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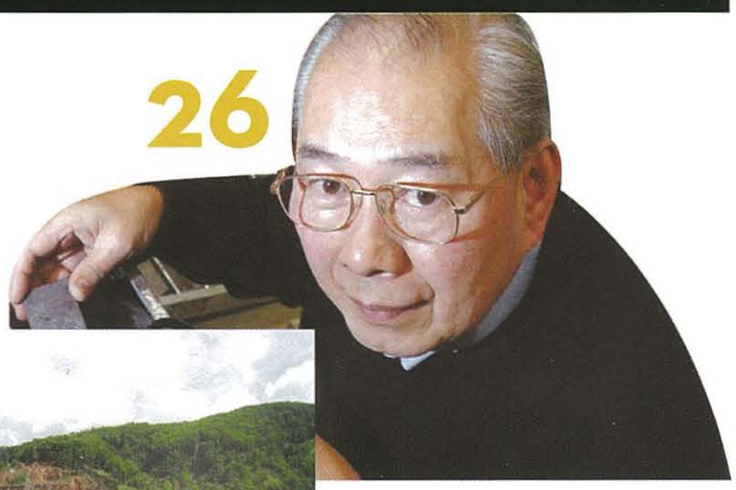

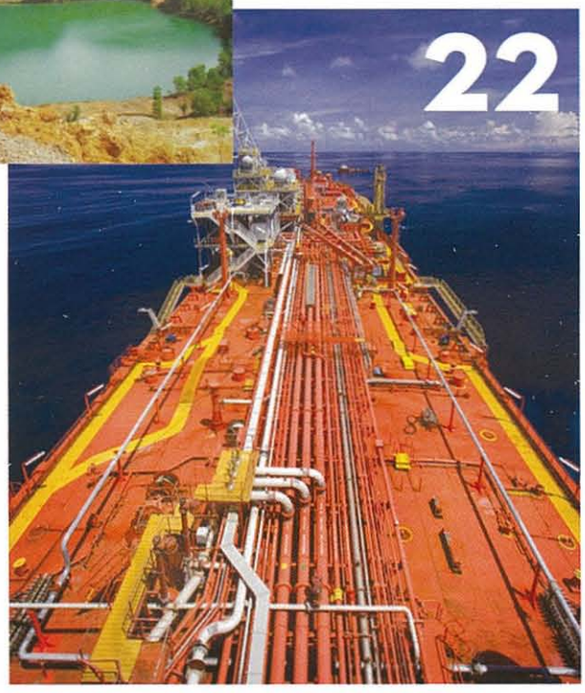

A minefield of misinformation and changing rules of business

By Patricia A. O. Bunye

The mining industry has taken quite a beating in media in the first quarter of 2011. The approval of the government's 2011 Investments Priority Plan to include mining as one of 13 priority sectors (up from the previous 11)–thereby extending incentives to mining projects that are not granted under the Mining Act – has been overshadowed by publicity about a populist signature campaign against mining in Palawan as well as news claiming that President Benigno Aquino himself has heeded calls to stop the processing of mining applications in Palawan.

That the arguments and grounds for opposition of the critics of mining in Palawan are anchored on misinformation and a lack of understanding of the legal framework deserves a separate discussion.

In any event, President Aquino's well-publicized comments that "(W)e will support whatever is the position of the communities. While they stand to economically benefit from mining projects, they are also the ones to suffer if anything goes wrong," coupled with news reports that new mining applications will no longer be accepted or that pending applications will no longer be processed, have created the misimpression that these are again uncertain times for the mining industry.

The moves by the government Mines and Geosciences Bureau to "cleanse" mining applications are not new. The MGB has always been vocal that at least half of the pending applications are not moving, justifying the need for "cleansing" and making the covered areas open to applications by other serious and legitimate applicants. Recent announcements on this initiative, however, have not been put in their proper context and have a resulted in a misunderstanding that there has effectively been a clampdown on mining.

In mid-February, the MGB met mining stakeholders to discuss the Department of Environment and Natural Resources' Memorandum Order No. 2010-04 dated March 12, 2010 ["DMO 2010-04"]; DENR Administrative Order No. 2010-13 dated May 5, 2010; and DENR Memorandum Order No. 2011-01 dated January 18, 2011. Similar issues were discussed at another forum in early March held at the monthly meeting of the Philippine Mineral Exploration Association.

DMO 2010-04, entitled "Reforms in the Department Mining Tenement System," states that a maximum time interval of 30 days between letters-notice shall be strictly followed in the implementation of the "three letters-notice policy" in complying with the requirements for the grant of mining tenements. Failure to observe this is a ground for denial of mining applications.

The same memorandum order provides that rejection of a request for Free and Prior Informed Consent (FPIC) by the rightful indigenous peoples concerned, as certified by the National Commission on Indigenous Peoples (NCIP), shall be a ground for denial of a mining application, provided that such rejection is carried out in accordance with the NCIP's procedural guidelines on securing the FPIC. Subject to the NCIP guidelines, the mining applicant concerned shall be allowed a maximum of two attempts to secure the FPIC from the indigenous peoples concerned.

