

client alert

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PUBLICATION OF THE ORDER ON ENVIRONMENTAL AUTHORISATION

Order no. 2017-80 of 26 January 2017 on the environmental authorisation and its two by-laws (decree no. 2017-81 and no. 2017-82 of 26 January 2017) were published in the Official Journal of 27 January 2017.

After a trial period, deemed satisfactory, for the project certificate, the single authorisation for facilities, structures, works and activities (collectively known as "IOTA" in French) governed by water legislation, and the single authorisation for facilities classified for environmental protection ("ICPE" in French), the French Ministry of the Environment decided to continue these measures by establishing a single environmental authorisation that integrates the project certificate.

This authorisation is governed by the new articles L. 181-1 to L. 181-31 of the "Code de l'environnement" (French Environmental Code), and concerns all IOTA and ICPE that are subject to authorisation, as well as projects subject to environmental impact studies but that are not governed by an authorisation regime that sets avoidance, reduction and compensation measures as to a project's negative impacts.

The environmental authorisation replaces a dozen decisions governed by the "Code de l'environnement" (French Environmental Code), the "Code forestier" (French Forestry Code) and the "Code de l'énergie" (French Energy Code), which are now merged under a single authorisation and instructed by a single administrative department.

The environmental authorisation is, on the one hand, an authorisation to operate under the law on water or the law on classified facilities and, on the other hand (and where applicable), an authorisation to land clearing, an exemption to fauna and flora protection measures, an unopposed agreement to Natura 2000, an authorisation to the use of GMOs or waste processing, an authorisation to operate an electricity generation plant, etc.

Conversely, the environmental authorisation does not equate to a building permit. Only land-based windfarms enjoy a more relaxed regime, with the environmental authorisation delivering a building permit (article R. 425-29-2 of the "Code de l'urbanisme", French Planning Code).

The new measures apply to authorisation applications filed from **1 March 2017**. Applications filed prior to this date shall be instructed according to the earlier provisions in force. Additionally, up until 30 June 2017, project owners can choose to have their authorisation application instructed according to the earlier provisions.

You will find below a quick overview of the new measures.

COMPILING THE APPLICATION REQUEST AND INSTRUCTION

The project certificate, which had been trialled, is maintained. The certificate indicates all regimes, decisions and procedures applicable to the project—yet without "crystallising" the applicable law—and includes a reminder of applicable regulatory deadlines or an instruction timeframe that is specific to the project. Where inaccuracy or ignorance of information on the certificate has caused injury to its beneficiary, the administration may be held liable. However, such information is not opposable in the event of an appeal against the authorisation (article L. 181-6 of the French Environmental Code).

The project certificate includes information as to what supporting documents must be provided to prove technical and financial capacities. From now on, applicants must describe either the capacities they can already draw on, or the steps they intend to take to ensure these capacities are reached, if they do not already exist. In this case, the operator shall prove the constitution of technical and financial capacities at the latest when the facility is commissioned (articles L. 181-27 and D. 181-15-2-3°).

A new environmental assessment is set up and is compulsory for all projects not requiring an impact study. Such assessment includes in particular avoidance, reduction and compensation actions as to a project's negative impacts on the environment (articles R. 181-13 and R. 181-14).

Instructing the authorisation follows a three-stage process, with an audit stage, a single public inquiry stage, and a decision stage (articles L. 181-9 and L. 181-10).

During the audit stage, a single consultation procedure is conducted that replaces the various consultations required by the various legislations applicable previously (articles R. 181-16 *et seq.*). The authorisation application may be rejected from the audit stage if it becomes apparent that the project is unlikely to respect applicable rules (articles L. 181-3 and R. 181-34).

Instruction lead times are reduced to a minimum of nine months¹, down from an average of fifteen months previously. These lead times can nevertheless be extended depending on the particular circumstances of each case (articles R. 181-17 *et seq.*).

IMPLEMENTATION OF THE ENVIRONMENTAL AUTHORISATION

A project implemented in several phases, be they simultaneous or successive, may need separate environmental authorisations so long as the project's separation into phases did not remove the project from the environmental authorisation regime, and that it is can be justified as regards environmental issues (article L. 181-7 of the French Environmental Code).

The *Préfet* retains his or her ability to request additional measures during the project's operation, as well as mechanisms to monitor authorisation beneficiary changes (in principle subject to declaration, except for facilities that are the subject of financial guarantees) and to monitor significant changes to the facilities in question (articles L. 181-14 and L. 181-15).

¹ 4 months for the audit stage + 2 months for the public inquiry stage (30 days of public inquiry + 30 days to file the inquiry commissioner's report) + 2 or 3 months for the decision stage (if the opinion of the CDNPS (nature and landscapes protection commission) or CODERST (local council for health and technological risks and the environment) is requested).

DISPUTE REGIME GOVERNING THE ENVIRONMENTAL AUTHORISATION

The environmental authorisation, similarly to other decisions made by the *Préfet* on the same topic (application rejection, third-party reviews, authorisation following substantial modification, authorisation for operator change, for authorisation extension or renewal etc.), are governed by a full jurisdiction appeal (article L. 181-17 of the French Environment Code).

The appeal period for third parties is brought down to four months, both for the environmental authorisation (article R. 181-50) and for other decisions taken as regards ICPE and IOTA (article R. 514-3-1).

For environmental authorisations only, the time for objections may be extended by two months via an administrative appeal, itself brought in the two months from the authorisation's display at the town hall or its publication on the *préfecture's* website (article R. 181-50).

The judge has the power to partially invalidate an environmental authorisation and may stay the proceedings until the issue is resolved (article L. 181-18).

Lastly, a specific recourse known as a "*réclamation*" is made available to third parties from the date the authorised project is commissioned, and whose sole purpose is to question the inadequacy or unsuitability of the requirements defined in the environmental authorisation (article R. 181-52).

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