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Seeing beyond the rhetoric

By Patricia A. O. Bunye

The efforts of the mining industry, led by the Chamber of Mines, to lift the ban on open pit mining imposed by rejected Department of Mining and Natural Resources Secretary-Designate Regina Lopez are beginning to bear fruit.

Shortly after this column was submitted, it was reported that the Minerals Industry Coordinating Council (MICC) Technical Working Group had made a favorable recommendation to lift the ban on open pit mining.

In a statement, the MICC announced that “(I)n the 28th MICC meeting held on October 24 wherein a quorum was acting and present throughout, [the] majority of the MICC members voted to recommend a change in the policy of the DENR with regard to Department Administrative Order [DAO] 2017-10, particularly, that the DENR lift the ban on open-pit mining provided that mining laws are strictly enforced.”

DENR Secretary Roy Cimatum, who co-chairs the MICC with Finance Secretary Carlos Dominguez, said he will follow the recommendation and present it at

a Cabinet meeting in the first week of November. If all goes well, the industry may have reason to celebrate very soon.

The foregoing recommendations find strong basis in both law and science.

First of all, from a purely legal perspective, Department Administrative Order No. 2017-10 banning open pit mining is unconstitutional and illegal for violating the constitutional guarantee to equal protection of the law by prohibiting only: (a) the open pit mining method; and (b) the use of this method specifically for the extraction of copper, gold, silver and/or complex ores.

The equal protection clause “requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others.” [City of Manila v. Hon. Laguio, Jr., 495 Phil. 289, 326 (2005)].

DAO No. 2017-10 arbitrarily imposes a restriction on the open pit mining method only, while allowing other forms of surface mining, even if the Mining Act clearly makes no such distinctions.

The choice of the open pit method is dictated primarily by the location of the deposits, i.e., the open pit method is used when the deposit is near the surface or shallow, while the underground mining method is used to extract deep seated deposits.

In this regard, open pit mining is an internationally accepted method of extraction in many jurisdictions, both developing and advanced economies, such as Australia, Canada, the United States, Brazil, and Malaysia, among many others.

There is no substantial distinction be-



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tween open pit and other forms of surface mining for as long as the method of extraction and subsequent rehabilitation conforms to international best practices of the industry.

Examples of the surface method exist in the Philippines, such as: Teresa Marble Corporation [quarry in Teresa, Rizal]; Taganito Mining Corporation (open cast, Claver, Surigao del Norte); Hinatuan Mining Corporation (Tagana-an, Surigao del Norte); and Ilocos Norte Mining (dredging, Badoc, Ilocos Norte). Considering that these are allowed, there is no substantial distinction with these methods that could be the basis for banning the open pit method.

Moreover, DAO No. 2017-10 creates an invalid classification as to the ore types covered by the prohibition on open pit mining since it only applies to copper, gold, silver and/or “complex ores” (which term is not even defined).

The current ban is also a usurpation of

legislative power for it amends the Mining Act, which clearly allows the open pit mining method. Under Section I, Article VI of the Constitution, it is Congress, or the legislative department, which generally exercises the power to make, alter, and repeal laws. As a department under the executive branch, the DENR has no power or authority to issue regulations that contravene or amend existing laws.

The open pit mining method is allowed under the Mining Act, which recognizes surface mining, e.g. open pit mining, as an allowable method of extracting mineral resources from the earth (cf. Sections 3 and 66).

Prior to the issuance of DAO No. 2017-10, the DENR consistently recognized open pit mining as a valid method of extraction in DAO No. 2010-21, as well as in DAO No. 2000-98, which explicitly allowed open pit or surface mining activities, subject to certain rules and regulations by the State.

In addition to DAO No. 2017-10 being unconstitutional, illegal, and a breach of the State’s treaty obligations (which shall

not be discussed in this column), the said issuance is even wholly unnecessary considering that there are already safeguards present in the Mining Act, its Implementing Rules and Regulations, and the other issuances of the DENR.

In promulgating administrative rules, the DENR is limited to filling in the details for implementing existing laws as they have been enacted.

Its rule-making powers cannot be extended to amending or expanding what is already provided in the statute or embrace matters not covered by the statute. As will be discussed, existing mining laws and regulations already provide for and sufficiently detail the implementation of safeguards that DAO No. 2017-10 seeks to address.

The recitals of DAO No. 2017-10 allege that “open pits have ended up as perpetual liabilities, causing adverse impacts to the environment” and that the “rehabilitation of mined-out open pits shall in-

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variably require perpetual maintenance works that shall outlive the existence of the mining companies x x x." This issue, however, is already addressed by the numerous conditions imposed by law, regulations, and specific permits upon mining companies.

