International Journal of Humanities and Social Science Invention (IJHSSI)
ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714
www.ijhssi.org ||Volume 10 Issue 1 Ser. I || January 2021 || PP 45-50

News of the Public Sector Contracts Act and the Environmental Assessment Act in the Authorization of the Mining Restoration Plan: Royal Decree 975/2009, Of June 12.

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ABSTRACT:. *The incorporation into Spanish law of Directive 2006/21/EC of 15 March is carried out, on a basic level, by Royal Decree 975/2009 of 12 June. The procedural processing of the authorization of the restoration plan is partially regulated, fixing some novelties. The adoption of new environmental impact assessment laws, with their subsequent revisions, and public sector contracts have had an impact on the mining restoration plan authorization procedure, introducing new requirements and features for mining promoters*.
KEYWORDS:. *authorization, restoration plan, environmental assessment, solvency, environmental impact statement, mining waste, administrative procedure, public participation, public information, electronic means*.

Date of Submission: 02-01-2021 Date of Acceptance: 15-01-2021

I. INTRODUCTION

1.- NEW REGULATORY REQUIREMENTS IN THE PROCEDURE FOR THE APPROVAL OF THE MINING RESTORATION PLAN

1.1. Procedural aspects of authorization

The procedure for the authorization of the restoration plan regulated in Royal Decree 975/2009 of 12 June is complementary to the environmental process for the granting of the authorization or open pit mining concession of mineral deposits and other geological resources of sections A, B), C) the use of which is regulated by the Mining Act 22/1973 of 21 July, and development regulations.

Where the implementation of the research project or the use of mineral resources requires an environmental impact assessment process, Law 21/2013 of 9 December on Basic Environmental Assessment (hereinafter LEA) transposing Directive 2011/92/EU of 13 December on the assessment of the impact of certain public and private projects on the environment is applicable to domestic law.

DR 975/2009 of 12 June incorporates, on a basic level, Directive 2006/21/EC of 15 March on the management of waste from extractive industries into Spanish domestic law, amending Directive 2004/35/EC, but with a broader content. It jointly regulates this Royal Decree, on the one hand, the rehabilitation of spaces affected by extractive activities, and, on the other hand, the management of mining waste. As regards the latter aspect, Law 22/2011 of 28 July on contaminated waste and soils is of additional application, since DR 975/2009 of 12 June does not meet all the requirements, nor all obligations, necessary for hazardous mining waste.

Our legal order is unanimous in terms of subjecting mineral resources to special legislation, given the general interest presiding over in the exercise of this particular economic activity. Administrative intervention in mines is intended, inter alia, for the protection of the public domain of geological resources, where the exception is made to the positive meaning of silence that Article 24.1 of Law 39/2015 of 1 October of the Common Administrative Procedure of Public Administrations (hereinafter LPACAP).

In the case of autonomous communities, it is for the autonomous communities to implement mine regulations, it is up to them to establish specific procedures within the framework of basic State legislation, legislative development and the implementation of the mining and energy legal regime.

1.2. Criteria in the restoration plan authorization application

LPACAP, which repealed Law 11/2007, 22 June, establishes as an obligation of legal persons, and therefore mining companies, which relate through electronic means to public administrations for the completion of any formality of an administrative procedure, and that the documents to which they are concerned are addressed to the bodies of public administrations may be presented in the electronic register of the administration or body to which they are addressed, as well as in the remaining electronic records. In addition, the regulation of the administrative file with its electronic format and the documents that must accompany it are incorporated.

In the field of representation, new means are included, by means of apud act of face-to-face or electronic proxy, or the accreditation of their registration in the electronic register of representatives of the public administration or competent body, with application since last October 2, 2020. In the case of electronic notifications, they are made at the electronic headquarters or at the single enabled e-mail address, as appropriate. In turn, it is possible to understand the notification both by the effective appearance of the interested party and, where appropriate, by the mere electronic availability of the communication, by transferring to the citizen the responsibility, almost exclusively, of the communicative process.

The LEA unifies terminology and establishes procedures for mining activities, such as strategic environmental environmental assessment assumptions in which the project is required to be assessed for affecting Spaces Red Natura 2000 as provided for in Law 42/2007, of December 13, on Natural Heritage and Biodiversity; or ordinary environmental impact assessment (the strategic environmental assessment of a plan or programme does not exclude environmental impact assessment from projects arising from it), for projects that may actually have significant impacts on the environment, as regulated in Title II, Chapter II, section 1a concerning "Annex 1 Group 2. Extractive industry", and projects subject to simplified environmental assessment, regulated in Title II, Chapter II, section 2a, referred to in "Annex 2 Group 3. Drilling, dredging and other mining and industrial installations."

