

Environment & Climate Regulation

Contributing editors

Carlos de Miguel Perales, Uría Menéndez

Per Hemmer, Bech-Bruun



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Environment & Climate Regulation 2018

Contributing editors

Carlos de Miguel Perales, Uría Menéndez

Per Hemmer, Bech-Bruun

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

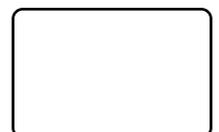


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2015
Third edition
ISSN 2059-9900

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and October 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Environment

Austria 5

Thomas Starlinger and Anita Trenkwalder
Starlinger Mayer Attorneys at Law

Brazil 15

Simone Paschoal Nogueira, Iris Zimmer Manor and
Marina Vieira Freire
Siqueira Castro – Advogados

China 21

Jihong Wang, Jie Shi, Anjing Wu and Yibai Xu
Zhong Lun Law Firm

Colombia 28

José Vicente Zapata Lugo and Margarita Solorza Cortés
Holland & Knight

Denmark 33

Jacob Brandt and Håkun Djurhuus
Bech-Bruun

Dominican Republic 41

Giselle Pérez-Reyes and Fabio J Guzmán-Saladín
Guzmán Ariza

European Union 47

Adrien Fourmon
Huglo-Lepage & Associés

Germany 52

Jochen Terpitz
Jochen Terpitz – Rechtsanwalt

Japan 58

Kiyoshi Honda and Takumi Naito
Nagashima Ohno & Tsunematsu

Mexico 64

Jose Luis Rendon
RHT Legal Consulting

Portugal 72

João Louro e Costa and Gonçalo Andrade e Sousa
Uría Menéndez – Proença de Carvalho

Spain 80

Carlos de Miguel Perales and Jesús Andrés Sedano Lorenzo
Uría Menéndez

United Kingdom 86

Douglas Bryden and Megan Penny
Travers Smith LLP

United States 95

Donald J Patterson Jr and Elizabeth M Richardson
Beveridge & Diamond, PC

Climate

Introduction and overview 102

Per Hemmer, Johan Weihe and Rania Kassis
Bech-Bruun

EU legislation on climate change 110

Adrien Fourmon
Huglo Lepage & Associés

Austria 118

Thomas Starlinger and Eva Kubr
Starlinger Mayer Attorneys at Law

Brazil 125

Simone Paschoal Nogueira, Iris Zimmer Manor and
Marina Vieira Freire
Siqueira Castro – Advogados

Colombia 133

José Vicente Zapata Lugo and Luisa Toledo Plata
Holland & Knight Colombia SAS

Denmark 139

Per Hemmer, Johan Weihe and Rania Kassis
Bech-Bruun

Germany 148

Jochen Terpitz
Jochen Terpitz – Rechtsanwalt

Japan 154

Kiyoshi Honda and Takumi Naito
Nagashima Ohno & Tsunematsu

Mexico 158

Jose Luis Rendon
RHT Legal Consulting

Portugal 164

João Louro e Costa
Uría Menéndez – Proença de Carvalho

Spain 169

Carlos de Miguel Perales and Jesús Andrés Sedano Lorenzo
Uría Menéndez

Turkey 174

M Feridun İzgi
Firat İzgi Attorney Partnership

United Kingdom 179

Tom Bainbridge, Louisa Cilenti and Sandy Abrahams
Lux Nova Partners Ltd

United States 190

Brook Detterman, David Weber, Kristin Gladd, Michael F Vitris,
Jacob Duginski, Laura LaValle, and Leah A Dundon
Beveridge & Diamond, PC

Mexico

Jose Luis Rendon

RHT Legal Consulting

Legislation

1 Main environmental regulations

What are the main statutes and regulations relating to the environment?

There are three levels of Mexican government: federal, state and municipal. Environmental legislation also has three levels.

Article 4 of the Mexican Constitution establishes the following human right related to environmental protection: 'Everyone has the right to a healthy environment for development and welfare. The State shall guarantee respect of this right. Environmental damage and impairment will generate liability in the terms established by Law for those who cause them.'

The most relevant provisions of the Mexican legal framework to ensure compliance with the transcribed human right are:

- the Mexican Constitution;
- international treaties;
- the General Law of Ecological Equilibrium and Environmental Protection (LGEEPA) and its Regulations (Prevention and Control of Pollution into the Atmosphere; Environmental Impact; Pollutant Release and Transfer Register; Environmental Audit, Natural Protected Areas and Territorial Planning);
- the General Law for the Prevention and Integral Management of Wastes (LGPGIR) and its Regulations;
- the National Waters Law and its Regulations;
- the Federal Law of the Sea;
- the General Law on Wildlife;
- the General Law of Sustainable Forest Development and its Regulations;
- the General Law of Climate Change and its Regulations on National Registry of Emissions;
- the General Law on Biosafety of Genetically Modified Organisms;
- the Federal Law on Environmental Liability (LFRA);
- the Hydrocarbons Law;
- the Law of the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sector;
- the Regulations on Land Transportation on Hazardous Materials and Waste; and
- the Mexican Official Standards (NOMs), which are administrative dispositions that set out maximum allowable pollutant limits for contaminants in air, water and soil, and list hazardous waste and substances, as well as endangered species.

