

**FURTHER SUBSTANTIAL MATERIAL ON COMMUNICATION****ACCC/C/2014/122**

1 December 2017

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**1. Introduction**

The **subject matter of the referenced communication** is how the First Transitional Provision of the Spanish Law 5/2013 of 11<sup>th</sup> June, amending Law 16/2002 on the Integrated Prevention and Pollution Control (IPPC) contravenes Article 6 (10) of the Aarhus Convention which requires public participation in accordance with paragraphs 2 to 9 of that article when a public authority reconsiders or updates the operating conditions for an activity.

The **objective of this further substantial material** is to illustrate with some examples of cases of environmental permit<sup>1</sup> updates undertaken in Spain according to that First Transitional Provision in which public participation was omitted as well as to show that given the updated conditions, public participation was fundamental and therefore *appropriate* in the language of Article 6(10) of the Aarhus Convention.

Before providing the substantial material, it is important to highlight that as the Spanish Law 16/2002 on IPPC was subject to a series of amendments in the course of

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<sup>1</sup> The so-called IPPC or environmental permit is known in Spain as integrated environmental authorization. In this submission, the used expression is “environmental permit”.

the years its text has been consolidated and harmonized through Royal Legislative Decree 1/2016 of 16 December approving the consolidated text of Law on IPPC<sup>2</sup>. This Royal Legislative Decree entered into force on 1.01.2017 and repealed Law 16/2002. In spite of this consolidation, the First Transitional Provision remains the same.

## 2. Examples of cases

We have selected three cases of updates of environmental permits.

1. Update of an environmental permit granted to a facility for the production of chlorine in the Autonomous Community of Galicia.
2. Update of an environmental permit granted to large combustion plant which produces energy based on coal in the Autonomous Community of Principado de Asturias.
3. Update of an environmental permit granted to the facility for the production of cement in the Autonomous Community of Valencia.

It is important to highlight that under the 1978 Spanish Constitution, Autonomous Communities (regions) hold a series of powers or competences in the field of environmental protection. One of those is the power to grant environmental permits.

### 3.1. Case 1: Chlorine production updated permit

On 17.12.2013 the Secretary General on Environmental Quality and Assessment of the Autonomous Community of Galicia updated the environmental permit granted to a facility to produce chlorine and derivatives in Pontevedra<sup>3</sup> (activity listed in Annex I.-4 (a)). The first environmental permit was granted to this facility in 2008, it was renewed in 2011. This facility uses mercury cells to produce chlorine. This technique has to be totally withdrawn by 11 December 2017 in accordance with the provisions of the Industrial Emissions Directive and of an EU Regulation on Mercury. It is important to highlight that this facility is located in a public domain land (maritime public domain) and operates under an administrative concession whose validity ends in July 2018.

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<sup>2</sup> Spanish Official Journal (BOE) num. 316, of 31.12.2016.

<sup>3</sup> Resolución de 17/12/2013, de la Secretaría General de Calidad y Evaluación Ambiental, por la que se actualiza autorización ambiental integrada otorgada a Electroquímica del Noroeste S.A.U para la planta química de producción de cloro-álcali y derivados situada en Lourizán, en el término municipal de Pontevedra, con nº de registro 2005/0101\_NAA/IPPC\_150. This update is available at: [https://www.xunta.gal/dog/Publicados/2013/20131231/AnuncioCA02-201213-0002\\_es.html](https://www.xunta.gal/dog/Publicados/2013/20131231/AnuncioCA02-201213-0002_es.html)

The update was intended to comply with 1st Transitional Provision of the Spanish IPPC Law. However, the update modified other conditions of the environmental permit:

- a) It withdrew from the renewed permit the condition which established 6 January 2011 as the end of the validity of the permit itself.
- b) It established 31 December 2016 as the date to initiate the procedure to close and dismantle the facility and the calendar that said procedure should follow.
- c) It added an annex to the renewed permit including conditions related to: accidents and incidents, non-compliance with the conditions in the environmental permit, the implementation of the waste hierarchy, conditions on the operation in the event of anomalous functioning conditions and conditions for the closure of the activity.

