

ENVIRONMENTAL LAW

Newsletter

FEDERAL LEGISLATION

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FEDERAL DECREE N° 6514 DATED JULY 22, 2008 - PROVIDES FOR ADMINISTRATIVE INFRACTIONS AND SANCTIONS RELATING TO THE ENVIRONMENT, ESTABLISHES THE FEDERAL ADMINISTRATIVE PROCESS USED TO INVESTIGATE SUCH INFRACTIONS AND CONTEMPLATES OTHER MEASURES

Signed on July 22, 2008 by President Luiz Inácio Lula da Silva and published in the Official Gazette on July 23, 2008, Decree n° 6.514/08 (“Decree”) has the purpose of speeding up the course of proceedings relating to administrative sanctions relating to the environment and rendering more efficient the collection of the fines applied. Article 153 of Decree n° 6514/08 expressly revoked Decree n° 3179/99.

One notes that one of the concerns of the Decree is to try to reduce the controversies surrounding the type of sanction applicable to certain administrative sanctions relating to the environment, and it is longer and more detailed than Decree n° 3179/99.

It also intends to correct some mistakes: it excludes from the list of administrative sanctions the “compensation of damages caused”, provided in Decree n° 3.179/99, given that the obligation to repair possible environmental damages caused does not depend on the application of criminal and administrative sanctions (Article 225, 3rd paragraph of the Federal Constitution).

Sanctions. Sanctions providing for warnings and fines are now treated in separate subsections, which establish the conditions for their application. The former will be applied only to the administrative infractions that harm the environment to a lesser degree, in other words, in the cases where the maximum fine applied does not exceed the amount of R\$ 1.000,00 (one thousand reais). But, this does not exclude the application of other sanctions. It should be stressed that Article 7 of Decree n° 6.514/08 prohibits the application of another warning three years as of the date of the ruling of the defense filed in response to the previous warning or as of the date of another applied penalty.

The Decree also clarified the issue concerning the cases of substitution of a monetary penalty, applied by a federal authority, for a fine imposed by a state or municipal environmental authority. This issue used to raise some controversy in connection with the possibility of a term of commitment to adjust a conduct (or another form of agreement to regularize the infraction or compose the damages) being suitable as a substitution. Now, it has specified that the substitution will only be possible in the event of actual payment of a fine.

One of the significant rules added by the decree regarding the rest of the administrative sanctions was that the sanctions that restrict rights shall stay in force for a maximum term of three years.

Statute of Limitations. The Decree also innovates where it dedicates a section to the treatment of the statute of limitations. The term established for the expiration of the statute of limitations for an administrative action regarding the investigation of the performance of infractions against the environment is of five years as of the date of the action itself, or, in the case of a permanent or

continued infraction, the day when it ceased to occur. The statute of limitations shall be applicable to investigative procedure of a tax assessment notice that has been paralyzed for more than three years waiting for a ruling or interlocutory court order, the case records of which shall be shelved *ex officio* or upon request of an interested party.

Infractions. Some changes were introduced to the subsections that deal with infractions. With regard to the infractions against the fauna, some criteria for the application of fines were slightly modified, as were modified the amounts stipulated for some of the sanctions, in addition to the inclusion of new infractions.

Among the changes related to infractions against the flora, one must highlight the following: (a) changing the prohibition to “transform hardwood into charcoal, thus classified in the public authority’s rules, for industrial or energy purposes or for any other exploration, be it economic or not, in disagreement with legal determinations”, which now is a prohibition to “transform wood from forests or other forms of native vegetation into charcoal” under the same circumstances; (b) prohibiting the practice of “deforesting, by means of *corte raso* (a method of simultaneously cutting down all of the trees in a part of a forest reserved for cutting, with a minimum area of half an hectare), of forests or other native plants, outside legal reserves, without authorization from the competent authorities”, a practice that was previously restricted to the areas of legal reserves; (c) typifying as a crime the practice of not observing the obligation to reforest; and (d) including the practice of “not registering the legal reserve”, subjecting the infractor to a fine of R\$ 500.00 (five hundred reais) to R\$ 100.000,00 (one hundred thousand reais), thus, making the registration with the competent environmental authorities mandatory, in all of the cases involving legal reserves.

In relation to infractions relating to pollution and other environmental infractions, the subject of importation of used tires is introduced. This issue has caused much debate during the discussion by the Supreme Federal Court (STF) regarding the constitutionality of such practice, having been submitted to the highest judiciary instance by the government itself. The wording of the article which previously defined as “importation of used or reformed tires” as an infraction was modified to “importation of used or reformed tires in disagreement with the legislation”.

