

24 June 2010

## **AMENDMENTS TO THE MINING LAW**

This article analyzes the major changes imposed by the Amendment and the recently enacted Soil Pollution Regulation. The Amendment was approved by the Turkish Grand National Assembly on 10 June 2010 and published in the Official Gazette No. 27621, dated 24 June 2010.

See **Annex** for definitions of terms contained in this article.

### **I. GENERAL**

The elimination of certain provisions of the Mining Law regarding environmental permits by the Constitutional Court Decision has led to the suspension of the implementation of some of the provisions of the Mining Activities Permitting Regulation by the High Administrative Court. The potential gap in the legislation, as well as, the practical necessity for amendment of other provisions of the Mining Law initiated the preparations for an amendment to the Mining Law.

The government enacted the Amendment to regulate the details of the permit issuing process of the law, rather than by a regulation, in order to comply with the rationale of the Constitutional Court Decision. The Amendment aims to cover the grey areas and gaps arising from the invalidation of certain provisions by the Constitutional Court. Even though the Amendment's main goals are to fill the gaps caused by the Constitutional Court Decision and to regulate environmental permit matters, it includes many other provisions that govern various matters so that mining activities will be conducted in a more efficient and effective manner.

Nevertheless, a clearer picture will become evident when the details of the implementation of regulations are published. As per the Amendment, the regulations shall be issued within three months following the effective date of the Amendment, which may take longer since this provision is not binding on public administration. Until these regulations are enforced, the provisions of the regulations which do not conflict with the Amendment shall remain effective. Thus, most of the changes brought by the Amendment may not be applied in practice, until the regulations regarding the application of the Amendment are issued.

## II. ANALYSIS

### A. THE AMENDMENT

#### 1. Mining Groups

The Amendment has reorganized the mining groups provided under Article 2 of the Mining Law. The most significant change is the addition of a new group, Group VI, which covers all radioactive minerals and radioactive substances that were previously enumerated under Group IV. Group IV license holders must, within six months, apply to the Mining Department to change the group of the mines which are now included in Group VI.

#### 2. Environmental Permits under Article 7

*Restriction of Mining Activities.* In order to avoid restriction of mining activities by secondary legislation and discretionary practices of governmental authorities, the Amendment provides that restriction of mining activities can only be regulated by laws. The Amendment grants authority to the Ministry to prohibit mining activities on certain types of lands by taking into consideration the region, type of the mine, environmental impact and other similar aspects, provided that vested rights are protected and the opinions of the relevant authorities are obtained.

*Special Protection Areas.* The Amendment regulates a system that aims to clarify the ambiguities on the restriction of mining activities in special protection areas imposed by other applicable legislation. The Amendment introduces a system where relevant public authorities are obliged to inform the Mining Department of the coordinates of the special protection areas. For mining license applications in these special protection areas, the license applicant shall be granted one year to obtain the necessary permits from the relevant authorities. If the license applicant fails to obtain the permits, the license application shall be rejected.

*Special Purpose Areas.* The Amendment allows mining activities in (i) the areas of protection and development of wildlife, and in (ii) explosions near drinking and utility water resources. In order to give assurance to license holders to continue their mining activities, we understand that the Mining Department intends to register the special purpose areas within the license area that require permits and list the required permits in its records. The required permits shall be issued subject to the relevant provisions of the applicable special laws.

Since there was an ambiguity with respect to the permitting of mining activities in forest areas, after the Constitutional Court Decision the Amendment more thoroughly regulated forest areas. The details of the forest permit process under the Amendment are summarized below:

As the goal is to govern each and every permit by particular law, the Amendment makes reference to the Forest Law for mining exploration and operation activities to be conducted in State forests. The Amendment revises Article 16 of the Forest Law to provide that the Ministry of Environment shall grant permits for mining exploration and operation licenses of State forests, as well as permits for the establishment of facilities, roads, energy, water,

communication and infrastructure facilities necessary for mining activities, for the term of the license. The former reference in the Forest Law made to Article 7 of the Mining Law has been removed because it caused confusion in practice. The Ministry of Environment suspended the issuance of forest permits since Article 7/1 of the Mining Law, which was also referred to in Article 16 of the Forest Law, was canceled by the Constitutional Court Decision. We did not agree with such application since we believed that application of the Forest Law never lost its effect.