Mining applications that have not complied with any of the following requirements shall also be denied:

- Securing the NCIP Certificate of Non-Overlap within one year and NCIP Certification Precondition within three years from the date of the NCIP's receipt of the pertinent letter-request from the MGB;
- Securing the proof of consultation with the Sanggunian concerned within two years from the date of acceptance of the mining application;
- Completion of the publication, posting and radio announcement requirements within one year from the date of acceptance of the mining application.

With respect to mining contracts, these may be cancelled due to:

- Failure to implement the three-year development/utilization work program or exploration work program for two consecutive years;
- Expiry of the exploration permit for five years or more.

The criteria for cleansing are found in internal memoranda of the MGB dated August 9, October 4 and October 15, 2010:

- Denial of aging mining applications [systematic cleansing based on the

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age of the applications];

• Final action on 1,113 aging applications for calendar year 2010;

• Final action on 50 percent of all pending applications by December 2010.

• A moratorium on new applications over areas covered by the denied applications.

As of February 2011, the MGB reports that 53 percent of the 2,180 applications aged 10-15 years have been reviewed. Of this number, 903 have been denied and 247 have been approved/endorsed, for a total of 1,150 applications acted upon.

To further implement DMO 2010-04 and ensure zero backlog by December 2011, the MGB issued Memorandum Circular 2011-2 dated February 8, 2011 containing the following directives to all MGB regional directors:

• The deadlines set under Section B.3 of DMO No. 2010-04 in connection with compliance with requirements of the National Commission on Indigenous Peoples, local Sanggunians, and the posting, publication and radio announcement requirements are fixed and non-extendible. Any order issued giving mining applicants additional time to comply with these requirements is a violation of DMO No. 2010-04 and is deemed void and without effect.

• Both large-scale and small-scale mining applications are covered by the moratorium on applications covered by Item 2 of the MGB's October 15, 2010 internal memorandum. Thus, small-scale mining applications will not be accepted in areas previously covered by denied large-scale mining applications pursuant to DMO No. 2010-04.

• Only mining applications with complete requirements will be endorsed to the MGB Central Office in Manila.

In addition, in its Memorandum Circular No. 2011-1 dated January 18, 2011, the DENR ordered the suspension of acceptance and processing of new mining applications by all MGB regional offices. For purposes of this issuance, "mining application" covers "any and all applications for Exploration Permit, Mineral Production Sharing Agreement, Financial or Technical Assistance Agreement and Industrial Sand and Gravel Permit."

The mining stakeholders have made it clear that they hope the MGB, in implementing the "cleansing" process, will not only be guided by the age of the applications and the deadlines to comply with NCIP and Sanggunian requirements, but will also consider legitimate issues that mining companies may have with the NCIP or the concerned Sanggunians.

The more controversial MGB initiative is the establishment of so-called mineral Reservations and the imposition of a five percent royalty on gross revenue of mining operations on top of the two percent excise tax.

According to MGB director Leo Jasareno, there are three approaches to the establishment of the mineral reservations:

• Automatic establishment – covering all mining companies in the operating phase, upon commencement of production/approval of a Declaration of Mining Feasibility;

• Clustering approach – covering areas with clustered applications (there are approximately 15 areas across the Philippines); and

• Regular approach – pursuant to procedure under the implementing rules and regulations of the Mining Act – i.e. the MGB director recommends to the DENR secretary, the DENR secretary recommends to the Philippine president, the president issues a proclamation.

The proposed increase in royalties by five percent on revenue, while seemingly small, has potentially huge effects.

This proposal, while allegedly made to optimize the government's benefits from mining, was unfortunately without consultation with industry stakeholders or consideration of its potential adverse effect on the profitability and viability of mining projects in the Philippines.

The Chamber of Mines and the Joint Foreign Chambers of Commerce have already raised their concerns to the Aquino administration, stressing particularly that a change in the financial model, particularly for mining projects in advanced stages of development, will certainly impact the overall viability of these projects. They say these projects take many years of development, with much of the required financing coming from banks and other financial institutions – and thus the proposed increase in revenue royalties not only dramatically impacts project viability, but also makes it more difficult for mining companies to attract funding.

The Chamber of Mines, in particular, has commissioned the consultancy firms SGV and KPMG to prepare a comprehensive study on the proposal to ascertain whether the structure to be implemented is realistic and competitive when compared to other jurisdictions. Certainly, the proposed increase in royalties by five percent on revenue, while seemingly small, has potentially huge effects. An accepted rough rule of thumb in mining is that every one percent of royalty is equivalent to 5-10 percent in profit. A reduction of 25-50 percent in profit would significantly impact the viability of most projects. In the long run, government will likely lose out on significant tax revenue and receive no royalties from those projects.

The 2009-2010 Fraser Institute survey of mining companies ranks the Philippines at the tail end of its policy potential index. Even without the proposed five percent royalty, the Philippines' ranking is already pulled down by issues concerning the administration, interpretation and enforcement of existing regulations. The country is also not considered sufficiently competitive in terms of its taxation regime, ranking 46 among 72 countries. This ranking is expected to further plummet if the proposed five percent royalty on minerals is implemented. ■