

4. The San Finx tin and tungsten mine is an underground mine. The mine currently has 8 levels. Prior to the mine's closure in 1989 a dewatering and access adit (tunnel) was opened in 1983 cutting to level 4. Since then, and with the exception of periods in which the adit collapsed along geological fault lines, the underground mine works from levels 1 to 4 have been dewatered by gravity using this adit ("T4" in technical documents). This situation creates a permanent and severe heavy metal pollution problem as mine water is discharged into a nearby river with no treatment whatsoever, leading to pollution with cadmium, copper and zinc and other metals from the mine. Fishermen guilds have repeatedly called upon the Galician regional Administration to force the mining company to seal off all drainage adits using bulkheads to allow the re-flooding of the mine and the creation of anoxic conditions that minimize acid mine drainage. Being an underground mine, access to any level is dependent on dewatering taking place, through gravity by opening up drainage adits at deeper levels or pumping. Currently, and while the NEXT project was being carried out, level 4 of the mine remained 'dry' because the drainage adit (T4) had not been sealed as should have happened to prevent or minimize heavy-metal bearing mine drainage flowing out.
5. During the NEXT project, level 5, being below the T4 drainage adit (tunnel), was maintained dewatered through pumping for the purpose of completing NEXT project deliverables. During the whole NEXT project, mine drainage was discharged illegally into a nearby river and flowed into an estuary, **without a waste water discharge permit and without any treatment to remove toxic substances**, including carcinogens, from the discharge. Taxpayers' money was given by the EU to a consortium involving on-the-spot samples collection at a mining site lacking discharge permits. While the illegal discharge of mine drainage through a drainage adit that flows into a river should in itself be of concern (discharge from levels 4 and above), the fact that during the duration of the NEXT project polluted water was additionally discharged by forced pumping from lower levels (that would have otherwise remained flooded) was of even greater concern.
6. The European Commission and its agencies were aware of San Finx's environmental and compliance problems since 2016, including through 16 written questions, priority questions and major interpellations at the European Parliament (E-004299-16, E-004301-16, E-006615-16, E-008694-16, E-008989-16, E-009298-16, E-000007-17, E-001604-17, E-003731-18, E-005046-18, **E-001731-19, E-003447/2021, E-000386/2023, E-002529/2023**, G-001001/2021, P-005504/2021). At least four of these communications explicitly referred to the NEXT project.
7. Specifically in the NEXT project, the Commission's knowledge of and involvement in these problems are also evident in a series of email exchanges in 2021 between the staff of the Commission or its agencies and the Finnish Geological Survey (GTK), as coordinator of the NEXT project (**Ares(2021)184329 – RE: Explanation Needed Valoriza Minería Report in the Ethics Deliverable 8.3 (DOCUMENT 1)**, emails partially redacted). An initial mail from the Commission asks GTK:

Please explain more clearly if the "Sampling in collaboration of the CSIC, of the 5 and 4 level of Buenaventura zone" as stated in the Deliverable 8.3 required prior pumping-out of the water from the mine levels 4 and 5 as this is not obvious from the report.

Also, please list any potential emissions to the environment that may have happened during NEXT implementation to date.

GTK responded: “*I have to contact CSIC and Valoriza Minería for more details. **But it is certain that the pumping is done within their normal maintenance operation and it has not been conducted only for the NEXT.***”

The Commission official responded: “*I must say I am surprised by your statement that you are certain that pumping is done as something regular as this is first news to us about this issue.*” GTK responded: “*Actually in my email ⁴th November 2020 to you, I referred to the pumping issue (see also attachment): ‘As any mine, San Finx has pumped out water. Obviously not with the funds of NEXT but with their normal operation. Any mine that operates below water level needs to pump water in order to maintain the operation.’*”

The Commission official responded: “**I was referring to discharge from levels 4 and 5 for which ones they do not have permit, and where the sampling took place.**”

The previous exchange shows how:

- The Commission (and/or its agencies) officials engaged in the NEXT project knew before March 2021 that the mine had no permit to discharge from levels 4 and 5 and that sampling at these levels was taking place.
- The Commission (and/or its agencies) expressed surprise that pumping was done as something regular despite the absence of a waste water discharge permit.
- In 4 November 2020 the NEXT project coordinator (GTK) had already informed the Commission/EASME that “*San Finx has pumped out water*” and that “*Any mine that operates below water level needs to pump water in order to maintain the operation*”.

8. In this context, and while the project was ongoing, on 10/09/2021 Montescola requested the Commission to provide the following documents relating to NEXT project activities at the San Finx mine, namely:

- **Ares(2021)1295662, 16-02-2021, NEXT: San Finx operations - report**
- **Ares(2021)3979485, 17-06-2021, NEXT: San Finx - further clarifications**
- **Ares(2021)4581553, 12-07-2021, NEXT: Explanations - San Finx documentation**

The rationale behind this request was public interest in relation to the protection of the environment.

