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French Administrative Supreme Court specifies the conditions for the regularization of environmental authorizations

In a ruling issued on March 1, 2023[1], the *Conseil d'Etat* (French Administrative Supreme Court) clarified the conditions under which the administrative judge exercises his/her power to stay proceedings for the purpose of correcting the defects of an environmental authorization.

In a prefectoral order dated July 29, 2019, the *préfet* (local representative of the Government)of the Deux-Sèvres department granted to the company Ferme éolienne de Saint-Maurice an environmental authorization for the implementation and operation of a wind park comprising 6 wind turbines on the territory of the Saint-Maurice-Etusson municipality.

Following an appeal lodged by a local resident, the Bordeaux Administrative Court of Appeals annulled in part the authorization insofar as it did not include the derogation from the prohibition on the destruction of non-domestic animal species and their habitats provided for under Article L. 411-2 of the French Environmental Code, suspended the enforcement of the order until the issuance of this derogation and ordered the stay of the proceedings in order to allow Ferme éolienne de Saint-Maurice to correct another defect relating to the deficiencies of the ecological part of the impact study on chiropterans.

Ferme éolienne de Saint-Maurice appealed against this decision before the *Conseil d'Etat*.

Stay of proceedings pending the regularization of the impact study

Article L. 181-18, I, 2° of the French Environmental Code provides that:

> *"The administrative judge who, asked to examine a request against an environmental authorization, considers, after having noted that the other legal arguments developed are groundless, even after the completion of the works: (…) that a defect resulting in the unlawfulness of this authorization is likely to be corrected, shall stay the proceedings, after having invited the parties to present their observations, until the expiry of the period of time that he/she fixes for this regularization to be achieved. If the judge is notified of a regularization measure within this period of time, he/she shall rule after having invited the parties to present their observations."*

According to a well-established case law, "*inaccuracies, omissions or deficiencies in an impact study are only likely to vitiate the procedure and, therefore, to result in the unlawfulness of the decision taken on the basis of this study if they could have had the effect of adversely affecting the provision of comprehensive information to the population or if they were such as to influence the decision of the administrative authority*"[2].

In its decision, the Bordeaux Administrative Court of Appeals had found that the impact study was deficient because it was based on a poor analysis of the number and species of chiropterans present on the site as no altitude audio recording had been performed.

In its ruling issued on March 1, 2023, the *Conseil d'Etat* criticized the Bordeaux Administrative Court of Appeals for not having first examined whether the deficiencies of the impact study had the effect of adversely affecting the provision of comprehensive information to the population or were such as to influence the decision of the administrative authority, and, therefore, to result in the unlawfulness of the environmental authorization.

The judge's own power

Pursuant to Article L. 411-1, I, 3° of the French Environmental Code:

> *"When a particular scientific interest, the essential role in the ecosystem or the needs for the preservation of the natural heritage justify the conservation of sites of geological interest, natural habitats, non-domesticated animal or non-cultivated plant species and their habitats, the following are prohibited: (…) The destruction, alteration or degradation of these natural habitats or species habitats*".

Article L. 411-2 of the same Code stipulates that the procedure intended to establish the list of species protected as a result of the above provision, the duration of the prohibitions, the part of the territory in which they apply and the issuance of derogations is to be determined in a Decree approved by the *Conseil d'Etat*.

Ferme éolienne de Saint-Maurice criticized the Bordeaux Administrative Court of Appeals for having annulled in part the environmental authorization because of the lack of derogation under Article L. 411-2 of the French

Environmental Code, even though it had requested that the possibility of regularization provided for under the aforementioned Article L. 181-18, I, 2° of the French Environmental Code be used.

The *Conseil d'Etat* specified that the possibility offered by this Article "***is a power that the judge may solely exercise, which is not subject to the submission of requests to this effect. When no such requests are made, the trial judge may still exercise this option, but he has no obligation to do so, as his/her choice is a matter of discretion that is beyond the control of the judge of the Conseil d'Etat. On the other hand, when he/she is asked to examine a request to this effect, the judge has the obligation to implement the powers vested to him/her under Article L. 181-18, paragraph 2 of the French Environmental Code if the defects he/she has identified appear, in the light of the investigation, likely to be corrected. In this case, he/she cannot substitute the partial annulment provided for under 1° of I of the same Article for the measure requested.***"

In the case at hand, Ferme éolienne de Saint-Maurice had asked the Bordeaux Administrative Court of Appeals to stay the proceedings pursuant to this Article in order to allow it to apply for the derogation provided for under Article L. 411-2 of the French Environmental Code.

Consequently, the *Conseil d'Etat* ruled that "***by having annulled in part the authorization because it did not include the derogation provided for under Article L. 411-2 of the [French] environmental code, whereas it noted, by suspending the authorization until the issuance of the derogation in question, that such a defect was likely to be corrected, the administrative court vitiated its decision with an error of law***".

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[1] Available here: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2023-03-01/458933 (in French only)

[2] *Conseil d'Etat*, October 14, 2011, No. 323257, Ocreal