According to paragraph 2, part (d) of 1st Transitional Provision of the Spanish IPPC Law, the updated permit must include prescriptions on the report set out in Article 12(1),(f) of said Law. As stated in IIDMA's initial communication, this article requires a baseline report on the state of soil and groundwater to be carried out before starting an activity or before the update of the permit when an activity implies the use, production and emission of hazardous substances, taking into consideration the possibility of groundwater and soil pollution in the site of the facility. The objective is to determine the state of soil and groundwater to make a quantified comparison with the state upon definite cessation of activities in order to set conditions and obligations on the closure. A "baseline report" is defined as information on the state of soil and groundwater contamination by relevant hazardous substances (article 3(19) of the Industrial Emissions Directive).

The operator had to submit the baseline report. The baseline report showed: a presence of mercury (Hg) and of Hydrocarbons **above the reference levels** in groundwaters and soil. Hg is a persistent, bioaccumulative and toxic substance and recognized as a substance producing significant adverse neurological and other health effects. There are particular concerns expressed about its harmful effects on unborn children and infants.

In spite of the contamination identified in the soil and groundwater the clause establishing conditions for the closure of the activity introduced in the environmental permit as a result of the update is very broad and general, a copy and paste of the conditions included in other updated permits. It does not include any specific requirement despite the identified contamination. In addition, the update did not establish any condition related to the monitoring of the soil.

Given the dimension of the identified pollution, a public participation procedure in the update would have contributed to ensure that the concerned public had access to relevant information as to the inclusion of stricter conditions in the updated permit.

### 3.2. Case 2: Large combustion plant updated permit

On 16 July 2015, the Regional Ministry of Development, Land Planning and Environment of the Principality of Asturias granted the updated environmental permit to the combustion installation of Soto de Ribera, located in the Autonomous Community of Asturias<sup>4</sup>.

This installation falls under the activities listed in Annex I, part 1 of the Aarhus Convention and Annex I, part 1(1)(a) of the Spanish IPPC Law as it is “a combustion installation with a heat input of 50 MW or more”.

According to paragraph 2, part (e) of 1st Transitional Provision of the Spanish IPPC Law, the updated permit must include the measures which will be applied in the event of anomalous functioning conditions. However, despite this clear indication, point 9 of the Resolution which updates the permit of Soto de Ribera provides that “the operator of the installation should take into account that it should dispose of a specific plan containing actions and measures to give response to anomalous functioning conditions which could affect the environment”. This phrasing casts certain doubt as to if, under said updated permit, the operator had the obligation to have that plan elaborated by the time it was granted.

Bearing in mind that this plan intends to address the measures that shall be undertaken by the operator in order to avoid or minimize the damage caused to both the environment and the health of people in the case of anomalous functioning of the plant, it would have been essential to carry out a public participation procedure, ensuring that the public concerned had access to this relevant piece of information to the decision-making and guaranteeing there was, in fact, a plan in place before the updated permit was granted.

As noted in case 1, according to paragraph 2, part (d) of 1st Transitional Provision of the Spanish IPPC Law, the updated permit must include prescriptions on the report set out in Article 12(1),(f) of said Law. According to Annex IV, section II.I, point 2 of the updated permit of Soto de Ribera, the analysis of the subsoil shows a presence of total petroleum hydrocarbons (TPH) in certain points in the soil above 50 mg/kg, the maximum threshold allowed by the Spanish legislation on soil<sup>5</sup>. Therefore, according to Annex IV of said instrument, it is necessary to carry out an evaluation of environmental risks to determine if the risk is admissible or not to human health.

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<sup>4</sup> The Resolution which modified and updated the permit of Soto de Ribera coal power plant was published in the Official Journal of the Principality of Asturias on 8 August 2015. (BOPA N. 184, of 08.08.2015).

<sup>5</sup> Royal Decree 9/2005, of 14 January, which establishes the relation between potential soil polluting activities and the criteria and standards for the declaration of soils as polluted, (BOE N. 15, of 18.01.2015).

Given that there is a potential risk to human health due to the pollution in the soil surrounding Soto, it would have been essential that the public concerned had been informed and had had access to this documentation before the update of the permit was granted.

