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Legal Regulation of Relations Connected with Special Nature Management

1. Background

Nature management in Kazakhstan, including a special nature management, is based on a general principle of the RK Constitution (paragraph 3 of Article 6) that the land, its subsoil, waters, fauna and flora, other natural resources are in the state ownership (except for land which may be privately owned)¹. Based on this, the state, as the owner, tries to control all processes involving the owned property (natural resources) used by other entities in the process of nature management, which seems to be quite appropriate.

The legal regime of nature management was formed alongside the development of relevant legislation in Kazakhstan from the moment it became an independent state. Initially, it was mainly based on the Soviet period regulations, which also explains some occurring processes and tendencies. This branch of legislation continues is being developed subject to the changed economic conditions and relations, when it has become possible to use natural resources privately.

The special nature management regulation still has gaps and contradictions, and, accordingly, needs further development and improvement, including the absorption of foreign experience.

2. Sources of Legal Regulation of Relations Connected with Special Nature Management

Since Kazakhstan is a codified law country, normative acts of all levels, adopted in the established procedure and covered by the general term "legislation", are the sources of legal regulation in the Republic. On the whole, the current legislative system

¹ We do not analyze the content of this rule of the Constitution as to its actual content with respect to the ownership to water, flora and fauna and other natural resources. We just note that the interpretation of this rule should probably be restrictive.

that regulates the relations involving a special nature management includes the 1995 RK Constitution, laws (including Constitutional Laws and Edicts of the RK President having the force of law), and also other legislative acts (including Resolutions of the RK Parliament) and sublegislative normative legal acts (including normative legal acts of the Government, departmental and other normative legal acts), international and other obligations of the Republic of Kazakhstan, etc.²

In order to provide a general overview of the current Kazakhstani legislation on special nature management (SNM), the normative acts for facilitating the perception may be grouped into several basic blocks, including the following:

- 1) **Basic legislation** that embraces laws and other normative legal acts that establish general legal regulations concerning special nature management;
- 2) **Special legislation** is the legislation that regulates the use of certain types of natural resources: land, water, subsoil (including petroleum) and others;
- 3) **Sector-related legislation** includes the rules of civil, administrative, criminal, and other branches of law, which in some way affect the special nature management;
- 4) **Legislation on taxes and other obligatory payments to the budget** may be subdivided into a separate group due to its significance in the performance of SNM;
- 5) **Special group of legislation** - International treaties to which Kazakhstan has acceded; and
- 6) **Other legislation.**

Evaluating the quantitative composition of the SNM legislation, we see that it includes sufficiently great number of normative acts that somewhat affect the issues of special nature management. At the same time a part of such issues remains to be altogether unregulated, while existing legal norms are often not inter-correlated.

Evidently, the significant factor for nature users, including subsoil users, is not the total number of normative legal acts, but the legal regime that establishes the clarity of the rules, their

² Article 1 of the RK Law On Normative Legal Acts of March 24, 1998 contains a legal definition of the legislation and kinds of normative legal acts.

inter-correlation. Lack of co-ordination of normative acts coupled with their abundance inevitably leads to the violation of legislative requirements, both by the nature users and representatives of controlling agencies.

2.1. Basic Legislation

2.1.1. The Law On Environment Protection of July 15, 1997 (the "Environment Law" or the "Law") is the basic law of Kazakhstan in the sphere of regulation of relations connected with the special nature management, and this Law introduces the very idea of special nature management.

The Law (Article 1) provides the concept of nature management as management of natural resources in the business and other activities of man. Under the Law, the natural resources are deemed to be *"constituent parts of the environment used in the process of business and other activities for the satisfaction of material, cultural and other needs of the society"*.

In accordance with the Law, the nature management may be:

- (i) general; and
- (ii) special.

The general nature management is carried out free of charge for the satisfaction of vital needs of the population and without granting natural resources to individuals and organizations. Restrictions on the general nature management are allowed if legislation explicitly provides for them.

The Law is not clear as to what constitutes a *"special nature management"*, just establishing that *"under special nature management natural resources are granted to the nature users in the established procedure"* (Article 13).

