

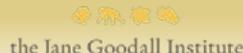
SOME CONSIDERATIONS ON TRADEOFFS BETWEEN BIODIVERSITY CONSERVATION AND MINING EXPLOITATION LAWS IN THE DR CONGO

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AFRICA BIODIVERSITY COLLABORATIVE GROUP



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Executive Summary

The Conservation International (CI) program in the Democratic Republic of Congo (DRC) submitted the following policy brief as a component of the Africa Biodiversity Collaborative Group (ABCG) efforts to assess the best way to engage the mining sector in DRC and to ensure that biodiversity and forest are not sacrificed in the scramble for Africa's mineral resources. Outcomes include reducing mining activities in protected areas, addressing factors of deforestation, mitigating the threat of violent conflict and building peace.

In February 2011, CI held a workshop for participatory identification of drivers of deforestation. Mining activity has been identified as one of the greatest threats to protected areas in the Eastern DRC. Indeed, mining activities are partially responsible for the loss of forests and biodiversity throughout DRC.

Conflicts with and between nascent government agencies are also common and exacerbated by a lack of appropriate and coordinated land and natural resource policies as well as a lack of capacity on the part of the central government. The values assigned to various sectors, including mining, forestry, water and nature conservation are not equitable and the superposition of sectoral areas leads to serious conflicts of competing interests when privileges and favours are put on one sector, regardless of the values represented by other sectors. Moreover, the free interpretation of laws by executive agencies in charge of various sectors becomes another cause of inequitable trade-off.

Through its Constitution dated February 18th, 2006, the DRC guarantees fundamental and collective rights including the right to a healthy environment for all Congolese, and the State is obligated to ensure the protection of the environment and the public health (Art.53 of the Constitution of the DRC). Through the Law of July 11th, 2002 the country adopted a new mining code which is committed to encourage investments in the extractive sector to support socio-economic development and to effectively ensure sound management and environmental protection so that present and future generations will benefit from natural resources. This Code lists investment incentives for this purpose, and specifies the requirements for environmental impact assessment of mining, according to the Decree of March 26th, 2003.

However, the expansion of mining activities in DRC is often done without any regard to the legal environmental requirements established by: the Conservation Law (Ordinance Law no 69-41 of August 22th, 1969) and the Mining Code (in Art.202, 206, 404, 444, 445, etc.). As one result, overlaps between mining and logging concessions, community lands, and protected areas are increasingly present in the field.

As analyzed in detail in Table 1, there is little to no legal guidance in cases of overlap between mining titles or quarrying permits and forest concessions. The Forest Code that applies to the forest protected areas in the classified (upgraded) forests, subjects them to a fairly restrictive legal regime, to the extent that, for example, any decommissioning/declassification of/in any of these areas must be preceded by a complete study of environmental impact (Art.19, Forest Code).

This above highlights the point that there are clearly conflicts between the extractive sector vs. the forestry and the nature conservation sectors, in terminologies, concepts, competences and procedures.

1) Conflict of concepts/terminology

The Chapter II of the Forest Code distinguishes three main types of forests: classified forests, protected forests and permanent production forests (Art.10, Forest Code). Also in its articles 12 and 13, the Forest Code provides a list of classified (upgraded) forests and protected areas. In the Chapter II of the Mining Regulations, these protected areas are considered as Special Areas and are divided into four categories, namely: protected areas, reserved areas, restricted areas and prohibited areas (Chapter II, Art. 3, 4, 5 and 6 of the Mining Regulations). This difference of terminology creates itself considerable confusions, misinterpretations, overlaps and conflicts in the application of the laws.

2) Conflicts of jurisdiction

The Mining Regulations gives the President of the Republic the sole authority to declassify a forest in Art.3 para5. The Forest Code gives the Minister in charge of forests the authority to downgrade/declassify a forest (Art.19 of Forest Code).

The competence to authorize mining on a perimeter that encompasses a national park is placed at the Head of the Decentralized Territorial Entity (DTE) in which is the national park, underlines the concept of “zone’ for such restrictions as defined by Art.2 of the Mining Regulations. This zone is understood as any portion of the country whose occupation for mining purposes is conditioned by the prior authorization of the competent authority. However, since any land within a national park is classified as a protected forest, we should first downgrade/declassify. In such case, the Forest Code applies and gives the Minister in charge of forests the competence of downgrade/declassify a forest reserve. Yet, the Mining Code states that the administrative authority competent to consent to the occupation of any land within a national park is the Head of the DTE (Art.279 para.1 subparagraph j).

