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LEGAL UNCERTAINTY AND LEGAL RISKS IN ENVIRONMENTAL LAW: PROBLEM STATEMENT[1]

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Legal uncertainty is considered as a state of legal regulation, which is characterized by gaps, collisions, other defects that generate legal and other risks for subjects of legal relations.

The author proves that the legal risks in environmental law, in environmental legal relations are due to "the presence of specific environmental risks, the nature of which is such that, even at the present level of development of science and technology, it is impossible not only to prevent with 100% probability, but even to identify and evaluate all possible risks to the environment resulting from the planned economic and other activity".

Keywords: legal risks, environmental law, legal risks in environmental law, legal uncertainty.

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There is no doubt that ideal laws are the goal of legislative activity, which should be constantly strived. Therefore, continuous attacks in the society on "bad" laws are often associated with a lack of understanding that the rulemaking process is subjective in nature, so the legislation objectively contains defects, such as legal gaps and conflicts. On the other hand, we cannot accept the position often occupied by officials at various levels of government, citing the "bad laws" in justification of their own inaction. The reference to "bad" law in their case is a convenient formal reason not to carry out functions entrusted to an official.

Very often the cause of criticism of the legislation and law, the legal system as a whole becomes a situation of legal uncertainty, in which legal norm exists, but at that, subject of law does not understand how to exercise it. The situation of legal uncertainty also arises when gaps in the legislation.

The relevance of resolving legal uncertainties can be easily proved by analyzing the decisions of higher courts. So, the categories of "uncertainty" and "legal uncertainty" are used in hundreds of decisions and rulings of the Constitutional Court of Russian Federation. In fact, considering specific legal situations, the Constitutional Court of the Russian Federation also resolves legal uncertainties through interpretation of norms for the check of conformity with the Constitution of the Russian Federation [5; 6].

In judicial decisions, of course, the content of these concepts is not disclosed. Therefore, there is a need for scientific analysis of the categories of "uncertainty" and "legal uncertainty" to work out definitions, approaches to identification and elimination or minimization their consequences.

In the legal literature, the uncertainty in law is understood in broad and narrow senses. In the broad sense uncertainty in law refers to the building and functioning of legal system, in which we can observe legal conflicts and contradictions between the levels and forms of legal regulation [11, 12].

According to T. N. Nazarenko, the uncertainty in law is the phenomenon of imperfection of legal regulation due to objective and subjective factors of lawmaking. It means inaccurate, incomplete and inconsistent enshrining and exercising of normative legal will in law. In the narrow sense the uncertainty in law is considered as a technical-legal defect in the text of law as an external, written form of it expression. Uncertainty as a technical-legal defect represents logical-linguistic deviations, deformations in the building and expression of legal norms, which are manifested in the absence of accurate, complete normative legal rules, what inevitably leads to reduction of regulatory properties of law, complicates interpretation of its norms and inhibits their effective implementation [9, 7-8].

In our view, legal uncertainty (uncertainty in law) is such a condition of legal regulation, which is characterized by gaps, conflicts, other defects and causes legal and other risks for the subjects of legal relations. Therefore, not every legal gap, conflict or other legal defect means the simultaneous existence of legal uncertainty.

In scientific papers and publications the terms of "legal uncertainty" or "uncertainty in law" are also widely used. So, as the provision for the defense of the dissertation for the degree of Doctor of Law has been submitted the thesis that legal uncertainty characterizes relations of legal succession of obligations of a peasant (farmer's) enterprise in the case of enterprise's termination by the formation a production cooperative or an economic partnership on the base of the enterprise's property [8, 12]. However, there are not so many works that specifically consider this issue or with regard to particular branches of law [10].

Legal and other risks are inherent feature of legal uncertainty in the provided by us definition of legal uncertainty. "Legal risks" is a multivalue concept, which can be understood in different ways. Firstly, legal risks can be regarded as risks the content of which is negative consequences for the parties of legal relations in the form of juridical sanctions: imposition of an administrative fine, recognition an agreement null and void, initiation of a criminal case or proceedings on administrative offence, deprivation of a special right.