Therefore, the key point in the definition of the special nature management is its granting in the established procedure. (The grounds for granting the right to SNM are presently not clearly formulated which will be discussed below in Section 3).

The right to the special nature management may be:

- permanent or temporary;
- alienated or not alienated;
- acquired for the charge or free of charge; and
- primary or secondary.

The Law also defines the competence of state agencies in the sphere of SNM. For example, currently the central executive agency is the RK Ministry of Environment Protection. The Ministry, within its competence, may carry out licensing and agreeing of licenses, issue permission for the nature management, including for emissions and discharges of pollutants to the environment, for burial and storage of production and consumption wastes, enter into agreements (contracts) for nature management related with hazardous types of business activities, emissions and discharges of pollutants into the environment, for burial and storage of production and consumption wastes. The Ministry controls compliance with the terms established in licenses for the natural resources use and in the conclusions of the state expert examination, implementation of agreements (contracts) for nature management.

When the Environment Law was adopted, it could be evaluated as quite progressive, however, many of its rules (especially Chapter IV "Natural Resources and Nature Management") are too general, especially in comparison with relevant special legislation provisions.

2.1.2. *The RK Law of March 18, 1997 On Ecological Expert Examination* should also be referred to basic laws, since many types of business activities both directly or indirectly related to certain types of the special nature management shall be subject to the ecological expert examination, both state (mandatory) or public. For example, the following shall be subject to the mandatory state ecological expert examination: documentation substantiating the ecological requirements to a new equipment, technologies, materials and substances, including those purchased abroad; documentation substantiating the issue of permissions (licenses) for the withdrawal (use) of natural resources; documentation on the assessment of impact of operating enterprises adversely affecting the environment (pursuant to decisions of controlling agencies and local representative and executive bodies); drafts of norms of the maximum admissible discharges, etc.

2.1.3. *The RK Law of June 15, 1997 On Especially Protected Natural Territories* establishes the specific features of the legal regime and nature management of various objects of the state nature-reserve fund depending on the purposes of their establishment,

regimes of protection and specific features of the use. In particular, Article 48 "State Reserve Zone in the Northern Part of the Caspian Sea" is of certain interest. According to this Article, the defined area of water of the eastern part of the North Caspiy with the deltas of the Volga river (within the boundaries of the Republic of Kazakhstan) and Ural enters into the state reserve zone in the northern part of the Caspian Sea intended for the preservation of fishery resources and providing for the optimal conditions of habitat preservation and natural reproduction of sturgeon and other valuable fish. According to Article 48, the nature management in this reserve zone may be performed only in compliance with special requirements³.

2.1.4. In the context of the basic legislation one should note "*Temporary Instructions on the Procedure for Conducting an Assessment of the Impact of Contemplated Business Activities on the Environment (AIE) in the Republic of Kazakhstan, RND 03.02.01-1993*" of the Ministry of Ecology and Biological Resources of December 30, 1993. These Instructions contain, among other things, a list of ecologically hazardous types of business activities and are still the main guidance for the performance of AIE.

2.1.5. There are also some subordinate normative acts (basically, Decrees of the RK Government) which regulate the issue of permission for the special nature management⁴, environmental pollution⁵, and also entering into agreements on the special nature management⁶. We are not aware of the existence of any normative acts that govern the issue of licenses for the utilization of natural resources.

³ RK Decree No. 1087 of July 31, 1999 has developed and approved such special requirements in furtherance of Article 48 with respect to the entire set of off-shore prospecting.

⁴ This is the Procedure for the Issue of Permission for the Special Nature Management approved by Order No. 2/14-П of February 11, 2000 of the Environment Protection Committee and Rules for the Issue of Permission for the Special Nature Management approved by Order No. 17-n of January 19, 2000 of the Minister of Natural Resources and Environment Protection of the Republic of Kazakhstan.

⁵ Rules for the Issue of Permission for Environmental Pollution approved by Decree No. 1154 of September 6, 2001 of the RK Government.

⁶ Temporary Procedure for Entering into Agreements on the Special Nature Management approved by the Minister of Ecology and Biological Resources of the Republic of Kazakhstan on April 11, 1994.