As to infractions committed against the environmental administration, many of the previously established rules were revoked and other changes were made, such as the following: (i) modification of the criterion used to stipulate a fine, in the case of non registration with the Federal Technical Registry: according to the new wording, the amount of the fine is established taking into account if the infractor is an individual or a legal entity and, in the latter case, taking into account the scale of the activities; (ii) establishing as an infraction the noncompliance with an embargo against works or activities; (iii) establishing as an obligation the compliance with environmental compensation determined by law, according to the form and terms required by environmental authorities.

Conservation units. Establishing a subsection to deal exclusively with the protection of Conservation Units was a great innovation by the decree. Among the types of activities related to the Conservation Units which were typified as crimes are: (i) “to commercially explore non-wood products or by-products and services obtained or developed using natural, biological, scenic or cultural resources in a conservation unit, without authorization from the unit’s supervising authority or noncompliance with such authorization, in the event such an authorization is enforceable”, except in connection with areas of environmental protection and private reserves of natural heritage; and (ii) “to explore or make commercial use of the conservation unit’s image, without authorization from the unit’s supervising authority or in disagreement with the terms of such an authorization”, with the same exception in relation to areas of environmental protection and private reserves of natural heritage.

Process. The creation of a chapter dedicated to the regulation of the federal administrative process used to investigate administrative infractions relating to conduct and activities that damage the environment is also an innovation, which has come to fulfill the need to unify the rules on this matter. In this chapter, there are sections dedicated to official notifications, defenses, discovery and judgment of the appeals and proceedings related to the destination of apprehended goods and animals.

A section was also established solely dedicated to the procedure of conversion of a simple fine into services involving the preservation, improvement and recuperation of the quality of the environment. The conversion of a simple fine may be performed by an environmental authority. The criteria and prerequisites that need to be considered in order to apply such conversion are defined, such as the prerequisite that established that “the value of the costs of the services involving the preservation, improvement and recuperation of the quality of the environment cannot be less than the amount of the converted fine”.

It is important to consider that some of the provisions of the Decree are still under discussion, which could result in some changes in response to requests to improve its application. Some of the issues being analyzed refer to the embargo of areas, the deadline for registration of a legal reserve, the definition of native species planted and definitions about biodiversity.

FEDERAL DECREE N° 6.515 DATED JULY 22, 2008 – INTRODUCES, INTO THE SCOPE OF THE JUSTICE MINISTRY AND ENVIRONMENT MINISTRY, ENVIRONMENTAL SECURITY PROGRAMS CALLED NATIONAL ENVIRONMENTAL GUARD AND GUARDS CORPS FOR PARKS, AND DEFINES OTHER PROVISIONS

After the publication, on the 22nd of last month, of Decree 6.515, the Government introduced the Environmental Security Programs called National Environmental Guard and of the Guards Corps for Parks, with the scope of developing actions of federative cooperation on environmental issues.

Despite the changes that affected the initial project, which defended the mobilization of troops similar to the National Security Force for this purpose, the programs were finally approved with a new formulation, thus consolidating the arrival of a new player in the activities of prevention and defense against environmental crimes and infractions.

The rule stipulates that the general coordination of the projects and the supply of supplementary material resources will be a duty of the Environment Ministry. The decree also establishes joint action between the Environment Ministry and the Justice Ministry in some situations, such as, for instance, deciding when to use the National Environmental Guard and coordinating the public servants mobilized during the period of intervention. In order to execute said programs, agreements with the Brazilian state governments shall be entered into, which shall also provide for the transfer of funds.

The National Environmental Guard’s activities shall be focused on the protection and support of activities developed by IBAMA or by the Chico Mendes Institute. Its staff shall be composed of public servants who shall receive special training for joint action with public servants belonging to the federal police and to the public security authorities and environmental preservation state authorities. With respect to the Guards Corps for Parks Program, its forces shall be composed of Fire Fighters and members of the Military Police and its Forest and Environmental Battalions. Its objective will be to promote the environmental protection of the federal conservation units located inside the territory of the federative entity that contains representatives in each unit. Among the activities that shall be carried out by the Guards Corps for Parks is combating forest fires in the interior and surrounding areas of the conservation units and providing operational and safety support to the servants with authority to exercise environmental police force.

IBAMA NORMATIVE INSTRUCTION N° 187 DATED SEPTEMBER 10, 2008 – DEFINES PROCEDURES AND STANDARDS FOR TERMINOLOGY AND COEFFICIENTS FOR INDUSTRIES THAT CONSUME OR TRANSFORM PRODUCTS AND BY-PRODUCTS DERIVING FROM NATIVE WOOD FORESTS, INCLUDING VEGETABLE CHARCOAL

The need to establish terminology standards for forest products and by-products that enable an integration of electronic control systems and surveillance actions throughout the national territory; the need to define minimal procedures for the technical inspection at industries that use native forest inputs; and the need to modify IBAMA’s Normative Instruction n° 112 dated August 21, 2006, all led to the enactment of Normative Instruction n° 187, which will be used as a parameter for the inspection of industries that consume or transform products and by-products deriving from native wood forests, including vegetable charcoal.

