

## Offsetting Predictions: Legal instruments in Chile

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### Abstract

One of the virtues of environmental impact assessment (EIA) is being a preventive tool. However, the predictive exercise this tool entails can undermine the ultimate goal of effective environmental protection, if there are not adequate instruments available set to take into consideration errors or changes that take place in reality.

Legal changes enacted in Chile in 2010 established two legal instruments with this objective:

- 1) The automatic expiration of environmental permits or licenses (known in Chile as 'resolución de calificación ambiental' or RCA) for projects that do not begin execution within five years of being issued (Article 25 ter of Law No. 19,300).
- 2) The power of authority to revise the content of the RCA when environmental conditions vary substantially (Article 25 quinquies of Law No. 19,300).

In the first case we are dealing with an instrument which ensures that the 'starting point' of the assessment (i.e. baseline) responds to reality. The second provides flexibility to the RCA, in the light of the 'ending point' of the environmental assessment, which is the effectiveness of the mitigation or compensation measures.

This paper aims to review both instruments and address the potential difficulties and limitations in their implementation. Energy-related projects recently submitted for environmental assessment provide a context for this discussion.

### 1. Introduction

Being an environmental protection tool, EIA's ultimate goal is to effectively protect the environment. Two of the objectives of 'good practice' EIA are to anticipate and avoid, minimize or offset the adverse significant effects of development proposals, and to protect the capacity of natural systems and the ecological processes to maintain their

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functions<sup>2</sup>. Based on scientific prediction, EIA provides the decision maker with information on the potential impacts of a project considering the implementation of particular measures. Thus, the decision of whether to authorize a development project on environmental grounds relies on a specific scenario.

That scenario, however, is not infallible. Indeed, 'there is now more recognition that effects information is often value-laden and uncertain, and that decision processes can be messy and unpredictable'<sup>3</sup>.

Evidence of the aforementioned is that one of the fundamental components of an EIA is the so called 'EIA follow up', which encompasses activities related to monitoring, compliance, enforcement, and environmental auditing<sup>4</sup>. Particularly relevant is the 'effects or impact monitoring', which measures the environmental changes that can be attributed to project construction and/or operation and check the effectiveness of mitigation and compensation measures<sup>5</sup>. In a sound EIA system, monitoring should provide information for optimizing environmental protection through adaptive management<sup>6</sup>.

In addition, there are objective circumstances which presuppose a change of environmental conditions and, therefore, should be considered when establishing a permit's validity over time.

## **2. Legal instruments to offset predictions: the Chilean case**

A rough examination of comparative law<sup>7</sup> shows two instruments that aim at guaranteeing that the basis for the environmental decision remains up to date:

- a) Expiration of the environmental permit or license due to the passage of time;
- b) Revision of the environmental permit or license due to the change of predicted circumstances.

The former case responds to a presumption, which is that the baseline changes with time. In its first variant, the environmental licence expires when an approved project does not

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<sup>2</sup> Slootweg, Roel et. al, *Biodiversity in Environmental Assessment*, Cambridge University Press, 2010, p. 129.

<sup>3</sup> Ibid. p. 151.

<sup>4</sup> Ibid., p. 132.

<sup>5</sup> Ibid., p. 195.

<sup>6</sup> Ibid., p. 198.

<sup>7</sup> Argentina, Belgium, Bolivia, Perú, Spain, Uruguay.

initiate execution within a date<sup>8</sup>. In its second version, the permit is issued for a certain period, obliging the proponent to renew it<sup>9</sup>.

In turn, the possibility to revise the environmental permit's content is based on the fact that environmental variables can behave in a way that was not predicted, either because the evaluation was flawed or because measures are not being effective to reduce or compensate the impacts<sup>10</sup>.

Law No. 20,417, enacted in Chile in early 2010<sup>11</sup>, introduced both instruments to EIA. Expiration of the environmental permit, however, is limited to non-executed proposals.

### ***Expiration of the RCA***

Article 25 ter of Law No. 19,300<sup>12</sup> establishes that the environmental permit (known in Chile as 'resolución de calificación ambiental' or RCA) shall expire if the project in question has not begun execution within five years. An administrative regulation shall specify which work, procedure or infrastructure, according to the type of project, will be considered the milestone for the beginning of execution. Such regulation has not been issued yet.

The history of the law reflects the reasoning behind this provision. According to the Minister of the Environment, the RCA is issued under certain environmental conditions, which can be rapidly affected by significant changes due to ecosystems' dynamics, as well as human intervention<sup>13</sup>. Expiration acts like a sanction to negligent investors<sup>14</sup>.

### ***Revision of the RCA***

Article 25 quinquies of Law No. 19,300<sup>15</sup> recognizes the power to revise the RCA exceptionally when environmental variables significantly change in relation to predictions

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<sup>8</sup> E.g. Perú (Decree 19/09); Belgium; Mexico.

<sup>9</sup> E.g. Argentina (Law No. 11,459, Buenos Aires Province; Law No. 24,585; Decree No. 1,352/02); Perú (Decree No. 19/09); Uruguay (Law No. 18,719); Belgium; Spain (Decree No. 8/08, Castilla y León).

<sup>10</sup> E.g. Bolivia (Decree No. 24,782);

<sup>11</sup> Publication in the Official Bulletin on January 26<sup>th</sup> 2010.