2.2. Special Legislation

Characterizing the rules of the special legislation that regulate certain types of the special nature management, we would note that the difference in approaches and in the content of the legal regulation of certain types of natural resources is explained by their special features. For example, subsoil use (production) is inevitably connected with destruction of useful minerals contained in the subsoil, and the use of atmospheric air within the framework of special nature management, entails, as a rule, discharge of pollutants, etc.

Accordingly, SNM legislation may be subdivided into separate subgroups based on the types of natural resources.

2.2.1. *Subsoil Use.* Considering that the subsoil use legislation theme is well-known, we restrict ourselves just to listing of the key normative legal acts. First of all, these are the Subsoil Law⁷, and Petroleum Law⁸. The following are noteworthy among the subsoil use-related normative legal acts: Rules for Granting the Right to Subsoil Use⁹, Unified Rules for Development of Gas and Oil Fields¹⁰, Unified Rules for the Subsoil Protection in the Development of Useful Minerals Fields in the Republic of Kazakhstan¹¹.

Currently, the active work is carried out on draft amendments to the Subsoil Law and the Petroleum Law, which were submitted to the Parliament by the Government at the end of last year¹². We would like to note that addition of a new Article 70-1 of the Subsoil Law regarding the state control of compliance by subsoil users with the terms of Contracts is contemplated.

Acts that govern the specific character of off-shore petroleum operations deserve special mention. They include Regulations on the Procedure for Conducting Marine Scientific Research Related to Petroleum Operations on Off-shore and Inland Reser-

⁷ The Edict of the RK President Having the Force of Law, On the Subsoil and Subsoil Use, dated January 27, 1996 (the Subsoil Law).

⁸ The Edict of the RK President Having the Force of Law, On Petroleum, dated June 28, 1995 (the Petroleum Law).

⁹ Approved by Decree No. 108 of the RK Government, dated January 21, 2000.

¹⁰ Approved by Decree No. 745 of the RK Government, dated June 18, 1996.

¹¹ Approved by Decree No. 1019 of the RK Government, dated July 21, 1999.

¹² Decree No. 1352 of the RK Government, dated December 24, 2002.

voirs¹³, Regulations on the Procedure for, and Terms of, the Issue of Permission for Construction and Operation of Artificial Islands, Dams, Structures and Installations in the Performance of Petroleum Operations in the Republic of Kazakhstan¹⁴, Regulations on the Performance of Petroleum Operations on Off-shore and Inland Reservoirs¹⁵.

2.2.2. Land Use. The specific feature of this type of nature management lies in that the land as a natural resource may be not only in the state ownership, but in private ownership as well. The Land Law of January 24, 2001 (that superseded the Law of December 22, 1995 of the same name) is the basic normative legal act that governs the issues of land use and also the grounds of, and the procedure for, obtaining the right of private ownership to land.

The Land Law is quite an extensive document that independently regulates practically all aspects of the grounds, terms and limits of arising, changing and terminating the right of ownership to a land plot and right of land use, and also the procedure for exercising the rights and obligations of the owners of land plots and land users. In addition, the Law inevitably affects some aspects of the forest and water utilization.

Despite the relative “youth” and comprehensive nature of the effective Land Law presently the Parliament considers a draft of fundamentally new Land Code of the Republic of Kazakhstan¹⁶, which is an issue of debate both in the press and among experts.

2.2.3. *Water Utilization.* In the area of water utilization one of the “oldest” normative acts - the Water Code of March 31, 1993 - is still effective. It was repeatedly amended and now the work on the preparation of a new Water Code is in progress. According to available information, in a draft Water Code the water utilization principles are based “on international rules for just and equal access for water users to water resources and on integrated control of water resources”; and the right of common water use, which arises from the moment of birth and cannot

¹³ Approved by Decree No. 693 of the RK Government, dated June 5, 1996.

¹⁴ Approved by Decree No. 772 of the RK Government, dated June 24, 1996.

¹⁵ Approved by Decree No. 105 of the RK Government, dated January 27, 1997.