IBAMA NORMATIVE INSTRUCTION N° 188 DATED SEPTEMBER 10, 2008 – DEFINES THE PORTS AND AIRPORTS DESIGNATED FOR THE ENTRY AND EXIT OF MATERIAL OF SPECIES LISTED IN THE EXHIBITS OF THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED OF SPECIES OF WILD FAUNA AND FLORA - CITES

The ports and airports designated for this activity are the following:

- I. Central-West Region - Brasília International Airport – President Juscelino Kubitschek
- II. Northeast Region – International Airport Pinto Martins (Fortaleza-CE) and Deputado Luis Eduardo Magalhães International Airport of Salvador
- III. North Region – Eduardo Gomes International Airport (Manaus-AM) and Port of Belém, Pará.
- IV. Southeast Region – International Airport of São Paulo / Guarulhos – Governador André Franco Montoro, Port of Santos-SP and Port of Vitória-ES.
- V. South Region – International Airport Salgado Filho, Porto Alegre-RS, Ports of Paranaguá-PR, Itajaí-SC and Uruguaiana-RS.

FEDERAL NEWS

DEFINITION ON THE COMPLIANCE WITH CONAMA RESOLUTION N° 315/02, WHICH DETERMINES THE REDUCTION IN THE SULFUR CONCENTRATION IN DIESEL AS OF JANUARY 1ST, 2009 THAT SHALL OCCUR DURING THIS MONTH

In light of the inertia regarding compliance with CONAMA Resolution n° 315 dated October 29, 2002, which establishes rules for the new phase of the Program for the Control of Vehicle Emissions – PROCONVE, the Environment Minister, Carlos Minc, stated on September 10, 2008, during a meeting of the National Environment Council (CONAMA), that the government shall demand compliance with the rule of the Council, according to the term stipulated. On September 16, the 19th Federal Court of São Paulo, through a decision by Judge José Carlos Motta, decided, by means of an injunction, that Petrobras will be forced to supply a less pollutant diesel S-50, having a concentration of 50 parts per million of sulfur – for fuelling the new vehicles entering the market as of January 2009.

According to the decision, at least one pump in each gas station must offer this fuel based on the standards required by the Resolution. The Federal Attorneys Office of São Paulo already announced that it shall file an appeal against this decision so that the injunction forces the supply of this fuel to the whole diesel fleet, and not only to the new vehicles.

The injunction also determines that the ANP must set rules for the distribution of S-50 diesel within 90 days. It is the agency's responsibility to determine the regulatory conditions to guarantee the supply of the less-pollutant diesel in all of the national territory.

Such Resolution determines that, as of January 1st, 2009, the EUR04 standard, which uses Diesel S50, must be adopted by heavy vehicles, such as buses and trucks, in 100% of national production, by manufacturer or importer. Presently, the concentrations of sulfur in metropolitan areas have gone up to 500 ppm, and in the remaining regions they can reach up to 2.000 ppm, well above international standards.

Despite the fact that the goal was established almost 6 years ago, the National Agency of Petroleum and Biofuels (ANP), Petrobras and the National Association of Manufacturers of Vehicles (ANFAVEA) have not implemented the measures required in order to comply with CONAMA Resolution n° 315/02. The present panorama reveals that there is not enough time to transform the fleet of vehicles to the new standards, which also evolves the use of new motors capable of running on Diesel S50

The Minister also presented to CONAMA, at the same meeting, the proposal to anticipate the next phase of PROCONVE for heavy vehicles, which established as the deadline for the adoption of Diesel S-10 determines the year 2016. According to Minc's proposal, which he intends to submit to the Congress plenary in October, the adoption of fuel with sulfur content of 10 parts per million (PPM) would have its deadline changed to 2012.

IN AUGUST THE FIRST PRIVATIZATION OF A PUBLIC FOREST TOOK PLACE, FOR THE PRIVATE, PROFIT-ORIENTED SUSTAINABLE EXPLORATION OF FOREST SERVICES AND PRODUCTS

The National Forest of Jamari, a federal conservation unit for sustainable use located in the state of Rondônia, has 220 thousand hectares, 90 thousand of which shall be used for forest concessions through public bids and payment for the use of its forestal resources, as per the terms of Law n° 11.284/06, that provides for the management of public forests for sustainable production.

