



**PARTY RESPONSE OF THE UNITED
MEXICAN STATES**

**SUBMISSION SEM-22-001
(POLLUTION IN PLAYA HERMOSA)**

**SUBMITTED TO THE SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION IN
ACCORDANCE WITH ARTICLE 24.27.4 OF THE UNITED STATES-MEXICO-CANADA AGREEMENT
(USMCA)**

Mexico City, 2 September 2022

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ACRONYMS and ABBREVIATIONS

Term	Meaning
Basin Agency	Baja California Peninsula Basin Agency (<i>Organismo de Cuenca Península de Baja California</i>)
CEC	Commission for Environmental Cooperation
Cespe	Ensenada State Public Service Commission (<i>Comisión Estatal de Servicios Públicos de Ensenada</i>)
Cofepris	Federal Commission for Protection Against Health Risks (<i>Comisión Federal para la Protección contra Riesgos Sanitarios</i>)
Conabio	National Commission for the Knowledge and Use of Biodiversity (<i>Comisión Nacional para el Conocimiento y Uso de la Biodiversidad</i>)
Conagua	National Water Commission (<i>Comisión Nacional del Agua</i>)
ECA	Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada
EIA	Environmental Impact Assessment, performed prior to the Environmental Impact Authorization (Permit)
EIAR	Environmental Impact Assessment Regulations under the General Ecological Balance and Environmental Protection Act
LAN	National Water Act (<i>Ley de Aguas Nacionales</i>)
LGCC	General Climate Change Act (<i>Ley General de Cambio Climático</i>)
LGEEPA	General Ecological Balance and Environmental Protection Act (<i>Ley General del Equilibrio Ecológico y la Protección al Ambiente</i>)
LGVS	General Wildlife Act (<i>Ley General de Vida Silvestre</i>)
Mexican Constitution (CPEUM)	Political Constitution of the United Mexican States
Mexico	United Mexican States
NAFTA	North American Free Trade Agreement
NOM-001	Mexican Official Standard NOM-001-SEMARNART-2021, Establishing the allowable limits of pollutants in wastewater discharges into nationally owned receiving bodies
PECC	Special Climate Change Program (<i>Programa Especial de Cambio Climático</i>)
Playa Hermosa Submission	Submission of 1 June 2022 to the Commission for Environmental Cooperation
Profepa	Office of the Federal Attorney for Environmental Protection (<i>Procuraduría Federal de Protección al Ambiente</i>)
Project	Construction of Playa Hermosa Boardwalk and Services Area (<i>Construcción de Malecón y Núcleos de Servicios de Playa Hermosa</i>)
Promarnat	Environmental and Natural Resources Sectoral Program (<i>Programa Sectorial de Medio Ambiente y Recursos Naturales</i>)
Protocol	Protocol replacing the North American Free Trade Agreement with the United States-Mexico-Canada Agreement
RLAN	Regulations to the National Water Act (<i>Reglamento de la Ley de Aguas Nacionales</i>)
Sedatu	Department of Agrarian, Territorial, and Urban Development (<i>Secretaría de Desarrollo Agrario, Territorial y Urbano</i>)
SEM	Submissions on Enforcement Matters
SEM Submission	Submission made in accordance with Article 24.27 (Submissions on Enforcement Matters) of the USMCA
Semar	Ministry of the Navy (<i>Secretaría de Marina</i>)
Semarnat	Ministry of Environment and Natural Resources (<i>Secretaría de Medio Ambiente y Recursos Naturales</i>)
Semarnat IR	Semarnat Internal Regulations, as last amended on 31 October 2014, in effect

	at the time of the Submission
Submitters	Individuals and entities whose identities are reserved
USMCA	United States-Mexico-Canada Agreement
WTP	Wastewater Treatment Plant
ZFMT	Federal Maritime Terrestrial Zone (<i>Zona Federal Marítimo Terrestre</i>)

LIST OF EXHIBITS

Exhibit	Document description
MX-001	Mexican Constitution
MX-002	General Ecological Balance and Environmental Protection Act
MX-003	National Water Act
MX-004	Environmental Impact Assessment Regulations under the General Ecological Balance and Environmental Protection Act
MX-005	Regulations to the National Water Act
MX-006	Mexican Official Standard NOM-001-SEMARNAT-2021, Establishing the allowable limits of pollutants in wastewater discharges into nationally owned receiving bodies
MX-007	General Climate Change Act
MX-008	Profepa Informational Note
MX-009	Inspection Report PFPA/4.1/2C.27.5/00064-2021
MX-010	Administrative Ruling PFPA/4.1/2C.27.4/00037-2021.
MX-011	Ruling No. B00.5.01.-07312 and Memorandum B00.807.77.
MX-012	Ruling No. B00.5.01.-08171.
MX-013	Administrative Ruling-Docket PFPA/9.3/2C.27.5/00035-2021.
MX-014	Administrative Ruling-Docket PFPA/9.3/2C.27.5/00036-2021.
MX-015	Administrative Ruling-Docket PFPA/9.3/2C.27.5/00037-2021.
MX-016	Administrative Ruling-Docket PFPA/9.3/2C.27.5/00074-2021.
MX-017	Administrative Ruling PFPA/9.3/2C.27.4/0007-2021.
MX-018	Administrative Ruling PFPA/9.3/2C.27.4/0008-2021.
MX-019	Administrative Ruling PFPA/9.3/2C.27.4/0009-2021.
MX-020	Administrative Ruling PFPA/9.3/2C.27.4/0013-2021.
MX-021	Docket PFPA/9.7/2C.28.2/022-2021.
MX-022	Results of pre-vacation monitoring results 2022
MX-023	Decree creating the Ensenada State Utility Commission
MX-024	Mexican Official Standard NOM-001-SEMARNAT-1996.
MX-025	Clarification to Mexican Official Standard NOM-001-SEMARNAT-1996, published 30 April 1997
MX-026	Municipal Report of the Municipality of Ensenada, Baja California
MX-027	Evidence of attention to the sanitary situation of Playa Hermosa