Other approach is to include into composition of legal risks different financial, economic risks (suspension of production, loss of assets), reputational risks. In our view, the legal risks are proposed to be understood narrowly as risks resulting from the presence of legal uncertainty and providing for negative legal consequences. Other categories of risks can also be the result of legal uncertainty. So, in the legal literature distinguish constitutional risk, management risk, budget risk, entrepreneurial risk, risk in the area of labor relations, environmental risk.

According to researchers, the institute of risk is an institute of the theory of law that gets development and concretization both in sectorial legal institutes of risk and in complex institutes. In relation to risk the law performs functions such as legal recognition and assumption of risk, establishment of means for preventing and minimizing risk, determination of a measure of responsibility, as well as the functions of compensatory means [12, 10].

The task of the legislator and law enforcer is to minimize the amount of legal uncertainties and legal risks, since legal uncertainties are often the product of subjective factors in the development of legislation. It is because of the incorrect formulation of legal norms there are legal conflict and legal gaps that lead to emergence of legal uncertainties.

Why, with regard to environmental law, is there a need to study the categories of "legal uncertainty" and "legal risk"? This question requires a separate explanation and justification. The choice of the object of study in this case is absolutely not accidental and caused by multiple causes.

First, by the specificity of ecological-legal relations, peculiarities of the objects of environmental law. Components of the environment, natural resources, environmental information, rights to natural resources – inclusion of the specified objects in the sphere of legal regulation stipulates peculiarities of applied terminology, "binding" of legislation to the laws of nature, the specifics of applied mechanisms [3].

Environmental legislation differs from other branches of law and legislation by the complexity to describe and appropriately reflect in the legislation the laws of nature with help of legislative technique. It can be argued that the laws of nature and the laws of society are not the same in their content and orientation, and sometimes even contradict each other.

Secondly, legal risks in environmental law and in environmental legal relations are due to the presence of specific environmental risks, the nature of which is such that even with the present level of development of science and technology it is impossible not only to prevent with one hundred percent probability, but even to identify and evaluate all possible risks to the environment as a result of planned economic and other activity.

This issue is reflected in the legislation: article 77 of the Federal Law No. 7-FL from January 10, 2002 "On Environmental Protection" establishes the obligation of full compensation for the harm inflicted to the environment, which is expressed in the fact that the environmental damage, inflicted by the subject of economic and other activity, is subject to compensation, even if a project has a positive conclusion of the state ecological expertise [7]. The Federal Law No. 174-FL from November 23, 1995 "On Ecological Appraisal" establishes the principle of the presumption of potential environmental hazard of any planned economic and other activity [2].

Thus, the legislator following the scientists proceeds from the impossibility of guaranteeing the full ecological safety of project or the fact that a project, which has passed all validation procedure established by the legislation, will not harm the environment.

Thirdly, legal uncertainty and legal risks in environmental law are due to the relative youth of the branch itself. Environmental law as a branch of law is at the phase of active formation, scientific understanding. There are discussions concerning the Ecological Code of the Russian Federation, the drafts of Federal Laws "On

Environmental Insurance", "On Environmental Audit", "On Environmental Well-being Zones".

In these conditions, the emergence of legal uncertainties and legal risks is an objective phenomenon. Therefore, as an important task of enhancing the effectiveness of environmental law we should recognize the study on the problem of legal uncertainty and legal risks in relation to this area of the law and legislation.

Thus, the presence of legal uncertainties and generated by them legal risks is a permanent feature of environmental law due to the specifics of regulated by it public relations in the field of environmental protection.

The main source of legal risks in environmental law – the absence of clear rules of conduct. In turn, the lack of clear rules is due to the permissibility of environmental assessments, the absence of clear methods and generally full knowledge about human impacts on the environment. Can we break out of this vicious circle, when we cannot clearly assess the environmental risks, and as a consequence there are legal risks? This is possible if the State will not seek to preserve nature in general, as a whole, and will set more specific but achievable tasks.