The 31 states, Mexico City and each municipality may enact and enforce their own environmental legislation within their jurisdiction.

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

The administrative instrument that regulates the prevention and control of pollution is the single environmental licence (LAU). Notwithstanding, the said licence regulates the industry under federal jurisdiction. Pursuant to dispositions from the Regulations in matters of Prevention and Control of Pollution into the Atmosphere, the following industrial sectors should apply for an LAU:

- petroleum and petrochemical;
- chemical;
- paints and dyes;
- metallurgy;
- automotive;
- pulp and paper;
- cement and lime;
- asbestos;
- glass;
- electrical power generation; and
- hazardous waste treatment.

An LAU is obtained for each industry and integrates environmental impact and risk activities, air emissions, water use and wastewater discharge and the generation of hazardous waste, and is recorded in the Pollutant Release and Transfer Register. An LAU can also be requested on a voluntary basis by an industry that does not necessarily fall within federal jurisdiction but has an operational licence.

Each industry files an updated report with information relating to air pollutant emissions, greenhouse gas (GHG) emissions, water and hazardous waste management through an annual operation certificate (COA). A COA containing information regarding the immediate past year should be filed between 1 March and 30 June. An industry that does not fall under federal jurisdiction must obtain an operational licence. Some states have created their own environmental integral licences.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

The LGPGIR and its Regulations establish that all contaminating parties are liable for damage arising from a contaminated site and must carry out remedial action. Owners and possessors or concession holders of property affected by soil contamination are jointly and severally liable for the remediation of such sites, this being irrespective of any action such owner or possessor (or both) may have taken against the contaminating party.

Mexican Official Standards NOM-138-SEMARNAT/SSA1-2012 and NOM-144-SEMARNAT-SSA1-2004 respectively establish the maximum permitted levels of hydrocarbons and heavy metals that may be present in soil contamination. Notwithstanding the above, if there is no NOM regulating a specific pollutant the contaminating party is obliged to perform a risk evaluation study to determine clean-up levels, which would be agreed upon with the Ministry of Environment and Natural Resources (SEMARNAT). If groundwater is contaminated, the National Water Commission (CNA) will have jurisdiction.

4 Regulation of waste

What types of waste are regulated and how?

Pursuant to the LGPGIR, waste is defined as a material or product that the owner or possessor discards and is found in a solid or semi-solid state, or a liquid or gas contained in repositories or deposits having recovery value or that needs to be subject to treatment or final disposal in accordance with the LGPGIR and other provisions derived therefrom.

While LGPGIR and its Regulations do not provide a legal definition of 'by-product', it is important to mention that the provisions of such ordinances do encourage the use and valorisation of by-products. Therefore, a by-product may be defined as the material not discarded but delivered by its generator to another person who uses it as raw material. Such a delivery may be onerous or free but in all cases must be documented in a contract as part of a hazardous waste management plan registered with SEMARNAT.

The LGPGIR classifies waste as urban solid waste, hazardous waste or special handling waste. Waste generators are classified into three categories:

- micro-generator: an industrial, commercial or services establishment that annually generates up to 400kg of hazardous waste;
- small generator: an individual or establishment that annually generates more than 400kg but less than 10 tonnes of waste; and
- large generator: an individual or establishment that annually generates more than 10 tonnes of waste.

Jurisdiction over waste is distributed as follows:

- urban solid waste is regulated by the municipal authorities;
- special handling waste is regulated by the state authorities; and
- hazardous waste is regulated by the federal authorities, specifically by SEMARNAT and PROFEPA, and by ASEA in the hydrocarbons sector.

The main obligations of hazardous waste generators are:

- large generators: register with SEMARNAT; keep a log book; submit an annual waste generation and handling report; file a waste management plan; and obtain environmental insurance. Those in the hydrocarbons sector (oil and gas) register with ASEA;
- small generators have the same obligations as large generators except for obtaining environmental insurance; and
- micro-generators have an obligation to register with SEMARNAT, or with the local environmental authorities if an agreement has been executed between the said authorities.

NOM-161-SEMARNAT-2011 establishes the criteria for the classification of waste requiring special handling and for determining which waste is subject to a handling plan, the list of the same, the procedure for the inclusion or exclusion from the list, as well as the elements and procedures for the formulation of the handling plans. The main obligations of special handling (non-hazardous) waste generators are similar to those applicable to hazardous waste generators: registration before the competent authority, keeping a logbook, submitting an annual waste generation and handling report and filing a waste-handling plan (ie, waste electrical and electronic equipment (WEEE), wood pallets, PET, paper and cardboard, glass, etc).