A. INTRODUCTION

1. On June 1, 2022, six civil society organizations, which requested the confidentiality of their information pursuant to Article 16(1)(a) of the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (**AEC**), filed a Submission with the Secretariat of the Commission for Environmental Cooperation (**CEC Secretariat**) in accordance with Article 24.27(1) of the United States-Mexico-Canada Agreement (**USMCA**). The Submission asserts that Mexican authorities did not effectively enforce the environmental laws with respect to: **1.** The execution of the project referred to as the "Construction of Playa Hermosa Boardwalk and Services Area" (**Project**), and **2.** "Beach contamination due to the discharge of wastewater without adequate treatment."¹
2. With respect to the Project, the assertions raised by the Submitters focus on the start of works and activities in the Federal Maritime Terrestrial Zone (*Zona Federal Marítimo Terrestre*—**ZFMT**) without the required environmental impact authorization issued by the federal authorities, the failure to take action to restore the damage to the Playa Hermosa dune system impacted by the Project, and the beach's water quality due to the discharges of wastewater without adequate treatment.²
3. On July 1, 2022, the CEC Secretariat issued its determination No. A24.27(2)(3)/SEM/22-001/25/DET (**Secretariat Determination**), stating that, after having examined Submission SEM-22-001 (*Pollution in Playa Hermosa*), in accordance with Article 24.27 (2) of the USMCA, the Secretariat considered that the Submission met the requirements set forth in that article. The CEC Secretariat further determined that the Submission warranted a response from the Government of Mexico, in accordance with Article 24.27 (3) of the USMCA.
4. Pursuant to the foregoing, the CEC Secretariat requested that the Government of Mexico (the Party) respond with respect to the following legal provisions:³
5. [sic]
 - i) Article 4, fifth and sixth paragraphs, of the Political Constitution of the United Mexican States ("**Mexican Constitution**").⁴
 - ii) 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 del Equilibrio Ecológico y la Protección al Ambiente*—**LGEEPA**);⁵
 - iii) Articles 47, 88 Bis 1, 95, 96 and 96 Bis 1, of the National Water Act (*Ley de Aguas Nacionales*—**LAN**);⁶
 - iv) Articles 5, subsection Q, 55, 57, 58, 59 and 65, of the Environmental Impact Assessment Regulations under the LGEEPA (**EIAR**);⁷
 - v) Articles 84 and 149, of the Regulations to the LAN (**RLAN**); and⁸
 - vi) Mexican Official Standard NOM-001-SEMARNAT-2021, which establishes the allowable limits of pollutants in wastewater discharges into nationally owned receiving bodies (**NOM-001**).⁹

B. PRELIMINARY ANALYSIS

6. Before submitting the Party response, we believe it is very important to clarify several legal provisions that were considered by the CEC Secretariat, since they do not apply to the matters raised in the Submission itself.

- **Article 29 of the LGEEPA**

¹ Submission, p. 1.

² CEC Secretariat Determination, p. 2

³ Ibid, p. 20.

⁴ MX-001.

⁵ MX-002.

⁶ MX-003.

⁷ MX-004.

⁸ MX-005.

⁹ MX-006.

7. With respect to Article 29 of the LGEEPA, we hereby inform CEC Secretariat that said provision does not apply, since the activities carried out in coastal ecosystems, such as Playa Hermosa, require an Environmental Impact Authorization (EIA).

- **Article 88 Bis 1 of the LAN**

8. This article does not apply because, as noted by the Submitters, the water pollution is due to non-operation of the "El Gallo" Water Treatment Plant (WTP); i.e., it is not due to the discharge of household wastewater and does not form part of the Municipal Sewer System.

- **Article 96 of the LAN**

9. The provisions of Article 96 of the LAN do not apply; the Article refers to **irrigation zones and extended or dispersed pollution zones**. To clarify understanding (of the Article), we note that pursuant to Article 3, section XXV, subsection a) of the LAN, the **irrigation zone** is within the irrigation districts in which waterworks, surface waters, and subsoil are found, along with their tributaries, the federal zone, and other connected facilities and works, in which one or more irrigation units may be established.

10. With respect to extended or dispersed zones of pollution, also known as nonpoint or diffused pollution,¹⁰ which, unlike point-source pollution, are produced by a wide range of sources that cannot be the result of a specific source in the territory.¹¹ Therefore, one distinguishes these from pollution associated with the treatment plants that are identifiable point sources.¹²

11. In the context of the present case, it should be noted that the zone referred to in the Submission does not constitute an **irrigation zone**, as the pollution generated is from a point source and not an extended or dispersed source, since it is released by the "El Gallo" wastewater treatment plant, and thus the provisions of the Article in question do not apply to this Submission.

- **Article 96 Bis 1 of the LAN**

12. It is important to note that the provisions of Article 96 Bis 1 of the LAN refer to wastewater discharges by individuals or entities¹³ other than operating agencies responsible for the provision of potable water, sewage effluent treatment, and wastewater treatment services.

13. In this context, we note that the said Article does not apply since the facts raised in the Submission are not attributable to a different individual or entity, but to the Ensenada State Public Service Commission (*Comisión Estatal de Servicios Públicos de Ensenada—Cespe*), which has the character of a decentralized agency of the State of Baja California and is responsible for wastewater treatment at the "El Gallo" WTP.

- **Article 154 of the RLAN**

¹⁰ Ortiz, A., y Fuentes, J. (2020). Estimation of the potential impact of diffuse pollution using simplified methods in the Pico de Tancítaro Flora and Fauna Protection Area, Michoacán, México.