In any event, the LPACPA shall apply, where appropriate, as provided for in this law. It should be noted that the LEA has been affected by the judgment of constitutional court 53/2017, of May 11, maintaining the common procedural scheme and nullising or reinterpreting some precepts of this environmental law. Recently Law 9/2018 of 5 December (hereinafter LEMA), transposing Directive 2014/52/EU of the European Parliament and of the Council of 16 April, amended several articles of the LEA.

1.3. Sufficient economic and financial and technical or professional capacity and solvency to ensure compliance with the restoration plan

Pursuant to the second paragraph of Article 4.1 of Royal Decree 975/2009 of 12 June, the applicant must prove to the competent authority that, in accordance with public sector contract law, he has sufficient economic and financial and technical or professional capacity and solvency to ensure compliance with the restoration plan.

These new criteria are consistent with the requirements governed since the adoption of Law 30/2007 of 30 October on Public Sector Contracts which included that the means of establishing economic, financial and technical or professional solvency were accredited by providing the documents determined by the contracting authority.

Subsequently, Royal Legislative Decree 3/2011 was published, November 14, which approves the consolidated text of the Law on Public Sector Contracts (hereinafter TRLCSP) which indicated as mandatory that only natural or legal persons, Spanish or foreign, with full capacity to act, could contract with the public sector and prove their economic, financial and technical or professional solvency or, where required by this Law, and are properly classified.

The minimum solvency requirements to be met by the employer and the documentation required to prove them are indicated in the contract notice and specified in the contract specifications.

The current Law 9/2017 of 8 November on Public Sector Contracts (transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, 26 February 2014), reiterates content equivalent to that regulated in TRLCSP, for the ability to contract with the public sector and the minimum solvency requirements, which continue to have their dual character in the technical and financial economic aspects, which to prove them will be indicated in the contract notice and specified in the contract specifications, and must be linked to their subject matter and proportionate to them.

1.4 Regulation of the public participation process

Article 6 of Royal Decree 975/2009 of 12 June issued under Article 149.1. 23a of the Constitution, concisely regulates public participation, which is integrated into the specific administrative procedure of the current Law on Mines and the Regulations that develop it, the provisions of Law 27/2006 of 18 July regulating the rights of access to information, public participation and access to justice in the field of the environment (hereinafter Law 27/2006 of 18 July), and the provisions of Articles 82 and 83 of the LPACAP.

Subsequently, Law 19/2013 of 9 December on transparency, access to public information and good governance, article 12 of which develops the right to public information, was adopted at the state level. This state law is of additional application of Law 27/2006, of July 18.

The first and second subparagraphs of Article 6 distinguish two situations, depending on the claim or non-environmental impact assessment. In the first one. This analysis states that, where an environmental impact assessment process is required for the authorisation of the research project or the use of geological-mining resources, in order to avoid duplication of processes and documents, the public information process shall also include public participation in relation to the authorisation of the restoration plan, provided that the matters determined in paragraph 3 of this Article are included.

In the ordinary environmental impact assessment procedure regulated in the LEA, all documentation submitted by the promoter relating to the project is subject to public information by the substantive body for a period of not less than thirty working days, upon announcement in the corresponding "Official Gazette" or official journal and at its electronic headquarters, and may be considered "environmental information" for the purposes of the application of Law 27/2006 of 18 July, in accordance with Article 2.3a therein.

The announcement of the initiation of public information shall include a summary of the procedure for the authorisation of the mining project, which shall contain minimal content, and the substantive body, or, where appropriate, the environmental body shall take the necessary measures to ensure that this documentation is broadcast to the public, using electronic means and other means of communication.

If the project has no significant effect on the environment, it is processed as a simplified environmental impact assessment, in which the environmental body will consult the public administrations concerned and the persons concerned, making available the environmental document of the project, which must be delivered within a maximum period of thirty days from receipt of the request for a report. In the event that the project has significant effects, it shall undergo an ordinary evaluation.

