary, an ongoing citizen

¹¹ SEM-22-001 (*Pollution in Playa Hermosa*), Response Pursuant to USMCA/CUSMA Article 24.27(4) (1 Sept. 2022) [Response].

¹² Cf. Response at paras 85-86.

¹³ Response at paras 20-46.

complaint proceeding before Conagua, and a criminal investigation conducted by the Office of the Attorney General of the Republic that is also still open.

12. The administrative proceedings initiated by Profepa are listed in the following table.

Table 1. Inspection orders and administrative resolutions issued by Profepa

Date of the inspection order	Inspection order number	Inspected	Resolution date	Resolution Number
21/05/2021	PFPA/9.3/2C.27.4/0007/2021/ENS	Ensenada City Hall	16/02/2022	PFPA/9.5/2C.27.4/0003/2022.ENS
21/05/2021	PFPA/9.3/2C.27.5/0035/2021/ENS	Ensenada City Hall	16/02/2022	PFPA/9.5/2C.27.5/0004/2022.ENS
8/06/2021	PFPA/9.3/2C.27.4/0008/2021/ENS	ACAR	26/11/2021	PFPA/9.5/2C.27.4/0011/2021.ENS
8/06/2021	PFPA/9.3/2C.27.4/0009/2021/ENS	Sedatu**	17/09/2021	PFPA/9.5/2C.27.4/0009/2021.ENS
8/06/2021	PFPA/9.3/2C.27.5/0036/2021/ENS	ACAR	29/11/2021	PFPA/9.5/2C.27.5/0024/2021.ENS
8/06/2021	PFPA/9.3/2C.27.5/0037/2021/ENS	Sedatu**	21/09/2021	PFPA/9.5/2C.27.5/0015/2021.ENS
13/09/2021	PFPA/9.3/2C.27.5/0074/2021/ENS	ACAR	16/02/2021	PFPA/9.5/2C.27.5/005/2022.ENS
13/09/2021	PFPA/9.3/2C.27.4/0013/2021/ENS	ACAR	9/02/2022	PFPA/9.5/2C.27.4/002/2022.ENS
8/12/2021	PFPA/4.1/2C.27.5/0064/2021	SIDURT-BC***	Pending resolution	Pending resolution
8/12/2021	PFPA/4.1/2C.27.4/0037/2021	SIDURT-BC***	Pending resolution	Pending resolution

* ACAR Obras y Proyectos, S.A. de C.V.

** Ministry of Agricultural, Land, and Urban Development, State of Baja California

*** Ministry of Infrastructure, Urban Development, and Territorial Reorganization, State of Baja California

13. As for the four proceedings that are currently under review by the Federal Judiciary, the Party notes that these are proceedings that Conagua instituted against the Ensenada State Public Services Commission (CESPE).

14. The ongoing investigation conducted by the Office of the Attorney General of the Republic—documented under investigation file No. FED/BC/ENS/1880/2021—is part of a

criminal proceeding pending before Investigation Cell IV of the sub-delegation of the Attorney General's Office in Ensenada, Baja California.

15. For its part, the ongoing citizen complaint is related to wastewater discharges by CESPE, and although it was originally filed with Profepa, it was soon turned over to Conagua, as it is the competent agency to handle the complaint.
16. The Secretariat is mindful that the threshold for considering whether an administrative or judicial proceeding is pending must be interpreted narrowly in order to fully satisfy the object and purpose of the USMCA/CUSMA.¹⁴ In doing so, the Secretariat is guided by previous determinations with respect to submissions in which issues have been raised that are the subject of pending proceedings. The Secretariat also considers whether the Party is pursuing the matter of concern in a timely manner and in accordance with its law, and whether the proceeding is likely to resolve the issue raised in the submission. The Secretariat has determined that when it identifies the existence of pending proceedings and therefore excludes them from consideration under the SEM process, it avoids both duplicating actions and interfering with those already underway.¹⁵
17. The Secretariat then provides a summary of the proceedings initiated by Mexico and determines the extent to which they pertain or relate to the issues raised in the submission and whether their administrative or judicial resolution would contribute to a resolution of the issues raised by the Submitters, in which case a determination to terminate the SEM process with respect to submission SEM-22-001 (*Pollution at Playa Hermosa*) could be warranted. In addition, the Secretariat examines the actions that Profepa has taken through various administrative proceedings to address the concerns raised by the Submitters.