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

All fixed sources that emit or could emit odours, gases or solid and liquid particles into the atmosphere require an operational licence or an LAU. Depending on the activities they perform they will be subject to federal, state or municipal jurisdiction. The hydrocarbons sector is subject to the federal government as well, but through ASEA, rather than SEMARNAT and PROFEPA.

The main pollutants regulated are solid particles, carbon monoxide, nitrogen oxide, sulphur dioxide and air excess and opacity (smoke stain).

The limits to the emissions of pollutants are contained in the corresponding NOMs.

6 Protection of fresh water and seawater

How are fresh water and seawater, and their associated land, protected?

The usage and exploitation of national waters and their associated land requires a concession issued by the CNA, which falls under the National Waters Law and its Regulations. Through the concession title, the CNA establishes all the conditions to carry out the authorised activities (such as the place where the extraction point is located, extraction quantities, etc).

Wastewater discharges are regulated depending on where the discharges are performed. If they are performed in the sewage system, municipal authorities regulate them. If discharges are performed in national bodies, the CNA regulates them.

Mexican Official Standards NOM-001-SEMARNAT-1996, NOM-002-SEMARNAT-1996 and NOM-003-SEMARNAT-1997 establish the maximum permitted limits (LMPs) of pollutants that may be present in wastewater discharges and reuse. Pursuant to the National Waters Law, the local environmental legislation may set forth stricter, but not more tolerant, LMPs than those established in the aforementioned NOMs.

Seawater is protected by the Ministry of the Navy, pursuant to the dispositions of the Federal Law of the Sea as well as the Law of Dumping in Mexican Marine Areas.

The federal maritime land area is protected and regulated by SEMARNAT and PROFEPA, in accordance with the Regulations for the use and exploitation of the territorial sea, waterways, beaches, federal maritime land area and land reclaimed from the sea.

7 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

The natural protected area (ANP) is an instrument of the National Environmental Policy that grants legal certainty for the conservation of biodiversity. ANPs are aquatic or terrestrial portions of Mexican territory that represent various ecosystems where the original environment has not been essentially altered. ANPs are created by presidential decree establishing where the development of certain activities are permitted or prohibited, as well as its management and territorial planning programmes. The performance of any activity on an ANP requires prior authorisation from SEMARNAT. An ANP is subject to special regulations for its protection, conservation, recovery and development, according to its category.

The National Commission for National Protected Areas (CONANP) currently administers 177 federal ANPs, mainly classified as follows:

- biosphere reserve, to protect ecosystems not altered by human action, or that need recovery measures. Such places host endemic or endangered species, or both;
- national parks, for the protection of places characterised for their landscape beauty, their historic, scientific, educational or recreational value, the presence of flora and fauna and their ability to attract tourism;
- natural monuments: these are areas protected due to their beauty, historic or scientific value;
- natural resources safeguard areas, for the protection of soil, waters, water basins and natural resources. ANPs are usually located in forest areas;
- flora and fauna safeguarded areas, to protect the habitats of wild species of flora and fauna; and
- natural sanctuaries: these areas are characterised by the presence of limited subspecies or by their richness in flora or fauna.

The land where an ANP is established is still private property but is restricted by the dispositions set forth in the decree. The owner or owners of the property affected by the declaration of an ANP may transfer said property without an objection, but the acquirer is obliged to follow the restrictions regarding the land's use.

States and municipalities may also establish ANPs according to their environmental legislation.

8 Protection of flora and fauna species

What are the main features of the rules protecting flora and fauna species?

The legal framework for the protection of flora and fauna consists of the LGEEPA, the General Wildlife Law, their Regulations, NOM-059-SEMARNAT-2001, which sets out the list of wild species of flora and fauna that are protected, and NOM-022-SEMARNAT-2003, which contains specifications for the preservation, conservation and sustainable use and restoration of coastal environments and mangroves.

Authorisations for the use, possession, management and preservation of wild flora and fauna are issued by SEMARNAT. The federal

authority has celebrated agreements with state environmental authorities to transfer some of the regulation of flora and fauna.

Depending on their degradation or risk, species have been classified as endemic, endangered, in danger of extinction, extinct or subject to special protection. In places where vegetation is abundant, prior to the development of any construction project, an authorisation to change the original use of land should be obtained to avoid deforestation and to protect special flora.

Damage to species of either flora or fauna are environmental crimes that may be prosecuted by the attorney general. They can be considered as environmental damage, and consequently subject to environmental class actions and action for environmental liability under the LFRA. See questions 10 and 25 to 30.

9 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

Emissions of noise, vibrations, thermal and light energy, as well as the generation of visual pollution, are prohibited in Mexico when such emissions exceed the maximum permitted limits established in the federal or local standards issued by the environmental authorities. The Regulations for Environmental Protection Against the Contamination Generated by Noise Emissions establish 68dB from 6am to 10pm and 65dB from 10pm to 6am as maximum permitted limits.

Noise, odours and vibration are regulated when generated by industrial and commercial establishments, and in the environmental legislation of the states it is common to find that noise and odours should not exceed the physical limits of the establishment that generates them.

