

February 2010

2009 Legislative Year-in-Review Russia Energy & Natural Resources

This 2009 Legislative Year-in-Review of the Russian Energy & Natural Resources Sectors has been prepared by White & Case's Moscow Energy Team for our clients and friends to give you a synopsis of 2009's principal legislative developments affecting the Russian energy & natural resources sectors.

Inside this Review you will find spotlight articles covering:

- Russia's withdrawal from the Energy Charter Treaty;
- The New Legal Framework for Energy Efficiency in Russia;
- Restrictions on Associated Gas Flaring;
- Changes in Wholesale Energy (Capacity) Market;
- Changes in Dispatching and Grid Facilities Use Regulations;
- The Draft Regulations on Long-term Capacity Tenders
- The Kyoto Protocol: New Rules for Approving JI Projects in Russia

In addition, we have included update briefs on the energy & natural resources sectors' key 2009 legislative changes.

We hope you find this Review interesting and informative. We wish you and your company a very successful 2010.

This Review covers the following sectors:

- Energy
- Oil & Gas
- Electricity
- Environmental
- Climate Change

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Spotlight Articles

Energy

Russia Withdraws from the Energy Charter Treaty

The Energy Charter Treaty (“ECT”), a multilateral treaty concerning inter-governmental cooperation and private investments in the European and Eurasian energy sectors entered into force in 1998. The ECT originated at the 1991 conference of the European Energy Charter, which was a political declaration of intent to open up the energy markets between Western Europe and the Soviet Union. To date, the ECT has been signed or acceded to by 51 states. In 1998, Russia accepted provisional application of the ECT by signing but not formally ratifying the treaty.

However, on 30 July 2009 the Russian Government issued an official decree announcing that Russia has no intention of becoming a party to the ECT and its Protocol on Energy Efficiency and related Environmental Aspects. The decree stated that Russia’s notice was made in accordance with part (a) of Article 18 of the Vienna Convention on the Law of Treaties (which provides that once a state signs a treaty, it is obliged to refrain from acts that would defeat the object and purpose of the treaty until the state makes its intention clear that it will not become a party to such treaty. On 20 August 2009, Russia officially informed the Depository (Portuguese Government) that it did not intend to become a contracting party to the ECT.

There has been some discussion of what Russia’s “withdrawal from the ECT” really means for Russia from a legal standpoint. Article 45(3-a) of the ECT provides that such a notification results in Russia’s termination of its provisional application of the ECT 60 calendar days after the date on which the Depository receives the notification (i.e., 19 October 2009). However, according to Article 45(3)(b) of the ECT, Russia’s obligations with respect to investments made prior to that date remain in effect for 20 years.

New Legal Framework for Energy Efficiency in Russia

In November 2009, the Russian President signed the Federal Law “On Energy Saving and Energy Efficiency and On Amendments to Certain Legislative Acts” replacing the previous Federal Law “On Energy Efficiency”. The adoption of the new law is a step forward in promoting energy savings and increasing energy efficiency.

The law seeks to establish legislative, economic and tax initiatives to encourage companies to actively implement energy saving methods. It also provides state support for companies investing in sectors related to energy efficiency.

In addition, the law provides a control system for importing, producing, selling and using energy-consuming facilities with low energy efficiency. It sets out a procedure for conducting energy surveys, primarily of companies that are high energy users, to collect information on the amount of energy used and to define indicators of energy efficiency.

About Us

White & Case’s Moscow office is one of the leading international law firms in Russia, with over 70 lawyers, including 12 partners. We have one of the largest dedicated energy & natural resources practices in Russia.

The broad range of our practice areas give us the breadth and depth of experience necessary to anticipate and deliver the complex legal services our clients require.

Our Moscow office practice areas include:

- Energy & Natural Resources
- Banking & Finance
- Capital Markets
- Corporate/M&A
- Real Estate
- Regulatory/Disputes
- Tax

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Russia adopts Energy Strategy

At the end of 2009, the Russian Government approved an Energy Strategy for the Russian Federation for the period through 2030. The Strategy establishes the main principles, goals and priorities of the state's long-term energy policy. It is primarily intended to form an innovative and effective national energy sector that matches the energy needs of Russia's growing economy and foreign economic interests.

