



ENACTMENT OF THE FEDERAL LAW ON ENVIRONMENTAL LIABILITY IN MEXICO

On June 7, 2013, the Federal Executive Branch of Mexico published the Federal Law on Environmental Liability (the “Environmental Liability Law” or the “Law”) in the Official Gazette of the Federation. It also published the amendment and modification of related provisions contained in the General Law for Ecological Balance and Environmental Protection, the General Wildlife Law, the General Law for the Prevention and Comprehensive Management of Wastes, the General Law on Sustainable Forestry Development, the National Waters Law, the Federal Criminal Code, the Law of Maritime Navigation and Commerce and the General Law on National Assets.

The Environmental Liability Law constitutes a relevant step toward a comprehensive scheme that is likely to generate an increase in environmental litigation in Mexico. Together with the incorporation of collective actions for environmental damages and the strengthening of the constitutional right to a healthy environment and the “polluter pays principle,” the Law will provide new and specific means

for the imposition of environmental restoration, compensation, and “exemplary” fines against individuals and companies.

PRECEDENTS

For more than 15 years, several bills and initiatives related to civil environmental liability were discussed at federal and local levels in Mexico. However, until 2013, such proposed instruments were not approved by the corresponding legislative bodies due to the complexity of achieving the integration of the diverse interested parties’ positions, with the exception of the 2004 Civil Liability Law for Environmental Harm and Deterioration for the State of Tabasco.

The issuance of the Environmental Liability Law constitutes Mexico’s compliance with two fundamental commitments that the country secured before the international community, derived from international law as well as from the Federal Constitution.

The first of these commitments was acquired by Mexico in 1992 through the ratification of the Declaration of the United Nation's Río de Janeiro Summit. The Declaration's 13th principle establishes that "states shall develop national legislation regarding liability and compensation in respect to victims of pollution and other environmental damages."

The second commitment derives from article 4 of the Mexican Constitution, as well as from the content of the Decree through which the constitutional article was amended in terms of including "the right to a healthy environment."¹ This Decree established that: "environmental damage and deterioration will generate liability for those who cause it in terms of the established in the law."

REGULATION

The Environmental Liability Law in general regulates the liability derived from environmental damage, as well as its reparation and compensation schemes. This is accomplished through a judicial process and alternative dispute resolution mechanisms dictating that the environmental liability procedure will stand independently of applicable administrative, civil, and criminal liabilities schemes currently in force in Mexico.

Likewise, the environmental liability regime recognizes that the damage caused to the environment is independent from the patrimonial damage suffered by the owners of natural elements and resources.

ENVIRONMENTAL DAMAGE

The Environmental Liability Law defines "environmental damage" as the "measurable adverse loss, deterioration, harm, affectation or modification of the chemical, physical and biological conditions of habitats, ecosystems, natural elements and resources as well as of their interaction relationships and the environmental services provided by the same."

¹ Published in the Official Gazette of the Federation on February 8, 2012.

The Law provides exceptions to the abovementioned concept, considering the "damage" as understood by the Law will not be verified provided that the corresponding environmental loss, deterioration, harm, affectation, or modification:

- Has been previously manifested and identified by the responsible party, as well as evaluated, mitigated, and compensated through conditions imposed and authorized by the Ministry of Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales* or "SEMARNAT") prior to their execution (this exception will not apply if the corresponding party does not comply with the mentioned conditions); or
- Does not exceed the limits established in applicable provisions.

JUDICIAL PROCEDURE

The essence of the Law are the specific substantive and judicial procedural elements established for civil claims on the matter of environmental liability.

Right and Legitimate Interest. The Law recognizes the right and legitimate interest to judicially claim environmental liability, damage reparation, and compensation, as well as the payment of the economic sanction to:

- Individuals inhabiting communities adjacent to the corresponding environmental damage;
- Nonprofit Mexican legal entities dedicated to environmental protection in general or to one of their elements in particular (provided they were constituted with a minimum of three years before filing the corresponding claim and that the claim is filed in representation of an inhabitant of the communities mentioned above);
- The Federation through the Federal Environmental Protection Agency (*Procuraduría Federal de Protección al Ambiente* or "PROFEPA"); and
- The Environmental Protection Agencies or analogous institutions in the corresponding state or the Federal District.

Jurisdiction and Courts. With respect to Mexico's judicial system, the Environmental Liability Law foresees the creation of district courts with specialized environmental

jurisdiction. These courts will be tasked with solving environmental liability-related controversies and shall be developed and functioning within a maximum period of two years once the Law enters into force.

General Comments on Specific Procedural Elements. In accordance with the Law, civil claims relating to environmental liability are subject to provisions established by the same and, in a supplementary manner, in the Federal Code of Civil Procedures. In this regard, the following relevant elements are established by the Environmental Liability Law.

Judges knowing of civil claims regarding environmental damage may order the PROFEPA to impose precautionary measures such as confiscation of documentation, books, and goods, as well as the seizure or sample taking of hazardous materials, substances, wastes, and natural elements related to the specific environmental damage. Likewise, the Law imposes an obligation on third parties that own or possess real estate in which environmental damage has been caused to allow the execution of the precautionary measures ordered by the corresponding court. In all cases, measures may be taken against the party originally responsible for the damages.