10 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

The general regime on liability for environmental damage can be divided into two regulations: actions for environmental liability under the LFRA and environmental class actions.

The LFRA has created a legal framework to regulate liability arising from environmental damage, which includes:

- restoration and compensation of damage through federal judicial procedures;
- alternate dispute resolution proceedings;
- administrative procedures; and
- damage related to environmental crimes.

If environmental damage has been caused, a judicial procedure may be started before a federal court specialising in environmental matters, by means of which those considered responsible (individuals or corporations) are obliged to restore and compensate (if restoration is impossible) the environmental damage, regardless of the economic sanctions the judge may impose for the commission of the damage. The judicial procedure required to assert the environmental liability referred to in the LFRA is independent of the applicable administrative-law liabilities, civil actions or criminal actions. The action under the LFRA can be filed within 12 years from the date on which the damage and its effects were caused.

The following entities are qualified to file suits under the LFRA:

- inhabitants of the community surrounding the area whose environment has been damaged;
- Mexican non-profit organisations representing an inhabitant; and
- the Federation through the Environmental Protection Agency (PROFEPA) as well as state environmental authorities and Mexico City, jointly with PROFEPA.

A corporation shall be liable for environmental damage caused by:

- its representatives
- administrators
- managers
- directors
- employees; or
- those persons who may exercise the functional dominium of the corporation's operations, owing to negligence or as a consequence

of their functions, in representation or under their protection, or to the benefit of the corporate entity, or if they have ordered or given their consent to the execution of harmful acts.

The maximum economic sanctions a judge may impose under the LFRA are:

- if an individual: 50,000 Units of Measure and Update* (UMA) (almost 4 million pesos); and
- if a corporation: 600,000 UMA (almost 45.5 million pesos).

Environmental class actions protect indivisible rights such from the constitutional right to a healthy environment, established in article 4 of the Mexican Constitution, which is the same right that belongs to the community as a whole and cannot be separated into an individual or group of individuals. If environmental damage has been caused, a judicial procedure may be started before a federal court, by means of which those considered as responsible (individuals or corporations) are obliged to restore and indemnify (if restoration is impossible) the environmental damage. Environmental collective actions are independent of the applicable administrative-law liabilities, civil actions or criminal actions. A class action may be filed within three-and-a-half years counted from the date on which the damage and its effects were caused. The following entities have 'active legitimacy' (standing) for environmental class actions:

- a class with at least 30 identified members, acting through a common representative;
- non-profit organisations with the corporate purpose of environmental protection;
- PROFEPA; and
- the federal attorney general.

* The UMA is the economic reference in pesos to determine the amount of the payment of the obligations and assumptions provided for in the federal laws, the federative entities and Mexico City, as well as in the legal provisions that emanate from all of the above. In 2017, the UMA daily value in Mexico was equal to 75.49 pesos.

11 Environmental taxes

Is there any type of environmental tax?

Fossil fuels tax

A tax is available for the sale and import of fossil fuels according to their carbon content. It is applicable to manufacturers, importers or producers of fossil fuels, not final consumers. This tax may be paid with carbon credits. The following fees were updated on 27 December 2016:

Kind of fuel	Fee	Unit of measure
Propane	6.50 cents	Per litre
Butane	8.42 cents	Per litre
Petrol and aviation spirit	11.41 cents	Per litre
Jet fuel and other kerosene	13.64 cents	Per litre
Diesel	13.84 cents	Per litre
Fuel oil	14.78 cents	Per litre
Coke oil	17.15 pesos	Per tonne
Coke coal	40.21 pesos	Per tonne
Mineral coal	30.28 pesos	Per tonne
Other fossil fuels	43.77 pesos	Per tonne of carbon contained in the fuel

Pesticides tax

Depending of the levels of acute toxicity established by Mexican Official Standard NOM-232-SSA1-2009, the tax will be applied in accordance with the following table:

Route of exposure	Category 1	Category 2	Category 3	Category 4	Category 5
Oral (mg/kg)	5	50	300	2,000	5,000
Dermal (mg/kg)	50	200	1,000	2,000	
Gas inhalation (ppmV)	100	500	2,500	5,000	
Steam inhalation (mg/l)	0.5	2	10	20	-
Dust and mist inhalation (mg/l)	0.05	0.5	1	5	

Based on the above, a rate is established to be applied to pesticides in accordance with the hazard category of acute toxicity, as follows:

Category	2015
1 and 2	9%
3	7%
4	6%

Income tax

Investment deduction

Pursuant to the Law on Income Tax it is possible to deduct 100 per cent of the expenditures on investments in machinery and equipment for power generation from renewable sources or systems of co-generation of efficient electricity, such as:

- solar energy in all its forms;
- wind power; hydropower, both kinetic and potential of any natural or artificial water body;
- oceanic energy in its various forms;
- geothermal energy;
- biomass or waste energy; or
- any other that due to its nature or by a suitable use is considered as inexhaustible.

