New environmental authorization scheme: how does this affect mining companies?

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A new environmental authorization scheme, which is intended to be a simplified version, was implemented under the *Environmental Quality Act* (“EQA”) and has been in effect since March 23, 2018. How does this new scheme affect mining companies? Is the authorization scheme truly simplified? What about the right to continue unauthorized operations that could benefit certain mining companies (also called an acquired right)?

Under the new EQA authorization scheme, mining activities will be subject to different schemes depending on the risk they present. While the majority of activities are subject to ministerial authorization[1], others may:

- benefit from exemptions
- be subject to the new scheme of declaring compliance
- be subject to the environmental impact assessment and review procedure if they present an elevated risk.

The implementation of the EQA’s new environmental authorization scheme involves a review of the regulations adopted pursuant to this act. This bulletin refers to the Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters (“Draft Regulation”). This Draft Regulation has been published, but it is not currently in its final form and may be modified before it comes into force.[2] Consequently, a regulatory watch is required.[3]

What authorizations are mining companies subject to?

Depending on the nature of the activity, the applicable scheme ranges from exemption to environmental impact assessment and review procedure. [4]

The general environmental authorization scheme

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Subject mining activities

Article 22 of the EQA lists several activities whose implementation requires prior authorization from the Minister. Mining activities are not part of this list. However, the 10th item of the list is “any other activity determined by government regulation.” At present, the Draft Regulation states that “any mining activity shall be subject to authorization.”[5] This leaves little room for interpretation.

Thus, with the exception of the specific cases currently provided for in the Draft Regulation, any mining activity requires an authorization from the Minister.

Content of the authorization request

It should be noted that in addition to the documents listed in the EQA, an authorization request for mining activity may have to be accompanied by the additional information and documents listed in the Draft Regulation.[6]

In addition, from now on, any documents submitted in support of an authorization request are considered as being public. It is up to the person submitting the request to specify whether certain documents include a confidential industrial or commercial secret. The decision as to the public nature rests with the Minister who notifies the applicant for authorization. This decision is legally binding upon the expiration of a period of 15 days following the transmission of the notice. Once this period has elapsed, the documents are made public, hence the importance of calling on the courts quickly if it is necessary to contest the Minister’s decision.[7]

Right to pursue an activity without environmental authorization

In its former version, the general environmental authorization scheme in Article 22 of the EQA prohibited “undertaking the operation of any industry, the performance of an activity or use of an industrial process [...]” without having obtained a prior certificate of authorization. Because of the word “undertaking,” the case law recognized the possibility of pursuing an activity without authorization when it had been undertaken before the entry into force of the EQA on December 21, 1972.

In its new version, Article 22 of the EQA no longer speaks of the need to obtain an authorization to undertake but rather to carry out an activity. This demonstrates the legislator’s willingness to no longer allow an activity to continue without environmental authorization.

However, certain transitional provisions specifically provide that an activity may be pursued without authorization, providing that it must then rely on the wording of the government regulation on the issue to make sure[8]. At present, the text of the Draft Regulation does not support the conclusion that mining companies could benefit from a right to pursue an activity without authorization.

Exemption scheme

Certain mining activities considered to be of little risk to the environment are completely excluded from the obligation to obtain prior environmental authorization.

The Draft Regulation currently provides that the following are exempt:

milestone marking,
geophysical, geological, or geochemical surveys,
drilling work (unless performed in wetlands and water environments[9])
stripping and excavation work under certain conditions (unless they are carried out in wetlands and water

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environments or within 30 meters of such environments).

The statement of compliance scheme

The statement of compliance scheme allows for proceeding by transmitting to the Minister all of the documents required by the EQA and the applicable regulatory provisions by stating compliance to them. In this case, if thirty days after the transmission of the documents, no follow-up has been made with the Declarant, he or she may begin the activity concerned.

The Draft Regulation provides that drilling work carried out in the wetlands and water environments as a part of a project searching for mineral substances would be, under certain conditions, eligible for the statement of compliance.[10] It should be noted that special provisions may be applied depending on the environment in which the work is carried out. Certain conditions are specific to work carried out in a pond, marsh, swamp or peatland[10], and others are specific to work carried out on a lake or shore or in a lake or river[12].