The LEMA has introduced in the environmental impact assessment procedures of projects, which must be published in advertisements on the edict board and, where appropriate, on the website of the town halls concerned. The preferential use of electronic means to ensure the effective participation of persons interested in environmental assessment processes is another novelty of this Law in order to expedite the processing of files.

Another aspect is that the rule leaves the discretion of the substantive body to determine which means of dissemination of information are "appropriate" (art. 9.3), without ensuring a total guarantee to achieve effective participation, as in practice it will be mediated by existing human and financial resources.

In the ordinary environmental impact assessment procedure, a change in relevance to the formulation of the environmental impact statement is the forecast contained in Article 38 which ensures better public participation to the extent that, if, as a result of the processing of public information and consultations with the affected administrations and interested persons, the promoter incorporating in the project or in the environmental impact study modifications involving significant environmental effects other than those originally envisaged, a new public information process and consultations should be carried out in two aspects, to the project and as regards environmental aspects, prior to the formulation of the environmental impact statement. In this case it is not indicated which body should check whether the above circumstances are present, which by analogy with the provisions of Article 40 LEA would be the environmental body.

Moreover, the LMEA maintains a special rule established in the LEA with respect to what is provided for in the LPACAP, for the specific assumption of a second phase of consultations arising from the modifications made by the promoter in stating that reports received outside the deadlines for the public information and consultation phases "will not be taken into account" (Art 38.3).

On the other hand, the LEA regulates the duty of confidentiality to be maintained by the Public Administrations in relation to the documentation provided by the promoter, which must be supplemented by the provisions of this law, "without prejudice to the provisions of Law 27/2006, of July 18".

Article 6.5 of Royal Decree 975/2009 is referred to the public concerned for access to environmental information, 12 June, to the provisions of Law 27/2006 of 18 July, which in this case affects its instrumental and preventive nature, merely setting the reporting principles on information and environmental participation, and minimum guarantees relating to the procedure for access to environmental information, which autonomous communities can implement.

Upon termination of the authorisation of the restoration plan, the competent authority shall inform the public concerned of the content and reasoning of the decision, "through the procedures deemed appropriate" by making a copy of it available to it, which is insufficiently guaranteed.

In relation to environmental information, if the public considers that an attributable act or omission of the competent authority has infringed rights, it may directly lodge a complaint with the Public Administration under whose authority it is active.

1.5 Coordination between the authorization of the restoration plan and environmental impact assessment.

The monitoring of the restoration plan by the environmental body is a novelty in state regulations. Thus, the mining authority may, in the light of the restoration plan submitted, authorise it, require extensions or make changes upon report by the environmental authority, in accordance with Article 5.1. In addition, Article 5.1 includes another novelty: the mandatory report of the competent health authority, where the implementation of the restoration plan "may pose a risk to human health". In this sense, it is up to the autonomous communities, the organization and management of public health surveillance.

With regard to the environmental report provided for in Article 5.1, following the approval of LCAPAP, the reports are issued by electronic means, reiterating the general forecast of Article 75, which also requires the telematic performance of the acts of instruction. In the event that such a mandatory report is not issued, the course of the maximum legal period for resolving the procedure may be suspended in the terms laid down in Article 22(1)(d), and if the report is not received within the prescribed period, the procedure shall continue.

With regard to the coordination between the procedure of the restoration plan, which is complementary to the environmental process for the granting of authorization or mining concession, the submission to environmental assessment has been the pillar in which environmental control of mining activities has been based, ending with the environmental impact statement.

It should be reiterated that the application of the LEA has varied with the publication of the judgment of the Constitutional Court 53/2017, 11 May, which declares the final provision eleventh in fine unconstitutional and void, although the first paragraph maintains the obligation on autonomous communities with their own environmental assessment legislation to adapt it to the provisions of this law within one year of its entry into force, at which point the articles of this law shall apply, except for non-basic ones.

The LEMA has modified the formalities of the ordinary environmental impact assessment indicated in the LEA, of its three phases: initiation, technical analysis and environmental impact statement, suppressing the reference at the beginning. Article 39, as amended, provides for the obligation of the substantive body to verify that the promoter has included all the specific paragraphs referred to in the environmental impact study and Article 41, relating to the environmental impact declaration, adapts the content and scope to that provided for in the Directive. In addition, the authorization of the project and advertising is amended, to include the obligation to establish a more reasonable period of time for the authorisation of the project, leaving its specific determination within the scope of the substantive body.

