

French Administrative Supreme Court cancels the operating license for the Gardanne biomass plant

In a ruling handed down on March 27, 2023[1], the *Conseil d'Etat* (French Administrative Supreme Court) upheld the cancellation of the operating license for the Gardanne biomass plant located in the municipalities of Meyreuil and Gardanne, in the Bouches-du-Rhône region, which had been ordered by the Marseille Administrative Court on June 8, 2017.

The *Conseil d'Etat* based its decision on the fact that the impact study had failed to analyze the environmental effects of the plant's wood supply process.

As part of the renewable energy development policy initiated by the programming law on the implementation of the Grenelle Environment Forum of August 3, 2009, several calls for tenders were launched by the French Energy Regulatory Commission.

The project supported by the company GazelEnergie (formerly Uniper, formerly E.ON, hereinafter the "Company") to convert unit 4 of the Gardanne power plant, which was coal-fired until 2013, into a biomass unit[2] was selected in one of these calls for tenders. It included a plan for the supply of fuels to be used for the biomass unit. According to this plan, local wood resources were to represent 25% of the energy entering the plant.

By a prefectoral order dated November 29, 2012, the *préfet* (local representative of the Government) of the Bouches-du-Rhône department authorized GazelEnergie, under the legislation governing classified facilities, to operate a biomass plant and ancillary facilities at the Provence power station located in the Meyreuil and Gardanne municipalities.

Associations, trade-unions and public entities asked the Marseille Administrative Court to cancel this

authorization.

In a judgment issued on June 8, 2017, the Marseille Administrative Court granted their request on the ground that the impact study was not commensurate with the size and nature of the project. However, in a decision handed down on December 24, 2020, the Marseille Administrative Court of Appeals ruled the opposite.

The decision of the Marseille Administrative Court of Appeals was challenged before the *Conseil d'Etat*.

A deficient impact assessment, including with respect to wood supply

Article L. 122-1 of the French Environmental Code, as applicable at the material time, provides that:

« I. - public and private works, construction and development projects that, by their nature, scope or location, are likely to have a significant impact on the environment or human health shall be preceded by an impact assessment. (...).

II. - When these projects contribute to the implementation of the same works, development or construction program and when these projects are carried out simultaneously, the impact study must cover the entire program. When the implementation of these projects is carried out in successive steps over time, the impact study for each project must include an assessment of the impacts of the entire program. When the works are carried out by different project owners, they may ask the State administrative authority responsible for environmental matters to specify the other projects in the program, in accordance with the provisions set forth in Article L. 122-1-2. A works, development or construction program is made up of projects for works, construction and developments carried out by one or more project owners and constituting a functional unit. (...)"..

And Article R. 512-8 of the French Environmental Code, as applicable at the material time, stipulates that:

« I.- The content of the impact study (...) must be commensurate with the size of the planned facility and its foreseeable impact on the environment (...).

II.- It must successively present:

1° An analysis of the initial condition of the site and its environment, focusing in particular on the natural resources and natural agricultural, forestry, maritime or recreational areas, as well as on the physical property and cultural heritage likely to be affected by the project;

2° An analysis of the direct and indirect, temporary and permanent, effects of the facility on the environment and, in particular, on sites and landscapes, fauna and flora, natural environments and biological balances, on the inconveniences for the neighborhood (noise, vibrations, odors, light emissions) or on agriculture, hygiene, health, public health and safety, on

the protection of tangible assets and cultural heritage. This analysis shall specify, as necessary, the origin, nature and seriousness of air, water and soil pollution, the effects on the climate, the volume and polluting nature of the waste, the noise level of the equipment to be used as well as the vibrations that they may cause, the method and conditions of water supply and use (...)

As such, an impact study must focus on the facility's "*foreseeable impacts on the environment*", which includes "*indirect effects*" on sites and landscapes, fauna and flora, natural environments and biological balances.

The question of the supply of wood to the plant was then at the heart of the discussions that took place before the court: To what extent should the way in which the fuel for the power plant is obtained be taken into account in terms of environmental effects?

The associations argued that the impact study was deficient because it did not analyze the effects of the implementation of the wood supply plan on the forest massifs.