The Mining Code states that the administrative authority bestowed on the Head of the DTE may consent to the occupation of land located up to than ninety meters from the boundary of a village (Art.279 al.1, subparagraph a). In reality, it may turn out that any decision to occupy land within ninety meters from a village, may totally impact the local community forests. Because the immediate vicinity of the villages is oftentimes covered by forests which are the community property of the surrounding communities (property acquired in accordance to Art.9 of the Forest Code), it is clear that this provision ignores any local community ownership of the surrounding forests by bestowing the authority upon the Head of the DTE. Meanwhile, the Forest Code in its Art.113 para.3 states that any exploitation of community forests should be made on a contract basis with the community and subject to the approval of the local forestry administration. It emerges therefore, in relation to this aspect, a potential for conflicting encroachment of mining on the local community forests which may become allocated to a mining or quarry right by the sole decision of an administrative authority that is not competent for community forests.

3) Conflict of Procedure of downgrading/declassification

The Mining Regulations provides no special procedure for downgrading/declassifying a forest reserve. Art.3 stipulates that the President of the Republic can downgrade a protected area following a joint proposal with both the Minister in charge of mining and the Minister in charge of environment and nature conservation. This provision however does not take into account the preliminary assessment of possible consequences of mining activities to be carried out on the perimeter of the downgraded/declassified forest. What emerges is a conflict of procedure with the Forest Code. The Forest Code in its Art.19 provides that the Minister in charge can downgrade a portion of the forest only after the consent of the provincial and national advisory board of the concerned forest, based on the full and prior consultation with the local population. Declassification also must be subject to a prior environment impact assessment.

No motivation is put forward nor does any procedure exist for the decision by an administrative authority to consent to the occupation of any land within a nature reserve or national park.

4) Conflict between mining and conservation

The Art.3 of the Ordinance-Law 69-041 of 22 August 1969 on the Conservation of Nature states that lands in the integral reserves cannot be given up nor granted (conceded), nor can they be assigned any use incompatible with the protection of nature.

The Mining Regulation meanwhile lists the protected areas into four categories, namely: protected areas, reserved areas, restricted areas and prohibited areas (Art.2).

In a protected area, one cannot grant rights of mining or quarry nor allocate any artisanal mining area. In the event of changed circumstances or national needs, a protected area may be downgraded or declassified by the President of the Republic only. If the creation of a protected area undermines the exploitation of existing mining or quarry, just compensation is paid to the concerned rights holder. In case of disagreement the arbitration or legal remedies may be exercised by the holder injured (art 3 Mining Regulations).

Art.279 of the Mining Code gives a possibility of occupying and therefore operating any land within the national park following the consent of the competent authority. However, the competent authority is not the one who is entitled to downgrade a protected area (the President of the Republic) as stated by Art.3 of the Mining Regulations, in opposition to Annex I of the Mining Regulations that identifies the authority competent to give consent for such a particular occupation, namely the Head the DTE.

Furthermore, while downgrading/declassification may take place, the changed circumstances or needs of national motivations underlying the consent of the competent authority are not explicitly stated.

In a reserved area, unlike the protected areas in which mineral rights may only be granted after downgrading/declassification, the Mining Code through its Mining Regulations does not exclude the possibility that mining or quarry rights be granted on perimeters encroaching on reserve areas. Art.5 of the Mining Regulations states that "mineral rights or quarries may be granted on perimeters which encroached on the reserve areas. However, environmental plans for operations under such rights should note the existence of these reserve areas, recognizing their purpose, and include adequate

measures to mitigate the adverse impacts of operations on the concerned reserve area and that the objective for which the reserve area has been established ". However, protected areas and land within a national park are also considered as reserve areas as defined above. Therefore, mining or quarry rights may be granted in reserve areas that can also be areas included in protected areas and therefore totally dedicated to integral conservation.