Conventional bicycles, and bicycles and motorcycles powered by rechargeable batteries are eligible for a 25 per cent deduction.

Hazardous activities and substances

12 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

Pursuant to the lists of high-risk activities, depending on the volume and type of hazardous materials handled, such activities may be classified as 'risk' or 'high risk'. High-risk activities are regulated by SEMARNAT and risk activities by state environmental authorities.

The performance of high-risk activities requires that an environmental impact and risk assessment as well as an accident prevention programme (PPA) be authorised by SEMARNAT. The authorisation will establish certain specific conditions to be observed while developing the activities. The state and ASEA also grant authorisation to handle risk activities following steps similar to SEMARNAT.

13 Regulation of hazardous products and substances

What are the main features of the rules governing hazardous products and substances?

Regardless of its physical state, a hazardous substance is an element, composition or chemical mixture that possesses corrosive, reactive, flammable, explosive, toxic or biological-infectious characteristics.

Regardless of its physical state, a hazardous material is an element, substance, composition or its mixture that represents a risk to the environment, health or natural resources due to the corrosive, reactive, flammable, explosive, toxic or biological-infectious characteristics it possesses.

Certain Ministry of Health requirements need to be complied with if products are to be publicly marketable (ie, obtaining a health licence).

In most cases, in order to handle, import and export hazardous substances or materials an authorisation should be obtained from both the Ministry of Health and SEMARNAT, which in general terms depends on each product's characteristics and the end user.

The Federal Law for the Control of Chemical Substances Susceptible to be Used for the Manufacture of Chemical Weapons classifies chemical substances into five groups and states the obligations and sanctions depending on the group in which the chemical substance is classified.

14 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

The main measures to prevent industrial accidents are the environmental risk assessment, the PPA and the contingency plan.

As discussed in question 12, all establishments that carry out high-risk activities must submit a risk assessment and a PPA for approval before SEMARNAT. The PPA should describe measures and actions for the prevention of accidents contemplated in the environmental risk assessment.

From the experience of approving PPAs, SEMARNAT has created organisations that are made up of companies and authorities that provide resources and efforts to raise the level of prevention, control, preparation and response to chemical emergencies. SEMARNAT can also establish geographic safety zones and order restrictions within such zones to protect the population from high-risk activities.

In addition to the above, local civil protection authorities require a contingency plan to be developed and registered before them.

Environmental aspects in transactions and public procurement

15 Environmental aspects in M&A transactions

What are the main environmental aspects to consider in M&A transactions?

In a share deal, the buyer retains the environmental liability, since the acquired entity still remains responsible for contamination caused within its operation unless contractually established otherwise.

In an asset deal, the seller retains liability for any contamination it may have caused unless the buyer acquires it contractually.

The purchase of contaminated sites involves environmental liability for the buyer if it cannot provide evidence to SEMARNAT that the seller assumed liability for pre-existing contamination on transfer.

The LGPGIR and its Regulations expressly prohibit the transfer of property contaminated by hazardous materials and waste without authorisation from SEMARNAT. The seller has the obligation to inform the buyer if the site is contaminated.

16 Environmental aspects in other transactions

What are the main environmental aspects to consider in other transactions?

The performance of an environmental due diligence investigation is recommended prior to the execution of any investment or acquisition. Although not obligatory, the most common investigations are Phase I and Phase II environmental site assessments. If the discovery of soil contamination arises from these, risk assessments and other necessary studies may also be needed.

Any soil, water or material samples have to be taken and validated by a laboratory approved by the Mexican Entity for the Accreditation of Laboratories.

The environmental authorities may order the owner or possessor of a contaminated site to restore it and prove who caused the contamination; for such reason, corporate and real estate transactions must be investigated in detail to prevent possible contamination issues (see questions 3 and 15).

Even though contracting parties cannot limit their clean-up liability established in the LGPGIR, they are able to make arrangements regarding indemnifications, defence and to hold harmless provisions.

17 Environmental aspects in public procurement

Is environmental protection taken into consideration by public procurement regulations?

The Law of Acquisitions, Leases and Services in the Public Sector establishes environmental requirements such as in the case of acquisitions of wood, furniture and office supplies made from wood, the certificates issued by third parties previously registered with SEMARNAT must be exhibited in order to guarantee the origin and sustainable management of the forest resources from which that wood comes.

Paper for office use must contain a minimum of 50 per cent recycled fibres or natural fibres not derived from wood or raw materials from forests sustainably managed in the national territory (or their combinations) and certified as provided in the preceding paragraph and processed without the use of bleaching chlorine.

Environmental assessment

18 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

Most environmental impact assessments are for construction projects (industrial or non-industrial); notwithstanding, all works or operations that could cause ecological disequilibrium or exceed the limits and conditions established in the applicable laws and regulations must submit this authorisation.