The Amendment, by adding a new paragraph to the Forest Law, provided for reclamation of forest areas after completion of mining activities. This addition has been made to comply with the Reclamation Regulation since the reclamation process is already governed by the Reclamation Regulation.

Workplace Establishment Permit. The Amendment aims to prevent administrative problems arising from differing practices of varying municipalities by unifying the workplace establishment permit regime under one authority (i.e., the special provincial administrations).

Zoning Areas. Mining activities to be conducted within an area (i) that is within a zoning area after the issuance of a mining license, or (ii) does not have a zoning plan, shall not be subject to construction and building use permits. This provision may cause ambiguities in practice since the Construction Law is not amended to provide for such exemption.

Projects Intersecting with Mining Projects. In the event that conducting mining activities becomes impossible due to intersection with projects that bear public interest and an alternative site cannot be determined, the Board shall decide on the prevailing project.

The Board shall be established under the chairmanship of the Minister to which the State Planning Organization is affiliated. A board for the same purpose was provided in the Mining Law prior to the Amendment; however, it has never been established.

Failure to Obtain Necessary Permits. The Mining Law provided that repetitive failure to comply with Article 7 governing permits at least three times over five years would cause termination of the license. The term of “five years” is now reduced to three years.

The vague provision of the Mining Law providing that the operation permit would be issued after obtaining the necessary permits under Article 7 of the Mining Law caused uncertainties in practice. The Amendment provides that the operation permit shall be issued within three years after obtaining the EIA decision, surface rights, workplace opening permit and permits registered at the Mining Department that are required for special purpose areas within the license area.

### **3. False Declarations and Unpermitted Production**

The Amendment has extended and clarified the scope of the penalties to be applied in the case of unpermitted mine production and transportation.

The obligation to employ a mining engineer as a technical supervisor (*teknik nezaretçi*) for supervision of mine extraction activities has been expanded to provide for mandatory employment of a permanent technical supervisor in project companies: (i) employing at least

15 workers; and (ii) operating a mine with underground production method. The Amendment also increased the role of technical supervisors and made it clear that technical personnel shall be personally liable for their declarations and reports.

#### **4. Financial Obligations**

The amount of the security deposit is increased to 1% (previously 0.3%) of the annual license fee per hectare. State royalties are reorganized. The royalty for gold, silver and platinum has been increased to 4%, and the royalty for Group II (b) mines, which are processed into a final product in the facilities of the license holder, has been reduced to 1%.

The incentive of not paying 50% of the royalty has been extended to include (i) production activities conducted by the underground operation method, and (ii) Group IV(c) mines processed into metals in Turkey, excluding gold, silver and platinum mines. The previous incentive of not paying 50% of the royalty if extracted ores (excluding Group I mines) are processed in Turkey (to provide an additional value to the Turkish economy) remains in effect. Accordingly, we believe that gold, silver and platinum mines qualifying for the previous incentive shall still benefit from this. However, the Amendment made it clear that license holders may not benefit from these two incentives simultaneously.

The Mining Law provides that the royalty will be levied by an addition of 30% on mining activities conducted on State owned lands. It is still not clear whether this will be calculated based on the entire production or pro rata according to the size of the State owned lands within the license area. The Amendment did not provide any clarification of this issue.

#### **6. Mining Exploration Activities**

The area limitations of the licenses have been rearranged to determine specific hectare limitations for each group of mine.

The Amendment reinstated the former application for sand and gravel licensing that was provided prior to the previous amendment to the Mining Law. It states that the licenses for such mines shall be issued by special provincial administrations, not by the Mining Department.

The license term for Group IV and VI mines is extended to seven years. In order to prevent holding of exploration licenses in an ineffective manner, the Amendment introduces a three step exploration period; a “*pre-exploration period*”, a “*general exploration period*”, and a “*detailed exploration period* (for Group IV and VI mines only)”.