In a restricted area, no one may occupy a restricted area without obtaining first the consent of the competent authority, particularly with regard to lands within a national park, in accordance with Art.279 para.1 sub-paragraph j of the Mining Code.

This prediction is somehow an exception to the planned downgrading/declassification procedure for protected areas whereas national parks are classified as first category. Thus, such definition of restricted area highlights the power of authorization to occupy any land for extraction within a national park only bestowed to the Head of the DTE.

The competent authorities referred to in Art.279 of the Mining Code are those provided by the specific legislation as set out in Annex I of the Mining Regulations; the authorities in this case is placed at the Head of DTE, under the Act Organic No. 08/016 of 07 October 2008 on "the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the provinces".

An analysis of legal texts on the conservation vs. the mining sector highlights this critical fact: the violation of the Ordinance Law No. 69-041 of 22 August 1969 on "the conservation of nature" by the Decree of 26 March 2003 on mining regulations which expressly states in Art.5 that "*mining or quarry rights may be granted on perimeters that overlap areas of reserve*", whereas Art.3 of Ord. Act states that "*public lands in the integral reserve cannot be assigned or granted. They cannot receive assignment incompatible with the protection of nature*".

In this context, Art.279 designates the authority for deciding the occupation of any land within a national park to the Head of a DTE whenever the park is in his constituency. Therefore, the life of any single national park is at the mercy of administrative authorities' decisions as specified in these Mining Regulations above.

To address these critical issues, it is vital to harmonize terminologies and concepts used in mining, forestry and conservation sectors; to clarify motivation and procedure for downgrading/declassification of a protected area, and to review the decision-making processes for occupation by miners.

Conflict analysis provision	Forest Code/Nature conservation law provisions	Mining Code provisions
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A. Some references to other laws.

a) Constitution of the Democratic Republic of Congo from 18 February 2006.

Art. 9. Of the constitution "The state has a permanent sovereignty on soil, subsoil, waters and forests, the Congolese aerial spaces, rivers, lakes and sea and Congolese territorial sea and continental shelf. The Modalities of management and concessioning State area referred to the preceding paragraph shall be determined by the law".

b) Land/property regime DRC: The tenure of the State in Democratic Republic of Congo is governed by Art. 53 of the Act of July 20th, 1973 called Land Law, which states:

"The ground is wholly owned and inalienable of the State". This has the corollary that the enjoyment of all land in a concession to individuals is organized by the law stated above.

c) Law No. 007 of 07 October 2008 concerning the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the provinces.

The authorities competent to decide on restrictions to the occupation of the land are those placed at the head of the decentralized territorial entities, endowed with legal personality, as defined by Law No. 007 of 7 October 2008 on the composition, organization and operation of decentralized territorial entities and their relations with the State and the provinces, namely:

- Governor for the city of Kinshasa,
- Provincial Governor for the province,
- Mayor of the City for city or town,
- Burgomaster for municipality administration (commune)
- Area Manager for the sector,
- Head/chief of chiefdom to chiefdom/chieftainship

It should be emphasized that even for an occupation of any land within a park, the consent of those authorities alone is sufficient.

Except with the consent of the owner or legal occupant, no person may occupy a site in less than:

- One hundred and eighty meters of houses or buildings occupied, vacant or temporarily unoccupied;
- Forty-five meters of land tilled and plowed for farm crops;
- Ninety meters from a farm with cattle, a reservoir, dam or private water supply.

B. Direct references to mining in the Forest Code

Forest legislation in the DRC refers bit of mining. The few references that affect the mining sector are those that submit any mining operation that would require the clearing of a portion of the forests, to first/prior obtain a permit after prior notice of deforestation from the local forest administration based on an impact study (art. 53 and 54 para 1. forest Code)

Art 53 of the Forestry Code
"Whoever, for the purposes of mining, industrial, urban, tourism, agricultural or otherwise, is forced to clear a portion of forest, is committed prior to obtaining a permit for this purpose of deforestation.