¹¹ Pedrozo, A. (2021). Diffuse pollution, the challenge for city water management, Mexican Water Technology Institute, available at http://repositorio.imta.mx/bitstream/handle/20.500.12013/2270/OT_291.pdf?sequence=1&isAllowed=y

¹² Hurtado, J. (2020). Determination of the root cause of diffuse and point pollution in Manzanillo Bay water quality, Cristóbal District, Colón, Panamá, Universidad de Panamá, available at <https://www.redalyc.org/journal/6517/651769122001/651769122001.pdf>

¹³ Article 96 BIS 1. Individuals or entities that discharge wastewater in violation of the applicable legal provisions and that cause the pollution in a receiving (water) body shall assume liability for repairing or the compensation for the environmental damage caused, pursuant to the National Water Act and its Regulations, without prejudice to the application of the applicable administrative, criminal or civil penalties, through the removal of pollutants from the affected receiving body and restoring it to its state prior to the damage caused. The Commission, supported by the Basin Agency of the competent jurisdiction, shall intervene in the instrument for the reparation of environmental damage to nationally owned bodies of water, caused by water extractions or discharges, pursuant to this Act, and to the Regulations hereto.

14. The provisions of this Article refer to unforeseeable wastewater discharges into receiving water bodies regarded as national facilities, i.e., due to events or occurrences force majeure [i.e., beyond human control], due to the unpredictability of nature.¹⁴

15. In this regard, it should be noted that the discharges to which Submitters refer are not derived from a force majeure event, but rather to the failure to operate "El Gallo" WTP; therefore, the said Article does not apply to the present case, as it would refer to events beyond the control of the persons responsible for the discharges.

- **NOM-001**

16. According to the Second Transitional Article of NOM-001, published 11 March 2022 in the Official Gazette of the Federation (DOF), the provisions referring to the parameters and allowable limits in Tables 1 and 2 of the Standard, with respect to the concentration parameters of basic substances as well as of wastewater discharges containing pathogenic and parasitic pollutants, metals, and cyanides into receiving bodies, will enter into force on **3 April 2023**,¹⁵ thus, as of the date of the Submission and this response those provisions do not apply.

C. MEXICO'S PARTY RESPONSE UNDER PARAGRAPH 4 OF ARTICLE 24.27 (SUBMISSIONS OF ENFORCEMENT MATTERS) UNDER THE USMCA

17. As indicated by the CEC Secretariat in its request for Mexico's response, the USMCA entered into force on 1 July 2020, in accordance with the Protocol for replacing the North American Free Trade Agreement with the United States-Mexico-Canada Agreement (**Protocol**).

18. Pursuant to numeral 1 of the Protocol, the provisions of the North American Free Trade Agreement are rendered without effect, without prejudice to "those provisions set forth in the USMCA that refer to provisions of NAFTA."

19. Based on the foregoing, Mexico presents its Party response according to the commitments assumed in the USMCA framework, which are binding as of its entry into force, i.e., starting 1 July 2020,¹⁶ in accordance with the provisions of paragraph 4 of Article 24.27 (Submissions on Enforcement Matters) of the USMCA.¹⁷

(a) whether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further

i) Execution of the Construction of Playa Hermosa Boardwalk and Services Area Project

- **Administrative proceedings**

20. Pursuant to the provisions of Article 28, section X, of the LGEEPA, and Article 5, subsection Q, of the EIAR, works and activities in coastal ecosystems require an Environmental Impact Assessment (EIA) and the respective Environmental Impact Authorization [Spanish abbreviation=AIA].

21. Any work or activities carried out without the appropriate Environmental Impact Authorization [Sp:

¹⁴ What is an unforeseen circumstance? What is force majeure? What are the differences?, available at <https://asesoria.juridicas.unam.mx/preguntas/pregunta/29-Que-es-caso-fortuito-Que-es-fuerza-mayor-Cuales-son-sus-diferencias>.

¹⁵ MX-006.

¹⁶ Article 24.4 (Enforcement of Environmental Law) provides that "No Party shall fail to effectively enforce its environmental laws [...] after the date of entry into force of this Agreement." This is further confirmed by Article 28 (Non-retroactivity of treaties) of the Vienna Convention on the Law of Treaties, which provides that "[a treaty's] provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

¹⁷ The information set forth in this response was provided by different administrative units and autonomous agencies of the Ministry of Environment and Natural Resources (Semarnat), as well as the administrative units of the Ministry of Infrastructure, Urban Development and Territorial Rezoning (Sedatu) of Cofepris, Conabio and the municipal authorities of Ensenada, Baja California.

AIA] will be subject to administrative penalty by the Ministry, through the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*), in accordance with Article 171 of the LGEEPA.

22. Based on the foregoing, and according to the communication issued on 21 May 2021 by the Semarnat Federal Delegation in the State of Baja California (Office of Semarnat) to the Profepa Delegation in the State of Baja California (Profepa Office), the Legal Division of Profepa reported with respect to the Project that it had learned that the company ACAR Obras y Proyectos S.A. de C.V., had released social media posts at the start of work, and requested therefore that public servants assigned to said Office carry out inspection proceedings and then report back accordingly.

23. The Profepa Legal Division also reported, on the same date, that the Profepa Office had received a public complaint about vegetation removal activities on the Playa Hermosa coastal dunes.

24. As part of the investigation by the Profepa Office, under Ruling PFPA/9.3/12C.4/0473/2021 of 21 May 2021, the Semarnat Office was asked to indicate whether it had received information on the filing of an Environmental Impact Statement or on resolutions referring to the Project.

25. The Profepa Office also conducted a field visit to Playa Hermosa, where it observed machinery and six persons removing vegetation from the coastal dunes, ditches, and holes. After taking the geographical coordinates and photographs, it issued two inspection orders, PFPA/9.3/2C.27.5/0035/2021/ENS and PFPA/9.3/2C.27.4/0007/2021/ENS, with respect to environmental impact and the federal maritime terrestrial zone.

26. Complying with those orders, on May 25 of that year, walkthrough inspections were carried out at 31°50'25.4" LN 116°36'41.8" LW DATUM WGS84, at Playa Hermosa. Also participating in the visits were the general counsel and legal director for the Ensenada Municipal Government.

27. During the walkthrough, the inspectors assigned by the Profepa Office noted that the inspected area consisted of approximately 7,800 m², and observed persons performing cleanup and removal of construction debris. They also witnessed excavations with hand tools, such as picks and shovels, as well as removal of sediment.