9. On 20/10/2021, the response (**DOCUMENT 2**) from the EC’s Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, signed by Director-General Ms. Kerstin Jorna, identified the following documents that fell within the scope of the request **and refused total access to them and their attachments:**

- Document 1 (16-02-2021) NEXT: San Finx Operations - Report with one attachment;
 - Document 1.1 (February 2021) San Finx Mine and NEXT Update;
- Document 2 (17-06-2021) NEXT: San Finx - Further Clarifications with one attachment;
 - Document 2.1 (DATE UNKNOWN) San Finx Documentation; and
- Document 3 (12-07-2021) NEXT: Explanations - San Finx Documentation.

10. On 07/11/2021, Montescola made a request for the decision to be reviewed by the EC through a **confirmatory application (DOCUMENT 3)**, pursuant to Article 7(2) of Regulation 1049/2001. Quoting Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in

Environmental Matters to Community institutions and bodies, established in Article 6, Montescola noted that enforcement of Regulation (EC) No 1049/2001 considers that “overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment”, as was the case for San Finx.

Following a period of over six months after the request was registered, on 02/06/2022, a response (**DOCUMENT 4**) from the EC was provided by the Director of Decision-Making and Collegiality, who gave highly redacted access to the following:

- Document 1 (**DOCUMENT 5**); and
- Document 1.1 (**DOCUMENT 6**), 2 (**DOCUMENT 7**), and 3 (**DOCUMENT 8**).

Access was completely prevented to: Document 2.1, with the EC’s decision relying on Article 4(1)(b) and the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

IV. Provision of the Convention with which non-compliance is alleged:

11. The following Aarhus Convention provision was breached in relation to the requested documents on the NEXT project at the San Fix mine:
 - Article 4(1) of the Aarhus Convention with incorrect application of the grounds for refusal in Article 4(4).¹

V. Nature of alleged non-compliance:

12. **Article 4(1) of the Aarhus Convention (implemented by the EC in Regulation (EC) 1367/2006) was breached** as the EC denied public access to the requested documents regarding the NEXT Project at the San Fix mine containing environmental information. The EC argued that the undisclosed parts of the documents did not contain environmental information and there is not an overriding public interest under Article 4(2) of Regulation (EC) No 1049/200, but this is not true. For example, the Commission prevented access to environmental information in the November 2020 restoration plan update (attached to Document 1.1 and redacted relevant sections regarding emissions). Under Article 6(1) of Regulation (EC) No 1367/2006, there is an overriding public interest in the disclosure of the relevant documents as the information requested relates to emissions into the environment.
13. The decision argued against document access stating documents contained personal data which is protected under Regulation (EC) 45/2001. However, released parts of document 1 section 2.2 and 2.3, clearly show they contain environmental information. The decision also claimed the remaining part is meaningless. However, Aarhus Convention Article 4(4) states that the listed “grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.” Article 4(6) allows release after concealing commercial interests. Moreover, the EC’s rules implementing the Aarhus Convention reflect these provisions in Regulation (EC) No 1367/2006 Article 6(1).

¹ The party also failed to comply with EU rules implementing the Aarhus Convention Regulation (EC) No 1367/2006 with incorrect application of the exceptions in Article 6 thereof and Article 4 of Regulation (EC) No 1049/2001.

14. The EC claimed that under Regulation (EC) No 1049/2001 the **first indent of Article 4(2)** (commercial interests of a person), they are able to refuse partial and full access to all of the concerned documents. However, that regulation clearly provides that if an overriding public interest is in the disclosure, there cannot be a refusal to access the document. As stated in the facts, the information being withheld from the public concerns the harms caused by or identified as part of the NEXT project at the San Finx. Specifically, the illegally removed water from level 5 of the mine disposed of into the local river has caused harm to a Natura 2000 site that must be protected under the Habitats and Birds Directives, which is also used for shellfish production, a vital source of income for the local area. With access to the refused documents, the local population would have access to relevant environmental information.
15. **In applying Article 2 of the Aarhus Convention, Regulation (EC) No 1367/2006 Recital 7 and Article 2(1)(c)** note that for reasons of consistency with Regulation (EC) No 1049/2001 of the European Parliament, regarding public access to the European Parliament, the provisions on access to environmental information should apply to all bodies acting in a legislative capacity as well as Community institutions. It is additionally noted that both acts and omissions should be open to review where they have legally binding or external effects. (Recital 11 and Article 2(1)(g)) The mining related documents that were requested by the communicants have been noted by the ACCC to come under the umbrella of Article 2, Paragraph 3 which notes that the information that was requested comes under the category of ‘environmental information’. However, this Article has not been fully applied with regard to the NEXT Horizon 2020 project at the San Finx mine. This is evidenced in the way in which despite continuous requests for access to all environmental information, documents have been heavily redacted and withheld from disclosure.