With respect to evidentiary elements, the Law foresees that the court may gather all evidentiary materials considered necessary in order to rule upon the corresponding environmental damage civil claim. Additionally, it establishes that the judge may require PROFEPA and SEMARNAT to provide all type of evidentiary materials such as expert studies, testimonies, and documents, as well as all types of evidentiary elements available through applicable techniques and science.

As for environmental liability judgments, the Environmental Liability Law requires that, in addition to the required elements established in the Federal Code of Civil Procedures, such judgments must contain (i) the environmental repair of the corresponding damage; or (ii) the environmental compensation of the corresponding damage through appropriate actions; (iii) the necessary measures and actions to execute in order to avoid an increase in the corresponding environmental damage; (iv) the amount of the applicable economic sanction, as well as the reasoning justifying that amount; (v) the sum to pay before the prevailing party; and

(vi) the deadline by which the responsible party's obligations must be complied with.

Once the mentioned sentence is notified to the involved parties, they will have 30 days to agree upon:

- The material environmental reparation procedures, terms, and levels proposed in order to comply with the imposed reparation obligation;
- The total or partial impossibility of materially repairing the corresponding environmental damage and, consequently, the procedure, location, and scope regarding the environmental compensation actions to be executed; and
- The deadlines proposed for compliance with the responsible party's obligations.

Once the abovementioned reparation proposals are received, the judge shall remit them to PROFEPA, which will formulate an opinion on the appropriateness of the proposals. If approved, the judge will then impose a reasonable deadline for the completion of the proposed reparation or compensation actions, and compliance will be sanctioned by PROFEPA. In accordance with the Law, all environmental liability-related judgments will be of public knowledge.

Statute of Limitation. The Law establishes a statute of limitations of a term of 12 years to file civil claims for environmental liabilities, counted from the day the environmental damage and its effects are produced.

Judicial Costs and Expenses. In accordance with the Environmental Liability Law, parties involved in environmental liability-related claims will not be obliged to pay judicial costs and expenses derived from procedural actions, except in certain cases, including expenses carried out by the original claimant in order to prove the corresponding environmental liability. Such costs shall be reimbursed to the parties once the judicial procedure terminates, only if the plaintiff's claims prevail.

LEGAL CONSEQUENCES

The Environmental Liability Law states that those individuals or legal entities responsible for causing environmental

damage are obliged to undertake the corresponding damage reparation or compensation actions (when damage reparation is not possible).

Under the Environmental Liability Law, the reparation of environmental damages is conceived as the restitution of habitats, ecosystems, elements, and natural resources to their original state through restoration, reestablishment, treatment, recovery, or remediation actions. The Law defines “compensation” as any investment or action performed by the responsible party in order to generate an environmental improvement equivalent to the adverse effects caused by the damage.

Additionally, when environmental damage is proved to be intentional, the Law provides that the responsible party may be subject to an economic fine ranging from:

- Three hundred to 50,000 days of general minimum wage in force in the Federal District² at the time the sanction is imposed, if the responsible party is an individual (approximately US\$1,554 to US\$259,000, at an average exchange rate of 12.50 pesos per dollar); or
- One thousand to 600,000 days of general minimum wage in force in the Federal District at the time the sanction is imposed, if the responsible party is a legal entity (approximately US\$5,180 to US\$3,108,480, at an average exchange rate of 12.50 pesos per dollar).

In accordance with the Law, these amounts may be reduced to a third if certain precedent situations may be proved. Such situations include the responsible party or its representatives (i) not having been previously sentenced for crimes against the environment; (ii) having developed prior to the environmental damage an internal control body dedicated to permanently verifying compliance of the responsible party’s environmental obligations; and (iii) owning a financial guarantee in the terms required by the Law, among others.

² Currently \$64.76 Mx. Cy. in accordance with the National Minimum Wage Commission.

ADR Provisions. As for alternative dispute resolution mechanisms, the Environmental Liability Law includes the possibility for involved parties to undergo mediation and conciliation procedures while the corresponding matters are pending resolution at the abovementioned federal courts. The use of these mechanisms is allowed under the Law provided that provisions contained in domestic environmental laws and international treaties ratified by Mexico will still be complied with. In this regard, if a conciliatory agreement is reached by the involved parties, the judge shall send a copy of the agreement to the Federal Environmental Protection Agency for comments before delivering the corresponding ruling.

Criminal Liability. Criminal matters under the Environmental Liability Law are referenced to the Federal Criminal Code and other environmental laws containing specific environmental crimes. Nevertheless, the Law establishes that any person who knows of a crime committed against the environment shall denounce it before the corresponding Federal Public Prosecutor Office. Likewise, it promotes cooperation between the PROFEPA and the General Attorney’s Office for the development of comprehensive public policies on the matter of prevention of environmental crimes.

The Environmental Liability Law shall enter into force after 30 calendar days following its publication in the Official Gazette of the Federation, on July 7, 2013.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

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