

1. What shortcomings the current Environmental Code has? Why was a new Environmental Code needed?

It is already 14 years since the current Environmental Code of the Republic of Kazakhstan was adopted. It played an important role in ensuring environmental protection, while many of its provisions, however, proved to be ineffective. In particular, while applying the Code, the goals and objectives of environmental protection we actually substituted with the goals of replenishing the state budget.

Among the shortcomings of the current Environmental Code, I would like to highlight the low efficiency of environmental impact assessment and environmental permits; backwardness and irrelevance of legislative regulation of waste; limited public participation in environmental control and settling other issues; inappropriate procedure for the economic assessment of environmental damage.

The new Environmental Code of the Republic of Kazakhstan, dated 2 January 2021, is aimed at eliminating the shortcomings of the current code revealed in the process of its application, introducing the positive experience of the European Union and other foreign countries in Kazakhstan, consolidating the missing mechanisms for Kazakhstan to perform its international environmental obligations, ensuring public participation in environmental decision making by the state.

2. What changes do you think are the most important for businessmen?

First, the new Environmental Code toughens the legal regime for large industrial facilities that have the most significant environmental impact. In my opinion, the most critical changes for entrepreneurs are those in the facilities (enterprises, structures) classification used to impose more or less strict environmental requirements thereon; changes regarding environmental impact assessment, environmental permits, application of best available techniques, and waste management systems.

3. Kindly ask you telling more about these changes. What are the changes in the enterprises and structures classification applied to impose various environmental requirements thereon?

Enterprises and structures (hereinafter - the 'facilities') that have a negative environmental impact are divided into 4 categories as provided by both the new Code and the current one. In the new Code, however, this classification does not depend on the sanitary feature of production facilities. The criteria for classifying the facilities as of I, II or III category are given in Annex 2 to the new Code. Facilities that do not meet those criteria are referred to IV category.

For facilities that have been commissioned or have with a positive opinion of the state environmental expert authority or a comprehensive non-departmental authority for projects expertise before 1 July 2021, the operators will have to submit an application to the Ministry of Ecology, Geology and Natural Resources of the Republic of Kazakhstan (hereinafter - the 'competent authority') by 1 August 2021 for assignment the relevant category to the facilities. In other cases, the category will be assigned:

- 1) to the facilities, which under the new Code shall be subject to an obligatory environmental impact assessment (hereinafter - the 'EIA') - during the EIA;
- 2) to the facilities, which under the new Code shall be subject to obligatory screening of planned activities - during the screening;
- 3) in other cases - by operators independently in view of the requirements of the new Code.

Besides, pursuant to the new Code, the competent authority shall approve instructions for determining the category of a facility that has a negative environmental impact. Facility operators, therefore, shall provide the competent authority with complete and reliable

information required to determine the facility category during the EIA and screening. Operators, which will determine the category of their facilities independently, need to be especially careful: they shall carefully study and correctly apply both Annex 2 to the new Code and the instructions for determining the facility category.

Differentiation of environmental requirements is that the new code provides for different types of obligatory documents for each facility category: category I - a comprehensive environmental permit, category II - an environmental impact permit, category III - environmental impact declaration by the operator, category IV - no permit or declaration shall be required. An operator's mistake in determining the facility category, therefore, may lead to the lack of the necessary permit or declaration, which, in turn, may entail the application of serious administrative penalties to the operator (which will be toughened with the new Code introduction).

4. What changes does the new Code provides in terms of the EIA?

When developing the EIA provisions of the new Code (as well as many other provisions), the positive experience of the ES states was applied.

Under the new code, activities that have a significant impact on the environment shall be subject to the obligatory EIA. The activities are listed in Section 1 of Annex 1 to the Code. Activities given in Section 2 of Annex 1 to the Code may have significant impact on the environment depending on the circumstances in each specific case - location of the activity, its duration, facility characteristics, etc. Such activities, therefore, shall be subject to screening of planned activity - a procedure that enables the competent authority to determine whether the planned activity in each specific case can have significant impact on the environment and, therefore, whether the EIA is required.

In addition, the EIA involves the procedure for the EIA scoping designed primarily to identify the EIA focus impacts. The nature of the activity causes specific impact; in one case it can be impacts on groundwater, in another - on flora and fauna, in the third - on atmosphere. While EIA scoping, the competent authority will establish what impacts require detailed study, what research methods apply, what minimum information sources are used, and what alternative options for performing activities are to be considered when choosing the final one.

The most critical part of the EIA will be the possible impacts report, which will reflect the results of the studies. Based on such reports, the competent authority will issue EIA opinions - documents confirming the conclusions on the possible significant impacts of the planned activity on the environment, the admissibility of the planned activity and the conditions, under which the activity is recognised as admissible.

The new Code requires at all EIA stages creating all conditions necessary to ensure participation of the interested public and interested state authorities. While screening and EIA scoping, the competent authority will collect, consider and take into account the comments and proposals of the interested authorities and the public received within the specified time; upon completion of the possible impact report, it will be submitted to public hearings. Where after the public hearings there are still comments and suggestions, the initiator of the planned activity will have to arrange the report completion and submit it to repeated public hearings. If during repeated public hearings the comments and suggestions are not removed, and the initiator does not agree with them, the case will be considered by an expert commission, which would include one representative of the National Chamber of Entrepreneurs of the Republic of Kazakhstan and one of accredited non-profit organisations in addition to the representatives of the public and state authorities.

