

PANDEMIC COVID-19: Resolution No. 28 of March 24, 2020, of the National Mining Agency (“ANM”) - Suspension of Deadlines and Omissions

Considering the current Pandemic COVID-19, the occurrence and declaration of the state of public calamity by the Brazilian Federal Government and, aiming at the need to ensure regularity, predictability and legal security to administrative proceedings, as a fundamental right with a positive character, the National Mining Agency (“ANM”), through Resolution No. 28 of March 24, 2020 (“Resolution”), established the cases whose procedural deadlines will be suspended, that is, from **March 20 to April 30, 2020**, as well as other related procedures (“Suspension Term”).

As provided in Article 1 of the Resolution, the following obligations, processes and procedures applicable to holders of mining rights are suspended during the Suspension Period:

- (i) Presentation of defenses, evidence, objections and appeals filed by the holders of mining rights in the assessment processes, constitution and collection of revenues related to Financial Compensation for Mineral Exploitation - CFEM, Annual Fee for Hectare - TAH, inspection fee and fines;

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- (ii) Presentation of defenses, objections and appeals in the administrative mining processes;
- (iii) Compliance with requirements; and
- (iv) in the other cases of deadlines foreseen in the Mining Code - Decree-Law n° 227/67, in its Regulation - Decree n° 9.406/2018 and, also, in Ordinance No. 155/2016 - ANM Normative Consolidation (“Ordinance”), which regulate acts within the competence of ANM.

It is worth noting that, under the terms of Article 3 of the Resolution, the obligations and deadlines related to the stability of mining dams and others whose non-compliance may put in risk the safety, health, life and property of workers, consumers and society, are not included in the Suspension Term.

Specifically in relation to the provisions of the aforementioned item (iv) of Article 1, IV, of the Resolution, it is understood (although it is not expressly stated, similarly to what other Regulatory Agencies did, such as the National Transport Agency - ANTT in its Resolution 5,879 of March 26, 2020, published in the DOU of March 27, 2020 (“ANTT Resolution”)), that ANM also suspended during the Suspension Term all the deadlines provided for in the aforementioned norms (i.e. Mining Code, Regulation and Ordinance) regarding the obligations applicable to mining rights’ holders, especially those holding mineral exploration authorizations/licenses, such as, for example, the delivery of final research reports, as required in Article 97 of the Ordinance.

A point that, however, draws attention in the Resolution is the lack of clarity regarding the applicability of the Suspension Term to the terms of validity of the mining exploration permits and/or of the small scale mining permits (PLGs), with the consequent return to the respective holders of such mining rights of additional validity terms proportional to the Suspension Term.

As is known, according to Article 88 of the Ordinance, the term of validity of an exploration mining right will be from 1 (one) to 3 (three) years, renewable only once and for a term not exceeding that initially granted (Article 94 of Ordinance). Therefore, in the event of a situation of social isolation and force majeure, as is the case at the moment with COVID 19, which evidently prevents the miner from carrying out his research or mining activities during the term of his exploration mining right and/or of the PLG, it is justifiable that ANM extends, proportionally to the Suspension Term, the term of validity of said exploration mining rights and/or PLGs.

In order to clarify this omission, it is necessary to note that the deadlines now suspended are administrative deadlines, resulting from an event of force majeure¹ and that the Brazilian Civil Procedure Code (“CPC”), as a supplementary and subsidiary source in these cases², in its article 221³, provided that the suspended terms must be

returned for an equal period to that which was missing for its completion.

Therefore, considering that the Resolution suspends all the terms listed in the Mining Code, in the Regulation and in the Ordinance except for those listed in its Article 3, it has to be said that, as the suspension was mainly focused on administrative terms, by virtue of a force majeure event, at the end of the Suspension Term, the supplementary and subsidiary source of the CPC should be applied by ANM, so that to the original terms of the exploration permits and/or PLGs be returned the same term that was missing for its conclusion, at the time of their suspension.

¹ Art. 313. The process is suspended:

(...)

VI - due to force majeure;

² Art. 15. In the absence of norms that regulate electoral, labor or administrative processes, the provisions of this Code will be applied supplementarily and in a subsidiary manner.

³ Art. 221 The term is suspended due to an obstacle created to the detriment of the party or occurring any of the hypotheses of art. 313, and the term should be refunded for the same amount of time as was missing for its completion.