

ENVIRONMENTAL LAW

NESTA EDIÇÃO

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LEGISLATION AND NEW DEVELOPMENTS - FEDERAL

FEDERAL DECREE 6848/09: NEW REGULATIONS FOR ENVIRONMENTAL COMPENSATION

Under the federal legislation that created Brazil's system of nature conservation units (Federal Law 9985/2009), developers of projects that have a significant environmental impact are required to contribute an amount known as "Environmental Compensation" to the creation and maintenance of "full-protection" conservation units.

Federal Law 9985/2009 had fixed the Environmental Compensation at not less than 0.5% of the costs of implementing the project, and provided that the percentage was to be fixed by regulation, in accordance with the degree of environmental impact caused by the project. These regulations were issued under Federal Decree 4340/2002.

However, in April 2008, the Supreme Federal Court (*Supremo Tribunal Federal*, Brazil's highest court) decided that the portion of article 36§1 of Federal Law 9985/2009 establishing that the contribution "cannot be less than one-half of one percent of the total expected costs of implementing the project" and the reference to "the percentage" in article 36§1 were unconstitutional. In other words, the court held that the amount of Environmental Compensation cannot be linked to the costs of implementing the project and, at the same time, eliminated the 0.5% threshold (ADI no. 3.378).

Federal Decree 6848 of May 14, 2009 amends the earlier regulations under Federal Decree 4340/2002 to establish a new method for calculating the amount of Environmental Compensation. Under the amended regulations, the Brazilian Institute of the Environment and Renewable Resources – IBAMA is required to fix the degree of the project's impact on the environment based on the Prior Environmental Impact Study and Report, taking into consideration only the project's negative effects.

Although the new methodology includes "the sum of the investments necessary for implementation of the project" as a variable, it excludes "investments in plans and programs required in the environmental licensing procedure to mitigate impacts, as well as the charges and costs applicable to the financing of the project, including guarantees, and the costs of personal and property insurance policies and premiums".

The new formula also provides that the "degree of impact on the ecosystems", another variable in the calculation, cannot be greater than 0.5%, establishing the new ceiling on Environmental Compensation.

As a transitional measure, Federal Decree 6848/2009 provides that the new methodology will apply in environmental licensing proceedings pending on the date the decree was published (May 15, 2009), although the issuing of environmental licenses and any renewals will proceed normally, even where additional information is required to perform the new calculation.

**CONAMA RESOLUTION 406 OF FEBRUARY 2, 2009:
TECHNICAL STANDARDS FOR SUSTAINABLE FOREST MANAGEMENT PLANS**

The National Environmental Council (*Conselho Nacional do Meio Ambiente* – CONAMA) has issued new regulations, Resolution 406, to establish the technical standards for preparation, submission, assessment and implementation of Sustainable Forest Management Plans for wood-producing purposes of native forests and successor formations in the Amazon Biome. The Resolution does not apply to planted forests of either native or exotic species.

CONAMA Resolution 406/2009 was issued as part of the decentralization of jurisdiction over forest management and management plans introduced by Federal Law 11.234/2006, delegating powers to state environmental agencies which belong to the National Environmental System (*Sistema Nacional do Meio Ambiente* – SISNAMA).

The new Resolution establishes the minimum standards applicable to forest management, to which the state agencies must adhere, and improves procedures for control and inspection.

**CTNBIO RESOLUTION 08/2009:SIMPLIFIED RULES FOR
PLANNED RELEASE OF GENETICALLY-MODIFIED ORGANISMS**

The National Technical Commission for Biosafety (*Comissão Técnica Nacional de Biossegurança* – CTNBio) has issued Resolution 8 of June 3, 2009, establishing simplified rules for Planned Release into the environment of Class I risk Genetically Modified Organisms (GMOs) and their derivatives.

Planned Release is the release of GMOs or their derivatives into the environment for monitored experimental evaluation. The simplified rules apply to Class I (low risk) GMOs and derivatives that have obtained approval for experimental evaluation from the CTNBio in the past.