The Strategy outlines the problems with and the main factors affecting the development of the Russian energy sector over the past years and includes an economic and social forecast of its development through 2030. It also provides an overview of the oil complex, gas and coal industry, heating and power sector and nuclear energy industry, and defines the priority projects and measures to be undertaken by the state in these spheres to improve the condition of the country's fuel and energy sector and develop a domestic energy market.

Under the Strategy, Russia will achieve the following targets by 2030: oil production of 530-535 million tonnes, oil refining of 275-311 million tonnes, gas production of 885-940 billion cubic meters, coal mining of 425-470 million tonnes and the electric power generation of 1,800-2,200 billion KW/hour annually.

The Strategy discusses developing fuel and energy sector industries, renewable energy sources, the central heating system, nuclear engineering and energy-saving technologies.

The Strategy also projects that direct foreign investments in the fuel and energy sector will increase to at least 12%.

In addition, in 2009 the Russian Government also approved Guidelines for State Politics in Increasing Effectiveness of Use of Renewable Energy Sources for the period until 2020. The Guidelines note that renewable sources of energy (excluding hydro power stations with capacity exceeding 25 MW) are used to generate only 1% of the total volume of electricity generated in Russia and declare that this ratio should be increased. In particular, under the Guidelines Russia is to achieve the following target ratio of the electricity generation based on renewable sources of energy: in 2010 – 1.5% of the total volume of generated electricity; in 2015 – 2.5%, and in 2020 – 4.5%.

Oil & Gas

Restrictions on Associated Gas Flaring

Russia is responsible for a significant portion of world's flared gas. In January 2009, the Russian Government issued a resolution establishing the target level for gas flaring starting in 2012. The resolution provides that the amount of flared gas should not increase by more than five percent of the volume of the respective associated gas]. The resolution also details the procedure for determining payments for pollutant air emissions, beginning on 1 January 2012, and envisages certain indexes for such payments to encourage companies to reduce air pollution.

Independent View – 2009 Russian Energy & Natural Resources Practice Rankings

First-tier ranking

- Chambers Global,
- Chambers Europe (2009)

"In addition to being kept busy with oil and gas matters, this team is developing its mining practice and deals with power projects. Clients report that the lawyers are easy to deal with and have broad sector knowledge".

- Chambers Global,
- Chambers Europe (2009)

Highly recommended law firm for Energy

- PLC Which lawyer?

First-tier ranking

The Legal 500

'absolutely first class' team

The Legal 500

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In November 2009, the Russian President delivered a message to the Federal Council of the Russian Federation (Upper House of the Russian Parliament) stressing his concern about the ineffective use of energy resources by flaring associated gas and demanding that companies undertake immediate measures to reduce such activities. The recently adopted Russian Climate Doctrine also calls for reducing flaring fossil fuels that cause greenhouse gas emissions.

The proposed amendments that have been recently introduced to the Russian legislation encourage companies to use associated gas through the construction of electric heating power plants operating on associated gas in the vicinity of the respective deposits.

Electricity

Changes in Wholesale Energy (Capacity) Market Rules

The Rules of the Wholesale Market were supplemented by the list of the constituent entities of the Russian Federation with special conditions of electricity and capacity trading. In particular, in 2010 electricity and capacity would be traded in full under regulated agreements on the tariff-based prices in these six regions: the Chechen Republic, the Ingush Republic, the Dagestan Republic, Republic North Ossetia-Alaniya, the Kabardino-Balkaria Republic, the Karachayev-Cherkessian Republic.

The Rules were also amended to include rules of electricity and capacity trading for the period of regime of state regulation of power industry which may be introduced by the Russian Government in cases provided for in Article 27 of the Federal Law "On Electric Energy". The regime of state regulation would restrict free pricing mechanism and generally would reinstate tariff based prices mainly on the balancing and the day-ahead-market. In addition, parties to free sale and purchase agreements of electricity would be prohibited to increase the volume of electricity traded under such agreements. Commercial operators would not perform agreements where offtakers act as sellers and generators act as buyers, which would mean that only actual volumes of electricity production and consumption would be admitted for trade.