The Company considered that the extraction of 25% of the local forest resources was a "*very small and [had an] insignificant impact on the available supply*".

The Marseille Administrative Court considered that the conditions of wood supply constituted "*an essential element of the operation with regard to its foreseeable impact on the environment*" and that the wood extraction was significant.

The Company also argued that it did not have to take into account the indirect effects of the wood biomass production and supply activities because it did not operate such activities directly. According to it, even though the supply of wood to the power plant was a condition for the operation of such plant, forestry on the one hand and electricity production on the other hand were distinct activities. It claimed that the impact study for its power plant project did not have to cover logging operations carried out by a third party for the purpose of supplying the power plant with wood.

The Marseille Administrative Court noted that there was no functional link between the forestry operation and the power plant project, within the meaning of the concept of "*works program*" provided for in Article L. 122-1 of the French Environmental Code, and that concerning the extraction of wooded land (which is subject to authorization and impact study) "*no legislative or regulatory provision will ensure that the cumulative effects of the forest clearing operations made necessary by the operation of the planned power plant will be taken into account*".

However, it pointed out that "***the absence of consideration of the cumulative effect of several projects should not have the effect of evading for all them the obligation to perform an assessment, because, taken together, they are likely to have significant effects on the environment***".

The Marseille Administrative Court concluded that considering the significance of the wood extraction (25%) and the foreseeable impacts on the environment, the impact study was not commensurate with the size and

nature of the project. The indirect effects of the facility on the sites and landscapes and on the natural environments and ecological balances had to be analyzed.

On the contrary, the Marseille Administrative Court of Appeals endorsed the Company's analysis and considered that the absence of an analysis of the impact of this wood extraction on the environment did not have the effect of rendering the impact study deficient. It based its decision on the distinct nature of the legislation applicable to land/forest clearing on the one hand, and to the operation of the power plant on the other hand.

In its March 27, 2023 ruling, the *Conseil d'Etat* supported the analysis of the Marseille Administrative Court and the associations.

It held that the project's impact study ought to analyze the environmental effects of the power plant's wood supply plan.

As such, it recalled that *"the assessment of these effects presupposes that the impact study analyzes not only the direct effects on the environment of the authorized facility, but also those **likely to be caused by its use and operation**. This analysis must, under Article R. 512-8 of the French Environmental Code (...) applicable at the material time, **be commensurate with the size of the planned facility**".*

And the *Conseil d'Etat* further noted that *"the operation of the Provence power plant **is based on the consumption of very large quantities of wood from local forest resources, i.e., natural resources that enjoy special protection**".*

As a result, *"the main environmental impacts of the plant through its wood supply, and in particular the effects on local forestry, must **necessarily be analyzed in the impact study**."*

A deficiency not likely to be corrected

It follows from the *Société Ocréal* judgment^[3] that inaccuracies, omissions or deficiencies in an impact study are likely to vitiate the procedure and, therefore, to result in the unlawfulness of the authorization 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.

In the first instance judgment, the Marseille Administrative Court held that the impact study was substantially deficient and had the effect of adversely affecting (i) the provision of information to the population during the public consultation insofar as it obscured an essential point of the project's impact on the environment, and (ii) the French administrative authorities' analysis of the impact.

The *Conseil d'Etat*, which annulled the decision of the Marseille Administrative Court of Appeals that had reversed the Marseille Administrative Court judgment, remanded the case back to Marseille Administrative Court of Appeals.

[1] Conseil d'Etat, March 27, 2023, No. 450135

[2] Pursuant to Article L. 211-2 of the French Energy Code "*Biomass is the biodegradable fraction of products, waste and residues of biological origin from agriculture, including plant and animal substances, forestry and related industries, including fisheries and aquaculture, as well as the biodegradable fraction of waste, in particular industrial waste and household and similar waste when it is of biological origin.*"

[3] Conseil d'Etat, October 14, 2011, No. 323257, Ocreal. See article entitled [French Administrative Supreme Court specifies the conditions for the regularization of environmental authorizations](#) published on our Blog in March 2023.

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