Under the terms of the Resolution, authorization for Planned Release can be suspended or revoked at any time by the CTNBio if adverse effects on the environment or human or animal health are detected, or new scientific knowledge is acquired.

After the applicant's Internal Biosafety Commission has approved the project, a proposal for release is submitted to the CTNBio, accompanied by (i) the Simplified Application for Planned Release into the Environment application form; (ii) maps for the Planned Release of the GMO and (iii) an application for importation of material, if necessary.

According to Resolution 08/2009, the CTNBio will adopt the measures necessary to safeguard confidential information of commercial value identified by the applicant and found to be worthy of protection by CTNBio, provided the grant of confidential treatment does not harm constitutionally-protected private or collective interests.

After conclusion of a Planned Release, the applicant's Internal Biosafety Commission is required to send a detailed report to CTNBio within six months.

**IBAMA INSTRUCTION 14/2009:
NEW PROCEDURES FOR FEDERAL ADMINISTRATIVE ENVIRONMENTAL OFFENCES**

Following publication of Federal Decree 6514/2008, which provides for administrative offences against the environment and the corresponding sanctions, IBAMA issued Instruction 14 of May 15, 2009 detailing the decision-making procedures with respect to offences, including the presentation of defenses and contestations, the imposition of sanctions and collection of fines and conversion of fines into services to recuperate, preserve or improve the environment, and the appeal system.

Under article 2 of the Instruction, the State Superintendents of IBAMA are required to appoint a senior public servant to act as decision-maker, with powers to judge at first instance offences involving fines of up to R\$2 million.

In cases where the fine is greater than R\$2 million, the Superintendents themselves act as decision-maker. The Superintendents also hear appeals from decision in matter involving fines of up to R\$2 million.

Appeals from decisions by Superintendents in offences involving fines greater than R\$2 million are heard by an Appeal Panel, to be created by the President of IBAMA.

A further appeal is possible to the National Environmental Council – CONAMA, provided the following requirements are met: (i) the appeal is timely, (ii) it involves a question of law going to the interpretation of a law or regulation that could affect the application of the national environmental policy, with repercussions for the uniformity of the activities performed by the agencies belonging to the National Environmental System – SISNAMA; (iii) the question of law was raised in the defense or earlier appeal; and (iv) the question has not been considered by CONAMA in any of its Resolutions or earlier decisions.

Instruction 14/2009 revokes all regulatory provisions to the contrary, particularly IBAMA Instructions 8/2003 and 79/2005.

IBAMA INSTRUCTION 05/2009:

NEW REGULATIONS ON THE ENVIRONMENTAL DECLARATION FOR PROPERTY TAX EXEMPTION

IBAMA has issued new regulations under Instruction 5 of March 25, 2009 on the submission of the Environmental Declaration (*Ato Declaratório Ambiental – ADA*) for purposes of exemption from rural property tax. The new Instruction revokes Instruction 76 of October 31, 2005 and article 9 of Instruction 96 of March 30, 2006.

The Environmental Declaration or ADA is the document used to register rural properties with IBAMA and the areas of environmental interest contained in such properties, for purposes of exemption from rural property tax.

According to IBAMA Instruction 5/2009, the following areas of environmental interest are exempt from rural property tax: (i) Permanent Preservation Areas (*Áreas de Preservação Permanente – APPs*); (ii) Legal Reserves; (iii) Private Natural Heritage Reserves (*Áreas de Reserva Particular do Patrimônio Natural – RPPNs*); (iv) Areas Declared to be of Ecological Interest (*Áreas Declaradas de Interesse Ecológico – AIE*); (v) Forest or Environmental Servitudes (*Áreas de Servidão Florestal ou Ambiental*) recorded on the title to the rural property; (vi) Areas Covered by Native Forest, where the owner protects native, primary or secondary forests at a medium or advanced stage of regeneration; and (vii) Areas Flooded for Use as Hydroelectric Station Reservoirs, with government authorization.

