

## ENFORCEMENT IN CHILE: A NEW PLAYER IN THE FIELD

### I. INTRODUCTION.

On January 2010 the Chilean government enacted Law 20,417, which replaced the CONAMA (National Commission for the Environment) with the Ministry of the Environment, the Environmental Assessment Service and the Superintendence of the Environment, and introduced significant modifications to Law 19,300 on General Bases of the Environment, regarding environmental policy, impact assessment and enforcement.

The main purpose of the Superintendence is to implement, organize and coordinate the follow-up and control of Environmental Qualification Decisions (environmental permit known in Chile as *Resolución de Calificación Ambiental*, or 'RCA'), on measures contained in Prevention and/or Decontamination Plans, the contents of Environmental Quality Standards and Emission Standards and of Management Plans, where applicable, as well as all other environmental instruments established by law.

Even though most of the Superintendence's powers are suspended until the environmental courts start to operate it is relevant, at this point, to examine the modifications introduced to Chile's legal framework, as well as the implications that said modifications could have on the Environmental Impact Assessment System (EIAS).

### II. FOLLOW-UP AND ENFORCEMENT BEFORE ENACTMENT OF LAW 20,417.

Before enactment of Law 20,417, State agencies that had participated in the EIAS were responsible for permanently controlling compliance with regulations and conditions on which Environmental Impact Studies and Statements had been approved or accepted. In the event of non-compliance, said agencies could require the National (CONAMA) or Regional (COREMA) Commission for the Environment the application of a penalty. Complaints against the decision that applied a penalty could be filed before a civil court judge.

Following the enactment of Law 20,417 it became evident that the law had not considered a temporary solution for the period of time between enactment of Law 20,417, which terminated the former CONAMA and COREMAS' power to impose penalties, and full operation of the Superintendence. Consequently, there was no agency capable of applying a penalty in the event of non-compliance with conditions and regulations set forth in RCAs.

In order to remedy the situation, Law 20,473 was enacted, granting the Assessment Committee (*Comisión de Evaluación*) the power to apply penalties in the event of non-compliance with RCAs, until full entry into force of Law 20,417.

### III. MAIN MODIFICATIONS INTRODUCED BY LAW 20,417

The creation of the Superintendence does not merely imply the transference of the former CONAMA and COREMAS powers to a new State agency. As a matter of fact, Law 20,417 also introduces some very relevant modifications to Chile's legal framework regarding environmental impact assessment, both to the assessment process itself as well as regarding follow-up and enforcement of RCAs.

Even though these modifications should contribute to a more efficient environmental impact assessment, they will probably pose some interesting challenges to the Environmental Assessment Service (*Servicio de Evaluación Ambiental*, or SEA).

### III.A Control actions

The Superintendence shall be the only agency responsible for imposing penalties upon the non-fulfillment of the conditions, standards and measures set out in RCAs, as well as upon the execution of projects and activities for which an RCA is required by law, without having been granted said decision. However, control actions may be directly executed by the Superintendence itself, licensed technical entities or the competent sectoral agencies. They all shall conform to the general technical instructions given by the Superintendence on protocols, procedures and analytical methods.

This new model is expected to have a positive effect on compliance. On the one hand, because control actions will now be carried out not only by sectoral agencies, but also by the Superintendence itself and certified third parties, and so projects and activities should undergo control actions much more frequently. On the other hand, because control actions shall now conform to a single set of general technical instructions, which should facilitate both compliance with RCA provisions and also raise the standard of the administrative procedure in the event of non-compliance with said provisions.

### III.B Procedure

Prior to the enactment of Law 20,417, Law 19,300 considered no provisions whatsoever regarding the procedure to be followed by the CONAMA or COREMAs in order to apply a penalty, in the event of non-compliance with the regulations and conditions set forth in RCAs. Therefore, the supplementary procedure contained in Law 19,880, on Bases for Administrative Procedures, was applied.

Law 20,417, on the other hand, contains a very detailed description of the procedure to be followed by the Superintendence.

Briefly put, the administrative action may be filed *ex officio*, at the request of a sectoral agency or on the basis of an accusation. The administrative action shall be prosecuted by an official from the Superintendence, referred to as prosecutor, and initiated with a precise definition of charges.

Once the action has been initiated, the prosecutor may reasonably request the Superintendent to adopt any of the provisional measures set forth in the law, such as the sealing of devices or equipment or temporary closure, in order to prevent an imminent environmental damage or a damage to the community's health.

Upon receipt of the answer to the charges or the expiry of the term appointed to that effect, the prosecutor shall examine the merits of the case, decree that expert proceedings and inspections be executed and that any other means of proof are received. He may also request reports from environmental sectoral agencies.

Once these formalities have been concluded, the prosecutor shall issue a decision proposing an acquittal or else the penalty to be imposed. The Superintendent shall then

decide and issue a reasoned decision either acquitting the offender or imposing a penalty, as the case may be.

The decisions imposing a penalty may be appealed before the Superintendent. Additionally, the interested parties considering that decisions by the Superintendence are inconsistent with the law, regulations or other legal bodies may file a complaint before the environmental courts.

