

# SOCIO-ENVIRONMENTAL IMPLICATIONS OF LEGAL REFORMS IN MINING MATTERS

MAY 2023



In the evening edition of the Official Gazette of the Federation of May 8, 2023, a decree was published amending the Mining Law, the General Law of Ecological Balance and Environmental Protection ("LGEEPA"), the National Waters Law ("LAN") and the General Law for the Prevention and Integral Management of Waste ("LGPGIR"), which entered into effect on May 9, 2023. Notwithstanding the broad scope of the aforementioned reforms, this note only refers to their implications in socio-environmental matters.

## **1. Prohibition to grant mining concessions and to carry out any mining activity in Natural Protected Areas ("NPA").**

The Secretary of Economy and the Secretary of Environment and Natural Resources ("SEMARNAT") may not issue new mining concessions or environmental impact authorizations ("AIA") for new mining projects in NPAs.

Once the term of the concessions to develop mining in NPA expires, such concessions will not be extended. Likewise, it would not be possible to extend the term of AIA granted for mining projects located in NPAs. Therefore, it is recommended that those projects in the exploration or exploitation stage that are located in NPA consider this limitation.

## **2. Mining concessions that affect an ancestral territory or an indigenous community must be subject to a free, prior, and informed consultation process.**

The right to free, prior, and informed consultation of indigenous people and communities is recognized in Convention 169 of the International Labor Organization, celebrated and ratified by Mexico. Said Convention obliges the Mexican State to respect it in the granting of mining concessions, even when this right was not provided for in the Mining Law prior to the amendment.

In cases where a mining concession is requested on an ancestral territory of an indigenous population or community, the Secretary of Economy must request the competent authority to carry out a consultation process with the community that could be affected. Such consultation process must be carried out prior to issuing the concession and in parallel with the environmental impact evaluation to obtain the AIA for the project.

In our opinion, the way in which the reform regulates this right raises the following issues:

- + The processes to obtain the mining concession and the AIA are not usually carried out at the same time since, as a result of the exploration, it could result that the mining activity will only be developed in a specific area and not in the entire concessioned surface.
- + It does not consider the right to consent of indigenous populations and communities, as recognized in Convention 169.
- + In addition to the obligation to carry out a consultation, the amendment establishes the principles and procedures to be followed. Convention 169 establishes that laws affecting an indigenous community must also be subject to a consultation process. Therefore, in our opinion, a law that contemplates an indigenous consultation process may require its own consultation process.

### **3. A social impact evaluation will be required for the granting of mining concessions.**

The social impact evaluation provides information on the effects that a mining project will have on a community. In addition, this study proposes measures to mitigate and/or compensate for adverse impacts. Within these effects, income reduction, possible displacement, infrastructure, connectivity and, in general, any cultural, economic and organizational impact on a community are considered.

The process of consultation with indigenous populations and communities is different from the social impact evaluation. Therefore, it is important to consider that (i) if a mining project affects an indigenous community, both the consultation process and the social impact evaluation must be carried out; and (ii) if a mining project affects non-indigenous people, only the social impact evaluation will be required.

### **4. Mining projects must have a Mine Restoration, Closure, and Post-closure Program ("Program") approved by SEMARNAT.**

This Program was already a condition established in the AIAs of mining projects, where SEMARNAT

ordered project owners to adopt measures for the abandonment of the mining project (for example, slope stabilization, soil restoration, and vegetation regeneration).

As a result of the amendment, the Program will be a requirement for the granting of mining concessions, the AIA, and concessions to exploit national waters.

In our opinion, the requirement to generate a Program from the beginning of the project could be inefficient, as conditions may change throughout the development of a mining project.

### **5. Current and future holders of a mining concession will be required to provide insurance, letter of credit, or other financial vehicle to ensure compliance with social impact prevention measures and the Program.**

In the case of the social impact evaluation, this financial vehicle must be approved by the Secretary of Economy, while the financial vehicle for compliance with the Program must be approved by SEMARNAT.

Current holders of mining concessions must comply with this obligation within 365 calendar days from the effective date of the reform.