A. On the alleged lack of sufficient action to protect and conserve the Playa Hermosa coastal ecosystem.

i. Actions prior to the works and activities referred to in the submission

18. The Submitters assert that in 2011, an infrastructure and improvement project for Playa Hermosa was approved through an environmental impact authorization (*autorización de impacto ambiental*—AIA) issued by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) on 8 November 2011.¹⁶

¹⁴ The Secretariat may not interpret the USMCA/CUSMA as permitting a determination to be based on the mere assertion of the existence of a pending proceeding. See SEM-01-001 (*Cytrar II*), Secretariat Determination Under NAAEC Article 14(3) (13 June 2001), p. 5: “In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.”

¹⁵ Previous determinations issued under the NAAEC: SEM-01-001 (*Cytrar II*), Secretariat Determination under Article 14(3) (13 June 2001); SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*) Article 15(1) Notification (May 18, 2005); SEM-04-005 (*Carboelectric Power Plants*), Article 15(1) Notification (5 Dec. 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 Jan. 2007).

¹⁶ Semarnat, oficio no. DFBC/SGPA/UGA/DIRA/2826/11, containing the environmental impact authorization for the project “Construction of equipment and infrastructure and restoration of coastal vegetation for the

The structures built then as part of that project were executed in accordance with the authorization of Semarnat, which included a section dedicated to the conservation of the beach and the rehabilitation of the dune vegetation.¹⁷

19. Almost ten years later, on 2 March 2021, the municipality of Ensenada announced the start of a new construction project for a boardwalk and services area in Playa Hermosa. The Submitters state that, on 20 May 2021, they documented the existence of work allegedly carried out by the municipality without an environmental impact authorization¹⁸ and that as a result, they filed several citizen complaints against the municipality of Ensenada before the Profepa.¹⁹
20. On 27 May 2021, after the start of construction in Playa Hermosa—without an AIA—the Semarnat *Ecological Gazette* published the submission of the environmental impact assessment (EIA) for the project “Playa Hermosa Boardwalk and Services Area Construction Project.”²⁰ Since the preventive nature of the environmental impact assessment procedure had been overlooked by initiating work without the corresponding authorization, the federal delegation of Semarnat in Baja California denied granting the AIA to the municipality of Ensenada on 10 June 2021, just days after the EIA had been submitted.²¹
21. The Submitters contend that, although Profepa supposedly shut down the project—as the authority stated on social media on 31 May—and on 10 June the Mayor of Ensenada stated—also on social media—that the project in Playa Hermosa would not stop.²²
22. The Submitters assert that Profepa has not resolved issues regarding the restoration of the coastal dunes of Playa Hermosa or sanctioned those allegedly responsible. They also point out that the people who filed citizen complaints have not been informed of the investigative actions underway, which represents obstruction of expeditious justice.²³

ii. Actions after the works and activities referred to in the submission

23. Mexico reports that the federal delegation of Profepa conducted several inspection visits to Playa Hermosa. These inspection orders and administrative resolutions (see Table 1) were carried out after works and activities were carried out in Playa Hermosa without

improvement of the municipal beach of Ensenada (Playa Hermosa), first stage,” *Secretaría de Medio Ambiente y Recursos Naturales, Delegación Federal en Baja California* (8 Nov. 2011), at: <<https://bit.ly/3LIQj40>>.

¹⁷ Submission at paras 4 and 5.

¹⁸ Submission at paras 12 and 13.

¹⁹ *Id.* at para 14.

²⁰ *Id.* at para 15.

²¹ *Id.* at para 20.