Changes in Dispatching and Grid Facilities Use Regulations

The Russian Government adopted rules for including legal entities of the electric power sector and electric power consumers into the list of persons subject to mandatory servicing when rendering operating and dispatch control services in the electric power sector. Thus, persons subject to mandatory servicing are: (a) generators which have the status of the Wholesale Market participant and registered delivery points; (b) exporters of the electricity; (c) generators producing electricity sold on retail markets, which installed capacity exceeds 25 MW; (d) generators producing electricity mainly for own needs, which average capacity of delivery exceeds 25 MW; (e) producers in isolated areas, which installed capacity exceeds 25 MW; (f) generators in isolated areas producing electricity mainly for own needs, which average capacity of delivery exceeds 25 MW; and (g) guaranteeing suppliers and electricity suppliers in isolated areas. Registers of persons subject to mandatory service should be kept by the system operator and providers of dispatch services in isolated areas.

Up and Coming – 2010 Promotions

Adam Smith is named Counsel of White & Case LLC as of 1 January 2010. Adam is a senior member of our Energy & Utilities practice group. He will continue to focus on our power practice, in addition to M&A and other project work.

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Disputes regarding establishment and application of payments for technological access to electricity grids and/or tariff rates for calculation of such payments should be resolved by the Federal Tariff Service and its territorial bodies. Detailed rules for relevant disputes resolution were adopted by the Russian Government on 9 January 2009.

The Russian Government adopted rules for entering contracts by the organization on management of united electricity grid on use of grid facilities owned of third parties. In particular, Resolution dated 15 June 2009 No. 492 sets out material terms of such contracts and rules on resolution of disputes on the right of entering agreement on transmission services with the use of facilities being the part of the united national electric grid and owned by other parties. These disputes are subject to review by the Ministry of Energy, which decisions may be appealed in court.

Draft Regulations on Long-term Capacity Tenders

Regulations on long-term capacity tenders are expected to be adopted by the Government in 2010. According to the draft resolution, the first long-term capacity tender should be completed by 1 September 2010 for the supply term starting from 1 January 2011. Long-term capacity tenders for the supply term starting from 1 January 2012, 1 January 2013 and 1 January 2014 should be held by 1 November 2010. In 2010 and in each subsequent year long-term capacity tenders should be held by 1 December. Delivery term under these tenders commences on 1 January of the year following 4 years after the year when respective tender was held and be: (a) one year for the current generators, and (b) until the expiry of the term when the generator is treated as new. The draft Regulations also provide for the correcting capacity tenders to be held to correct the exact volumes of the capacity to be supplied to the Wholesale Market.

According to the current draft Regulations the following generators would be admitted to the Wholesale Market without tenders: (a) generating facilities being subject matters of the agreements on supply of capacity to the Wholesale Market; (b) new nuclear power stations, and (c) new hydro power stations. Price of the capacity of such facilities should be set out in agreements under rules to be determined by the Government. Generators keeping the electricity system's stability will not participate in capacity tenders either.

Generators which were not selected under the results of the capacity tenders will not receive capacity payments and would be able to sell electricity only. In this case an owner of such generating facility may decide to decommission it. The Government is expected to adopt relevant rules of decommissioning.

Price of the capacity supplied to the Wholesale Market under the results of the capacity tenders is subject to annual adjustment in accordance with the change of the consumer index.

Part of the Industry

Our lawyers are active in industry organizations, such as the Association of International Petroleum Negotiators and the Moscow Mining Club.

If you would like to learn more about either of these organizations or their activities in Russia, please do not hesitate to contact us.

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Environmental/Climate Change

Kyoto Protocol: New Rules for Approving JI Projects in Russia

Russia ratified the Kyoto Protocol on 4 November 2004. The Kyoto Protocol came into effect on 16 February 2005, 90 days after the submission of Russia's ratification document to the United Nations.

From 2006-2008, in order to be eligible to transfer and acquire emission reduction units ("ERUs") generated from joint implementation projects ("JI projects"), Russia tried to develop the legal framework for such projects. In particular, in May 2007 the Government issued key Resolution No. 332, which outlined the procedure for reviewing and approving JI projects. More than 40 JI projects have been submitted for approval under Resolution No. 332. However, none of the submitted JI projects have been approved.

2009 proved to be a turning point, with a significant policy change regarding the approval process for JI projects in Russia. In October 2009, the Russian Government issued Resolution No. 843, which established a new procedure for selecting and approving JI projects in Russia and invalidated Resolution No. 332.