28. Because of this, the inspectors asked the person in charge to present the **Environmental Impact Authorization** [AIA] issued by the Semarnat Office, as well as the concession title to use, occupy, and exploit the ZFMT, the coastal lands and the beach; however, the requested information was not provided.

29. Therefore, and since the activities carried out could modify the beach and its coastline, the coastal strip, and the beach dynamics, among other things, **the Total Temporary Closure of activities was ordered as a safety measure.**

30. That year on May 25, the Profepa Office received Ruling DFBC/UJ/752/2021 from Semarnat, indicating that on May 18, the company ACAR Obras y Proyectos, S.A. de C.V., had submitted the **Environmental Impact Assessment** for the project, noting that the company did not have the **Environmental Impact Authorization** due to its recent filing, and that the file was being completed.

31. Following from the above, on 10 June 2021, Profepa conducted inspection visits under inspection orders PFPA/9.3/2C.27.5/0036/2021/ENS and PFPA/9.3/2C.27.4/0008/2021/ENS, with respect to environmental impact and the federal maritime terrestrial zone, respectively, aimed at the person responsible for the Project, ACAR Obras y Proyectos S.A. de C.V. In addition, to fully address the public complaints that had been filed on 14 June 2021, new visits were conducted (in accordance with orders PFPA/9.3/2c.27.5/0037/2021/ENS and PFPA/9.3/2C.27.4/0009/2021/ENS), with respect to environmental impact and the federal maritime terrestrial zone, aimed at the Department of Agrarian, Territorial, and Urban

Development (*Secretaría de Desarrollo Agrario, Territorial y Urbano—Sedatu*) for the State of Baja California.

32. During the new visits, the same works that had been examined on the prior visits of May 25 were again assessed, including the **safety measure ratifying the Temporary Total Closure of the Project site**, since the inspections lacked an accredited **Environmental Impact Authorization** or a concession title for the use of the ZFMT.

33. With respect to the project works and activities, note that under Ruling DFBC/SGPA/DIRA/957/2021 of 10 June 2021, the Semarnat Office ruled, denying an **Environmental Impact Authorization** to ACAR Obras y Proyectos, S.A. de C.V., for exceeding the preventive character in line with Articles 28 of the LGEEPA and 5 of the EIAR and, according to details reported in the assessment file, had begun works and activities before an **Environmental Impact Authorization** was issued.

34. Based on the foregoing and the information provided by the Profepa Deputy Federal Attorney, the CEC Secretariat is hereby advised that there are currently **two administrative proceedings pending administrative resolution**:¹⁸

- **Environmental Impact:**
 - **PFPA/4.1/2C.27.5/00064-2021**, against Sedatu¹⁹
- **Federal Maritime Terrestrial Zone:**
 - **PFPA/4.1/2C.27.4/00037-2021**, against Sedatu²⁰

ii) Beach pollution due to the discharge of wastewater without adequate treatment

- **Administrative proceedings**

35. With respect to the water pollution at Playa Hermosa due to wastewater discharges lacking adequate treatment, the CEC Secretariat is hereby informed that Conagua, as the authority responsible for the comprehensive management of national waters, including their regulation, control, and the maintenance of their quantity and quality, has, in performing its duties as set forth in the LAN, conducted inspection, verification, and monitoring actions on Playa Hermosa waters.

36. Conagua Ruling No. B00.5.01.-07312 and Memorandum No. B00.807.77 reported that the Conagua Technical Bureau for the Baja California Peninsula Basin Agency (**Basin Agency**) conducted various inspection and verification actions against Cespe with respect to the concession title, regarding the discharge of wastewater into the “Arroyo El Gallo” receiving body of the “El Gallo” and “El Naranja” WTPs.²¹

37. Based on the inspection order, executed on 27 July 2021, administrative proceeding No. **PNI-2021-PBC-052** has been established to levy monetary penalties consisting of **four fines against Cespe**, due to violation of sections I, XIV, XV and XXI of Article 119 of the LAN. It also ordered the **suspension of Concession Title No. OBCA100304/01HMGCC11**, issued to Cespe; as well as the **total and final suspension of wastewater discharge activities**. The ruling was appealed by Cespe in **Nullification Suit No. 4008/21-01-02-B**, before the Second Chamber of the Federal Court for Tax and Administrative Justice (*Tribunal Federal de Justicia Administrativa*), for which there is a **pending judicial resolution**.

38. In the same fashion, the Conagua Basin Agency also began administrative proceeding No. **PNI-2021-**

¹⁸ MX-008.

¹⁹ MX-009.

²⁰ MX-010.

²¹ MX-011.

PBC-053, as a ruling to levy monetary penalties of **five fines against Cespe**, due to the violation of sections I, VII, XIV, XV and XXI of Article 119 of the LAN, as well as the **suspension of Concession Title No. 01BCA109012/01HMGR03** issued to Cespe, and the **total, definitive suspension of wastewater discharge activities**. This ruling was appealed by Cespe through **Nullification Suit No. 4009/2021-01-01-4**, before the Second Chamber of the Federal Court for Tax and Administrative Justice, which is **pending judicial resolution**.

39. On 7 September 2021, the Conagua Basin Agency filed another administrative proceeding with No. **PNI-2021-PBC-072** against Cespe, likewise levying monetary penalties consisting of **four fines against Cespe**, due to the violation of sections I, XI, XIV and XV of LAN Article 119. It also declared the **suspension of Concession Title No. 01BCA100304/01HMGCC11** issued to Cespe and the **total and final suspension of wastewater discharge activities**. The ruling was appealed before the Federal Court for Tax and Administrative Justice through **Nullification Suit No. 1158/22-01-02-4**, which is **pending judicial resolution**.²²

40. On 9 September 2021, the Basin Agency filed administrative proceeding No. **PNI-2021-PBC-073** against Cespe, to impose monetary penalties consisting of **six fines against Cespe**, due to the violation of sections I, VII, XI, XIV, XV and XXI of the LAN. It further ruled to order the **suspension of Concession Title No. 01BCA100304/01HMGCC11** issued to Cespe, as well as the **total and final suspension of wastewater discharges**. The ruling was appealed before the Federal Court for Tax and Administrative Justice through **Nullification Suit No. 1159/22-01-01-3**, which is **pending judicial resolution**.²³