²² *Id.* at paras 16 and 19.

²³ *Id.* at para 40.

environmental impact authorization and are related to the citizen complaints referred to below.

24. According to the submission, between 21 May and 29 July 2021, several citizen complaints were filed with Profepa regarding the alleged destruction of coastal dunes at Playa Hermosa. According to the authors of the complaints filed on 21 May and 29 July 2021, the construction and subsequent expansion of the port of Ensenada encouraged the placement of rocks and grading of the sandy beaches of the city, which were reduced to the portion of the coastline at Playa Hermosa.²⁴ The complainants state that they noticed the presence of heavy machinery in Playa Hermosa, as well as grading, compacting the sand, and removing the dunes.²⁵ They also claim that it is presumed that these activities are part of the “Playa Hermosa Boardwalk and Services Area Construction Project” and that, in any case, the municipal authority is responsible for the damage caused to the coastal dunes and the beach.²⁶ Finally, the complainants state that work continues to be carried out on the boardwalk of Playa Hermosa, despite having been shut down by Profepa for not having the proper environmental impact authorization.²⁷
25. It should be noted that the assertions in two other citizen complaints—filed on 23 June and 20 July 2021—are very similar to those in the complaints of 21 May and 29 July.²⁸ The complainants highlight the existence of a construction project in Playa Hermosa that will modify the Zofemat by involving the elimination of coastal dunes, construction of foundations and serious consequences to the site's resources.²⁹ They also point out that the project in question should have been submitted to the environmental impact assessment procedure before Semarnat prior to the start of construction, which did not occur.³⁰
26. Now, as Mexico points out in its response, according to Article 28, section X of the LGEEPA and Article 5, paragraph Q of the REIA, works and activities in coastal ecosystems require the completion of an EIA and the corresponding authorization, i.e., an AIA.³¹ In addition, according to Article 117 of the LGEEPA, any work or activity that is carried out without an environmental impact authorization may be subject to sanctions by Profepa.³²

²⁴ Profepa, oficio no. PFPA/9.7/2C.28.2/0911/2021, Agreement on the admission of complaints, *Procuraduría Federal de Protección al Ambiente, Delegación Federal en Baja California* (16 August 2021), p. 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Citizen complaint (23 June 2021), p. 1.

²⁹ *Id.* at p. 6.

³⁰ *Id.* at pp. 1-5.

³¹ Response at para 20

³² *Id.* at para 21.

27. Mexico submits that on 21 May 2021 the federal delegation of Profepa in the state of Baja California received a citizen complaint about the activities of removal of vegetation from the dunes on the coast of Playa Hermosa.³³ According to the Party, on that same date, the federal delegation of Profepa requested information from the federal delegation of Semarnat regarding the submission of the EIA for the project “Playa Hermosa Boardwalk and Services Area Construction Project” or, if applicable, regarding the corresponding authorization (i.e., the AIA).³⁴
28. Mexico adds that, on 25 May 2021, the federal delegation of Profepa received information, from its counterpart at Semarnat, on the submission of the EIA for processing for the “Playa Hermosa Boardwalk and Services Area Construction Project.” According to the information provided, on 18 May 2021, the company *ACAR Obras y Proyectos, S.A de C.V.* presented the EIA for the project. However, the federal delegation of the Semarnat denied the AIA to the company in question because the works and activities of the project began without prior authorization.³⁵
29. Mexico also states that the federal delegation of Profepa conducted a field visit to Playa Hermosa, in which it observed the presence of machinery and the removal of vegetation from the coastal dunes, as well as pits and ditches in the area.³⁶
30. As noted above, the Party reported in its response the initiation of 10 administrative proceedings by the federal delegation of Profepa against various entities, two of which are pending resolution (see Table 1). As part of such proceedings, and with the purpose of verifying the existence and status of permits, concessions, and authorizations in matters of environmental impact and use of the Zofemat in Playa Hermosa, inspection visits were carried out in Playa Hermosa on 25 May,³⁷ 10 June,³⁸ 14 June³⁹ and 22 September⁴⁰ of 2021. The procedures were all motivated by citizen complaints filed by the Submitters and by various residents alleging facts related to damage to the coastal ecosystem of Playa

³³ *Id.* at para 23.