¹⁶ Decree No. 1263 of the RK Government, dated November 27, 2002.

be alienated under any conditions, is clarified.

Alongside the effective Water Code there are a number of subordinate normative acts that regulate the water utilization, including Instructions on the Procedure for Agreeing and Issue of Permission to Special Water Utilization in the Republic of Kazakhstan¹⁷ and others. In addition, the Law On Rural Consumers' Co-operative of Water Users was adopted on April 8, 2003.

2.2.4. Forest Utilization. The Forest Code of the Republic of Kazakhstan is also one of the "oldest" effective acts in the sphere of regulation of relations involving nature management. It was approved by the Resolution of the RK Supreme Soviet on January 23, 1993. Presently, the active work on a new Forest Code is carried out. It was submitted to the RK Parliament in the middle of the last year¹⁸, however, it was not adopted yet.

2.3. Sector-Related Legislation

In this block of legislation, we identified normative acts that regulate the responsibility for violation in the sphere of special nature management, which in Kazakhstan, as distinct from the practice of many foreign states, are referred to the sphere of civil, administrative, and criminal legislation.

The Environment Law practically does not touch upon the issues of responsibility, it just contains a referenced rule of the responsibility of guilty persons in accordance with the RK legislation (Article 85) and rule of the compensation of harm inflicted by violation of environmental legislation (Article 86). The rules of special legislation, though mentioning the responsibility (including compensation of harm), do not establish all required provisions and principles of imposing of responsibility. In this connection, in specific cases it shall be necessary to apply to the general analysis of the current legislation which allows to isolate the property-related (civil law), administrative and criminal responsibility for violation in the sphere of SNM.

When addressing the property accountability for violation in

¹⁷ Approved by a Joint Order No. 155-П of June 20, 2001 of the Chairman of the Committee for Geology and Subsoil Protection and No. 50-П of June 20, 2001 of the Chairman of the Committee for Water Resources.

¹⁸ Decree No. 811 of the RK Government dated July 22, 2002.

the sphere of special nature management, the relevant rules of the RK Civil Code on responsibility (predominantly related to losses, forfeit and other measures of civil rights protection) by virtue of paragraph 3 of Article 1 of the Civil Code¹⁹ should be applied subsidiarily to the mentioned rules of the Environment Law.

It is also necessary to dwell on the most important protective rules of criminal and administrative law. In doing so, it should be noted that the measures of criminal liability (in the form of deprivation of freedom, and also of the right to hold a definite position and also to engage in certain types of activities and/or penalties) might be imposed only on individuals, while presently the measures of administrative liability (in the form of penalties) may be applied both to individuals and legal entities.

The RK Criminal Code of July 16, 1997 (the "RK Criminal Code") establishes responsibility for violation of the environmental requirements to business and other activities (Article 277 of the Criminal Code establishes, among other things, a criminal responsibility for violation of environmental requirements by persons responsible for the observance of these requirements), for violation of the rules for conservation and subsoil use (Article 286); for violation of the regime of a specially protected natural territories (Article 293) and others.

Chapter 19 of the Code of the Republic of Kazakhstan, On Administrative Offences, dated January 30, 2001 (the "Administrative Code") establishes the responsibility for administrative offences in the sphere of environment protection and use of natural resources. The said Chapter establishes, among other things, the responsibility for the exceeding the maximum permissible norms of emission into the atmosphere or unauthorized discharge of pollutants (Article 243), failure to meet legal requirements on obligatory conducting of the state ecological expert examination (Article 245); such responsibility may also be imposed on legal entities.

2.4. Legislation on Taxes and Other Obligatory Payments to the Budget

¹⁹ General Part of the RK Civil Code dated December 27, 1994, as amended; Special Part of the RK Civil Code dated July 1, 1999, as amended.

The effective Tax Code²⁰ generally regulate all relations connected with the payment of taxes and making other obligatory payments to the budget, including basic provisions regarding the payment for the use of various nature resources.

The Tax Code (Section 10) determines the rates of special payments of subsoil users and rates of payment of excess profit tax, which, in its essence, is payment for the use of subsoil.