Legal uncertainties can be divided into subjective and objective ones. Subjective legal uncertainties – false uncertainties due to the subjects' of law lack of knowledge of legislation and law enforcement practice [14]. Objective legal uncertainties really exist and are due to legal defects. Therefore, it is important to distinguish objective legal uncertainties from subjective ones

You must also distinguish between legal uncertainties and actual uncertainties that take place everywhere in practice. If legal uncertainty is associated with the defects of legal regulation, then actual uncertainty is due to, for example, uncertainty of legal regulation object in a legal regime. So, an uncertainty in the legal regime of a particular land plot (encumbrances and restrictions, assignment to a particular category, borders of the plot) in usage is an example of not legal uncertainty, but actual uncertainty. There are many such examples, particularly with land plots and other natural resources. However, although, the actual uncertainties cannot be a cause of legal uncertainty, they very often lead to considerable legal and other risks.

Legal risks can be divided into potential and real ones. Potential legal risks are identified in the analysis of projects, environmental audits, when risks are identified through analysis of actual data, documents, samples, analysis of judicial practice, decisions of competent authorities. Real legal risks arise in the practice of natural resource users, which with a large degree of probability can lead to various kinds of legal sanctions.

It is essential to distinguish legal uncertainties from the established by law possibility of discretion by the subject of law in choosing one or another legal tool. In this case, the legislator does not "drive" the subject of law into certain strictly defined framework, and allows it to choose the possible option of conduct. In fact, if the subject of law in such legal situation discerns the existence of legal uncertainty, then we have the existence of subjective legal uncertainty.

What is the correlation of legal uncertainties and legal risks? Does the existence of legal uncertainty always mean existence of a legal risk? Does the existence of an identified legal risk determine mandatory existence of legal uncertainty? Seems to be that legal uncertainty is one of the sources of legal risks.

The correlation of legal uncertainties and legal risks is presented in the table.

Table

level of legal uncertainty	criteria of the level of legal uncertainty	degree of legal risk
high level of legal uncertainty	1. Uncertainty of a legal norm; 2. Uncertainty of law-enforcement practice; 3. Uncertainty of judicial practice.	High degree of legal risks
medium level of legal uncertainty	1. Uncertainty of a legal norm; 2. Uncertainty of law-enforcement practice or uncertainty of judicial practice.	medium degree of legal risks
low level of legal uncertainty	1. Certainty of a legal norm; 2. Certainty of law-enforcement practice; 3. Certainty of judicial practice.	low degree of legal risks

The ways to prevent or minimize legal uncertainty and legal risks are of practical interest. To prepare the approaches to prevent legal risks and legal uncertainties it seems appropriate to introduce a number of concepts: legal scenario, legal factor and legal situation. Legal scenario is a future, predicted state of legal reality, which can be characterized by possible set of legal risks or legal uncertainties. Legal scenario differs from legal prediction, which is characterized by commonality and versatility, in that it concerns a future legal situation with taking into account the availability of specific legal factors that individuate legal scenario and allow

distinguishing one legal scenario from another. Several legal scenarios for the development of a legal situation can be formed within the framework of one legal prediction. Legal factor – legal means, including legal risks, affecting the formation and change of legal situation or legal scenario. Legal situation is a current or future state of legal reality, which is characterized by a specific set of legal uncertainties and legal risks.

Extrajudicial procedure is actively used as a mechanism to overcome legal uncertainty. Citizen, an individual entrepreneur or legal person that address a request to a competent body of state power or local self-government that adopts either normative legal acts or law-enforcement acts for clarification of legal situation. Apparently, such a clarification might be required for specified subjects, and could be taken into consideration when similar cases. Though it is far from panacea, because public authorities do not pursue the aim to overcome legal uncertainties, moreover, in some situations it is beneficial for the State.

Examples of legal regulation for the procedure of clarification are pointwise present in the current legislation. Article 2 of the Federal Law No. 326-FL from November 29, 2010 "On Compulsory Health Insurance in the Russian Federation" enshrines that, with a view to the uniform application of the mentioned Federal Law, appropriate clarifications can be issued in accordance with the procedure established by the Government of the Russian Federation.