³⁴ *Id.* at para 24.

³⁵ *Id.* at paras 30 and 33.

³⁶ *Id.* at para 25.

³⁷ Environmental Impact Inspection Order No. PFPA/9.3/2C.27.5/0035/2021/ENS (21 May 2021) and Zofemat Inspection Order No. PFPA/9.3/2C.27.4/0007/2021/ENS (21 May 2021), both addressed to the municipality of Ensenada.

³⁸ Environmental Impact Inspection Order No. PFPA/9.3/2C.27.5/0036/2021/ENS (8 June 2021) and Zofemat inspection order No. PFPA/9.3/2C.27.4/0008/2021/ENS (8 June 2021), both addressed to the company *ACAR Obras y Proyectos, S.A. de C.V.*

³⁹ Environmental Impact Inspection Order No. PFPA/9.3/2C.27.5/0037/2021/ENS (8 June 2021) and Zofemat inspection order No. PFPA/9.3/2C.27.4/0009/2021/ENS (8 June 2021), both addressed to the state representation of the Ministry of Agricultural, Land, and Urban Development (Sedatu) in Baja California.

⁴⁰ Environmental Impact Inspection Order No. PFPA/9.3/2C.27.5/0074/2021/ENS (13 September 2021) and Zofemat inspection order No. PFPA/9.3/2C.27.4/0013/2021/ENS (13 September 2021), both addressed to the company *ACAR Obras y Proyectos, S.A. de C.V.*

Hermosa.⁴¹ The actions reported by Mexico in its response culminated in the imposition of monetary sanctions on the City of Ensenada for 327,148 pesos (\$); on the company *ACAR Obras y Proyectos, S.A. de C.V.* for \$1,014,096, and on the Ministry of Agricultural, Land, and Urban Development (Sedatu) of Baja California for \$304,708.⁴²

31. As for the two administrative proceedings that are still pending resolution and that are related to the allegations in submission SEM-22-001, these were filed against the Ministry of Infrastructure, Urban Development and Territorial Reorganization (*Secretaría de Infraestructura, Desarrollo Urbano y Reordenación Territorial* —SIDURT) of Baja California.⁴³
32. The Secretariat notes that of the 10 proceedings initiated by Profepa, eight have led to the issuance of administrative resolutions that concluded the matter in question. Also, in four of these cases, the temporary total closure with suspension of works and activities at Playa Hermosa was ordered. In addition, as part of the corrective measures, Profepa ordered the performance of a study of damage to the environment with the purpose of assessing the impacts and damages to the environment caused by the unauthorized works and activities, as well as the corrective measures to be implemented.⁴⁴ The Secretariat considers that the completion of this environmental damage study and its possible subsequent implementation could contribute to resolving the Submitters' assertion regarding the restoration of coastal dunes in the Playa Hermosa ecosystem.
33. In addition, the Secretariat also considers the existence of two administrative proceedings pending resolution, which are related to the alleged environmental impact of the works and activities carried out at Playa Hermosa. Although there is no further information on the status of these proceedings, it is clear from the information provided by Mexico that they address the same legal provisions cited in the submission and that, if resolved, they may address the concerns expressed by the Submitters.
34. For all of the foregoing reasons, and in accordance with Article 24.27(4)(a) of the USMCA/CUSMA, the Secretariat does not recommend the preparation of a factual record regarding the alleged failure to take sufficient action to protect and conserve the Playa Hermosa coastal ecosystem.

B. On the alleged lack of sufficient action to control untreated sewage discharges at Playa Hermosa

⁴¹ Cf. Profepa, oficio núm. PFPA/9.7/2C.28.2/0978/2022, *Procuraduría Federal de Protección al Ambiente, Delegación Federal en Baja California* (11 July 2022), pp. 1-10.