It also determines the procedure for, and terms of, payment of land tax which payers are individuals and legal entities which have land plots (objects of taxation) under the right of ownership, permanent land use and primary charge free temporary land use (Section 12).

Additionally, the Tax Code contains general regulations on the payment for the land plots use, which is made by legal entities and individuals that received land plots for temporary chargeable land use. The land legislation determines the rates of payment, however, they cannot be lower than the rates of land tax.

As regards the payment for water resources of surface sources, the Tax Code refers the establishment of rates of such payment to the competence of the Government that approved such rates²¹.

Under the Tax Code, the local representative bodies shall annually establish the rates of payments for environment pollution. These rates are based on the calculations of an authorized agency in the area of environment protection (i.e. the Ministry of Environment Protection). At the same time there are still effective the Rules for Collection of Payment for Environment Pollution as approved by Decree No. 1213 of the RK Government dated December 1, 1998, which establish a somewhat different procedure. Obviously, the provisions of the Tax Code should apply, and this Governmental Decree should be invalidated.

The establishment of rates of payment for the use of fauna is also referred to the competence of the Government, to which effect Decree No. 429 of April 15, 2002 of the Government was adopted. This may be especially interesting in Atyrau oblast

²⁰ The Code of the Republic of Kazakhstan on Taxes and Other Obligatory Payments to the Budget of June 12, 2001 (the Tax Code).

²¹ Decree No. 374 of the RK Government dated March 29, 2002.

since the Decree, among other factors, establishes the rates of payment for the use of animals, which are objects of fishery.

2.5. International Treaties

Kazakhstan legislative system includes the rules of international treaties, conventions, and bilateral and multilateral agreements, which in some or other way regulate special nature management. Among which the following may be named as examples:

The 1996 Brussels International Convention on Civil Liability for Damage Inflicted by Oil Pollution, to which Kazakhstan acceded in 1995;

The Basle Convention of the Control of Trans-Border Conveyance of Hazardous Wastes and their Removal, executed in Basle on March 22, 1989, to which Kazakhstan acceded quite recently, on February 10, 2003;

Convention for Protection and Use of Trans-Border Water Ways and International Lakes, executed in Helsinki (Finland) on March 17, 1992 (Kazakhstan acceded thereto on October 23, 2000);

Agreement between the Government of the Republic of Kazakhstan and the Government of the Chinese People's Republic on Cooperation in the Sphere of the Use and Protection of Trans-Border Rivers, executed in Astana on September 12, 2001 (approved by the RK Government on September 10, 2002)

Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on Cooperation in the Sphere of Environment Protection and Rational Nature Management, dated June 2, 1997;

2.6. Other Legislation and Judicial Practice

In addition to the already mentioned acts, Kazakhstan legislative system includes other normative acts regulating the relations connected with the special nature management, and they also may be grouped based on some criteria.

For example, it is possible to group a legislative block on the legal status of Kazakhstan state agencies implementing the policy of the Republic in the sphere of nature management, and also forming a departmental legislation, which would include, among others, the Constitutional Law, On the Government of the Republic of Kazakhstan, and Regulations on

various RK Ministries, including the Regulations on the Ministry of Energy and Mineral Resources and on the Ministry of Environmental Protection.

When analyzing the system of SNM legislation, one should also take into account the so-called ecological rules of individual laws (dealing, for instance, with privatization, insurance, etc.) and also the practice of applying the environmental legislation by Kazakhstani courts, which official position is reflected in relevant Resolutions of the Plenum of the RK Supreme Court.

3. On Drawbacks of Legal Regulation of Special Nature Management

As practice shows, despite the availability of ample legal regulation of special nature management, it is not quite efficient today. The reasons for this may be of objective nature (for example, limited (to-date) capabilities of human beings in perceiving and controlling the environment, dynamic development of the regulated relations themselves) and of subjective nature, consisting in inevitable drawbacks of the legal acts themselves.

The drawbacks of the legal regulation of relations connected with a special nature management may be conventionally divided into conceptual drawbacks and drawbacks of legal technique.