- **Criminal proceeding**

41. In criminal matters, Memorandum No. B00.807.77 reported that the Legal Affairs Office of the Conagua Basin Agency in the Municipality of Ensenada filed a criminal complaint against the person or persons responsible for discharging wastewater into the Arroyo El Gallo, which empties into the Pacific Ocean around Playa Hermosa. The complaint, made by the Profepa Office in the State of Baja California before Investigative Cell IV of the Ensenada, Baja California Office of the Federal Prosecutor's Office, was included in **Investigation File No. FED/BC/ENS/1880/2021**.²⁴

42. Based on the actions carried out under the aforesaid Investigation File, in early January 2022 the [Conagua] Basin Agency received an invitation from the Alternative Dispute Resolution Mechanisms Office of the Prosecutor's Office, to reach an agreement to settle the dispute with Cespe; however, to date no agreement has been reached in a possible settlement. The last action was dated 4 August 2022, at which Conagua's General Director stated that it was not legally possible to execute a reparations agreement that would completely settle the conflict arising from that authority's complaints, since technical meetings to find a final solution were still being held with Cespe personnel.

43. The CEC Secretariat is thus hereby advised that the criminal proceeding under **Investigation File No. FED/BC/ENS/1880/2021** is still **pending resolution**.²⁵

- **Public Complaint**

44. According to information provided by Profepa on 16 May 2022, a public complaint was received through the Online Complaint Management System (*Sistema de Administración de Denuncias presentadas por Internet*) concerning on wastewater discharges without adequate treatment by Cespe, in which the filers requested the safeguarding of their identities, pursuant to Article 190 of the LGEEPA. The complaint was docketed under No. **PFFPA/9.7/2C.28.4.2/00011-22**, through the corresponding Qualification and Admission Ruling.

45. Under Ruling PFFPA/9.7/2C.28.2/035/2022, the complaint was forwarded to the Industrial Inspection

²² MX-012.

²³ Ibid.

²⁴ MX-011.

²⁵ MX-012.

Division of the Profepa Office, to carry out the appropriate inspection actions pursuant to Article 68 sections IV and VIII of the Semarnat IR. Similarly, the Profepa Office forwarded the complaint to the Conagua Basin Agency under Ruling PFPA/9.7/2C.28.2/0668-2022, with regard to its jurisdiction for the management of national waters and the inherent public facilities, as well as the enforcement of the LAN—namely, the enforcement of the particular conditions for discharges and compliance with Mexican Official Standards—as provided in Articles 4, 9, 12 Bis 6, 86, 86 Bis, 87, 88, 88 Bis, 96 Bis, 96 Bis 1, 119 and 120 of the LAN.²⁶

46. In this context, the CEC Secretariat is hereby informed that the aforesaid public complaint procedure is continuing its course, i.e., is pending resolution.

(b) any other information the Party wishes to provide, such as:

iii) whether the matter was previously the subject of a judicial or administrative proceeding

47. The Profepa Office reported as follows, on the status of administrative files opened with regard to the inspection visits described above:

- **Environmental Impact:**
 - PFPA/9.3/2C.27.5/00035-2021, against the Ensenada Municipal Government, concluding with a penalty ruling²⁷
 - PFPA/9.3/2C.27.5/00036-2021, against ACAR Obras y Proyectos, S.A. de C.V., concluding with a penalty ruling²⁸
 - PFPA/9.3/2C.27.5/00037-2021, against Sedatu, concluding with a penalty ruling²⁹
 - PFPA/9.3/2C.27.5/00074-2021, against ACAR Obras y Proyectos, S.A. de C.V., concluding with a penalty ruling³⁰
- **Federal Maritime Land Zone:**
 - PFPA/9.3/2C.27.4/0007-2021, against the Ensenada Municipal Government, concluding with a penalty ruling³¹
 - PFPA/9.3/2C.27.4/0008-2021, against ACAR Obras y Proyectos, S.A. de C.V., concluding with a penalty ruling³²
 - PFPA/9.3/2C.27.4/0009-2021, against the Department of Agrarian, Territorial and Urban Development, concluding with a penalty ruling³³
 - PFPA/9.3/2C.27.4/0013-2021, against ACAR Obras y Proyectos, S.A. de C.V., concluding with a penalty ruling³⁴
- **Public Complaint**

48. With regard to the public complaint filed on 21 May 2021 with the Profepa Office, as provided in Articles 189, 191 and other applicable provisions of the LGEEPA and [Article] 68, sections IV and XII of the Semarnat IR, the respective Qualification and Admission Ruling consolidated the complaints with **PFPA/9.7/2C.28.2/022-2021**, as they refer to the same Project works and activities.

²⁶ MX-008.

²⁷ MX-013.

²⁸ MX-014.

²⁹ MX-015.

³⁰ MX-016.

³¹ MX-017.

³² MX-018.

³³ MX-019.

³⁴ MX-020.