Pursuant to the LGEEPA, the following federal activities require the obtaining of an environmental impact authorisation from SEMARNAT:

- water infrastructure, general communication routes, oil pipelines, gas pipelines, coal pipelines and multi-purpose pipelines;
- petroleum, petrochemical, chemical, iron and steel, paper, sugar, cement and electrical industries;
- exploration, use and processing of minerals and substances reserved for the federal government;
- installations for the treatment, storage or disposal of hazardous waste, as well as radioactive waste;
- forestry use of jungles and of species whose regeneration is difficult;
- forest plantations;
- changes in the soil use of forested areas, as well as in jungles and arid zones;
- industrial parks where high-risk activities are to be carried out;
- real estate developments that affect coastal ecosystems;
- works and activities in marshes, swamps, lagoons, rivers, lakes and estuaries connected to the sea, as well as on their shores or federal zones;
- works on protected natural areas under federal jurisdiction;
- fishing, aquaculture or farming that could place the preservation of one or more species at risk or cause harm to ecosystems; and
- works under federal jurisdiction that could cause serious and irreparable ecological imbalance, harm to public health or to ecosystems or exceed the limits and conditions established in the law regarding the preservation of ecological balance and environmental protection.

State legislation should be reviewed to verify if activities not listed do require environmental impact or preventive notice authorisation from local authorities. All industries in the hydrocarbons sector must obtain their authorisation from ASEA.

Any expansions or modifications to projects that have already obtained an environmental impact authorisation are subject to environmental assessment. The regulatory authority will evaluate to determine whether such expansions or modifications require a new environmental impact authorisation.

19 Environmental assessment process

What are the main steps of the environmental assessment process?

The environmental impact authorisation is a licence that establishes which activities may be performed; its period of validity and the conditions to be complied with last for the lifetime of the authorised project.

After receiving an environmental impact assessment (EIA), SEMARNAT must prepare a file and make it available for public review. A public consultation may be initiated by SEMARNAT if any interested party requests one. The public consultation should be carried out on the following basis:

- SEMARNAT must publish in its Ecological Gazette, and in some cases in a widely circulated newspaper, a summary of the plan for the work or operation;
- any citizen, within a period of 10 days from publication of the summary of the plan, may request SEMARNAT to make the EIA available to them. The citizen, within 20 days from the date SEMARNAT makes the EIA available, can submit comments;
- SEMARNAT must add the remarks made by the citizen to the file and refer to the public consultation process in the decision that it issues;
- consultations may also be requested from state or municipal authorities or from other government agencies or scientific institutions; and
- parties filing the EIA have the right to request their information be handled confidentially since it can affect industrial property rights or commercial information, or both.

Once the EIA is evaluated, SEMARNAT issues a resolution within 60 working days from receipt of the EIA. This resolution can be approved, approved with conditions or denied. If the resolution is denied the party has the right to appeal.

State legislation should be reviewed to verify the time it takes the local authorities to issue a resolution. Also, the resolution can be approved, approved with conditions or denied. If the resolution is denied, the party has the right to appeal.

Regulatory authorities

20 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

Federal, state and municipal governments have environmental authorities that enforce their environmental legislation according to their competence as established by law.

SEMARNAT is the federal authority that regulates the environment nationwide. Its main function is to grant permits, licences and any kind of authorisation in environmental matters established in the federal legislation, such as:

- environmental impact;
- air pollutant emissions;
- handling of hazardous waste;
- high-risk activities and matters related to soil contaminated with hazardous waste; and
- flora and fauna (wildlife).

The following administrative agencies are also part of SEMARNAT but act with autonomy since there is particular legislation regulating their activities:

- the Federal Environmental Protection Agency (PROFEPA): this agency focuses on compliance with environmental legislation by performing inspections and audits and imposing sanctions in the event obliged subjects are found in violation of applicable laws;
- the National Water Commission (CNA): this commission grants permits and concessions for the use of water resources and their associated land as well as wastewater discharges into national bodies such as land and water bodies under federal jurisdiction. It also has the authority to verify compliance with applicable legislation by performing inspections and imposing sanctions;
- the National Forestry Commission: the scope of this commission is to develop activities of production, exploitation, conservation and restoration in forest matters. It has the authority to verify compliance with applicable legislation by performing inspections and to impose sanctions;
- the National Commission on Protected Natural Areas: its main objective is to preserve ecosystems and biodiversity by establishing protected natural areas;
- the National Institute of Ecology and Climate Change is a federal body that will lead the national research in matters of climate

change and will monitor and update the national inventory of GHG emissions; and

- the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sector also known as the Agency of Safety, Energy and Environment (ASEA) is a federal organism that regulates and controls the hydrocarbons sector (oil and gas) in matters of industrial safety on operations, closing of installations and integral management of wastes and emissions.

The Ministry of Environment of each state or city regulates the environment in those aspects not regulated by the Federation (environmental impact, air pollutant emissions, risk activities, management of non-hazardous waste and wastewater discharge). Their main function is to grant permits, licences and any kind of authorisation in environmental matters established in the state legislation. Another of their functions is the performance of inspections and audits to verify compliance with local environmental laws in order to impose sanctions in the event that obliged subjects are found in violation.