Resolution No. 843 introduced a tender procedure for approving JI projects. Under the new procedure, Sberbank, Russia's largest state-owned bank, is authorized to review and select the applications submitted for the tender. However, the Ministry of Economic Development must approve all JI projects awarded through the tender.

Pursuant to Resolution No. 843, JI projects that have already been submitted for approval under the previous regulations may be resubmitted for approval under the new procedure at the investor's request and will be subject to the new tender procedure[.

Notwithstanding the introduction of Resolution 843, the regulatory framework required to implement the Kyoto Protocol mechanisms, including JI projects and emission trading, have not yet been fully established in Russia. Elaborating the provisions of Resolution No. 843 related to tender rules, the Ministry of Economic Development approved a decree establishing the tender rules for selecting JI projects. The decree is to be officially published yet. Besides, the procedure for maintaining a register of JI projects still needs to be adopted. With respect to the development of emission trade and green investment scheme, there is also a need for respective legislation to be established.

Our Energy Overviews

In addition to this Review, our Moscow Energy Team has detailed overviews covering:

- Russian Oil and Gas Legislation
- Russian Power Legislation
- Russian Mining and Metals Legislation
- Russian Nuclear Legislation

If you would like a copy of the most recent version of any of these overviews, please contact us.

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Legislative Update Briefs

Energy

Energy Charter Treaty

The Energy Charter Treaty establishes a legal framework for promoting long-term cooperation in the energy sector in accordance with the objectives and principles of the Treaty. On 30 July 2009 the Government issued Decree No. 1055-r outlining Russia's intention not to become a member of the Energy Charter Treaty. The Decree provides an official notification that Russia does not intend to become a member of the Treaty and its Protocol on Energy Efficiency and Related Environmental Aspects.

Energy efficiency

On 23 November 2009 the President signed Federal Law No. 261-FZ "On Energy Saving and Increasing Energy Efficiency and On Amendments to Certain Legislative Acts." The Law establishes a legal framework for activities aimed at supporting and promoting energy saving and increasing energy efficiency. In particular, it provides for: (i) state support for companies implementing investment activities aiming at energy efficiency; (ii) state management for increasing energy efficiency; and (iii) a control system for import, production, sale and use of energy-consuming facilities with low energy efficiency.

The Law also establishes (i) a procedure for conducting energy surveys, in particular, in respect of energy-intensive companies, to obtain information on the volumes of utilizing energy resources and to define indicators of energy efficiency; (ii) terms and the scope of the energy service agreement; and (iii) a state information system on energy saving and energy efficiency increase.

Furthermore, the Law extends companies' liability for ineffective use of energy facilities. The energy facilities' users will have to pay for the use of energy facilities if their efficiency index is below the required level.

Energy strategy

On 13 November 2009 the Government issued Decree No. 1715-r approving the Energy Strategy of the Russian Federation until 2030. The Strategy establishes the main principles, goals and priorities of the state long-term energy policy of the Russian Federation. It is primarily aimed at the formation of innovative and effective national energy sector that is appropriate to energy needs of the growing economy and foreign economic interests of Russia.

The Strategy outlines the problems with and the main factors in the development of the Russian energy sector

over the past ten years and provides an economic and social forecast of its development for the specified period. It also provides an overview of the oil complex, gas and coal industry, heating and power sector and nuclear energy industry and defines the priority projects and measures to be undertaken by the state in these spheres to improve the condition of the country's fuel and energy sector and develop domestic energy market.

Oil & Gas

Classification of oil and combustion gas reserves and resources

On 9 December 2008 the Ministry of Natural Resources and Ecology "(MNR)" issued Decree No. 329 in respect of the Classification that sets out unified for Russia main principles for classifying oil and combustion gas reserves and resources. The Decree now postpones the date of the Classification's entry into force from 1 January 2009 to 1 January 2012.

Access to trunk pipelines

On 21 December 2009 the Government issued Resolution No. 1039 that sets out the procedure for non-discriminatory access of the planned, designed, constructed and reconstructed oil refineries to a service on connecting trunk oil pipelines and (or) petroleum-products pipelines, and procedure for keeping record of oil refineries in Russia.