⁴² *Id.* at p. 10.

⁴³ Response at para 34.

⁴⁴ See, Profepa, Administrative Resolutions Nos. PFPA/9.5/2C.27.5/0004/2022.ENS (16 Feb. 2022), PFPA/9.5/2C.27.5/0024/2021.ENS (29 Nov. 2021), PFPA/9.5/2C.27.5/0015/2021.ENS (21 Sept. 2021) and PFPA/9.5/2C.27.5/005/2022.ENS (16 Feb. 2022), 5/0015/2021.ENS (21 Sept. 2021) and PFPA/9.5/2C.27.5/005/2022.ENS (16 Feb. 2022), *Procuraduría Federal de Protección al Ambiente, Delegación Federal en Baja California*.

35. The Submitters contend that in the 2022 Clean Beaches Program Report, the Federal Commission for the Protection against Health Risks (*Comisión Federal para la Protección contra Riesgos Sanitarios*—Cofepris) established that Playa Hermosa is a beach unfit for recreational use due to the high level of fecal material in the water.⁴⁵
36. The Submitters contend that one of the causes of the high rate of water pollution at Playa Hermosa is the deficient operation of the wastewater treatment plant (WWTP) “El Gallo,” operated by CESPE.⁴⁶ The deficient operation of the WWTP “El Gallo” forced the Ensenada City Hall to close the beach in February 2022.⁴⁷ On 16 May 2022, the Submitters filed a citizen complaint before Profepa against CESPE for the water pollution that continues to be generated at Playa Hermosa, but the federal authority has not yet issued a resolution.⁴⁸
37. In its response, Mexico states that Conagua and the Baja California Peninsula Basin Agency (hereinafter “Basin Agency”)—which depends on Conagua—carried out inspection, verification, and water monitoring actions at Playa Hermosa⁴⁹ and implemented various inspection and verification actions directed to CESPE in relation to the concession title for the discharge of wastewater into the receiving body of the WWTP “El Gallo” and “El Naranjo.”⁵⁰
38. Mexico submits that the Basin Authority instituted four administrative proceedings in relation to the operation of the WWTP “El Gallo,” the resolution of which resulted in the imposition of a total of 19 fines on CESPE; the suspension of concession titles in the name of CESPE,⁵¹ and the order for the total and definitive suspension of wastewater discharge activities at Playa Hermosa.⁵²
39. Mexico also notes that the measures imposed as a result of the four administrative proceedings initiated by the Basin Authority were challenged by CESPE before the Court of Fiscal and Administrative Justice through annulment proceedings that are currently under way.
40. The Secretariat notes that the imposition of fines and the suspension of wastewater discharge activities are being reviewed by the Court of Fiscal and Administrative Justice and that, by decision of that authority, they were suspended until the merits of the case

⁴⁵ Submission at para 24.

⁴⁶ *Id.* at para 25.

⁴⁷ *Id.* at para 26.

⁴⁸ *Id.* at para 28.

⁴⁹ Response at para 35.

⁵⁰ Response at para 36.

⁵¹ Concession titles 0BCA100304/01HMGCC11, 01BCA109012/01HMGR03, 01BCA100304/01HMGCC11, and 01BCA100304/01HMGCC11, in the name of *Comisión Estatal de Servicios Públicos de Ensenada* (CESPE).

⁵² Response at paras 36-40.

are resolved. Because of this, CESPE can legally continue to operate the WWTP “El Gallo” and discharge wastewater since the court temporarily suspended the compliance measures. The judicial resolution of the four proceedings instituted against CESPE is pending, according to the information provided by Mexico in its response.