Rural properties that contain Legal Reserves, Forest or Environmental Servitudes or Areas with Native Forest Coverage in compensation for other rural properties also benefit from the tax exemption.

The Environmental Declaration must be submitted annually via the internet, using the ADAWeb form available on-line, in the period from January 1st to September 30th. The declaration can be rectified up to December 21st of the year in question. The form and instructions for completing it are available on IBAMA's website, at the following address:

http://servicos.ibama.gov.br/cogeq/index.php?id_menu=76

Instruction 5/2009 provides that the Environmental Declaration must reflect the information given in the

property's Information and Registration Update Document (*Documento de Informações e Atualização Cadastral – DIAC*), the rural property tax assessment form (*Documento de Informação e Apuração – DIAT*) and the Declaration of Registration of Rural Property (*Declaração de Cadastramento de Imóvel Rural – DP*) submitted to INCRA.

IBAMA ORDER 11/2009: IBAMA'S NEW INTERNAL ENVIRONMENTAL COMPLIANCE REGULATIONS
Order (*Portaria*) 11 of June 10, 2009 approves IBAMA's new internal rules for its environmental compliance activities.

Among other provisions, the new rules establish the powers of IBAMA managers in compliance matters and the duties of federal environmental agents.

Environmental agents are IBAMA's compliance personnel, and have powers to issue notices of infractions and take other administrative actions in the exercise of their environmental policing authority.

BRAZIL'S CENTRAL BANK FORMALIZES ADHERENCE TO THE GREEN PROTOCOL

On May 12, 2009, Brazil's Central Bank adhered to the Green Protocol, an agreement among public and private banks and the Ministry of the Environment to implement socio-environmental actions in the banking sector.

By adhering to the Protocol, which has already been signed by a number of banks, together with the Brazilian Federation of Banks, FEBRABAN, signatories undertake to make a common effort to adopt banking practices and policies that promote sustainable development and will not compromise the needs of present and future generations. The Green Protocol complements environmental commitments already made by financial institutions, such as the Equator Principles.

Among other actions, signatory banks agree to make their best efforts to offer financing and programs that promote the population's quality of life and sustainable use of the environment, and to consider socio-environmental impacts and costs in the management of assets and risk analysis of projects.

CLIMACTIC CHANGE

CIMGC RESOLUTION 9/2009 APPROVES REGULATIONS FROM CDM PROGRAM OF ACTIVITIES

The Interministerial Commission on Global Climactic Change (*Comissão Interministerial de Mudança Global do Clima – CIMGC*) has published Resolution 9 of March 20, 2009, approving regulations on the Program of Activities for the Clean Development Mechanism (CDM) created by article 12 of the Kyoto Protocol. The objective is to permit various actions for reduction or removal of greenhouse gas emissions to be proposed under a single Program of Activities or PoA, reducing operational costs and increasing the opportunities to generate carbon credits in Brazil.

In addition to introducing into Brazil specific rules on the PoA adopted by the Conference of Parties of the Kyoto Protocol (COP/MOP) and the CDM Executive Council, the Resolution establishes the documentation that must be submitted to the CIMGC to support review of projects, and the procedures for inviting commentaries from interested national actors.

The CIMGC has already approved a Program of Activities in Brazil for treatment of waste produced by pig farming, and various CDM projects have been approved in recent months, raising expectations that Brazil will generate carbon credits in the next few years.

According to data published by the United Nations Organization (UNO), there are currently 159 Brazilian projects registered with the CDM Executive Council, which should generate more than 20 million Emission Reduction Certificates or ERCs, commonly known as carbon credits, per year.

In turn, the CIMGC has approved more than 210 CDM projects in Brazil, placing Brazil in the vanguard of this global environmental market.