We refer the inconsistency of rules and, what is more important, the failure to regulate important aspects coupled with current availability of "redundant rules", both declarative and unjustified, to the conceptual drawbacks. We can also note the so-called devaluation of rules of law. For example, a rule saying that law infringers (in various spheres of nature management) shall bear the responsibility and compensate for the damage is repeated in many legislative acts but has no actual filling.

As mentioned, *the Law On Protection of the Environment, dated July 15, 1997* is the basic Kazakhstan law that regulates relations in special nature management.

This Law has been developed as the main act of the environmental legislation system and has been oriented at the new system of public and economic relations in Kazakhstan. Foreign consultants (primarily, from the USA) actively participated in drafting the Law, and there is a view that the Law embodied the

most part of progressive environmental principles of the developed nations (on ecological audit, on setting ecological norms, economic mechanism of environmental protection, and so on).

It is noteworthy that the Law On Environment Protection in the terms of legal force is a law, while a number of other acts regulating the issues of water and forest utilization are codes, and it is very likely that they will remain as codes in the near future since work is carried out on developing the codes (Water, Forest, and Land Codes). Thus, today and in the future the rules regulating individual types of nature management will be by their legal force superior to the fundamental act - the Law on Protection of the Environment, which is illogical.

Among the conceptual regulation drawbacks of SNM, we would like to note the regulation of relations connected with licensing in the basic Environment Law and in special subsoil use legislation.

Presumably, the provisions of the Law, including those regulating the issues of SNM (concept of nature management, procedure for obtaining a right to special nature management, obligations of entities that perform the nature management, etc.), shall be observed when using all types of natural resources. Article 2 of the Law determines that "in the case of inconsistency between this Law on Protection of the Environment and other act containing the rules regulating relations in environmental protection, the latter may apply only after introducing to the Law of appropriate amendments".

Thus, the Law claims to occupy the dominating position in the hierarchy of normative legal acts regulating the environmental issues and, consequently, the issues of special nature management. (We will not comment on the correlation of Article 2 of the Environment Law with provisions of the Law On Normative Legal Acts concerning the hierarchy of normative legal acts). Ideally, the provisions of the Environment Law shall be strictly consistent with the respective provisions of the special and sector-related legislation regulating the relations connected with the special nature management, and shall act in interaction with them.

However, unfortunately, the Law contains a number of contradicting provisions that cause problems in its interpretation

and correct application. As a result, there arise disputed legal relations between users of nature and the bodies of inspection and control over the compliance with environmental legislation.

First of all, please note the grounds for arising of the right to special nature management.

According to the Environment Law (Article 14), natural resources may be granted for special nature management on the following grounds:

- *“license to use natural resources and to carry out certain types of activities in the sphere of environmental protection;*
- *decisions of local executive bodies or Decrees of the Government of the Republic of Kazakhstan granting natural resources for nature management;*
- *agreements/contracts for use of nature management”.*

However, it imperatively follows from Article 14 of the Law that a permission for nature management, annually issued to a subsoil user by a central executive body in the field of environment protection, is a document certifying the right of a subsoil user for:

- the use (extraction) of natural resources;
- emissions and discharges of contaminants to the environment; and
- the right for the disposal of production and consumption wastes.

Since no permission is addressed in Article 14, then a question arises - what are the grounds for the obtaining a right to special nature management - the documents listed in Article 14 or permission for nature management, or both of them?

And Article 21 of the Law once and for all complicates the situation. According to this Article the following types of activities are subject to licensing:

- the use of natural resources in accordance with the legislation thereon;
- performance of emissions (discharges) of contaminants to the environment;
- burial and storage of production and consumption wastes that are especially hazardous to the environment and health of the population; and

- ecological auditing activity.

According to Article 21 all ecologically hazardous types of economic activities are subject to obligatory state licensing.

In the system interpretation of the above-mentioned three Articles there arises a whole set of questions that could not be answered from the viewpoint of judicial logic. For example, what is the difference, in its legal essence and nature, between permission for emission and discharge of contaminants (Article 16 of the Law) and a license for performing emission (discharge) of contaminants to the environment (Article 21 of the Law), and is it really necessary to obtain both documents for performing such emissions?