In accordance with the Resolution of the RF Government No. 1226 from December 31, 2010 "On the Issuance of Clarifications on the Uniform Application of the Federal Law "On Compulsory Health Insurance in the Russian Federation" in order to ensure uniform application of the Federal Law "On Compulsory Health Insurance in the Russian Federation", the Ministry of Health and Social Development of the Russian Federation was endowed the right to issue corresponding explanations, including in cooperation with the Federal Fund of Compulsory Medical Insurance, and in agreement with the Ministry of Finance of the Russian Federation with regard to matters within its competence.

Unfortunately, not all the federal ministries and agencies have a similar function. So, the provision on the Ministry of Natural Resources and Environment of Russian Federation formally does not provide for the power to give clarifications on the issues of application of legislation in the field of environmental protection and environmental management.

The issue concerning legal consequences of giving explanations by relevant ministry also remains not obvious. So, the letter of the Ministry of Economic Development of the Russian Federation No. D09-3425 from December 30, 2011 "On the

Application Norms of the Federal Law "On Protection the Rights of Legal Entities and Individual Entrepreneurs in the Implementation of State Monitoring (Supervision)" notes, that clarifications of a public authority have legal force if this authority is endowed, in accordance with the legislation of the Russian Federation, special competence to issue clarifications on the application of provisions of normative legal acts.

Russian Federation Economic Development Ministry is not endowed the power to clarify the legislation of the Russian Federation either by the current legislation or the Charter of the Ministry approved by the Decree of the Government of the Russian Federation No. 437 from June 05, 2008. At that, the said letter contains an explanation of the application the norms of the Federal Law "On Protection the Rights of Legal Entities and Individual Entrepreneurs in the Implementation of State Monitoring (Supervision)".

The practice of appeal against explanations of authorized bodies of state power is of interest. One would think, how can non-normative explanations be appealed in court? However, the Higher Arbitration Court of the Russian Federation allows for the possibility of such an appeal. A good example is the decision of the Higher Arbitration Court of the Russian Federation No. VAS-4065/12 from July 03, 2012. State Order Committee of Nenets Autonomous District appealed to the Higher Arbitration Court of the Russian Federation with an appeal to invalidate the letter of the Federal Antimonopoly Service No. IA/19712 from 23.05.2011 "On Explaining the Federal Law No. 94-FL from 21.07.2005 "On Placing Orders concerning Goods, Works and Services for State and Municipal Needs" in terms of the legality of combining in one subject of trades works on the preparation of project documentation and works for the organization of construction".

According to the applicants, the contested letter contains provisions of normative nature and is intended for multiple use, what violates their rights and legitimate interests. So, the contested letter has been repeatedly used in the administrative practice of the Federal Antimonopoly Service of Russia and its territorial bodies. At that, as noted by the applicants, generally binding nature of the mentioned act of antimonopoly body is ensured by the possibility of legal consequences in the form of issuing prescriptions on cancellation of tenders.

The applicants also refer to the absence of registration and official publication of the contested letter, that is contrary to the provisions of the Decree of the President of the Russian Federation No. 763 from 23.05.1996 "On the Procedure for the Publication and Entry into Force of the Acts of the President of the Russian

Federation, the Government of the Russian Federation and of Normative Legal Acts of the Federal Bodies of Executive Power".

The antimonopoly body in its turn believed that findings contained in the contested letter are based on the norms of the current legislation, and the contested letter does not match the essential features that characterize normative legal act, and therefore it cannot be recognized as such.

HAC RF came to the conclusion that the stated requirements should be met. Current legislation does not contain provisions defining the competence of the Federal Antimonopoly Service of Russia to clarify the legislation on placing orders. Resolving the issue of jurisdiction of arbitration court concerning the case on an application for invalidation of a normative legal act depends on the specific content of this act, the nature of relations in respect of which the dispute has arisen, including on the fact whether the contested normative legal act affects the rights and legitimate interests of unspecified range of persons in the field of entrepreneurial and other economic activity.

At that, the resolving of the question of whether an act of public authority is normative in nature should be carried out regardless of its form, content and other conditions, such as state registration, publication in an official gazette.

As it follows from the Letter of the Federal Antimonopoly Service of Russia No. IA/19712 from May 23, 2005, the specified act has been issued to explain the Law on placing orders concerning the issue of legality of combining in one subject of trades works on design and construction. The Letter of the Federal Antimonopoly Service of Russia No. IA/19712 from May 23, 2005 is addressed to the federal executive authorities, heads of the subjects of the RF, territorial bodies of the Federal Antimonopoly Service of Russia.