Conflict analysis provision	Forest Code/Nature conservation law provisions	Mining Code provisions
	<p>For agricultural activities, the permit is only required in the case that the deforestation will covers an area equal to or greater than 2 hectares.</p> <p>Article 54 para 1, Forestry Code: "The deforestation permit is delivered by the Provincial Governor, when the area to be cleared is equal or less than 10 hectares. Beyond this area, it is delivered by the Minister. In both cases, a prior notice from the local forestry administration based on an impact study is required.</p>	

C. Reference and other indirect interactions

<p>None of both codes/law provisions provides the solution to every time there is interaction between the mining title or quarrying permits and forest concessions. The forest code includes the various forest protected areas in the classified (upgraded) forests and subjects them to a fairly restrictive legal regime. To the extent that any decommissioning of these areas is preceded in the prior completion of a study of environmental impact (art. 19, Forest Code). It clears up a Conflict of terminology / concept, competence and procedures between mining and the forestry sector, also with the nature conservation law.</p> <p>1) <u>Conflict of concepts / terminology</u></p> <p>The chapter II of the Forest Code distinguishes three main types of forests: classified forests, protected forests and permanent production forests (Art. 10 para. The Forest Code). Also in Articles 12 and 13, the Forest Code provides a list of classified (upgraded) forest or protected areas. In the Chapter II of the Mining Regulations, these protected areas are considered as Special Areas and are divided into four categories, namely: protected areas, reserve areas, restricted areas and prohibited areas (Chapter II art. 3, 4, 5 and 6 of the Mining Regulations). This difference of terminology created itself enormous confusions, overlaps and conflicts in the application of these laws.</p> <p>2) <u>Conflicts of jurisdiction</u></p> <p>The Mining Regulations gives the President of the Republic in case of change of circumstances or</p>	<p>Art10 Forestry Code: "The forest area includes classified (upgraded) forests, protected forests and forests for permanent production.</p> <p>The classified (upgraded) forests are those submitted, in execution of an act of classification, has a restrictive legal regime concerning the rights of use and exploitation; they are assigned to a particular vocation, particularly ecological.</p> <p>The Protected forests are those that have not been subject of an act of classification and are subject to a legal regime less restrictive about the rights of use and exploitation.</p> <p>The Permanent production</p>	<p>Art 3 para. 5 of the Mining Regulations: "If circumstances change or national needs, a protected area can be downgraded through the same procedure specified in the first paragraph above for classification.</p> <p>Art. 279 al. 1 subparagraph j of the Mining Code: Restrictions on land occupation. Except with the consent of the competent authorities, no one can occupy land: ... j) included in a national park;</p> <p>Art.2. Mining settlement: "definitions of terms: ... Restricted Zone: Any portion of the country whose occupation</p>
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Conflict analysis provision	Forest Code/Nature conservation law provisions	Mining Code provisions
<p>national skills needs of declassification of a forest (a protected area to hear the extent of its definition is included in such forests provided by the Forest Code) Article 3 para. 5 of the Mining Regulations. The Forest Code also states that it is the Minister in charge of forests who can downgrade/declassify a forest (art.19 Forest code).</p> <p>The competence to authorize mining on a perimeter including a national park by an authority placed at the head of a decentralized territorial entities (DTE) in which lies the national park is well explained by the concept of zones of such restrictions defined by Art 2 of the Mining Regulations. This area is understood as any portion of the country whose occupation for mining purposes is conditioned by the prior authorization of the competent authority. However, since the land within a national park is classified as a protected forest, we should first downgrade/declassify. Therefore, the Forest Code gives the Minister in charge of forests the competence of downgrade/declassify a forest reserve.</p> <p>The Mining Code provides that the administrative authority at the head of a DTE may consent to the occupation of any land within a national park (Art. 279 para. 1 subparagraph j)</p> <p>The Mining Code provides that the administrative authority at the head of a DTE may consent to the occupation of land located less than ninety meters from the boundary of a village (Art. 279 al. 1, subparagraph a). It turns out that this decision to the occupation of land within ninety meter from a village, can totally relate to the local community forests. Because the immediate vicinity of the villages is generally covered by forests which are community property of surrounding communities (property acquired in accordance to art. 9 of the Forest Code). It is clear from this provision the ignorance of local community ownership of forests by the decision of the authority placed at the head of a DTE. So that the Forest Code in Article 113 para. 3 provides that any exploitation of communities forest should be made on contract basis with the community and subject to the approval of the local forestry administration.</p> <p>It emerges therefore in relation to this consideration, an encroachment of mining on the local community forests which may be subject to a mining right or quarry in the sole decision of the competent administrative authority.</p> <p>3) <u>Conflict of Procedure of downgrading/declassification</u></p> <p>-The mining regulations provides no special procedure before the downgrading/declassification of a forest reserve. Its Art 3 mentioned above provides that the President of the Republic can downgrade a protected area on a joint proposal with both the Minister in charge of mining and Minister in charge of environment and nature conservation. This prevision does not take into account the preliminary assessment of possible consequences of mining activities to be carried</p>	<p>forests are subtracted from protected forests by a public inquiry in order to concede; they are subject to operating rules prescribed by this law and its implementing measures.</p> <p>Art.19 of Forest Code: "it may be repaid or downgrading/declassification of a partial or total classified forest only after the assent of the national and provincial forests advisory councils. The downgrading/declassification and subject to the realization of a prior study of environmental impact.</p> <p>Downgrading/declassification is the decision taken under the same conditions and procedural reforms as classification.</p> <p>Art. 9 of the Forestry Code: "The trees situated in a village or its immediate environment or in an Individual or collective field are the collective property of the village or of the person to whom belongs the field".</p> <p>Art 113 al. 3. Forest Code: "The exploitation of forests for local communities may be entrusted to third parties under an operating contract. This contract must be subordinated to the approval of the local forestry administration".</p>	<p>for mining purposes is conditioned by the prior authorization of the competent authority, the owner or legal occupier such as: ... - land within a national park;</p> <p>Art. 279 para. 1, subparagraph a) Mining Code "restrictions on land occupation. Except the consent of the competent authorities, no one can occupy a land in: a) the cemetery reserve; "</p> <p>Art.2 para 32. Of Mining the Regulations: "The definitions of concepts:" the protected area is any geographical area on the surface and forming a national park, a hunting area, a zoo and / or botany or a conservation area. Under the Decree on the mining regulations, are considered as protected areas:</p> <ul style="list-style-type: none"> - The National Parks; - Hunting areas; - Reserves; - Preservation areas; - The zoological and botanical gardens (Art. 3 para. 4 Mining Regulations). <p>The reserved area is any portion of the country classified as reserves:</p> <ul style="list-style-type: none"> - Strict nature reserve established under the