49. The file was closed on 16 March 2022, in accordance with Profepa Ruling No. PFPA/9.7/2C.28.2/221/2022 and Article 199, section VII of the LGEEPA, with the Environmental Complaints, Claims and Engagement Department reporting the issuance of eight administrative proceedings derived from the public complaints.³⁵

50. Notice of the aforesaid ruling was given to the filers in accordance with Articles 167 Bis, section II of the LGEEPA, 35 of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo*) and 316 of the Federal Civil Procedure Code (*Código Federal de Procedimientos Civiles*), applicable by default.³⁶

iv) Other Information

- **Playa Hermosa pollution due to the discharge of wastewater without adequate treatment**

51. With respect to the sanitary situation at Playa Hermosa, particularly considering the Submitters' assertion that the *water pollution [is] due to the deficient operation of the "El Gallo" WTP*, the Government of the Municipality of Ensenada, Baja California (**Ensenada Municipal Government**), reported the actions taken through the Bureau of Ecology and Environment to create solutions to such issues. For instance, it noted that the WTP is operated by Cespe and overseen by Conagua and, accordingly, the Ensenada Municipal Government has provided timely monitoring, inspections, penalties, recommendations, and complaints within its jurisdiction, expecting the responsible agency and its hierarchical superior to remedy the operation of the "El Gallo" WTP.³⁷

52. In this regard, the Ensenada Municipal Government provided evidence of the actions performed through the Ensenada Clean Beach Committee (*Comité de Playas Limpias de Ensenada*), to determine actions and maintain up-to-date information on the results of seawater quality monitoring, and to attend to the sanitary situation at Playa Hermosa, given the wastewater pollution.³⁸

53. The CEC Secretariat is further informed that among the actions carried out to attend to Playa Hermosa pollution, the Cofepris Delegation in the State of Baja California took six enterococcus samples,³⁹ and using the geometric mean, calculated a value of 17 NMP/100 ml, which accordingly allowed the beach to be classified as **Suitable** for the summer 2020 vacation period.⁴⁰

54. Therefore, the Ensenada Clean Beach Committee Ensenada Clean Beach Committee, in an extraordinary session to consider compliance with NMX-AA-120-SCFI-2016, which establishes the requirements and specifications for beach quality sustainability, approved by majority vote the lifting of the precautionary beach closure.⁴¹

D. ENFORCEMENT OF ENVIRONMENTAL LAWS

- **Article 2, sections I and V of the LGEEPA**

55. With respect to the ecological zoning of national territory and the development and execution of climate change mitigation and adaptation actions, it is important to note that public utility refers to an activity, good, or service for the common benefit or interest, other than private use, and whose benefit is not limited to a small group or to stakeholders.

³⁵ MX-021.

³⁶ Ibid.

³⁷ MX-026.

³⁸ MX-027.

³⁹ Federal Commission for the Prevention of Health Risks (2022). Pre-vacation beach monitoring for summer 2022, available at <https://www.gob.mx/cofepris/documentos/monitoreo-prevacacional-de-playas-de-verano-2022>.

⁴⁰ MX-022.

⁴¹ Government of Ensenada, Baja California (2022), available at <https://www.ensenada.gob.mx/?p=15132#:~:text=Playa%20Hermosa%20apta%20para%20uso,y%20el%2020%20de%20julio>.

56. For its part, the Mexican Supreme Court has held that the notion of a public utility is not limited solely to the State having to build a public work or render a public service, but rather it also includes those economic, social, sanitary and aesthetic needs that may be required by a given population, such as enterprises for the common good, hospitals, schools, housing, parks, and ecological zones, among others, by reason of their social function.⁴²

57. In this context, the ecological zoning of national territory and the development and execution of actions to mitigate and adapt to climate change are deemed to be a public utility, as they foster benefits for the public at large.

58. In terms of ecological zoning, LGEEPA Article 3, section XXIV, provides that it is the "environmental policy instrument intended to regular or induce land use and production activities in order to achieve the protection of the environment and the preservation and sustainable use of natural resources, based on an analysis of impairment trends and their use potential." This instrument establishes a basic framework for the comprehensive management of the territory and its resources, in addition to being a strategic tool for the convergence between the state and society.

59. The conceptualization, implementation, evaluation, publication, types, and jurisdiction of Semarnat, the States and the Municipalities, are governed by the Zoning Regulations under LGEEPA.⁴³ The types of ecological zoning are General Ecological Zoning, Marine Ecological Zoning, Regional Ecological Zoning, and Local Ecological Zoning. In accordance with that provision, various national ecological zoning programs have been issued in national territory, and various actions have been carried out, which may be consulted at the following link: <<https://www.gob.mx/semarnat/acciones-y-programas/ordenamiento-ecologico-del-territorio>>.

60. With reference to national climate change policy planning, in accordance with Article 58 of the General Climate Change Act (*Ley General de Cambio Climático—LGCC*), Mexico has instruments such as the National Climate Change Strategy (*Estrategia Nacional de Cambio Climático*), the Special Climate Change Program (*Programa Especial de Cambio Climático—PECC*), the National Adaptation Policy (*Política Nacional de Adaptación*), and national contributions and state programs. The PECC establishes the actions to be carried out by the centralized and parastatal federal public administration to mitigate and adapt to climate change pursuant to Article 67 section IV of the LGCC.⁴⁴

61. With respect to the foregoing, note that on 8 November 2021, Mexico issued the PECC, published in the Federal Official Gazette,⁴⁵ and whose implementation is subject to funding in accordance with the Federal Revenue Act (*Ley de Ingresos de la Federación*).

62. The CEC Secretariat is therefore advised that the ecological zoning of the national territory and the development and execution of climate change mitigation and adaptation actions are in effect regarded as being of public utility, and thus in turn are executed pursuant to the LGEEPA, its ecological zoning regulations and the LGCC, respectively. Mexico is therefore deemed to have effectively enforced the provisions of Article 2, sections I and V, of the LGEEPA.

- **Article 157 of the LGEEPA**

63. Regarding the enforcement of Article 157 of the LGEEPA, it should be noted that, as provided in Article 17 of the same Act, one of the environmental policy instruments is Environmental Planning, which is handled in accordance with the guidelines established in the National Development Plan (*Plan Nacional de Desarrollo*) and the corresponding programs. For its part, Article 18 of the Act provides that the federal government will

⁴² Full Court of the Mexican Supreme Court, EXPROPRIATION. CONCEPT OF PUBLIC UTILITY, Federal Judicial Weekly and Gazette, Constitutional Jurisprudence P./J. 39/2006, available at <https://sjf2.scjn.gob.mx/detalle/tesis/175593>.

⁴³ Ecological Zoning Regulations under LGEEPA, available at https://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGEEPA_MOE_311014.pdf

⁴⁴ MX-007.