### **6. Prohibition to grant mining concessions in areas with low water availability.**

This prohibition affects new mining projects intended to be developed in areas with low water availability. It is important to consider that the area most affected by drought in recent years is the north of the country, which also represents the area with the largest mining reserves in Mexico.

The reform does not establish the criteria to determine whether an area has a water shortage. In that sense, the Secretary of Economy could consider the declarations of closure by the National Water Commission ("CONAGUA"), the declarations of emergency, or the drought reports that are published monthly by CONAGUA.

### **7. The transfer of national water concessions for mining activities is prohibited.**

Mining companies may not obtain water for mining activities through the transfer of a previously issued concession title; therefore, they may only obtain concessions directly from CONAGUA.

It is important to consider that in closure zones, where it is not possible to issue new concession titles, it would not be possible to obtain a mining concession title from CONAGUA, which would jeopardize the development or continuity of mining activities in these zones.

### **8. National water concessions may be revoked in the event of supervening events of public interest that cause economic, social, environmental, or any other kind of imbalance.**

This measure affects any titleholder of a national water concession, regardless of whether they are part of the mining sector or not. The reform to the LAN does not clearly establish what should be understood as social or environmental imbalance, so CONAGUA could act with discretion to revoke water concessions regardless of whether they have complied with all their legal obligations.

### **9. Prior notice will be required to CONAGUA for the use of tillage water.**

Prior to this amendment, the mining concession title gave the right to use the working water without the need for any additional procedure before CONAGUA. As a result of the amendment, it will be required to give notice to CONAGUA prior to using these waters.

### **10. The concept of "water for industrial use in mining" is created and the depth of wells is limited.**

In order to use national waters in the mining industry, a concession must be obtained from CONAGUA which expressly permits water for industrial use in mining.

This type of concession does not allow the construction of wells whose depth may affect the exploitation of water for other uses. Even CONAGUA is prohibited from granting permits for the deepening of existing wells.

### **11. CONAGUA is prohibited from granting concessions in riverbeds or river vessels and its federal zone for the purpose of final disposal of mining waste or wastewater deposits.**

In some cases, mining projects are developed in small riverbeds and their federal zone. However, sometimes these rivers are actually intermittent water runoffs that meet the characteristics to be considered as national assets in charge of CONAGUA.

Prior to this amendment, it was common for mining projects to divert or build tailing dams, mining dumps, or deposits for non-hazardous mining waste over these runoffs. However, with the amendment, CONAGUA would not be able to grant concession titles to occupy these areas.

Therefore, in our opinion, this provision will affect the development of mining projects in mountainous areas since it will be technically complicated to find a space with the appropriate characteristics to build mining waste facilities.

### **12. The categories of metallurgical waste and mining waste are created, in addition to establishing new obligations for their generators.**

Metallurgical waste is waste from the smelting, refining, and transforming of metals, while mining waste is waste from the exploitation and processing of minerals. These wastes must be subject to a management plan approved by SEMARNAT.

### **13. Waste from mining activities will always be the responsibility of its generator.**

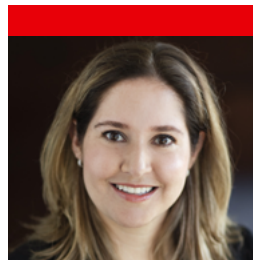
The amendment does not distinguish between the different types of waste that must be subject to this rule. Consequently, the environmental authorities could argue that all mining waste, regardless of its category, will always be the responsibility of its generator, independently of whether the generator contracts with authorized companies for its transportation and final disposal.

In our opinion, this provision contradicts the principles established in the LGPGIR in the sense that the responsibility of a waste generator ends at the moment it delivers the waste to a duly authorized person for transportation and final disposal.

To consult the original publication in the Official Gazette of the Federation, visit: [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5688050&fecha=08/05/2023#gsc.tab=0](https://www.dof.gob.mx/nota_detalle.php?codigo=5688050&fecha=08/05/2023#gsc.tab=0)



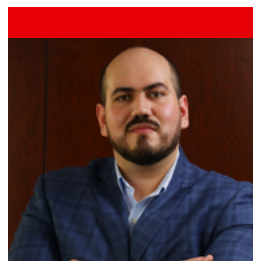
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