Conflict analysis provision	Forest Code/Nature conservation law provisions	Mining Code provisions
<p>out on the perimeter of the downgraded/declassified forest. What emerges is a conflict of procedure with the forest code. The Forest Code in its Article 19 provides that the Minister can downgrade a portion of the forest after the assent of the provincial and national advisory board of the concerned forests, based on prior consultation with the local population. Declassification is subject to the prior environment impact assessment.</p> <p>-No motivation is advanced even less any procedure for the decision of the administrative authority who consents to the occupation of any land within a nature reserve (National Park).</p> <p><u>4) Conflict between mining and conservation</u></p> <p>The art.3 of the Ordinance-Law 69-041 of n0 22 August 1969 on the Conservation of Nature states that the lands in the integral reserves cannot be given up or granted (conceded). They cannot receive assignment incompatible with the protection of nature.</p> <p>The analysis of the mining regulations highlights protected areas into four categories, namely: protected areas, reserve areas, restricted areas and prohibited areas (Art. 2)</p> <p>In a protected area cannot be granted rights of mining or quarry in a protected area nor be erected on an artisanal mining area. In the event of changed circumstances or national needs, a protected area may be downgraded/declassified by the President of the Republic. It should be noted that in addition to predicting that the realization of mining operations in a protected area can only be done through a prior downgrading/declassification by the President of the Republic. If the declaration of a protected area undermines the enjoyment of existing mining or quarry, just compensation is paid to the concerned rights holder. In case of disagreement the arbitration or legal remedies may be exercised by the holder injured (art 3 Mining Regulations).</p> <p>Art. 279 of the Mining Code gives a possibility of occupying and therefore operating any land within the national park on consent of the competent authority. However, the competent authority is not the one who downgrade (President of the Republic) as provided by Article 3 of the Mining Regulations. However, Annex I of the Mining Regulations identifies the authority competent to give consent for such a particular occupation namely authorities placed at the head of Decentralized Territories Entities (DTE).</p> <p>Furthermore, while downgrading/declassification has taken place in the event of changed circumstances or needs of national motivations underlying the consent of the competent authority has not been determined.</p>	<p>Art. 3 of Ordinance-Law N0 69-041 of August 22, 1969 on the Conservation of Nature: "Public lands reserved in the integrals cannot be assigned or conceded: They cannot receive assignment incompatible with the protection of nature ".</p> <p>Art.5 al. 5 and 6 of Ordinance-Law No 69-041 of 22 August 1969 on the Conservation of Nature: "subject to the exceptions provided by this ordinance-law or creating texts of an integral reserve, it's prohibited in an integral reserve: ... 5. To excavate, excavation, surveys, samples of any material and any other kind of work that has to change the look of the land or vegetation, 6. To block the rivers or to extrate or polluter directly or indirectly waters ".</p>	<p>provisions of the Decree-Law no. 69-041 of August 22th, 1969;</p> <ul style="list-style-type: none"> - The biosphere reserves by UNESCO established and managed by the National Secretariat of the MAB Program in DRC under the Ministry of Environment; - Forest reserves managed by the Department of Natural Resources Management and Renewable Ministry of Environment (article 2 litera 28 mining regulations). <p>Area restrictions is any portion of the country whose occupation for mining purposes is conditioned by the prior authorization of the competent authority, the owner or legal occupant. These are sites such as:</p> <ul style="list-style-type: none"> - Land reserved for forest nursery or planting of forests; - Land located within ninety meters from the boundary of a village, a city, municipality or city; - Land included in a national park (Art.2 para 29 of mining regulations). <p>Prohibited area is any geographical area where mining activities are prohibited for reasons of national security, security of populations,</p>