⁴⁵ See https://dof.gob.mx/2021/Semarnat/Semarnat_081121_EV.pdf

foster the participation of various social groups in the development of programs intended to preserve and restore the ecological balance and protect the environment, as provided in the Act and in other applicable provisions.

64. As provided in Articles 4 and 26 of the Mexican Constitution and Article 16, section III, of the Planning Act, the Ministry of Environment and Natural Resources (**Semarnat**) prepared the Environment and Natural Resources Sectoral Program (*Programa Sectorial de Medio Ambiente y Recursos Naturales—Promarnat*) considering the proposals presented by entities in the sector as well as those obtained in social engagement exercises and from interested Indigenous Peoples and communities, as it was presented for consultation in various regional forums held in Hermosillo, Sonora; Saltillo, Coahuila; Guadalajara, Jalisco; Xalapa, Veracruz; Acapulco, Guerrero; Oaxaca, Oaxaca; Mérida, Yucatán, and Mexico City, from August 14 to 19, 2019, at which 3,350 contributions and considerations were submitted, and which contributed to the development of Promarnat.

65. The principal issues raised in the consultation forums were:⁴⁶

Table 1. Principal issues raised by the public in the eight Regional Consultation Forums
1. Update and improvement of environmental regulatory framework
2. Strengthening environmental institutions
3. Greater citizen engagement
4. Improved quality, water supply and efficient use
5. Conservation of biodiversity and sustainable use
6. Improved management of urban solid waste
7. Fostering ecological zoning
8. Strengthened inspection, oversight and furtherance of environmental justice
9. Agroecology and sustainable woodland management
10. Response and attention to climate change
11. Greater control and regulation of industrial activities such as mining and major projects
12. Environmental education and culture

Source: Promarnat, 2020–2024.

66. We therefore note that the Mexican environmental authorities have not failed to effectively enforce Article 157 of the LGEEPA, since engagement has been contemplated in the development of environmental policy. As regards execution and enforcement, we note that this has been done as provided therein, and has been evaluated according to the General Social Development Act (*Ley General de Desarrollo Social—LGDS*), through the National Social Development Policy Assessment Council (*Consejo Nacional de Evaluación de la Política de Desarrollo Social*). Thus, we reiterate that the environmental authorities have not failed to enforce Article 157 of the LGEEPA.

- **Articles 117 and 123 of the LGEEPA, 47, 95, 96 Bis 1 of the LAN, and Articles 84 and 145 of the RLAN**

67. As indicated in Section C, (a) (iii) of this Party response, water pollution caused by wastewater discharges by the "El Gallo" WTP, without adequate treatment, forms part of various pending proceedings. Thus, we respectfully recommend that the CEC Secretariat continue the Submissions procedure no further, with respect to Articles 117 and 123 of the LGEEPA, Articles 47, 95 and 96 Bis 1 of the LAN, and Articles 84 and 145 of the RLAN.

- **Articles 189 of the LGEEPA and 65 of the EIAR**

68. Section C of this Party response states the procedural status of public complaints

⁴⁶ Federal Official Gazette (2020). Environment and Natural Resources Sector Program, available at https://www.dof.gob.mx/nota_detalle.php?codigo=5596232&fecha=07/07/2020#gsc.tab=0

PFPA/9.7/2C.28.2/022-2021 and **PFPA/9.7/2C.28.4.2/00011-22**, with respect to environmental impact and wastewater discharges, respectively, and it can therefore be concluded that Profepa has not failed to enforce Articles 189 of the LGEEPA and 65 of the EIAR.

- **Articles 194 and 202 of the LGEEPA**

69. With respect to the duties prescribed by Article 194 of the LGEEPA, to request that academic institutions, research centers and public, social and private-sector agencies prepare studies, reports or expert reviews on matters raised in the complaints filed, the CEC Secretariat is hereby advised that such duty is elective.

70. The same applies to Article 202 of the LGEEPA,⁴⁷ as it establishes elective powers for Profepa to perform duties and the respective collective actions governed by Book V of the Federal Civil Procedure Code.

71. With regard to elective powers, it should be noted that in these cases the Legislative Branch vested the law enforcement authorities with the power to determine whether or not to exercise them, using the term “**may**”; i.e., such duties may or may not be performed, and their nonperformance does not give rise to a failure to perform an obligation that is not coercive, as the word “**must**” is missing.

72. Therefore, we believe that there is no omission with respect to Articles 194 and 202 of the LGEEPA, and advise the CEC Secretariat accordingly that the environmental authorities have not failed to enforce them accordingly.

- **Article 195 of the LGEEPA**

73. With respect to the enforcement of Article 195 of the LGEEPA, it should be noted that, based on the investigations carried out by Profepa in regard to: **1.** The execution of the Construction of Playa Hermosa Boardwalk and Services Area Project, and **2.** Beach pollution due to the discharge of wastewater without adequate treatment, Mexico has satisfactorily complied with the said provision by starting the administrative proceedings intended to issue measures for the offender to repair the damage to the environment, and not only the nonbinding recommendations to state and municipal authorities, as provided by Article 195 of the LGEEPA.

74. In this context, we hereby notify the CEC Secretariat that, contrary to the Submitters' assertion during the public complaint procedure, Article 195 of the LGEEPA was not enforced, since the provision prescribes the issuance of recommendations to the authorities, but rather that in the performance of its duties, Profepa did in fact enforce Articles 161 and 169 of said Act, which enabling the Baja California Delegation to exercise its inspection powers. As a result, penalties were levied on environmental offenders and corrective measures were issued through the corresponding rulings, obliging the inspected persons to repair the identified environmental damage. Potentially applying the literal provisions Article 195 of the LGEEPA, even had Profepa issued public, autonomous recommendations to the federal, state and municipal authorities, they would only have been indicative, unlike the binding rulings and measures derived from the administrative proceedings begun.