21 Investigation

What are the typical steps in an investigation?

Mexican environmental justice is mainly of an administrative nature. To protect constitutional rights, the LGEEPA establishes that to carry out investigations it is imperative for the administrative authorities to document an inspection order that must be delivered to the installations to be inspected. The inspection order must detail the object of the inspection.

The agency's personnel are obliged to exhibit the proper documents to identify themselves as commissioned to perform the inspection. When the inspection begins the inspected party has the right to appoint two witnesses who may be present during the inspection.

An inspection report is elaborated to record all the facts found at the inspection. The report is the basis for the authority to determine whether the inspected party is in compliance with environmental legislation.

Environmental crimes are regulated by criminal legislation. The attorney general investigates the commission of environmental crimes and has the discretionary power to collect any document and object as well as to request the declaration of all those persons whose testimony is considered as relevant for the investigation. A judge needs to authorise all requests made by the attorney general during the investigation.

22 Administrative decisions

What is the procedure for making administrative decisions?

In general terms, to verify compliance with environmental legislation all administrative authorities (regardless of the level of government they belong to) have to perform the following procedure:

- an inspection should be performed, provided that an inspection order is issued and signed by the head of the agency;
- the inspected party has the right to appoint two persons who will witness the inspection development;
- all facts and situations that occur during the inspection will be recorded in a report that will be signed by all parties involved (the original report is kept by the authority and a copy is created for the inspected individual);
- five days after the inspection, the inspected party has the right to approach the authority to deliver evidence or arguments that could not be delivered during the inspection;
- after that, the authority will take one of the following two administrative decisions: if no violations to the environmental legislation arise from the report, the inspection will be terminated; if there are violations recorded in the report, an administrative procedure will be opened against the inspected party;
- if an administrative procedure is opened, the inspected party will be notified through a ruling setting out the facts considered as violations of the legislation and giving the inspected party 15 working days to offer evidence in this regard. The law recognises as evidence:
 - confessions;
 - public documents;
 - private documents;
 - expert reports;

Update and trends

Among the law amendment initiatives to be discussed in the Senate is one that proposes to increase the fines established by the Federal Law of Environmental Responsibility, from 300 to 1,000 UMA as minimum (50,000 UMA as a maximum) if the offender is an individual and going from 1,000 to 10,000 UMAs as minimum (600,000 as maximum) if the offender is a corporation.

In 2018, SEMARNAT is expected to present an online hazardous waste tracking system for generators to report and control their shipments from the generation source to the final disposal site.

- recognition or judicial inspections;
- witnesses;
- photographs, writing and shorthand notes, and in general, any evidence derived from scientific discoveries; and
- presumptions;
- there is a term from three to five days to file written allegations; and
- after the aforementioned term expires, the authority will issue its resolution within 20 working days, taking into consideration all the evidence and arguments presented by the inspected party.

All final rulings in any administrative procedure can be challenged before the same administrative authority that issued such rulings (see question 25).

It is important to review state and local legislation to verify deadline periods and whether additional dispositions apply.

23 Sanctions and remedies

What are the sanctions and remedies that may be imposed by the regulator for violations?

If violations to environmental dispositions arise, the environmental authorities may open an administrative procedure for the imposition of sanctions. The possible sanctions the authorities may impose are:

- fines: a minimum amount of 20 or 30 UMA and a maximum of 50,000 UMA. Fines for infractions to the National Waters Law are imposed on a case-by-case basis starting with 200 UMA as a minimum and 20,000 UMA as a maximum;
- closure (temporary or definitive, partial or total);
- administrative arrest for up to 36 hours;
- seizure (of hazardous waste, flora or fauna);
- confiscation of the instruments, specimens, products or by-products directly related to infractions relative to forest resources, species of flora and fauna or genetic resources; or
- suspension, revocation or cancellation of any authorisations, licences or permits previously issued to carry out activities.

In the event of a second violation (repeat infraction) the amount of the fine imposed may be up to twice the amount originally imposed, without exceeding double the maximum amount permitted, or definitive closure of operations may be ordered.

If the same causes of violation are committed within a period of two years, the transgressor will be considered a recidivist.

24 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

A motion for review is the administrative appeal that can be filed by the inspected party if it disagrees with the resolution. This appeal should be filed before the same authority within 15 working days after the administrative resolution is notified. The motion for review will be resolved by the hierarchical level above that of the authority that issued the original resolution. The final decision given to the motion for review can also be challenged before the administrative tribunals or the courts.

Judicial proceedings

25 Judicial proceedings**Are environmental law proceedings in court civil, criminal or both?**

Legal procedures on environmental matters are mostly administrative since the environmental authorities have an administrative nature. Nevertheless, environmental, civil and criminal courts may be involved if civil remedies or environmental crimes fall under their jurisdiction (see questions 10 and 21).

