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Mining Research

Briefing 4 : Mining in Forest Reserves - Spotlight on L.I. 2462

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1. Introduction

The Environmental Protection (Mining in Forest Reserves) Regulations, 2022 (L.I.2462), enacted on June 23, 2022 allows mining in forest reserves. It derives its alleged authority from Section 62(1) of the Environmental Protection Agency Act, 1994 (Act 490) that empowers the Minister responsible for the Environment to make regulations generally for, among other things, giving effect to the Environmental Protection Agency Act, 1994 (Act 490).

L.I 2462 is specifically designed to address the environmental aspects of mining activities within forest reserves[1]. Prior to the enactment of L.I.2462, government's policy on mining in forest reserves was contradictory. Whereas the National Land Policy[2] bans mining in forest reserves, the Environmental Guidelines[3] and Forest and Wildlife Policy[4] imply that mining is permitted in forest reserves, within limits. L.I 2462 now appears to permit mining in all forest reserves in Ghana, provided the procedures specified in the L.I are complied with.

2. Overview of the Environmental Protection (Mining in Forest Reserves) Regulations, 2022 (L.I.2462)

Under L.I 2462, mining licenses may be granted in forest reserves with the exception of certain prohibited zones, encompassing globally significant biodiversity areas, protected provenance zones, and cultural sites, albeit with exceptions. To embark on mining activities in forest reserves, various permits are required. A Forestry Entry Permit from the Forestry Commission is required in addition to the mineral rights from the Ministry of Lands and Natural Resources, Environmental Permits from the Environmental Protection Agency, Water Use Permits from the Water Resources Commission and Mining Operating Permits from the Inspectorate Division of the Minerals Commission.

To minimise the impact of mining activities on the forest reserves, individuals holding mineral licenses must ensure that their operations do not cause unwarranted destruction. Activities such as excavation and drilling must be confined to safe areas with adequate safeguards, while all ancillary facilities must be situated outside the boundaries of the forest reserve. Upon completion of exploration, the site must undergo rehabilitation according to plans submitted to relevant authorities. These plans are submitted to the relevant authorities before the exploration activities commence. It is important to note that whiles Regulation 8 outlines safety processes to follow in carrying out excavation and drilling activities in the forest reserve such as avoiding areas which are environmentally or culturally sensitive when positioning drill holes, safe area is not explicitly defined in the law.

In addition to these measures, the Regulations mandate comprehensive environmental impact mitigation strategies throughout the mining process. Mineral right holders are required to submit a reclamation and

[1] Forest Reserves is defined in Regulation 53 of LI2462 as an area of land designated under section 2 of the Forest Act, 1927 (CAP 157).
[2] National Land Policy 1999: "All lands declared as forest reserves [...] are "fully protected" for ecosystem maintenance, biodiversity conservation and sustainable timber production"12; "Land categories outside Ghana's permanent forest and wildlife estates are available for such uses as agriculture, timber, mining and other extractive industries..."13 and "...no land with primary forest cover will be cleared for the purpose of establishing a [...] mining activity".
[3] Environmental Guidelines for Mining in Production Forest Reserves 2001 state that protected areas of forest reserves such as Globally Significant Biodiversity Areas (GSBAs), Hill Sanctuaries and special protection areas are exempt from mining exploration.
[4] Forest and Wildlife Policy 2012 includes an aim "to reduce, as much as possible, the prospecting and mining of mineral resources in forest reserves".

decommissioning plan, establish a biodiversity offset area, and consider the ultimate land use. These plans would be included in documents submitted during the EIA process for the grant of the mineral right. They would be used and take effect after the party has completed exploration activities in the forest reserve. This can involve efforts to re-establish forest cover, create wildlife habitats, and preserve infrastructure.

A pivotal feature of the Regulations is the establishment of a Mining in Forest Reserve Committee to ensure the effective and efficient management of mining exploration and exploitation. It is composed of

- a Liaison Group[5] that facilitates effective exploration and mining,
- a Steering Committee[6] that oversees and approves their budget, ensuring the implementation of exploration and mining policies within the reserve, and
- a Local Liaison Group[7] in charge of mining activities in each forest reserve.

This multi-tiered governance structure is integral to maintaining the delicate balance between mining activities and the preservation of forest reserves. Whilst the creation of the Liaison groups is an action to be applauded and adopted in other sectors, since it involves the bringing together different experts from different sectors in managing the forest reserves, it is important to ensure that these committees are representative of the relevant stakeholders.

The Regulations establish a set of offenses, violations of which entail either a fine ranging from Gh¢2400 to Gh¢3000 or a period of imprisonment spanning from six months to a year. These offenses encompass a range of activities: Granting licenses in prohibited areas; Committing acts that run counter to the exploration activities mandated for license-holders; Undertaking the construction of access routes, bridges, tracks, and drill pads without engaging in appropriate consultation; Violating drilling and excavation requirements; Causing the destruction of the natural flow of perennial water bodies and Contravening post-mining and exploration requirements, including improper siting of ancillary facilities within forest reserves, and disregarding the guidelines established by the Liaison Group.

