

# EHS Newsletter

November, 2018



## Highlights in this issue

In this issue, MediTerra presents the main aspects and regulations applying to environmental due diligence (EDD) in Spain.

The main aspects that have an influence in the EDD process in Spain are:

- ✓ The different levels of regulatory authorities and levels of enforcement depending on the region.
- ✓ The difficulties to have access to environmental information for a site or activity in a short period of time.

Environmental Due Diligence process in Spain is driven by three main issues:

- ✓ The difficulties to access public information
- ✓ Delivering time for environmental information
- ✓ The regulatory framework and associated liabilities



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# Spanish Environmental Enforcement

The Spanish system has three main levels of competences for bodies in charge of the environmental law enforcement: national (Spain), regional (Autonomous Communities) , and local (Municipalities).

The **Spanish National Administration** (mainly the Ministry of Ecological Transition) is entitled to enact the basic Environmental legislation and to set the main coordination and supervision mechanisms.

The **17 Autonomous Regions** (“Comunidades Autónomas”) in Spain develop basic legislation in their territorial scope and are in charge of compliance for much of the regulations; they are usually the authorities who grant Environmental Authorizations (IPPC activities).

Finally, **local authorities** or municipalities have competences on certain sectors such as noise or waste collection and wastewater discharges to municipal network. Also they grant the Operational and Environmental Permits.

Apart from the above, there are other national and regional bodies and agencies which take part in the enforcement of environmental law within specific sectors, such as River Basin Authorities (national



and regional, who can define water quality requirements or permits for the use of public water), Metropolitan Authorities, Environmental police (SEPRONA), etc.

## What happens in practice?

The different levels of environmental authorities obliges to be up-to-date for all the applicable regulations when an EDD or EHS compliance project must be developed.

On the other hand, the enforcement levels for the same regulation vary significantly depending on the region.

As an example: for the closure of an industrial activity potentially contaminant of the soil (according to Royal Decree 9/2005), the owner is obliged to present a Soil Status Report. In some regions like Madrid or the Basque Country, this report must include intrusive sampling.

Or for example: According to European and national legislation, an owner of an IPPC activity must perform Soil Baseline Study. However, it is experienced that in certain regions only a simple desktop study is required.



# Environmental disclosure and information

## Access to environmental information

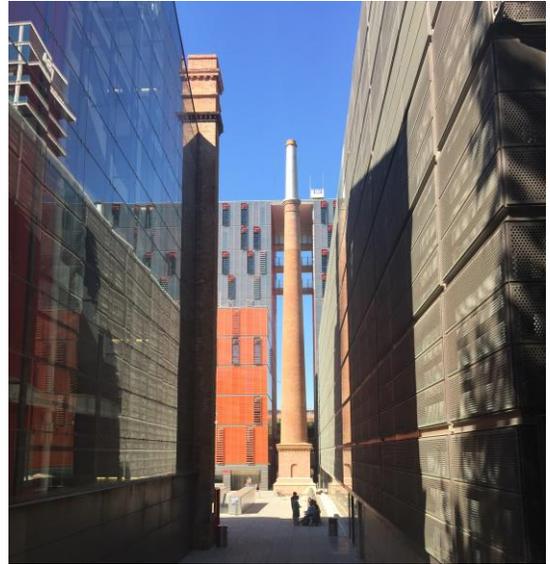
### Law 27/2006, of July 18<sup>th</sup>, on rights to access information, public participation and access to justice on environmental matters

According to Law 27/2006, the citizens may obtain environmental information whenever it is held by the public authorities or other subjects on their behalf, without being obliged to declare a particular interest. The law also sets out the deadlines before which the information shall be disclosed.

### Contamination Information disclosure

The Law on Environmental Liability specifies that operators have to immediately communicate the existence of environmental damage or imminent threat that has already been caused by them or that could eventually be caused.

Also, Royal Decree 9/2005 obliges to inform the regional authorities about the results of a soil risk assessment when the soil threshold regulatory values have been exceeded.



### What happens in practice?

In Spain, services like Historical Sanborn Fire Insurance Maps or EDR services for collecting environmental information do not exist. Public databases such as the inventory of contaminated sites are only readily accessible in some regions like the Basque Country. For the other regions, a written request has to be sent to the regional authorities and it can take between 2 and 4 weeks to obtain a response.

In some municipalities, the environmental information related to a specific site can be only obtained after a meeting in the Town hall, which might not coincide with the time of the site visit.

Therefore, the EDD process probably requires more time and resources than in other countries and this must be taken in consideration when contracting with the client.