The main issue now under discussion in the regulation of the Brazilian carbon market is the grant of tax exemptions for revenue from the transfer of carbon credit. The matter is being studied in detail by the Ministry of the Treasury and the Brazilian Revenue Service. Barbosa, Müssnich & Aragão took part in a meeting with the Ministry of the Treasury to discuss the subject.

IBAMA INSTRUCTION 07/2009:

COMPENSATION OF CO₂ EMISSIONS FROM THERMOELECTRIC GENERATING STATIONS

IBAMA Instruction 07 of April 13, 2009 establishes that the environmental licensing process for electric power generating stations fired by oil or coal must include measures to mitigate CO₂ emissions resulting from the generation of power.

The Instruction refers to the National Plan on Climactic Change and provides that applicants for environmental licenses must submit a Program for Mitigation of Carbon Dioxide Emissions that meets the following requirements? (i) at least 1/3 of the emissions must be mitigated by forest recovery programs and (ii) no more than 2/3 of the emissions must be mitigated by investment in the generation of renewable energy or energy efficiency.

Although there is a proposal before the National Environmental Council – CONAMA to issue these regulations as a Resolution which would apply to all environmental licensing processes, at the moment the rules apply only to thermoelectric stations licensed by IBAMA.

Even in IBAMA's licensing process, however, the new rules will not apply to projects currently at the Installation License or Operating License phase: the Mitigation Program need only be submitted when the Operating License is renewed.

IBAMA's new regulation has sparked discussion over its impact on balance sheet of Brazil's projects under the Clean Development Mechanism created by article 12 of the Kyoto Protocol, since it creates an obligation to reduce emissions. The constitutionality of the Instruction has also been the subject of debate.

SMA RESOLUTION 30/2009: GUIDELINES FOR VOLUNTARY REFORESTATION PROJECTS TO COMPENSATE FOR GREENHOUSE GAS EMISSIONS IN THE STATE OF SÃO PAULO

The Secretariat of the Environment (*Secretaria do Meio Ambiente* – SMA) of the State of São Paulo has issued Resolution 30 with guideline for voluntary reforestation projects undertaken to compensate for emission of greenhouse gases. The Resolution is part of the Strategic Forestation Project (*Projeto Estratégico Mata Ciliar*) to create means to reforest 1.7 million hectares and increase the proportion of native forest coverage in the state to 20%.

SMA's Resolution recognizes the growing share of voluntary forestation in the carbon market as a means to compensate greenhouse gas emissions, and seeks to direct market participants to native species reforestation within Permanent Preservation Areas (*Áreas de Preservação Permanente* – APPs) designated by Federal Law 4771 of September 15, 1965, Brazil's Forest Code.

Under SMA Resolution 30/2009, the emissions inventory should be prepared in accordance with the criteria established by the Intergovernmental Panel on Climactic Change (IPCC) using the GHG Protocol, and reforestation should follow SMA Resolution 8/2008. Monitoring of carbon stocks should be performed using the methodology approved for the Clean Development Mechanism (CDM) created by article 12 of the Kyoto Protocol.

MUNICIPAL LAW 14.933/2009: THE CITY OF SÃO PAULO'S POLICY ON CLIMACTIC CHANGE

Municipal Law 14.933 of June 5, 2009 creates the City of São Paulo's Policy on Climactic Change and establishes the city's priority strategies to mitigate climactic change and adapt to its adverse effects.

The most polemic aspect of the municipal policy is its goal to reduce anthropic emissions in the municipality by 30% by 2012, in relation to 2005 levels. This issue is controversial because it goes against the position taken by the Federal Government, particularly the Ministry of Foreign Affairs and the Ministry of Science and Technology, that developing countries should not assume goals for reduction or limitation of greenhouse gas emissions for the first commitment period under the Kyoto Protocol (2008 to 2012).

Another important point under the new municipal law is that it requires businesses that produce significant greenhouse gas emissions to submit an emission mitigation plan and compensatory measures in the environmental licensing process.