In the preparation of the document scope the application must be accompanied by the initial document of the project, with minimal content, and the promoter is obliged to include in the environmental impact study a description of the significant adverse effects on the environment as a result of the vulnerability of the project to the risk of serious accidents or relevant disasters, in relation to the mining project in question.

The law more fully regulates the technical analysis of the dossier. Thus, it distinguishes two phases, first, a formal analysis, aimed at verifying that the mandatory reports are on the record, that public information and consultations have been carried out in accordance with legal requirements.

Secondly, once the dossier is considered complete, a technical analysis will be carried out in itself, which will check whether the mandatory reports and specific sections of the environmental impact study are sufficient to have the necessary evidence to carry out the environmental impact assessment, and if not, the environmental body shall be directed to the substantive body for the complete of the reports, following the procedures already provided for in the LEA. The environmental impact statement to be prior to the resolution of the substantive body shall lay down the conditions under which it may be developed for the proper protection of the factors listed in Article 35(1)(c), during implementation and operation and, where appropriate, the cessation, dismantling or demolition of the project, as well as preventive, corrective and countervailing measures.

If the operating entity meets all the relevant requirements of Royal Decree 975/2009 of 12 June, according to the competent authority, the authorisation of the restoration plan shall be made in accordance with the granting of the investigative permit, authorisation or concession of exploitation, including the authorisation of the PGRM and, in particular, that of the start of activity or construction of the mining waste facilities, clearly indicating their category.

II. METHODOLOGY

The research has focused on primary, secondary and tertiary sources of legal information and information, original documents and other printed sources. Statements regarding the subject matter of the investigation have been analysed.

The deductive method, concerning basic science, and empirical, has been applied.

III. FINDINGS

The incorporation of Directive 2006/21/EC into Spanish domestic law has sought to unify and improve the mining provisions on the restoration of the natural area affected by mining activities, in force until then.

The application of Law 39/2015 of 1 October on the Common Administrative Procedure of Public Administrations in the mining authorisation or concession procedure has had an impact on the processing of files, thus requiring mining companies, as legal entities, to relate electronically to the administration, has implemented electronic administration and reduced time limits.

Where the implementation of the research project or the use of mineral resources requires an environmental impact assessment process, the provisions of Law 21/2013 of 9 December on Environmental Assessment, which has provided an impetus for simplification of the environmental assessment procedure, regulated exhaustively, facilitating greater legal certainty for mining developers, apply.

Law 9/2018 of 5 December amending it has introduced simplifications in the procedure, an impetus for the use of electronic means, although it allows the discretion of the substantive body to determine the appropriate means for the dissemination of information without ensuring that effective participation is achieved.

The application for authorization of the restoration plan requires Royal Decree 975/2009 of 12 June that the applicant must meet new requirements in accordance with public sector contract legislation, in relation to sufficient economic and financial and technical or professional capacity and solvency to ensure compliance with the restoration plan.

The regulation in Royal Decree 975/2009, 12 June of public participation, is scarce, and thus misses the opportunity to expand access to information, as well as establish guidelines that encourage the competent authority to inform the public concerned of the content and motivation of the authorisation. The consequence is a certain limitation of a right in relation to public participation. On the other hand, the duplication of processes and documents is avoided, when the realization of the research project or the use of mineral resources requires environmental impact assessment process.

IV. CONCLUSION

1.- Law 39/2015, of 1 October, of the Common Administrative Procedure of Public Administrations has had an impact of dynamization on the processing of mining files, as it obliges mining companies, as legal entities, to relate electronically to the administration, has implemented electronic administration, introduced a reduction in time limits and raises some objections such as burdens in electronic notifications.

2.- Law 9/2018 of 5 December amending the State environmental assessment law has introduced simplifications in the procedure, an impulse to use electronic means.

3.- The mining promoter must prove in accordance with public sector contract legislation, has sufficient economic and financial and technical or professional capacity and solvency to ensure compliance with the restoration plan which has led to an increase in the requirements to be met for the particular use of Section A resources).

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CARLOS RAMÍREZ SÁNCHEZ-MAROTO. "News of the Public Sector Contracts Act and the Environmental Assessment Act in the Authorization of the Mining Restoration Plan: Royal Decree 975/2009, Of June 12." *International Journal of Humanities and Social Science Invention (IJHSSI)*, vol. 10(01), 2021, pp 45-50. Journal DOI- 10.35629/7722