# Environmental Liability System

## Law 26/2007 on Environmental Liability

### What types of environmental liabilities must be considered?

There are four types of legal liabilities:

- ✓ **Civil liability** derives from infringements which cause damage to third parties, who will be entitled to obtain the corresponding compensation provided that there has been a damaging action or omission with harmful results for the environment and there is a causality link between these two elements.
- ✓ **Criminal liability** is a consequence of the commission of environmental crimes established in the Spanish Criminal Code. It may entail high pecuniary sanctions, closure of facilities and activities, disqualification, imprisonment, etc., as well as the obligation to repair the damage caused.
- ✓ **Administrative liability** derives from the commission of administrative infringements envisaged by regulations. Penalties to be imposed after the perceptive proceedings may also imply fines or restrictions on the activity.
- ✓ **Environmental liability** comprises the operators' duties to prevent, avoid and repair environmental damage (damage to habitats and wild species, water, seashores and banks of estuaries, and land). With regard to damage caused by certain categories of activities, environmental liability is strict, so it does not depend on the existence of fault or negligence of the operator.



### What happens in practice?

The Spanish Criminal Code envisages that directors and officers of legal entities will attract personal criminal liability in case a criminal offence is committed by the actions of a company represented by such person.

# Environmental Liability System

## Law 26/2007 on Environmental Liability

In addition, Law 26/2007 on Environmental Liability sets that those managers of legal entities whose conduct has been decisive for the causation of environmental damage will have subsidiary liability regarding the prevention, avoidance and reparation obligations imposed on the company. The company or its shareholders may also make a claim against its directors or officers regarding civil liability due to their illegal or reckless behaviour.



If shares of an operator are sold, such operator will keep the environmental liability derived from the damage caused by its activity before and after the transaction.

When the object of the sale is an asset, the buyer does not generally keep any liability for the previous activity (except for some special cases such as historical land contamination or hidden defects in the purchase). However, since the enactment of Law 26/2007 on Environmental Liability, those who substitute the person who caused the environmental damage in its ownership or in the exercise of its activity, have subsidiary liability.

According to Law 26/2007, the person who causes environmental damage is liable and has to assume the costs of avoidance of more damages and reparation. Therefore, if the tenant of a facility causes environmental damage, in general terms there is no action that can be brought against the owner unless the latter had control or power over the activity carried out by the former.

This general rule has an exception in the case of soil contamination, where according to Law 22/2011, the owner has subsidiary liability in case the tenant who caused contamination cannot be identified or cannot face the decontamination costs.

# Contaminated land liabilities

Law on Waste and Contaminated Soils 22/2011  
Royal Decree 9/2005, on contaminated sites

## Which is the liability framework for soil contamination?

The person or entity which caused a soil contamination, is liable for such contamination and will assume the remediation costs. Besides that, the Law on Waste and Contaminated Soils 22/2011 envisages that the owner of the land affected or its current possessor, in this order, will have subsidiary liability.

With regard to groundwater contamination, Royal Decree 849/1986 also sets out that the damage has to be repaired by the polluter, but no subsidiary liability is indicated, although if the groundwater contamination is caused by the soil, the soil liability procedure would apply. Spain has not yet approved the parameters to consider groundwater decontamination. Some regions like Catalonia have developed threshold values that are guidelines, but in general in Spain the Dutch Intervention Values are used.



According to Royal Decree 9/2005, soil remediation is driven by the results of a risk assessment, and remediation target values can be higher than the regulatory threshold values if risk is considered acceptable but the remediation of groundwater is generally driven by quality standards or the obligation to restore the natural resources to their initial situation.

## What happens in practice?

The subject who has to assume decontamination costs of contaminated land is the person who caused the contamination. Only when the polluter cannot be identified or does not have economical resources the obligations will fall on the owner of the land or on its current possessor.



# Contaminated land liabilities

Law on Waste and Contaminated Soils 22/2011  
Royal Decree 9/2005, on contaminated sites



In this regard, a private agreement between the seller of a piece of land and its buyer exonerating the seller from any responsibility arising from a previous contamination will only be enforceable between the parties but not in front of the authorities, who will require the real polluter to carry out the decontamination of the soil.

Moreover, the seller should inform the potential buyer of any environmental liabilities in order to avoid subsequent compensation claims for hidden defects or even the nullity of the purchase.

Additionally, owners of land where a potentially contaminating activity has been carried out have to declare such circumstance in the corresponding public deed for the transfer of the land (this declaration will be registered in the Property Registry).

# MediTerra, your partner in Spain

## Tailored Environmental and safety solutions



MediTerra is an independent environmental consultancy company founded in 1998. The activity of MediTerra has mainly been focused towards:

- ✓ The integrated environmental management;
- ✓ The investigation and remediation of contaminated soil and groundwater;
- ✓ The performance of Environmental, Health and Safety Compliance and Corporate Audits as well as Environmental Due Diligences;

MediTerra holds all the necessary accreditations to work in the field of contaminated soils in all the regions in Spain.

With more than 25 years experience of the MediTerra team in EDD projects, we can assist with transaction projects in an efficient way with short time responses, including Phase II investigations, if necessary.

This year MediTerra celebrates the 20th anniversary, with members in our team with more than 25 years experience in the fields of EHS regulatory compliance, environmental due diligence and soil and groundwater contamination.



### More Information

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