26 Powers of courts**What are the powers of courts in relation to infringements of environmental law?**

Sanctions imposed by the administrative authorities can be confirmed, modified or revoked by courts. To obtain a resolution from the court it is necessary to file a complaint when the final ruling has been issued. The appeal may be submitted before the same administrative authority that issued the ruling or it may be appealed before the administrative courts. Decisions issued by the administrative courts can be appealed before the federal courts, with a right of final appeal before the Mexican Supreme Court of Justice.

In class actions for environmental damage a judge is empowered to:

- resolve the case by issuing a judgment;
- oblige the defendant to repair the damage caused to the community (restitution);
- if restitution is not possible, the judge may order the payment of indemnification to the community;
- order the compliance with preventive measures to avoid the performance of acts or activities that cause or may cause imminent and irreparable damage to the rights or interests of the community;
- order the performance of those acts or activities that were previously omitted where the omission is causing or may cause imminent and irreparable damage to the rights or interests of the community; and
- order coercive measures such as fines of up to 30,000 daily wages in force in Mexico City applicable for each day elapsed if there is no compliance by the defendant with the resolution of the court, use of public force or arrest for up to 36 hours.

In actions for environmental liability a judge is empowered to:

- resolve the case by issuing a judgment;
- order SEMARNAT and PROFEPA to provide immediately preventive and corrective measures applicable to the case that are within their jurisdiction;
- order the seizure of documents, books, chattels, papers and property related to the damage caused to the environment and compliance with the defendant's legal obligations as provided by domestic environmental legislation and international treaties to which Mexico is a party;

- order the seizure or taking of samples of hazardous substances, materials, waste, liquids, pollutants and natural elements related to the damage caused to the environment;
- request SEMARNAT and PROFEPA to contribute any and all evidence available;
- oblige the defendant to repair or compensate the environmental damage; and
- impose fines for the environmental damage in the terms of the LFRA (see question 10).

With regard to criminal complaints for environmental damages, criminal courts are empowered to order the repair of environmental damage as part of their judgments, which may include the sanctions of imprisonment for individuals, economic fines, special sanctions for corporations in certain cases, seizure of goods, special publication of the judgment and community works orientated to environmental protection.

27 Civil claims**Are civil claims allowed regarding infringements of environmental law?**

Civil claims for violations to environmental law are permitted when such violations cause damage to the environment. A civil claim for compensation based on contractual or non-contractual responsibility may be filed by the party that suffers the environmental damage. See question 11.

28 Defences and indemnities**What defences or indemnities are available?**

The three main defences are:

- proof that the defendant did not cause the environmental damage that serves as the basis of the civil or criminal claim;
- acceptance that the environmental damage was caused by the defendant with previous authorisation from the Environmental Authority (as in an environmental impact authorisation); and
- acceptance that the environmental damage was caused by the defendant without exceeding the limits established in the corresponding NOMs.

29 Directors' or officers' defences**Are there specific defences in the case of directors' or officers' liability?**

A company's director or officer will be liable only in the event that he or she has participated directly in the commission of the offence or has ordered or authorised the activities that caused environmental damage.

RHT

LEGAL CONSULTING

Jose Luis Rendon

jlrendon@rhtlegal.com

Blvd Teofilo Borunda No 8349 Suite B
Partido Iglesias
Ciudad Juárez
Chihuahua CP 32528
Mexico

Tel: +52 656 634 0430
www.rhtlegal.com

30 Appeal process**What is the appeal process from trials?**

The possible levels of appeal are:

- motion for review (15 days after the administrative resolution is notified);
- nullity appeal (30 days after the resolution of the motion of review is notified); and
- Constitutional protection trial (final appeal) (15 days after the resolution of the nullity appeal is notified).

International treaties and institutions**31 International treaties****Is your country a contracting state to any international environmental treaties, or similar agreements?**

The main environmental international treaties that Mexico is subscribed to are:

- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989;
- the La Paz Agreement with the United States on Cooperation for the Protection and Improvement of the Environment in the Border Area 1983;

- the Montreal Protocol on Substances that deplete the Ozone Layer 1989;
- the North American Agreement on Environmental Cooperation 1994;
- the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998;
- the Sydney Declaration on Climate Change, Energy, Security and Clean Development 2007;
- the Stockholm Convention on Persistent Organic Pollutants 2001;
- the United Nations Programme for the Environment 1972;
- the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973;
- the United Nations Framework Convention on Climate Change (UNFCCC) 1992; and
- the UNFCCC Paris Agreement 2015.

32 International treaties and regulatory policy**To what extent is regulatory policy affected by these treaties?**

Any international treaty whose dispositions are in accordance with the Mexican Constitution is supreme law. To consider treaties as part of Mexican law, they should be signed by the President, ratified by the Senate and published in the Federal Official Gazette.

Getting the Deal Through

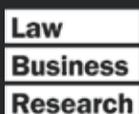
Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Environment &
Climate Regulation
ISSN 2059-9900



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law