Like IBAMA Instruction 7/2009, São Paulo's law has generated discussion over its impact on new projects under the Clean Development Mechanism (CDM) created by article 12 of the Kyoto Protocol, since it creates an obligation to reduce emissions.

LEGISLATION AND NEW DEVELOPMENTS IN THE STATE OF SÃO PAULO

STATE LAW 13.542/ 2009: BROADER POWERS FOR THE CETESB

State Law 13.542 of May 8, 2009 has changed the name of the CETESB (*Companhia de Tecnologia de Saneamento Ambiental*) to "Environmental Company of the State of São Paulo" (*Companhia Ambiental do Estado de São Paulo*) and broadens its powers to protect the environment.

After the Law comes into force, 90 days after its publication, the CETESB will be the only environmental licensing agency in the state, assuming the functions of the State Department of Protection of Natural Resources (*Departamento Estadual de Proteção dos Recursos Naturais* – DEPRN), the Department of Metropolitan Land Use (*Departamento de Uso do Solo Metropolitano* – DUSM) and the Department of Environmental Impact Assessment (*Departamento de Avaliação de Impacto Ambiental* – DAIA).

As a result, in addition to maintaining its jurisdiction as the licensing agency for establishments and activities that are effective or potential polluters and use environmental resources, the CETESB will now be responsible for (i) authorizing suppression of vegetation and intervention in Permanent Preservation Areas and other environmentally-protected areas; (ii) issuing permits and license for use and occupation of land in protected water source areas; (iii) issuing licenses under metropolitan industrial zoning rules; and (iv) environmental monitoring, especially of surface and underground water, soil and air quality.

CETESB UPDATES ITS LIST OF CONTAMINATED AREAS

In March 2009, CETESB published an updated list of contaminated areas in the State of São Paulo, showing a 10% increase in comparison to November 2007. Despite this increase, largely due to more intense monitoring by the agency, 182 areas were decontaminated and are ready for use, an indication of São Paulo's success in managing its contaminated areas.

Of the 2514 contaminated areas in the state 78% are fuel stations, which 13% resulted from industrial activities. More information on the management of contaminated areas in the State of São Paulo is available at http://www.cetesb.sp.gov.br/Solo/areas_contaminadas/areas.asp.

LEGISLATION AND NEW DEVELOPMENTS IN THE STATE OF RIO DE JANEIRO

STATE LAW 5.438/2009:

STATE REGISTER OF POTENTIAL POLLUTERS AND USERS OF NATURAL RESOURCES

State Law 5.438 of April 17, 2009 has created a Register of Potential Polluters and Users of Environmental Resources and an Environmental Control and Inspection Fee for the State of Rio de Janeiro.

The State Register will be managed by the State Institute of the Environment (*Instituto Estadual do Ambiente* – INEA), under the supervision of the Secretariat of the Environment – SEA.

Existing potential polluters and users of natural resources have until September 30, 2009 to register their activities in the State Register. New potential polluters and users of natural resources will have a period of 60 days after commencing activities to register.

Failure to register is an administrative offense punishable by fines of up to approximately R\$14,000 (in 2009), in the case of large companies. Potential polluters and users of natural resources in the state of Rio de Janeiro are also required to enroll in the Federal Register created by Federal Law 6.938/81 and managed by IBAMA.

Rio de Janeiro's new Environmental Control and Monitoring Fee is payable by all persons and entities which engage in the activities listed in Schedule I to State Law 5.438/2009, starting in 2010.

Rio de Janeiro's new fee does not increase the burden on businesses in the state, since the Environmental Control and Monitoring Fee will be shared between the State of Rio de Janeiro and the federal agency IBAMA, with Rio de Janeiro receiving 60% and IBAMA 40%.

Payers of the fee continue to be required to present by March 13 of each year a report on their activities in the previous year, in a form to be established by INEA. An annual report must also be submitted to IBAMA under Federal Law 6.938/81.

This newsletter is merely informative, presenting only a general overview of the subjects. Thus, it is not a legal opinion.

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