41. The Secretariat considers that the preparation of a factual record on the allegation of contamination of Playa Hermosa by the discharge of untreated sewage could unduly interfere with the four ongoing judicial proceedings notified by Mexico. Such proceedings relate to the same allegations in the Submission and their resolution could—potentially—contribute to resolving the issues raised by the Submitters.
42. On the other hand, Mexico submits information on a criminal proceeding initiated by the Basin Agency against the person responsible for the discharge of wastewater without prior treatment into the El Gallo stream, the final destination of which is the waters of Playa Hermosa.⁵³ With regard to the progress of these criminal proceedings, Mexico notes that in January 2022 the Basin Authority received an invitation from the Alternative Dispute Settlement Mechanisms Body to resolve the conflict arising from the facts denounced and to end the proceedings by means of an agreement with CESPE to repair the damage.⁵⁴ Mexico states that this process is pending resolution.
43. The Secretariat considers that the resolution of the criminal proceedings and, in particular, the measures it offers through alternative dispute resolution mechanisms could contribute to resolving the issue raised by the Submitters. The Secretariat also believes that the preparation of a factual record could unduly interfere with the course of the criminal investigation before the Office of the Attorney General of the Republic.
44. In addition, Mexico notifies that it is processing a citizen complaint that the Submitters filed before the federal delegation of Profepa in the state of Baja California on 16 May 2022 for the discharge of wastewater without adequate treatment. This complaint was referred to the Basin Agency given its competence in the management of national waters and it is—according to the response of the Party—pending resolution.⁵⁵
45. In this regard, the Secretariat believes that there is insufficient information in Mexico's response to conclude that the citizen complaint submitted to the Basin Agency has given rise to an administrative proceeding for the imposition of sanctions, and therefore determines that it does not qualify as a pending proceeding under Article 24.27(4)(a) of the USMCA/CUSMA.
46. Finally, Mexico notes in its response that the municipality of Ensenada, through the Ensenada Clean Beaches Committee, has taken actions to address the health situation at Playa Hermosa, and also that the federal delegation of Cofepris in Baja California took six water samples whose results led to the conclusion that Playa Hermosa is considered

⁵³ *Id.* at para 41.

⁵⁴ Cf. Conagua, oficio núm. B00.5.01.-07312, *Comisión Nacional del Agua, Subdirección General Jurídica* (29 July 2022).

⁵⁵ Response at paras 45-46.

suitable for the summer vacation period 2022.⁵⁶ While this is not determinative of the Secretariat's decision not to recommend the preparation of a factual record, the information provided by Mexico reflects continued monitoring of the water quality at Playa Hermosa.

III. NOTIFICATION

47. The Secretariat determines that SEM-22-001 (*Pollution in Playa Hermosa*) does not merit the preparation of a factual record. Mexico's response notifies the existence of several pending administrative and judicial proceedings that relate to the central assertions of the submission and to the effective enforcement of the environmental laws listed below:
- a. Article 4, fifth and sixth paragraphs, of the Constitution;
 - b. Articles 2: Sections I and V, 28: Section X, 29, 117: Sections I, II, III, IV and V, 123, 157, 189, 194, 195 and 202 of the LGEEPA;
 - c. Articles 47, 88a(1), 95, 96 and 96a(1) of the LAN;
 - d. Articles 5: Q, 55, 57, 57, 58, 59 and 65 of the REIA;
 - e. articles 84 and 149 of the RLAN, and
 - f. NOM-001-Semarnat-2021.
48. The resolution of the pending administrative and judicial proceedings would also contribute to resolution of the issues raised in the submission. Therefore, pursuant to Articles 24.27(4)(a) and 24.28(1) of the USMCA/CUSMA, the Secretariat determines to terminate the processing of SEM 22-001 (*Pollution in Playa Hermosa*).

Secretariat of the Commission for Environmental Cooperation

(original signed)

Per: Jorge Daniel Taillant
Executive Director

cc: Miguel Ángel Zerón, Alternate Representative of Mexico
Stephen de Boer, Alternate Representative of Canada
Jane Nishida, Alternate Representative of the United States
Environment Committee contact points
Paolo Solano, Director of Legal Affairs and Head of SEM Unit
Submitters

⁵⁶ *Id.* at paras 41 and 51-53.