According to HAC RF, the fact that the contested letter has not been registered at the Ministry of Justice of the Russian Federation, does not affect the assessment of the normativity of its provisions, since relates only to the procedure of its adoption and announcement.

Under such circumstances, the court concluded that the contested act was normative in nature, since it contained provisions not provided for by federal legislation, and established conditions entailing legal effects designed for repeated use.

The contested letter of the antimonopoly body was not sent for registration to the Ministry of Justice of the Russian Federation. The official publication of the letter also was not carried out. Since the contested act contains provisions of normative nature and is intended for multiple use, the lack of its registration and official publication is contrary to the Decree of the President of the RF No. 763 from

23.05.1996. A similar position was taken by HAC RF when considering the issue concerning the legitimacy of the letter of the Ministry of Finance of the Russian Federation [1]. However, in this case, the Court dismissed the claim of the applicant, acknowledging the letter of the RF Ministry of Finance as corresponding to the current legislation.

With no doubt one of the legal factors that contribute to legal uncertainty is instability of legislation and law-enforcement practice. This factor is evident in the repeal by authorized bodies of their own decisions through extrajudicial procedure.

So, according to the former Russian Finance Minister L. Kudrin, one of the most important incentives for economic development is the invariance of the rules established by the State. According to him, the stability and invariance of the rules are essential conditions both for business planning and in general for development of economy. This stability, most importantly, is as an institute of these rules; it creates a feeling of freedom [11].

The constant changes in legislation are the strongest factor of creating legal risks. In addition, permanent novelties in legislation may lead to both objective and subjective legal uncertainties. Moratorium on amendments to legislation may be a way out. This proposal implies that during a specific period (1 year, 3 years, another period) amendments to law are not allowed.

Additionally, we have to consider the issue on legislative ban on extra-judicial abrogation by the State of its decisions on granting of a land plot, on harmonization of a project, on building licensing. Otherwise the State is able to break the rules of the game that it sets. If a decision has been made, and the decision has been made without violations, it is impossible to cancel, change it without a court decision or without the consent of the subject of law which is affected by the decision. The compensation to be paid to such person should be determined. And such cases must also be determined in legislation.

In practice ignoring this principle leads to bad consequences. An example is the legal situation that has happened in St. Petersburg in connection with the abolition by the St. Petersburg's executive authorities of their own law-enforcement decisions [4].

So, the ways to eliminate or minimize legal uncertainties and legal risks include:

- legal experiment on the territory of the Russian Federation or the subject of the Russian Federation;
- preliminary consultations and agreements with public authorities and local self-government bodies;

- mediation;
- application of pre-trial procedures in handling disputes;
- official explanations concerning requests of the subjects of law;
- audit of legal-environmental risks;
- insurance of legal-environmental risks.

One of the today's methods of resolving environmental disputes is mediation. This process involves an attempt to involve in discussion all interested parties with a view to taking decision, which would be legally justified and generally supported by all these parties. Such situations often require the assistance of professional mediators. Mediation is a less expensive way of solving problems. However, mediation does not imply the existence of a winner, equally as it also does not imply obligatory for everybody decision. In recent years, the scope of use of mediation and negotiation in settlement disputes concerning environment has significantly increased.

Another way to resolve environmental disputes could be the use of courts or judges with special knowledge in this field. The so-called scientific court could be used to determinate specific scientific facts and the judge, specializing in environmental law, could be appointed to use its knowledge in making decisions on environmental disputes. Perhaps the scope and depth of the impact of results concerning resolving complex environmental disputes justify the transfer of the right of decision-making to professionals specializing in the problems of environment [13, 123-124].

The enumerated ways to eliminate or minimize legal uncertainties and legal risks require detailed consideration. The result can be the development of appropriate methodology and system of measures, which may be reflected in legislation and law-enforcement practice. This proves that the categories of "legal uncertainty" and "legal risk" are of both theoretical and practical interest, as well as need further research.

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