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Strategic deposits of federal significance (“strategic subsoil deposits”)

On 24 December 2008 MNR issued Order No. 344 amending the procedure for reviewing applications for subsoil use rights upon the discovery of a subsoil deposit by a subsoil user who has conducted a geological study, at its own expense, on the subsoil deposit for exploration and production purposes.

On 8 January 2009 the Government issued Resolution No. 4 approving the procedure for reviewing applications for obtaining subsoil use rights for exploration and production of natural resources, or geological study, exploration and production of natural resources under a combined license within a strategic subsoil deposit granted for use without holding a tender or auction, if a subsoil deposit is located offshore (continental shelf) or contains gas.

On 19 January 2009 the MNR issued Decree No. 5 that amends MNR Decree No. 1026, dated 19 November 2003 specifying the procedure for re-issuing subsoil use licenses in respect of strategic subsoil deposits. The Decree sets out an additional list of documents that a foreign investor should file with the Federal Agency for Subsoil Use (“Rosnedra”) or its territorial agencies for re-issuing subsoil use license in respect of strategic deposits.

On 5 March 2009 the list of strategic subsoil deposits was published in the official Russian publication, Rossiyskaya Gazeta and includes 986 onshore strategic subsoil deposits. The Subsoil Law establishes the criteria determining whether it is a strategic subsoil deposit. Once a subsoil deposit is included in the List, it will retain its status as a strategic subsoil deposit, notwithstanding any changes in the respective criteria resulting from an amendment of the Subsoil Law. However, the subsoil deposits are considered of federal significance regardless of whether or not they have been included in the List, provided that they satisfy the criteria set out by the Subsoil Law.

On 10 March 2009 the Government issued Resolution No. 206 approving the procedure for: (i) compensating a foreign investor's expenses for a geological study and estimation of a discovered strategic subsoil deposit and a one-time payment made in compliance with the terms of a combined license if a foreign investor was denied the right to use the strategic subsoil deposit; and (ii) paying a foreign investor a reward of an amount that will depend on the type of natural resources contained in the strategic subsoil deposit and the territory where such deposit is located.

Utilizing associated gas

On 8 January 2009 the Government adopted Resolution No. 7 that sets out the target level for gas flaring starting in 2012. According to the Resolution, the amount of gas flared should not increase by more than five percent of the volume of the associated gas released.

On 11 December 2009 the State Duma adopted in the first reading Draft Law No. 244371-5 that seeks to amend Article 32 of the Federal Law “On Electric Power Sector,” with respect to priority access of electric power generated from using associated gas and associated gas products to the wholesale electricity market. The Draft Law aims to provide the possibility for companies to utilize associated gas, produced at oil deposits, by constructing electric heating power plants operating on associated gas in the vicinity of such deposits.

Payments for using subsoil deposits

On 4 February 2009 the Government issued Resolution No. 94 approving the procedure for determining the amounts of one-time payments for using subsoil within subsoil plots that are granted without a tender and auction for (i) exploration and production of natural resources or (ii) geological study, exploration and production of natural resources under a combined license. The procedure does not apply to subsoil plots that are granted for short-term use (up to one year).

Holding tenders and auctions

On 17 June 2009 MNR issued Order No. 156 approving the Guidelines that sets out procedure and terms for implementing by Rosnedra or any of its territorial bodies of a state function on holding tenders or auctions for the right to use subsoil. The Guidelines do not apply to subsoil deposits: (i) of federal significance, (ii) containing commonly occurring natural resources and (iii) of local importance.

Extracting ground water by subsoil users

On 25 June 2009 MNR issued Order No. 168 approving the procedure for extracting ground water (for technological water maintenance) by subsoil users for their own use that conduct exploration and production of natural resources or geological study, exploration and production of natural resources under a combined license within the borders of mining allotments based on the approved technical project.

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Deviation of actual oil and gas production from planned production level

On 30 June 2009 MNR issued Order No. 183 amending the Rules for Subsoil Protection in respect of permissible deviation of actual oil and gas production from planned production. The Order specifies the permissible deviation of actual annual oil and gas production from planned annual production levels, in the form of a differentiated scale.

Schemes for developing power sector

On 17 October 2009 the Government adopted Resolution No. 823 establishing the procedure for developing and approving schemes and programs for development of the energy power sector to expand power grid infrastructure and generating capacity, and create conditions for attracting investments for the construction of energy power facilities.