The compliance statement scheme requires the production of extensive and professionally signed studies. If the processing time is shortened, the declarant's task remains complicated.

The environmental impact assessment and review procedure scheme

Certain mining activities are subject to the environmental impact assessment and review procedure pursuant to the *Regulation on the assessment and review of the environmental impact of certain projects*[13]currently in force.

The purpose of this bulletin is not to discuss the procedure followed under this more complicated scheme that involves the intervention of the *Bureau d'audiences publiques sur l'environnement* [Bureau of Public Hearings on the Environment] ("BAPE").[14]

The following mining activities are subject to this review procedure:

The establishment of a uranium or rare earth mine;
The establishment of a mine with a maximum daily metal-bearing ore mining capacity of 2000 metric tons or more;
The establishment of a mine with a maximum daily ore (other than metal-bearing) mining capacity of 500 metric tons or more;
Any increase in the daily maximum mining capacity of a mine thus making it reach or exceed the thresholds identified above;[15]
The establishment of a mine within an urban area identified in the construction and development plan of a RCM or in an Indian reservation or within 1000 meters of such an area or reservation;
Any expansion of 50% or more of the operating area of a mine in certain specific cases identified in the regulation;

After the BAPE's work, the Minister makes a recommendation to the government as to the authorization requested. Ultimately, it is the government that decides whether or not to issue the authorization. [16]

Changes to the environmental authorization scheme are major. Mining companies have every interest in taking a closer look at it and monitoring the entry into force of the regulations that allow the implementation of this scheme in order to continue their operations in Québec legally.

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1. Article 22 EQA.
2. The Minister of Sustainable Development, the Environment, and the Fight against Climate Change, Ms. Isabelle Melançon, mandated Ms. Suzanne Giguère and Mr. Jean Pronovost to give their opinion on the regulatory approach adopted by the Ministry. Here is the link to the SDEFCC press release: http://www.mddelcc.gouv.qc.ca/Infuseur/communique.asp?no=3996
3. On July 19, a press release was issued by the SDEFCC announcing the intention of the Minister, Isabelle Melançon, to postpone the coming into force of the draft regulations considering the findings of Suzanne Giguère

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and Jean Pronovost. Here is a link to the SDEFCC press release: http://www.mddelcc.gouv.qc.ca/infuseur/communique.asp?no=4049

4. It should be noted that at the time of writing, most of the government regulations implementing the new environmental authorization scheme have been the subject of proposals published in the Official Gazette of Québec. These regulations, however, are not yet known in their final versions.
5. The Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters, Appendix 1 (other activities subject to prior authorization), Section 2, Article 4.
6. Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters, Article 38.
7. The *Regulation on certain transitional measures for the application of the Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund* currently provides, in a transitional manner, the documents that must be attached to a request for authorization.
8. It should be noted that activities already in progress on March 23, 2018 and for which no environmental authorization was required pursuant to the EQA and that would now be subject to environmental authorization according to Article 22 of the EQA, could be continued without further formalities subject to any special provisions that may be provided for by a government regulation (Art. 290 of the *Act to amend the Environment Quality Act to modernize the environmental authorization scheme and to amend other legislative provisions, in particular to reform the governance of the Green Fund* (Bill 102, 2017, Chapter 4).
9. It should be noted that the EQA includes a broad definition of wetlands and water environments. These environments include lakes, rivers, shorelines and flood plains of lakes and rivers, ponds, marshes, swamps and peatlands (Article 46.0.2 EQA).
10. The Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters, Appendix 2 (activities subject to a statement of compliance), Section 8, Article 19 et seq.
11. Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters, Appendix 2, Section 8, Article 21
12. Draft Regulation on Ministerial Authorization and the Statement of Compliance in Environmental Matters, Appendix 2, Section 8, Article 22
13. Decree 287-2018, March 21, 2018
14. Articles 31.1 et seq. EQA
15. It should be noted that this does not apply to a mine existing as of March 23, 2018. Other standards apply to these mines for which any plan to increase the daily mining capacity by 50% or more is subject to the impact review procedure if this increase exceeds the applicable mining thresholds depending on the nature of the mined material.
16. Article 31.5 EQA

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