### 3.3. Case 3: Cement production updated permit

On 16.12.2013, the Directorate General for Environmental Quality of the Autonomous Community of Valencia updated the environmental permit granted to the cement production installation operated by Cemex España Operaciones, S.L.U.<sup>6</sup>

This industrial activity falls under Annex I of the Aarhus Convention, Section 3 as “Mineral Industry” meaning “Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day”, and Section 5 point 1 and 2 regarding “Waste management”. This classification falls under Section 3.1. a) ii), and Section 5.2, a) and b) of Annex I of the Spanish IPPC Law.

Among the different prescriptions contained in the 1st Transitional Provision of IPPC Law 16/2002, section 2 (g) requires waste incineration and co-incineration plants to update their permit conditions in relation to the Emission Limit Values (ELVs). The update of ELVs must be in accordance with those specifically established for this type of plants in Annex 2, Part 4 of the Industrial Emissions Directive (Annex 2, Part 2 of the IPPC Law).

It is important to take into account that the update of the referred ELVs was not included in the 2013 initial update procedure, which lead, on 10.11.2014, to a subsequent amendment of the resolution updating the permit<sup>7</sup>. The deadline established under the 1st Transitional Provision for adapting environmental permits to the Industrial Emissions Directive requirements was January 7th 2014. However, the ELVs of this plant were updated 10 months after required, resulting in the release of higher ELVs of polluting substances into the atmosphere.

In particular this is the case of nitrogen oxides (NO<sub>x</sub>) emissions. While the plant was initially authorized to emit 800 mg/Nm<sup>3</sup>, the ELV set out for NO<sub>x</sub> under the Industrial Emissions Directive was 500 mg/Nm<sup>3</sup>. This exceedance of NO<sub>x</sub> emissions during that 10 month period was likely to entail negative effects on the environment and health of

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<sup>6</sup> Resolution of 16 December 2013 of the Directorate General for Environmental Quality, updating the environmental permit granted to the company Cemex España Operaciones, S.L.U., for its installations for cement production located at the Valencia-Madrid highway, Km 307, on the municipality of Buñol (Valencia) with NIMA 4600008098 and registration number at the Register of Facilities of the Valencian Community 049/AAI/CV.

<sup>7</sup> Resolution of 10 November 2014 of the Directorate General for Environmental Quality, amending the update of the environmental permit granted to the company Cemex España Operaciones, S.L.U., for its installations for cement production located at the Valencia-Madrid highway, Km 307, on the municipality of Buñol (Valencia) with NIMA 4600008098 and registration number at the Register of Facilities of the Valencian Community 049/AAI/CV.

the population living near the installation. The municipality of Buñol is located at less than 2 km from the cement installation. Given the implications of this updated condition, a public participation procedure would have contributed to avoid such omission in the initial update of the ELVs, and ensure that the plant's emissions were in line with the ones legally established.

In addition, the resolution granted on 10.11.2014, aimed to update the ELVs, reveals that the operator was granted with the temporary derogation regulated in article 15 (5) of the Industrial Emissions Directive (article 7.6 of IPPC Law). This derogation was granted for the maximum period allowed under the IED: 9 months, for the testing and use of new emerging techniques in the plant, in particular, the so-called Selective Non Catalytic Reduction (SNCR), which is considered as an emerging technique under the 2010 BAT Reference Document for Cement Industries<sup>8</sup>.

Under that derogation, this plant has been exempted to comply with the ELVs legally set out for NO<sub>x</sub> for the period between November 2014 to August 2015, resulting in the emission of higher pollutants into the atmosphere than those legally permitted. NO<sub>x</sub> is a pollutant likely to cause adverse impacts on the environment, and especially on health. It mainly impacts on respiratory conditions causing inflammation of the airways at high levels. Long term exposure can decrease lung function, increase the risk of respiratory conditions and increases the response to allergens.

Given the dimension of such higher polluting emissions originating from a plant which operates at less than 2 km from population areas, it is obvious that a public participation procedure in the update procedure of the permit would have contributed to have further information on the derogation request procedure, and evaluate the conditions under which this derogation was being granted such as the period of its duration.

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<sup>8</sup> Emerging techniques are defined under article 3 (14) of the Industrial Emissions Directive as: "a novel technique for an industrial activity that, if commercially developed, could provide either a higher general level of protection of the environment or at least the same level of protection of the environment and higher cost savings than existing best available techniques".