The 90 thousand hectares shall be divided into small, medium and large size areas, which shall be offered through public bids separately and under differentiated rules. The use of the remaining areas of said conservation unit has already been defined by the Management Plan for the National Jamari Forest, approved by IBAMA in 2005. The publication of the official version of the invitation to bid was estimated to occur on October 31, 2007.

Law n° 11.284/06 establishes that the criteria to be used for the judgment of the best proposal in the public bid shall be the highest price offered as payment to the grantor for the granting of the forest concession and the best technique, considering (i) least environmental impact; (ii) most direct social benefits; (iii) highest efficiency; and (iv) highest value-added to the forest product or service in the concession region.

The deadlines for qualification of the parties in the public bid after the publication of the invitation to bid and submission of proposals ended on November 23, 2007 and December 15, 2007, respectively.

THE MINISTER FOR STRATEGIC AFFAIRS, MANGABEIRA UNGER, PROPOSES THE CREATION OF AN AGENCY TO DEAL EXCLUSIVELY WITH REGULARIZATION OF PROPERTY IN THE AMAZON REGION

Mangabeira Unger, Minister for Strategic Affairs, proposed to President Luiz Inácio Lula da Silva the creation of a new government agency, directly linked to the presidency, with the exclusive purpose of dealing with the solving issues related to land ownership in the Amazon. According to the minister, the creation of this agency would be a manner of controlling the “land ownership chaos” that is one of the main problems in the Amazon, given that only 4% of the properties are in good standing. This new agency would assume the responsibilities that today belong to INCRA for a region that encompasses “Amazônia Legal” and includes the states of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima, as well as parts of the states of Mato Grosso, Tocantins and Maranhão. On Thursday September 11th, at a meeting of the Managing Commission for the Sustainable Amazon Plan (PAS), the issue of land ownership regularization in the Amazon was discussed and four points were defined: (i) creation of a new agency to coordinate and monitor the regularization task; (ii) definition of a legal instrument to facilitate the collaboration with the states; (iii) advance the collaboration in the federal sphere; and (iv) simplify the rules and procedures for such regularization.

LEGISLATION OF THE STATES

SÃO PAULO

RESOLUTION SMA-62 DATED SEPTEMBER 10, 2008. PROVIDES RULES CONCERNING TEMPORARY SUSPENSION IN THE ISSUANCE OF AUTHORIZATIONS FOR VEGETATION SUPPRESSION OF THE “CERRADO BIOME” OF THE STATE OF SÃO PAULO

In commemoration of the National Savanna (*Cerrado*) Day (September 11th), the State Secretariat for the Environment published a resolution that suspends 180 authorizations for the vegetation suppression in the biome in that whole state. A bill was also sent to Governor José Serra, the purpose of which is to protect and preserve the savanna. The resolution resulted from a “Spring Package” that is part of the Strategic Environmental Project called “Zero Deforest”, organized by the SMA.

RIO DE JANEIRO

CREATION OF THE STATE INSTITUTE FOR THE ENVIRONMENT (INEA)

State Law n° 5.101 dated October 4, 2007, created the State Institute for the Environment -INEA. This new environmental institute in Rio de Janeiro shall unify the State Foundation for Environmental Engineering-FEEMA, the State Foundation Supervision of Rivers and Lakes - SERLA and the State Foundation Institute for Forests -IEF. Moreover, the INEA Law also authorized official examinations to be held until the end of the year, with the purpose of increasing, as of January 2008, the number of public servants qualified to work for such new environmental institute.

With the creation of the INEA, the State Secretariat for the Environment intends to speed up the process of environmental licensing and simplify its phases, consequently, eliminating bureaucracy and corruption. For the enterprises of small and medium environmental impact, the bill of law also establishes the delegation of licensing to the municipalities that have the required technical and institutional capacity. Furthermore, there is the intention to render environmental surveillance more effective in the state of Rio de Janeiro.

MATO GROSSO

NEW NORMATIVE INSTRUCTION ABOUT ENVIRONMENTAL LICENSING FOR RURAL PROPERTIES

The Secretariat for the Environment, through Normative Instruction n° 1 dated July 6, 2007, contemplated new technical and administrative procedures for environmental licensing of rural properties in the State of Mato Grosso and expressly revoked Normative Instruction n° 5 dated November 24, 2006.

Normative Instruction n° 01/07 provides rules for authorizing the localization, implantation and operation of activities related to deforesting, forest exploration and agricultural and livestock projects, by granting a Single Environmental License (LAU), as well as for registrations of the legal reserve.

The most relevant modification consisted in the possibility of having an environmental licensing for the registration surplus, up to the limit of 1/20 (5%) above or below the total size of the rural property, up to the limit of 150 hectares. With such modification, these areas will no longer be characterized as areas of ownership, contrary to what was established in the revoked Normative Instruction n° 05/06, according to which all registration surplus should be licensed as such.

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

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