Given that the Superintendence still does not possess its full powers, there is no clarity on how the new process set forth in Law 20,417 will in fact operate. However, it is expected that the existence of a detailed, ordered procedure will reduce the arbitrariness inherent to the former procedure and that the possibility of filing a complaint before an environmental court, instead of an ordinary civil court, will contribute to more reasoned, technical decisions regarding environmental issues.

### III.C Penalties

Former section 64 of Law 19,300 stated that, in the event of non-compliance, the former CONAMA or COREMAs could issue a written admonition, apply a fine of up to 500 monthly tax units (approximately 40,000 USD) or revoke the relevant RCA, without prejudice to other relevant civil or criminal actions. However, Law 19,300 contained no provisions at all regarding the criteria that should be employed in order to apply a specific penalty.

Under Law 20,417, infringements are divided into most serious, serious and minor. Most serious infringements may lead to the revocation of the RCA, closure, or a fine of up to 10,000 annual tax units (approximately 9,800,000 USD). Serious infringements may lead to revocation of the RCA, closure, or a fine of up to 5,000 annual tax units (approximately 4,900,000 USD). Finally, minor infringements may lead to a written admonition or a fine of up to 1,000 annual tax units (approximately 980,000 USD).

Contraventions are labeled as most serious, serious or minor depending on the circumstances under which they have taken place, or the consequences derived from them. For example, they shall be labeled as most serious if they have caused an environmental damage beyond repair, but will be labeled as serious if said damage can be remedied. Contraventions that do not amount to most serious or serious infringements will be labeled as minor infringements.

Additionally, Law 20,417 includes a list of circumstances to be taken into consideration in order to determine the specific sanctions to be imposed in each case, such as, the extent of damages or danger caused, or the economic benefit obtained as a result of the infringement.

Law 20,417 provides the Superintendence with the possibility of applying much harsher penalties, but hopefully it will also contribute to reduce arbitrariness, by setting forth guidelines and criteria that the Superintendence must follow in order to apply a specific penalty. This, in turn, should reduce project owners' uncertainty regarding the penalties that could be applied to them.

### III.D Submission to the EIAS and division of projects

Prior to enactment of Law 20,417, no environmental agency had the power to request project or activity owners to enter the EIAS, or impose penalties upon the execution of projects and activities for which an RCA was required by law, when said decision had not been granted. Furthermore, it is not uncommon for project or activity owners to knowingly divide their projects or activities in order to alter the assessment instrument or elude its entry into the EIAS.

Now, Section 3 of Law 20,417 provides that the Superintendence shall have the following functions:

- To request - upon report from the SEA, by means of a grounded decision and under warning of a penalty – owners of a project or activity that must submit to the EIAS and hold no RCA, to submit the relevant Environmental Impact Study or Statement to the system.
- To request – also upon report by the SEA, by means of a grounded decision and under warning of a penalty – holders of RCAs to submit to the EIAS any amendments on their projects or activities that would require a new RCA.
- To require proposers, upon report by the SEA, to adequately enter the EIAS where they have divided their projects or activities in order to elude or knowingly circumvent the entry thereto.

It must be noted that in all three cases a report from the SEA will be required by the Superintendence in order to exercise its functions. This will imply not only an additional work load for the SEA, but also the challenge of determining on the basis of very limited information whether a project or activity must enter the EIAS by means of an Environmental Impact Assessment Study or a simple Statement.

Regarding division of projects, it is still unclear which service will in fact be responsible for determining if a project has been divided. On the one hand, Law 19,300 provides that the Superintendence shall be responsible for determining the existence of any infringement of the obligation not to divide projects or activities; however, a report from the SEA is required in order for the Superintendence to require proposers to adequately enter the EIAS. Whatever the solution is, it will certainly require the permanent cooperation of both agencies.

### III.E The Superintendence as a sectoral agency taking part in the environmental impact assessment procedure

Pursuant to section 9 of Law 19,300, “*The review process of Environmental Impact Statements and qualification of Environmental Impact Studies shall take into consideration the grounded opinion of environmental agencies on matters connected with the relevant project or activity*”.

Should the Superintendence be considered a State agency with environmental powers and, as such, participate in the environmental impact assessment procedure? Law 20,417 does not address the issue explicitly.

This question remains unanswered, and is currently being addressed both by the SEA and the Superintendence. On the one hand, it is possible to argue that the Superintendence's powers and attributions are instrumental, rather than substantial. On the other hand, it is

essential that the measurements, analyses and other information owners must provide according to the requirements established in the RCAs should be consistent with the methodology that will be employed by the Superintendence in order to carry out its control activities.

#### IV. CONCLUSION

This is only a sample of the many situations that the Chilean environmental impact assessment process will face as a consequence of the full entry into force of the Superintendence of the Environment.

In general, it is possible to foresee that the EIAS will benefit from these modifications, however, the concrete success of the reengineering of the Chilean legal framework regarding impact assessment will depend largely on how it is actually implemented.