Conflict analysis provision	Forest Code/Nature conservation law provisions	Mining Code provisions
<p><i>In an area reserved</i> unlike the protected areas in which mineral rights may only be granted after downgrading/declassification, the mining code through the mining regulations concerning its enforcement does not exclude the possibility that mining or quarry rights be granted on the perimeters encroaching on reserve areas. Article 5 of the Mining Regulations states that "the mineral rights or carriers may be granted on the perimeters which encroached on the reserve areas. However, environmental plans for operations under such rights should note the existence of these reserve areas, recognizing their purpose, and include adequate measures to mitigate the adverse impacts of operations on the concerned reserve area and that the objective for which the reserve area has been established ". However, protected areas and land within a national park are also classified in the reserve areas as defined by subject area mentioned above. So that the mining or quarry right granted in the reserve areas can be found in an area totally dedicated to the integral conservation and therefore included in protected areas.</p> <p><i>In a restricted area</i> no person may occupy a restricted area without obtaining first the consent of the competent authority, particularly with regard to the land within a national park, in accordance with Article 279 para. 1 subparagraph j) of the Mining Code. This prediction is somehow an exception to the planned downgrading/declassification procedure for protected areas in which national parks are classified into the first rank. Thus, the definition of the restricted area highlights the power of authorization to occupy any land within a national park in the only authority placed at the head of the DTE.</p> <p>The competent authorities referred to in Article 279 of the Mining Code are those provided by specific legislation in this area as set out in Annex I of the mining regulations, the authorities in this case placed at the head of ETD under the Act Organic No. 08/016 of 07 October 2008 on the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the provinces (see section A: some references to other laws above). Analysis of text on the conservation side from those in the mining sector highlights this observation: The violation of the Ordinance Law No. 69-041 of 22 August 1969 on the conservation of nature by the Decree of 26 March 2003 on mining regulations which expressly provides in Article 5 that: "mining or quarry rights may be granted on the perimeters that overlap areas of reserve". While the art. 3 of Ord. Act provides that: "the public lands in the integral reserve cannot be assigned or granted. They cannot receive assignment incompatible with the protection of nature. "</p> <p>In this context, Article 279 provides for the occupation of any land within a National Park with the consent of the authority placed at the head of a decentralized administrative entity (DTE) when the park is in his constituency. The Life of national parks is at the mercy of administrative authorities' decisions as specified in the Mining Regulations.</p>		<p>incompatibility with other uses existing or planned ground or subsoil and environmental protection .</p>