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[5] Liaison groups are formed of the following:

- The head of the Department of the Agency responsible for mining,
- Two representatives from the Agency,
- One representative of senior managerial level from the following:
  - The Forestry Commission,
  - The Forest Services Division,
  - The Minerals Commission,
  - The Inspectorate Division of the Minerals Commission,
  - The Water Resources Commission,
  - The Ghana Geological Survey Authority; and
  - Ministry responsible for Lands and Natural Resources,
- One representative of the Ghana Chamber of Mines; and
- The Technical officer in charge of the Secretariat.

[6] The Steering committee is made up of:

a. the heads of the following institutions: the Agency, the Forestry Commission, the Forest Services Division, the Minerals Commission, the Water resources Commission, Ghana Geological Survey Authority and the Ghana Chamber of Mines and
b. the Chief Director of the Ministry responsible for forestry and mines.

[7] The local Liaison Group is made up of the following from the catchment area of the forest reserve: a representative of the District Assembly, a representative of each traditional council or traditional authority where applicable, and a representative of the following;

(i) Women's groups nominated by the traditional council and
(ii) Youth groups nominated by the traditional council.

3. Legality Concerns With L.I 2462

a. Capacity of EPA to Regulate Mineral and Forestry Resources

The regulation of mining within forest reserves, as overseen by the Environmental Protection Agency (EPA) through L.I. 2462, raises a significant constitutional concern. According to the 1992 Constitution of Ghana, the responsibility for regulating and managing natural resources, as well as coordinating related policies, is specifically allocated to the Natural Resource Commissions established either by the Constitution or by the Parliament of Ghana. The Environmental Protection Agency is not included among these designated Commissions - unlike the Forestry and Minerals Commissions. Despite this, the current form of L.I. 2462 effectively grants the EPA the authority to supervise and control the utilization of mineral resources. This encroachment on the mandate of the Minerals Commission exceeds the scope of the EPA's designated functions in its establishment legislation.

The enactment of L.I. 2462 by the EPA constitutes a clear overreach, effectively supplanting the legitimate functions of the Forestry and Minerals Commission and thereby violating constitutional directives regarding the management of natural resources in Ghana.

Furthermore, L.I. 2462 introduces various provisions that involve the regulation and management of mineral resources. These include aspects such as granting mineral rights, imposing restrictions on mining in prohibited areas, providing the President with discretionary authority to authorize mining in globally significant biodiversity areas, and establishing criminal offenses to penalize violations. While these provisions may have their merits, the core issue remains that they are being implemented by an agency – the EPA – that lacks the constitutional authority and mandate to manage natural resources.

The purported regulation of mining in forest reserves through L.I. 2462 by the EPA not only contradicts the constitutional framework for managing natural resources in Ghana but also usurps the roles of the Forestry and Minerals Commissions. This infringement on constitutional principles and established mandates serves as a basis for questioning the legitimacy of L.I. 2462

b. Illegitimate source of authority for L.I. 2462

L.I. 2462, purportedly enacted under the Environmental Protection Act of 1994 (Act 490), appears unconstitutional and may exceed the Minister's authority due to a lack of a proper legal foundation. Upon close examination of Act 490, it is evident that the Minister lacks the necessary power to regulate the specific matters outlined in L.I. 2462. A Legislative Instrument must have its basis in legislation, meaning that the Constitution or a statute must explicitly grant the power to formulate rules. L.I. 2462 lacks this clear authorization, making any attempt by an administrative officer or body to create regulations appear as an unconstitutional assumption of the legislature's role, contravening the principle of the separation of powers.

The extended title of L.I. 2462, found in Section 62(1) of Act 490, outlines the legal foundation for the Instrument. However, it delineates a restricted scope of activities that the Minister can regulate, namely environmental standards and waste disposal, where the Minister can establish rules. Regulation 2 of L.I. 2642 elucidates the rationale behind the Regulations, encompassing the management of mining in forest reserves, efficient use of natural resources, stakeholder involvement in mining issues in forest reserves, effective mineral royalties' administration, and maximizing benefits for the local community from mining in forest reserves.

L.I. 2462 does not comfortably align with any of the permitted activities specified in Section 62(1) of Act 490. Consequently, it is evident that L.I. 2462 cannot be considered a properly passed legislative instrument within the confines of the law. Its overreaching scope strongly argues against the Instrument's legal validity.