In particular, Presidential Decree No. 1586 ("PD 1586") established the Environmental Impact Statement ("EIS") System for every project and undertaking which significantly affect the quality of the environment. In reviewing the EIS, the EMB is "guided by three general criteria: (1) that environmental considerations are integrated into the overall project planning, (2) that the assessment is technically sound and proposed environmental mitigation measures are effective, and (3) that social acceptability is based on informed public participation."

PD 1586 further prohibits any entity from undertaking or operating any declared environmentally critical project or area, e.g. mining, without first secur-

ing an Environmental Compliance Certificate ("ECC").

The issuance of the ECC, among others, also certifies that the project proponent "has complied with all the requirements of the EIS System and has committed to implement its approved Environmental Management Plan."

In this regard, all mining companies must undergo the EIS process and secure an ECC before they may operate. During the EIS process, the EMB is mandated to ensure that the environmental impact is considered and mitigated before it issues an ECC.

The Mining Act also requires companies to plan for mine rehabilitation before it may abandon its mine, and to set aside funds therefor. Section 71 of the Mining Act and Sections 180 to 200,

Chapter XVIII of the Implementing Rules and Regulations of the Mining Act provide for the establishment of a rehabilitation fund and the procedure for claiming damages.

Notably, the recitals of DAO No. 2017-10 state that the ban on open pit mining was imposed "notwithstanding the provisions of the Mining Act on final mine rehabilitation and decommissioning x x x." Therefore, DAO No. 2017-10 itself recognizes its redundant nature.

Technical experts are better qualified to discuss the issue of acid mine drainage, which is one of the primary objections against the open pit method, and how it may be properly addressed at all stages in the mining cycle, from exploration to post-closure.

Nevertheless, it is clear from the many examples of rehabilitated mines throughout the world that any further discussion on the use of open pit mining should be based on strengthening the regulatory framework and ensuring the proper safeguards are in place

These latest developments signal that order is finally being restored at the DENR after the tumultuous months under the previous dispensation, and that due regard for the law and proper consultations are once again the bedrock of the decision making there. ■



Patricia A. O. Bunye is a senior partner at Cruz Marcelo & Tenefrancia and head of its mining and energy practice. She is also President of Diwata-Women in Resource Development, Inc. Questions and comments are welcome at po.bunye@cruzmarcelo.com.



Diwata spearheads #MillennialsOnMining, a call for responsible, sustainable mining

By Maria Paula Tolentino

From its conception on 2012 to the present year, the Diwata group recently celebrated its 5th year anniversary on 18 July 2017 together with its stakeholders at the Manila Elk's Lodge, Corinthian Plaza Makati City.

Prior to the celebration, the group voted for its new Board of Directors and welcomed its new President, Geologist Eliza Laudencia.

In response to the industry's change of leadership at the Department of Energy & Natural Resources, Mines and Geosciences Bureau and recently, the Chamber of Mines, Diwata saw it fitting to participate in Mining Philippine's 2017 conference with a group discussion centered on the theme: "Is Responsible Mining possible? Millennials respond".

During Mining Philippines' Conference on 5 September 2017 at the Sofitel Philippine Plaza, Laudencia in her opening statement said "with the change in leadership both at the DENR, the MGB and recently, the Chamber of Mines, there is much to be hopeful for.

A change of leadership means we are now given an opportunity to better ourselves as professional miners and most importantly, given a fighting chance to redeem our reputation as an industry."



She adds that our industry needs a facelift. "We need to create a robust information-educational campaign where responsible mining is not only a buzzword but is the industry standard. Who better to bring this narrative to perspective but our future geologists, engineers, metallurgists and scientists? The millennials of the mining industry."

But why Millennials? Diwata says Millennials have the ability to reach common ground on everything from pop culture to global warming, yet they also have the constant stream of opinions and information that clash with their own experiences. Thus, Diwata's FGD was the very platform where millennial mining professionals can share the challenges, triumphs and rewards when responsible and sustainable mining practices become the standard in the workplace.

In true Millennial fashion, Diwata was not far behind. The event was driven by a potent social media campaign that used the hashtag #MillennialsOnMining with the goal to reach a wider audience of millennial mining practitioners to further Diwata's cause.

In a twitter poll created by the group a few hours before the FGD, the millennial respondents answered in the affirmative that "Yes! Responsible is indeed possible in the Philippines".

Diwata's social media campaign managed to engage millennial users on Facebook, Twitter and Instagram. As of this writing, the group is scheduled to visit a solar farm located at Mabalacat, Pampanga.

WHO IS DIWATA?

Diwata is a non-government organization advocating the responsible development of the Philippines' wealth in resources, principally, extractive industries such as mining, oil and gas, quarrying, and other mineral resources from the earth for processing.

It provides a platform for the promotion of responsible development of the Philippines' resources and promotion of initiatives, to protect the land and its communities, particularly our indigenous people – their livelihood, health, education, and culture. ■

Website: www.diwata.org
Facebook: @DiwataResourceDev
Twitter: @DiwataResrcDev
Instagram: @DiwataResourceDev