Thus, the EIA related novelties are aimed at ensuring a detailed study of the significant impacts of the planned activity on the environment, application of research methods that correspond to the current level of knowledge development, ensuring the participation of the interested public and interested state authorities at all EIA stages, ensuring the opportunity for the interested public to defend their rights and legitimate interests during the EIA.

5. What changes are provided by the new Code in terms of environmental permits and application of best available techniques?

As stated earlier, in respect of I category facilities, an obligatory comprehensive environmental permit shall be required.

The category I facilities are those having a significant environmental impact, therefore, the conditions for a comprehensive environmental permit (as compared to another type of environmental permit - an environmental impact permit) are the most stringent.

A feature of a comprehensive environmental permit is that it includes technological standards for emissions, discharges, technological specific standards for the water, electrical and(or) thermal energy consumption. These standards shall not exceed the technological parameters associated with the application of best available techniques.

The best available techniques are technologies, ways, methods that are used in the course of activity and are effective, advanced and practically applicable. The best available techniques will be included in the guides and opinions on the best available techniques, which will be approved by the Government of the Republic of Kazakhstan.

As to the II category facilities, there is an obligation to obtain environmental impact permits. These permits will also be issued for I category facilities, which the Code exempts from the need to obtain a comprehensive environmental permits (i.e., I category facilities that were commissioned or have a positive opinion of the state environmental expert authority or a comprehensive non-departmental authority for projects expertise before 1 July 2021).

Environmental impact permits will be similar in many respects to the currently issued emissions permits, however, there will be some differences:

- 1) environmental impact permits will include waste accumulation limits, while waste disposal limits will be only included where the operator has own landfill;
- 2) as the activity prerequisite, the environmental impact permit will contain the requirements for environmental protection established in the EIA opinion, if the EIA is obligatory for such an activity.

An environmental impact declaration is a novelty for the environmental legislation of the Republic of Kazakhstan. The obligation to submit the declaration will be imposed on the operators of the III category facilities. Declarations will be submitted in writing or as an e-document signed with an electronic digital signature to the relevant local executive authority. Before submitting the declaration regarding the planned activities, the facility operator will have to obtain an opinion of the state environmental expert authority for the facility (I believe that this means an opinion for the 'Environmental Protection' section as part of the project documentation for the facility construction).

The declaration, among other things, shall indicate: the declared amount of emissions, the amount and types of waste (generated, accumulated and transferred to specialised waste management organisations). If the actual volumes of emissions, discharges, accumulation or disposal of waste exceed the declared ones, the operator may incur administrative liability for providing an inaccurate declaration. The liability, in addition to a fine, may include the suspension of the facility operation.

6. What changes are provided for by the new Code in terms of production and consumption waste management?

The concept of 'waste handling' enshrined in the current code has been replaced in the new Code with the concept of 'waste management'. Waste management will include a system of operations that is significantly different from the system of operations currently envisaged under 'waste handling'.

In particular, the new code provides for the concept of 'waste accumulation', which partially coincides with the concept of 'temporary waste storage' provided for in the current code. Pursuant to the current code, temporary storage of waste is storage of waste by persons, which activities result in such waste, in places for temporary storage and for the periods specified in the project documentation (but not more than six months), for their subsequent transfer to the organisations engaged in utilisation, recycling or disposal of waste. Under the new Code, waste accumulation is allowed not only to the person generating the waste, but also to those, who collect, recover or dispose of waste. The Code establishes the maximum periods for waste accumulation: 6 months at the place of generation, 3 months at the place of collection and 6 months at the place of disposal or recovery. The maximum accumulation period at the place of generation for wastes from mining and processing industries is 12 months.

For violation of the periods provided for the temporary waste accumulation, the violators will be subject to severe administrative liability- a fine in the amount of the rate of payment provided for the disposal of this type of waste multiplied by the amount of accumulated waste, for each day in excess of the established accumulation period. Thus, the fine acquires the nature of a penalty, which is only terminated when the waste are removed to the place of collection, disposal or recovery. Serious administrative liability is also stipulated for violation of the established limits for the waste accumulation.

I would like to note that the new Code introduces licensing and notification procedures for certain waste management operations.

7. Other important novelties that you may like to note?

First, there is a change in the procedure for calculating environmental damage, as well as the very concept of damage. Under the new Code, environmental damage will be reimbursed in kind only - through taking measures to restore the environment. This approach should eliminate cases of damage recovery without proof of the damage caused, as it is now.

Second, the introduction of mechanisms for assessing cross-border impacts, which will apply in cases where an activity, plan or program of a foreign state may have a significant harmful impact in the territory of the Republic of Kazakhstan, and vice versa, when similar documents developed in the territory of the Republic of Kazakhstan may have such an impact in territory outside the jurisdiction of the Republic of Kazakhstan. These standards are aimed at implementing the Convention on Environmental Impact Assessment in a Cross-Border Context, made at Espoo (Finland) on 25 February 1991. Kazakhstan's participation in this Convention provides an opportunity for the citizens and state authorities to prevent or mitigate possible significant adverse environmental impacts in Kazakhstan arising from foreign sources.

Third, I would like to mention a new method of calculating an administrative fine - as a percentage of the economic benefit (i.e. money saving or income earning) obtained as a result of the respective administrative violation. For instance, violation of the ban on the disposal of certain types of waste causes a fine in the amount of 100% of the economic benefit obtained as a result of the violation.

There are many other provisions in the new Code that require thorough study by facility operators in order to assess the legal risks associated with possible violations. I hope that a timely assessment of such risks will allow businessmen avoiding serious economic losses in future.