Even under the broadest interpretation of Section 62(1) of Act 490, justifying the enactment of L.I. 2462 under this provision is extremely challenging. The mismatch between the purpose and provisions of L.I. 2462 and the functions assigned to the Environmental Protection Authority by Act 490 makes it almost impossible to interpret Section 62(1) to legitimize L.I. 2462. If L.I. 2462 had primarily focused on setting environmental standards, it might have found some justification under Section 62(a) of Act 490. However, after careful examination, the standards aspect is secondary to the broader goals of regulating mining, involving stakeholders, and facilitating mineral royalty payments. Essentially, L.I. 2462 attempts to achieve more than what is allowed for a standard-setting regulation under Section 62(a).

The failure to place L.I. 2462 within the scope of Section 62(1) is a critical flaw that deprives the Legislative Instrument of its legislative authority, likely rendering it legally invalid. This glaring absence of a robust legal foundation provides substantial grounds for challenging the Instrument's legal standing. Given this significant flaw, it is reasonable to expect that a court would question the validity of L.I. 2462. The lack of legislative support seriously undermines the Instrument's legal basis, casting doubt on its legitimacy. Consequently, it is highly likely that a court would decide to nullify L.I. 2462 due to its inherent lack of legislative support, emphasizing the importance of adhering to established legal frameworks and principles.

c. L.I. 2462's Inadequacy in Granting Authorization for Mining Activities Within a Forest Reserve

In Ghana, forest reserves are established by the President through Executive Instruments (E.I.), managed by the Forestry Commission. The President's exclusive authority, exercised via an E.I., allows modifications to the rights of a forest reserve. Without an Act of Parliament or an E.I., the legal protections for land designated as a forest reserve remain unchanged. L.I. 2462, crafted by the Environmental Protection Agency (EPA), is a Legislative Instrument lacking the legislative legitimacy to supersede protections granted by an E.I. Although no specific law addresses the E.I. and L.I. conflict, legal principles confirm that an L.I. cannot implicitly repeal an E.I.

The crucial distinction between an Executive Instrument and a Legislative Instrument lies in their legislative approval requirements. Legislative Instruments, even if initiated by an executive body, necessitate parliamentary approval, while an Executive Instrument, representing executive authority, does not. This difference nullifies the rule that conflicts between subsequent and prior legislation don't apply to E.I. and L.I. conflicts. Due to the distinct nature of these subsidiary legislations, the doctrine of the separation of powers dictates that an L.I. cannot amend an E.I. unless explicitly allowed by the constitution. This clarifies the rules allowing L.I. 2462 to implicitly repeal an E.I. creating a forest reserve do not apply. Consequently, L.I. 2462 cannot diminish the protections given to land classified as a forest reserve through an E.I., logically preventing it from allowing mining activities within these reserves.

Even if we disregard the relationship analysis between E.I. and L.I., L.I. 2462 lacks the authority to undermine statutory safeguards for forest reserves. This is because the protections, offenses, and penalties are defined in parliamentary acts—the Forests Act, 1927 (CAP 127), and Forests Protection Act, 1974 (NRCD 273). In Ghana's legal hierarchy, an act of parliament holds a higher status than subsidiary

legislation, emphasizing that L.I. 2462 cannot implicitly revoke safeguards for land designated as a forest reserve, as these protections are rooted in legislative acts.

In conclusion, L.I. 2462 cannot authorize mining in forest reserves due to its lack of legislative legitimacy to erode the protections conferred on land classified as a forest reserve.

d. Other shortcomings

Beyond its legal shortcomings, L.I. 2462 faces challenges, including drafting, political, and diversity issues that collectively undermine its effectiveness in safeguarding precious forest ecosystems. Firstly, the sanctions regime within L.I. 2462 is weak, governing mining activities within forest reserves with a maximum penalty of a one-year imprisonment term and a fine of 250 penalty units (3000ghc). This feeble stance is highlighted when compared to similar regulations like the Timber Resource Management and Legality Licensing Regulations, 2017, which prescribe more stringent penalties.

The weak sanctions regime in L.I. 2462 is attributed to constraints imposed by the EPA Act on the Minister's authority to enact sanctions through regulations. Given the gravity of issues like biodiversity loss and irreversible environmental destruction, a robust sanctions framework is imperative. The inherent inability of L.I. 2462 to ensure effective compliance with its prohibitions underscores the inadequacy of a legislative instrument in regulating mining activities within forest reserves. A more comprehensive and robust approach is essential to protect these critical ecosystems.

Secondly, the process through which L.I. 2462 was created is concerning. While not legally mandated, there is a growing practice in Ghana, especially in natural resource management, for civil society organizations and community-based stakeholders to be involved in developing legislation. Conflicting accounts exist regarding whether these groups were consulted during the formulation of L.I. 2462. The absence of consultation with key stakeholders is a compelling political argument for reconsidering or repealing this legislation.

Thirdly, unlike recent legislation, L.I. 2462 lacks gender quotas despite creating three new institutions. This departure from the norm raises concerns and offers a compelling political opportunity to advocate for a thorough review of L.I. 2462.

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