There are also questions about the obligatory licensing of all ecologically hazardous types of activities. The Environment Law does not contain the concept of “ecologically hazardous type of activity”. This concept is contained in the Law On Ecological Expert Examination²² the identifies such activity as ‘direct or indirect activities, including managerial and investment activities that affect or may adversely affect the health of a human and the environment.’”

Under such wide definition, any activities in the area of the industrial production, including petroleum operations and other operations connected with the subsoil use may be referred to the ecologically hazardous activities.

Kazakhstan has not yet adopted a normative legal act defining the procedure of licensing of a special nature management in accordance with Article 21 of the Law. And the Law itself, due to vague provisions and contradictions of three key Articles related to the grounds for granting the right to the special nature management, does not provide a clear answer as to on what ground (grounds) the performance of one or another type of special nature management is currently carried out in Kazakhstan.

Addressing to the special legislation for clarifying this issue does not resolve the situation since this legislation, while regu-

²² The Law of the Republic of Kazakhstan, On Ecological Expert Examination, dated March 18, 1997 (the Ecological Examination Law).

lating certain types of the special nature management, conflicts with the Environment Law. Let's consider it on the example of the subsoil use, specifically, granting the right to exploration and production of useful minerals.

In accordance with the Subsoil Law presently "granting the subsoil use right to exploration, production, combined exploration and production, as well as to construction and/or operation of underground facilities not related to exploration and/or production is performed by the execution of a contract" (Article 13 of the Law).

'Before the execution of a contract, it shall be obligatory agreed upon with the special executive bodies which are in charge of the issues of environment protection, health care and sanitation, conservation of mineral resources, and mining supervision" (Article 44 (1) of the Law).

"A required ecological grounds for the performance of subsoil operations is a positive conclusion of the state ecological expert examination for the performance of those operations and permission for nature management granted on its basis by the executive bodies which are in charge of the environment protection issues, with the inclusion of the corresponding ecological requirements as mandatory conditions into the contract." (Article 50 (1) of the Subsoil Law).

Therefore, in accordance with the subsoil legislation a sufficient ground for exploration and production of useful minerals is the execution of a contract and obtaining of permission for nature management issued by an executive body, which is in charge of the environment protection issues.

Neither the Subsoil Law nor Petroleum Law mentions the necessity of licensing such activity in accordance with Article 21 of the Environment Law, although being based on the legislative definition, this activity can be referred to ecologically hazardous activity.

We believe that Articles 14, 16, and 21 of the Environment Law should be coordinated between each other in order to exclude misunderstanding of the requirements of the legislation and, as a consequence, its unintentional violation by the nature

management users.

Gaps at the level of legal regulation result in undesirable development of normative acts that sometimes start to conflict with or unreasonably extend the rules of the higher acts, and an example of this is the correlation between the Environment Law and the Rules for Granting Permissions for the Environment Pollution in part related to the determination of a regime of production waste, an example of which is a well-known "sulphurous" legal case involving TCO.

Imperfection of legal technique may sometimes play a significant role in complication of legal regulation of some legal relations. Such imperfections, including insufficiently clear definitions, are characteristic feature of the branch of law, which is being developed, but are often caused by a routine negligence when drafting normative acts.

4. Possible Ways for the Improvement of the Nature Management Legislation

The current economic growth in the industrial sectors results in an intensive use of the environment, accumulation of industrial wastes, air pollution, contamination of river basins and ponds. The main polluting industries are oil and gas, non-ferrous and ferrous metallurgy, mining industry, and heat-and-power engineering. In this regard the state will definitely take further measures for the protection of natural resources of Kazakhstan, and the legislation in this sector will be developed.

The possibility of the adoption of a unified Ecology Code that would include both the rules of a general nature and the provisions regulating specific types of nature management (subsoil use, water use, the use of atmospheric air, etc.) may be considered as one of the way for the improvement of the nature management legislation.