VI. Use of Domestic Remedies (European Union):

16. Regulation 1049/2001 Article 7(2) allows applicants to send a **confirmatory application** to the institution in case of a total or partial refusal of documents to reconsider their position. Montescola sent their confirmatory application to the EC on **07/11/2021** within 15 working days of the EC’s response to the request issued on 20/10/2021. The response to this confirmatory application was issued on **02/06/2022**, which is outside of the 15 working day time limit allowed under Regulation 1049/2001 Article 8(1). Despite this, there was a partial refusal of documents 1, 1.1, 2, and 3; and a total refusal of document 2.1 by the EC.
17. On 10/09/2021, Montescola submitted a **complaint to the European Ombudsman** for public access to documents under Regulation (EC) No 1049/2001, citing the Commission’s total refusal of document 2.1 and partial (heavily redacted) access to the remaining four documents (Cases 1132/2022/OAM and 1374/2022/OAM). The complaint to the European Ombudsman evidenced Montescola’s actions in exhausting domestic remedies.²

² Article 12 of Regulation (EC) No 1367/2006 provides the possibility to go to the Court of Justice of the European Union (CJEU) to appeal a negative decision adopted in reply to their administrative review request. Due to lack of legal funds, Montescola turned to the European Ombudsman. While Regulation (EC) No 1367/2006 states that legal costs should be minimal, legal costs would have been prohibitive for a CJEU appeal by Montescola.

18. The European Ombudsman determined that the requested documents contained “*environmental information*” within the meaning of Regulation (EC) No 1367/2006. On the 17th April 2023, the European Ombudsman responded to the complainant and proposed solutions (**DOCUMENT 9**). The Commission refused to accept the Ombudsman’s proposed solution (**DOCUMENT 10**) stating that the complainant, Montescola, did not show there was an overriding public interest in full disclosure of the documents. In its final decision (**DOCUMENT 11**),

After reviewing the documents, the Ombudsman considered that they contain information that can be understood as being “environmental information” within the meaning of the EU Aarhus Regulation. Such information should benefit from greater transparency. She asked the Commission to review its position with a view to granting the widest possible public access. The Commission maintained its position that no further access can be granted.

Adding that:

the Ombudsman is concerned about the Commission’s application of the EU Aarhus Regulation and the Aarhus Convention when assessing requests for public access to documents. She emphasised that the exceptions to granting public access have to be interpreted in a restrictive way as regards environmental information and reminded the Commission that transparency in this area is crucial to enhance the legitimacy of, and public trust in, the EU’s activities.

VII. Use of International Remedies:

19. **The Commission’s adverse decision on the 17th April 2023 concluded the domestic remedies available for accessing the information covered by this complaint. Montescola wants the ACCC to be aware of other related developments.** First, Montescola initiated an additional complaint on 06/01/2023 before the European Ombudsman regarding the way in which the European Commission dealt with concerns related to the implementation of the NEXT Horizon 2020 project at the San Finx mine. The case was opened on August 2023 (Case 530/2023/OAM) and the inquiry remains ongoing.³ Further documentation on this procedure can be provided in due course.
20. Additionally, several Members of the European Parliament made written questions to the European Commission regarding the use of EU funds in research projects at the San Finx mine:
- **E-001731-19**: “Financiación de proyectos mineros que incumplen la normativa de la Unión Europea mediante la iniciativa Materias Primas del Instituto Europeo de Innovación y Tecnología”.⁴
 - **E-003447/2021**: “EU funding for illegal and polluting mining project in San Finx (Galicia)”.⁵

³ <https://www.ombudsman.europa.eu/en/opening-summary/en/173337>

⁴ https://www.europarl.europa.eu/doceo/document/E-8-2019-001731_EN.html

⁵ https://www.europarl.europa.eu/doceo/document/E-9-2021-003447_EN.html

- **E-000386/2023**: “Concealing environmental information on the San Finx mines”.⁶
- **E-002529/2023**: “San Finx”.⁷

VIII. Confidentiality:

21. None of the information contained in this communication will be kept confidential.

IX. Supporting documentation:

- **Document 1.** Ares(2021)1843294 RE: explanation needed Valoriza Minería report in the Ethics deliverable 8.3
- **Document 2.** Negative reply to application for access to documents – Ref GestDem No 2021/5420
- **Document 3.** Confirmatory application for access to documents Ref GestDem No 2021/5420
- **Document 4.** Decision of The European Commission Pursuant to Article 4 of The Implementing Rules to Regulation (EC) NO 1049/20011. Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/5420.
- **Document 5.** Document 1. San Finx Operations - Report with one attachment.
- **Document 6.** Document 1.1. San Finx Mine and NEXT Update
- **Document 7.** Document 2. NEXT: San Finx - Further Clarifications with one attachment
- **Document 8.** Document 3. NEXT: Explanations - San Finx Documentation
- **Document 9.** Proposal for a solution on the European Commission’s refusal to give full public access to documents concerning a mineral exploration research project funded under the Horizon 2020 programme (cases 1132/2022/OAM and 1374/2022/OAM)
- **Document 10.** Reply of the European Commission to the proposal for a solution from the European Ombudsman regarding the European Commission’s refusal to give full public access to documents concerning a mineral exploration research project funded under the Horizon 2020 programme
- **Document 11.** Decision on the European Commission’s refusal to give full public access to documents concerning a Horizon 2020 mineral exploration research project (cases 1132/2022/OAM and 1374/2022/OAM)

Signature



January 2, 2024

⁶ https://www.europarl.europa.eu/doceo/document/E-9-2023-000386_EN.html

⁷ https://www.europarl.europa.eu/doceo/document/E-9-2023-002529_EN.html