Investigating accidents in power sector

On 28 October 2009 the Government adopted Resolution No. 846 approving the procedure for investigating causes of accidents within the electric power sector that applies to accidents at all electric power facilities and (or) energy receiving facilities on the territory of the Russian Federation, except for accidents at nuclear power stations.

"Offshore" subsoil development

On 27 December 2009 the President signed Federal law No. 364-FZ amending certain Federal Laws with respect to use and protection of natural resources of the continental shelf, internal sea waters, territorial sea and exclusive economic zone of the Russian Federation. The Law, in particular, abolishes the requirement to obtain, in addition to a subsoil license, a permit for implementing certain activities for subsoil use purposes (i.e. drilling works, pipeline construction) within specified aquatic areas and the continental shelf. The Law also specifies the procedure for implementing certain economic activities (i. e regional geological study), in particular, on the continental shelf.

Electricity

Technological access

On 9 January 2009 the Government adopted Resolution No. 4 that sets out the procedure for resolving disputes regarding the establishment and application of payments for technological access to power grids and/or tariff rates to determine the payments established by government authorities.

Renewable sources of energy

Under Federal Law "On the Electric Power Industry," the Government provides subsidies from the federal budget to legal entities and individuals that own or have legal title to generating facilities which use renewable sources of energy (e.g., wind power, hydraulic power, and solar energy). On 17 November 2008 the Ministry of Energy (Minenergo) issued Decree No. 187 on confirming the volume of electricity production by using renewable sources of energy.

Persons that are subject to mandatory service on operating and dispatch control

On 14 February 2009 the Government issued Resolution No. 114 that approves the criteria and procedure for including legal entities of the electric power sector and electric power consumers into the list of persons subject to mandatory servicing when rendering operating and dispatch control services in the electric power sector.

Information to be submitted to Minenergo

On 9 December 2008 Minenergo issued Decree No. 256 amending the list of information on production activities that must be submitted by legal entities of electric power sector to Minenergo.

Disputes in respect of agreements on electric power facilities

On 15 June 2009 the Government adopted Resolution No. 492 approving material terms of agreements and the procedure for resolving disputes concerning the right to conclude agreements in respect of electric power facilities of the unified national electric power grid.

Free electric power zones

On 6 April 2009 Minenergo issued Order No. 99 approving the procedure for defining free electric power flow zones.

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Environmental

Changes to environmental laws

On 30 December 2008 the President signed Federal Law No. 309-FZ that amends a number of legislative acts, including the Federal Law "On Environmental Protection," the Law "On Subsoil," the Federal Law "On Industrial and Consumption Waste," and the Federal Law "On Environmental Expert Review."

The Law on Subsoil (as amended by the Law), among other things, (i) defines the grounds for regional authorities to grant the right to use subsoil plots for developing commonly occurring natural resources ("common natural resources"); (ii) facilitates the procedure for the exploration and production of common natural resources by subsoil users for their own needs; (iii) limits the number of authorities that can approve technical projects for developing subsoil deposits; and (iv) authorizes the Federal Agency for Subsoil Use to issue permits for construction in areas containing natural resources.

The Law on Industrial and Production Waste (as amended by the Law) in particular, (i) expands the list of definitions related to waste treatment; (ii) defines the classification of hazardous waste (from "almost non-hazardous" to "highly-hazardous" wastes); (iii) prohibits waste disposal within facilities not included in a state register of waste disposal facilities; (iv) narrows the list of legal entities that must develop the quotas reflecting waste generation and limits for its disposal; (v) specifies the procedure for licensing waste-related activities; and (vi) requires a state environmental expert review of project documentation for facilities related to the disposal and decontamination of wastes.

Following the adoption of the Law, the Law on Environmental Expert Review also specifies the procedure for conducting a state environment review of materials for justifying the licenses for implementing certain activities.

Court practice: environmental pollution payments

Clause 4(b) of Government Resolution No. 632, dated 28 August 1992 "On Approval the Procedure for Determining Payments and the Maximum Amount of Payments for Environmental Pollution, Waste Disposal and Other Types of Adverse Impact" permits regional executive authorities to exempt certain organizations from environmental pollution payments as unconstitutional. On 14 May 2009 the Constitutional Court adopted Resolution No. 8-P which recognized this provision as unconstitutional.

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