In our view, such unified Ecology Code could eliminate the existing contradictions between specific acts, gaps and duplications of legal norms, having created the unified, universal and comprehensive legal regulation of the protection and use of natural resources. The necessity of the creation of the Ecology

Code is supported by a number of authors and the experience of foreign countries²³.

From this point of view the experience of France (also a country of the codified law as Kazakhstan) that on September 18, 2000 adopted the unified Ecology Code (EC)²⁴ seems to be very interesting for Kazakhstan. The creation of the EC by France is considered to be the one of the achievement of the ecology law related with its unification and harmonization. France is one to those few countries, for example, such as Sweden, that aimed at the adoption of the EC. Other countries, for example Germany, despite efforts undertaken have failed to resolve the problem of the ecology law codification.

The French ecology law has ancient backgrounds, especially in the area of industrial production and air law. The first legal regulation of the industrial law goes back to the years of 1806-1810. Despite this fact the ecology law is considered to be a young branch of law.

The process of codification took 10 years. First, a research was conducted in the area of restructuring and codification of the ecology law. The research took 2 years and its results were published in 1991. The research demonstrated both the legal and social necessity of the EC development. Such thoroughness of the code development may also be a good example for Kazakhstan.

The first Draft of the EC was presented to the Parliament in February of 1996 and, to put it mildly, this Draft was not successful. The speaker called the Draft 'the legal garbage' not worthy of discussing. The approval of the Code was postponed until the mistakes were corrected. Ordinance EC was issued only on September 18, 2000 and published on September 21.

The French EC contains the provisions related to the nature, air, water economy, waste, industrial facilities, and chemicals. In

²³ For example, E. V. Novikova, *Theoretical problems of the development of the ecology legislation in the Republic of Kazakhstan*, Moscow: The Lawyer, 1999. Currently, the possibility of the creation of a unified Ecology Code is being discussed and considered in Russia. N. A. Ignatova writes with confidence about this. Law-makers mistakes and other shortcomings of the effective legislation: reasons for their appearance, *Ecology Law*, 2002, No. 1 pages 27-28.

²⁴ For more detail please see: Pascal Cromarec, *On Miracle-Code of France*, *Ecology Law*, 2002, No. 5, pages 39-41.

this respect it is necessary to determine the border between the instructions on ecology and mining law. Thus, for example, according to the French legislation the regulation in the area of underground gas, oil, and chemicals is referred to the mining law.

The EC of France consists of General Part and Special Part (975 Articles). The General Part (the first book) includes the principles, goals, and ecological responsibility. The Special Part (books second-sixths) regulates the issues of the protection of nature, forests, waters, air, and issues related to hazardous substances and waste.

In our view, it is the unification and harmonization of a great number of normative legal acts currently regulating the issues of nature management in Kazakhstan what may lead to the desired result, that is, to clear and accurate regulation of the relations arising in the area of nature management.

Considering the fact that the RK Government in its Program of Actions for 1998-2000 provided for "strengthening of ecological aspect in the nature-resource-related and other legislation"²⁵, one could expect its further "ecologization" that is possible and is already occurring, including in the area of hydrocarbons. According to the Concept of Legal Policy of the Republic of Kazakhstan one may also expect the further development of the ecology legislation²⁶.

Considering the provisions of the Memorandum of Understanding and Cooperation between the RK Ministry of Environment Protection, nature users, and non-governmental and international organizations²⁷ under which the Ministry should engage nature users in the development of draft laws and normative legal acts, we call upon on nature users to actively participate in the process of the legislation improvement and hope that such legislation will appear in the near future.

End of Document

²⁵ Approved by Decree No. 119 of the RK Government, dated February 19, 1998, in the wording of February 5, 1999, No. 86 (paragraphs 4.5.1.5 - 4.5.1.7.).

²⁶ Approved by Decree No. 119 of the RK Government, dated February 19, 1998, in the wording of February 5, 1999, No. 86 (paragraphs 4.5.1.5 - 4.5.1.7.).

²⁷ Edict No. 949 of the President of the Republic of Kazakhstan, On the Concept of Legal Policy of the Republic of Kazakhstan, dated September 20, 2002

²⁸ Kazakhstanskaya Pravda of March 13, 2003.