<sup>12</sup> "Artículo 25 ter.- La resolución que califique favorablemente un proyecto o actividad caducará cuando hubieren transcurrido más de cinco años sin que se haya iniciado la ejecución del proyecto o actividad autorizada, contado desde su notificación.

*El Reglamento deberá precisar las gestiones, actos o faenas mínimas que, según el tipo de proyecto o actividad, permitirán constatar el inicio de la ejecución del mismo."*

<sup>13</sup> History of the Law No. 20,417, p. 1,564.

<sup>14</sup> History of the Law No. 20,417, p. 1,565.

<sup>15</sup> "Artículo 25 quinquies.- La Resolución de Calificación Ambiental podrá ser revisada, excepcionalmente, de oficio o a petición del titular o del directamente afectado, cuando ejecutándose el proyecto, las variables evaluadas y contempladas en el plan de seguimiento sobre las cuales fueron establecidas las condiciones o medidas, hayan variado sustantivamente en relación a lo proyectado o no se hayan verificado, todo ello con el objeto de adoptar las medidas necesarias para corregir dichas situaciones.

or do not take place, in order to adopt the necessary measures to correct those circumstances. Revision of the RCA, either promoted ex officio or at the request of an interested party (i.e. proponent or person directly affected), requires an administrative procedure, which guarantees 'due process' (i.e. proponent hearing, public hearing, and the request for technical opinion). As registered in the history of the law, this provision aims at bringing the RCA up to date to avoid environmental damage<sup>16</sup>.

### 3. Implementation challenges

Both instruments pose interesting questions that need to be addressed before implementation.

#### ***Expiration of the RCA***

Is five years a reasonable period for the RCA to expire? The answer, of course, will depend on who formulates the question. Considering the purpose of the provision, it could be argued that it is excessive. Not only is it highly probable that environmental conditions will vary in a five year period, but comparative law is much less generous, with no more than a three year window to begin execution<sup>17</sup>. From the viewpoint of the proponent, this is an adequate time frame to obtain all the necessary permits to initiate his development project. This was precisely the argument which permeated the discussion in Congress and promoted the change of the original bill, which required a three year period for the RCA to expire. In this regard, it is interesting to note that approximately seven per cent of energy-related projects assessed in the past ten years would have had their environmental permit removed under current legislation.

Whereas the former question is theoretical, from a practical point of view it is more important to ask ourselves what does it mean for a project to 'initiate execution'. Again, the history of the law provides some insight on this matter, by clarifying that the concept is not related to operation, but rather to construction<sup>18</sup>.

According to the law, an administrative regulation shall set the milestone to interrupt the RCA's expiration and it shall do so 'according to the type of project'. Considering that

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*Con tal finalidad se deberá instruir un procedimiento administrativo, que se inicie con la notificación al administrativo, que se inicie con la notificación al titular de la concurrencia de los requisitos y considere la audiencia del interesado, la solicitud de informe a los organismos sectoriales que participaron de la evaluación y la información pública del proceso, de conformidad a lo señalado en la ley N° 19.880.*

*El acto administrativo que realice la revisión podrá ser reclamado de conformidad a lo señalado en el artículo 20."*

<sup>16</sup> History of the Law No. 20,417, p. 1,568.

<sup>17</sup> Mexico, one year; Belgium, one year; Perú, three years.

<sup>18</sup> History of the Law No. 20,417, p. 224: 'no se trata que entre en operaciones, sino de que ejecute las primeras obras'.

Chilean EIA is based upon a rigid list of project types<sup>19</sup>, one could in theory expect for the regulatory body to identify the precise work, procedure or infrastructure which shall mark the beginning of execution for each type of project. Upon closer examination, however, such a task does not seem easy. Whereas the type of project 'transmission lines'<sup>20</sup> is relatively straightforward, the concept of 'power plants'<sup>21</sup> encompasses a diverse array of projects, from coal-fired to hydroelectric power stations and even wind farms. Furthermore, the examination of energy-related projects shows that there are several works and infrastructures described under the construction stage, many of which take place simultaneously. In this context, it seems advisable for regulation to take a flexible approach on the matter.

### ***Revision of the RCA***

In order to revise the environmental permit of a project, legislation requires that environmental variables, which were assessed and are contemplated in the monitoring plan, have significantly change in relation to predictions, or do not take place. The strict wording of the article vis-a-vis the flexibility principle behind it poses several questions. In a legal context where only Environmental Assessment Studies require a proper assessment and a monitoring plan, it is relevant to determine whether the RCA of Environmental Assessment Declarations can be subject to revision. In addition, it is not clear whether a new impact, which was not foreseen and thus not included in the monitoring plan, can trigger an RCA's revision. This is particularly important where there is no abundant environmental regulation.

## **4. Conclusions**

It is essential to contemplate instruments to correct and adapt environmental permits to reality. This not only responds to the EIA's ultimate purpose –environmental protection–, but also to the idea that the decision (i.e. the environmental permit) is adopted on a specific basis. Both articles 25 ter and 25 quinquies of the Law No. 19,300 introduce valuable instruments in this direction. Administrative regulation, however, should to take them a step further, in order to guarantee the necessary flexibility to avoid or confront problems not identified in the assessment stage.

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<sup>19</sup> Article 10 of Law No. 19,300 lists the type of projects that require EIA.

<sup>20</sup> Article 10 b).

<sup>21</sup> Article 10 c).