- **Articles 55, 57, 58, 59 and 65 of the EIAR**

75. As regards the corrective or urgent measures and the imposition of the safety measures prescribed by Articles 55, 57, 58, 59 and 65 of the LGEEPA, Exhibits MX-010, MX-013, MX-014, MX-015, MX-016, MX-017, MX-018, MX-019 and MX-20 demonstrate that they have been imposed, and the enforcement of such legal

⁴⁷ Article 202. The Office of the Federal Attorney for Environmental Protection, within the scope of its duties, **is authorized** to undertake the applicable actions before the competent authorities, when it learns of acts, facts or omissions constituting violations of the administrative or criminal laws. When acts, facts or omissions that threaten collective rights and interests are carried out, the Federal Attorney for Environmental Protection and any other person with standing under Article 585 of the Federal Civil Procedure Code **may** exercise the collective action as provided in Book V of said Code. This will also apply to those acts, facts, or omissions that violate the state environmental laws.

provisions by the environmental authority, accordingly.

- **Article 84 of the RLAN**

76. With respect to the enforcement of Article 84 of the RLAN, we first note that this provision is jurisdictional, in that it provides that the persons responsible for public urban wastewater treatment are the municipalities and the Federal District (now Mexico City), or, as applicable, the various municipalities through regional systems.

77. Moreover, pursuant to Article 115, section III, second to last paragraph of the Mexican Constitution, when the respective municipal government deems necessary, the municipalities may enter into agreements with the States for the latter to be temporarily responsible for any service, including the treatment of public urban wastewater.

78. In this regard, on 31 August 1968, the Ensenada State Utility Commission was created as a decentralized agency of the state government through which potable water and sewer utilities would be provided. Its operations began upon entry into force of Decree No. 139, issued by the Governor of the Free and Sovereign State of Baja California.⁴⁸

79. Therefore, we believe that there is no failure to enforce said article.

- **Mexican Official Standard NOM-001-SEMARNAT-2021, Establishing the allowable limits of pollutants in wastewater discharges into nationally owned receiving bodies, published in the Federal Official Gazette of 6 January 1997, and its clarification published in said Gazette on 30 April 1997**

80. For further context, it should be noted that **Mexican Official Standard NOM-001-SEMARNAT-1996⁴⁹ and its clarification, published on 30 April 1997,⁵⁰** establish the maximum allowable limits of pollutants in wastewater discharges into national waters and facilities, in order to protect their quality and enable their uses, and are mandatory for the persons responsible for such discharges.

81. Item 3.7 of the above Standard prescribes the particular conditions for discharges, providing that they are the set of physical, chemical, and biological parameters and the maximum levels allowed in wastewater discharges, as **determined by the National Water Commission for the person or group of persons responsible for the discharge or for a specific receiving body**, with the purpose of preserving and controlling water quality pursuant to the LAN and its Regulations.

82. Thus, in accordance with Article 86, section IV, of the LAN, Conagua establishes and enforces the particular conditions for wastewater discharges, by the different uses and users, into national waters and facilities. Such particular conditions are prescribed through the corresponding concession title and enforced through inspection and verification actions.

83. As indicated in Section C (a) (iii) of this Party response, the water pollution caused by the wastewater discharges from the "El Gallo" WTP, without adequate treatment, is subject to various judicial proceedings pending resolution, whereby it has been decided to penalize Cespe for the offenses prescribed by Article 119, sections I, VII, XIV, XV and XXI of the LAN; resolution is also pending with respect to the criminal proceeding under **Investigation File FED/BC/ENS/1880/2021**, before Investigative Cell IV of the Ensenada, Baja California Office of the Federal Prosecutor's Office. Accordingly, the CEC Secretariat is respectfully called upon to conclude the Submissions procedure with respect to Articles 117 and 123 of the LGEEPA, Articles 47 and 95 of the LAN, and the particular conditions prescribed in the corresponding concession titles in accordance with numeral 3.7

⁴⁸ MX-023.

⁴⁹ MX-024.

⁵⁰ MX-025.

of Mexican Official Standard NOM-001-SEMARNAT-1996.

- **Article 4, fifth and sixth paragraphs of the Mexican Constitution**

84. Lastly, with regard to the enforcement of the fifth and sixth paragraphs of Article 4 of the Mexican Constitution, as the works and activities have caused environmental impairment duly indicated in this Party response, the Mexican environmental inspection and enforcement authorities have begun various administrative and criminal proceedings against those responsible, which are pending resolution.

E. CONCLUSIONS

85. As specified in this response, the performance of the works and activities under the Project has been subject to nine administrative proceedings. The public complaints filed by various citizens have also been promptly addressed, and there are currently two administrative proceedings pending resolution. This points to the effective enforcement of the following legal provisions:

- Article 4, fifth paragraph of the Mexican Constitution
- Articles 28, section X, and Article 189 of the LGEEPA
- Articles 5, subsection Q), 55, 57, 58, 59 and 65 of the EIAR

86. Similarly, with respect to the issue of wastewater pollution at Playa Hermosa, located in Bahía de Todos Santos, Municipality of Ensenada, Baja California, the inspection and enforcement authorities began various administrative and criminal proceeding against the environmental offenders, issuing penalties and safety measures to be satisfied by the offenders according to the identified environmental damages.

87. Therefore, Mexico reiterates that it has effectively enforced the following legal provisions:

- Article 4, sixth paragraph of the Mexican Constitution.
- Articles 117, 123, 157, 189 of the LGEEPA.
- Articles 47, 95 and 96 Bis 1 of the LAN.
- Articles 84 and 145 of the RLAN.
- Articles 55, 57, 58, 59 and 65 of the EIAR.
- Mexican Official Standard NOM-001-SEMARNAT-1996, Establishing the maximum allowable limits of pollutants in wastewater discharges into nationally owned waters and properties, published in the Federal Official Gazette on January 6, 1997 and its clarification published in the same Gazette on 30 April 1997.

88. Now, therefore, we respectfully request that the CEC Secretariat, in accordance with Article 24.27 (4) (a), not continue with this Submission since, as detailed herein with respect to: **1.** The execution of the Construction of Playa Hermosa Boardwalk and Services Area Project, and **2.** Beach pollution due to the discharge of wastewater without adequate treatment, there are administrative and judicial procedures pending resolution.