#### **7. Mining Operation Activities**

The sanction to “terminate the license and forfeit the security thereof in the case where mines are not operated for more than three years within a period of five years, except for force majeure events and unexpected events” shall also apply to the licenses for which the total production within such three years is below 10% of the annual production amount declared in the project.

The Amendment grants authority to the Mining Department to cease mining activities that cause threat to safety, health or property. Such discretionary authority of the Mining Department may cause problems in practice.

The operation license holders, who have not obtained operation permits as of the effective date of the Amendment, shall obtain permits under Article 7 within three years starting from the date of the operation license. Should the three year period expire or should only a period of one year remain, the permits shall be obtained within one year.

#### **8. Royalty Holders**

The liabilities arising out of labor law and health and safety regulations shall be borne by the royalty holder. We believe that application of this provision would be problematic in practice since, as per the Labor Law, the license holder (as the owner of the work) and the royalty holder (as the subcontractor) are held jointly liable for certain instances stemming from the employees working in the license area.

#### **B. SOIL POLLUTION REGULATION**

The recently enacted Soil Pollution Regulation, laying down the principles for the prevention of soil pollution, determination and cleaning of the contaminated lands, introduces an obligation to certain industrial facilities including the following mining operations: (a) metal ore mining; (b) limestone, gypsum and chalk quarry operation; and (c) clay and kaolin operations.

The facilities within the scope of the Soil Pollution Regulation are obliged to submit preliminary activity information form to the provincial environmental administration to be forwarded to the Ministry of Environment, containing the status of the lands within the license area, previous usage purpose of such lands, usage purpose of surrounding lands, types of dangerous wastes and chemicals, their storage methods, and a list of industrial accidents that occurred during operations.

The Soil Pollution Regulation will become effective two years after its publication (i.e., 8 June 2012). The Ministry of Environment will issue circulars regarding the implementation of the Regulation within those two years. Accordingly, industrial facilities, that begin operation after 8 June 2012, must submit said form within one month after the start of their operation, whereas the industrial facilities existing at that time must comply with this obligation within three months after the effective date of the Soil Pollution Regulation. ⊕

**ANNEX**

**DEFINITIONS**

“ <u>Amendment</u> ”	Law No. 5995 amending the Mining Law, published in the Official Gazette No. 27621 dated 24 June 2010.
“ <u>Board</u> ”	A board to be established under the chairmanship of the Minister, with whom State Planning Organization is affiliated, to determine the priority of mining and other investments.
“ <u>Constitutional Court Decision</u> ”	Constitutional Court Decision No. E. 2004/70, K. 2009/7 dated 15 January 2009, cancelling certain provisions of Articles 7 and 10 of the Mining Law regarding environmental permits, which became effective on 11 June 2010.
“ <u>Construction Law</u> ”	Construction Law No. 3194 published in the Official Gazette 18749 dated 9 May 1985.
“ <u>EIA</u> ”	Environmental Impact Assessment.
“ <u>Forest Law</u> ”	Forest Law No. 6831 published in the Official Gazette No. 9402 dated 8 September 1956.
“ <u>Labor Law</u> ”	Labor Law No. 4857 published in the Official Gazette No. 25134 dated 10 June 2003.
“ <u>Mining Activities Permitting Regulation</u> ”	Mining Activities Permitting Regulation published in the Official Gazette No. 25852 dated 21 June 2005.
“ <u>Mining Law</u> ”	Mining Law No. 3213 published in the Official Gazette No. 18785 dated 15 June 1985 as amended by Law No. 5177 published in the Official Gazette No. 25483 dated 5 June 2004.
“ <u>Mining Department</u> ”	Mining Affairs General Directorate.
“ <u>Ministry</u> ”	Ministry of Energy and Natural Resources of the Turkish Republic.
“ <u>Ministry of Environment</u> ”	Ministry of Environment and Forestry of the Turkish Republic.
“ <u>Reclamation Regulation</u> ”	Regulation on the Reclamation of Lands Destroyed Resulting from Mining Activities published in the Official Gazette No. 27471 dated 23 January 2010.
“ <u>Soil Pollution Regulation</u> ”	Regulation Concerning the Control of Soil Pollution and Contaminated Lands published in Official Gazette No. 27605 dated 8 June 2010.